

**Case No. D41/13**

**Profits tax** – sale of properties – intention at time of acquisition – onus of proof on the appellant – sections 2(1), 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Chow Wai Shun (chairman), Chyvette Ip and Woo Lee Wah Cecilia.

Date of hearing: 21 October 2013.

Date of decision: 25 February 2014.

The Appellant objected to the 2010/11 Profits Tax Assessment raised in respect of the profits on sale of 3 properties, Property 4, Property 5 and Property 9.

The Appellant contends that his property portfolios (of 14 properties with 5 remaining unsold) are held for long term investment purposes with proven track records.

The Appellant chose not to give any evidence and adduce no further documentary evidence.

**Held:**

1. The Appellant fails to adduce any evidence to discharge his legal or persuasive burden of proof under section 68(4).
2. The Appellant's declared intention cannot stand in the light of objective facts found, evidence adduced and the whole of the surrounding circumstances. In particular,
  - 2.1 the relevant properties were let out for rental income yet held for less than a year;
  - 2.2 those properties were in fact put up for sale before they were assigned to the Appellant; and the asking prices were revised from time to time until they were finally sold;
  - 2.3 the Appellant should have no particular need to sell those properties since rental income was sufficient to cover the mortgage repayments.

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2.4 the Appellant's holding records and intention of acquiring other properties could not attribute to that of acquiring those properties in dispute.

3. The Appellant acquired those properties as trading assets.

**Appeal dismissed.**

Cases referred to:

Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461

All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750

Marson v Morton [1986] STC 463

Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51

Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433

Pickford v Quirke (1927) 13 TC 251

D58/09, (2010-11) IRBRD, vol 25, 54

D33/12, (2012-13) IRBRD, vol 27, 701

CIR v Common Empire Ltd (No 2) [2007] 3 HKLRD 75

Tso Lam Ching of Anne of Tan Proud Accounting Consultant for the Appellant.  
Leung Wing Chau and Li Mei Foon for the Commissioner of Inland Revenue.

**Decision:**

**Background facts**

1. The Appellant appeals against a Determination of the Deputy Commissioner of Inland Revenue dated 24 July 2013 in respect of the Profits Tax Assessment for the year of assessment 2010/11 raised on him ('the Determination').

2. The Appellant chose not to give any evidence. No further documentary evidence has been adduced by the Appellant.

3. In the absence of any contrary evidence adduced by the Appellant, we find the facts upon which the Determination was arrived at relevant facts of this appeal:

(1) Insofar as relevant, the Appellant entered into the following transactions in properties located at Estate A, Address A:

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	<u>Property</u>	<u>Purchase</u>	<u>Sale</u>
	(i) Address (ii) Gross floor area (iii) Number of bedrooms	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration
(a)	(i) Flat B (‘Property 1’) # (ii) 1,019 square feet (iii) 2 bedrooms	(i) -- (ii) 29-10-2001 (iii) 24-11-2001 (iv) \$3,398,000	(i) -- (ii) 22-05-2009 (iii) 25-08-2009 (iv) \$4,730,000
(b)	(i) Flat C (‘Property 2’) # (ii) 1,250 square feet (iii) 3 bedrooms	(i) -- (ii) 02-10-2004 (iii) 02-11-2004 (iv) \$6,521,000	(i) -- (ii) 04-04-2011 (iii) 12-05-2011 (iv) \$12,330,000
(c)	(i) Flat D (‘Property 3’) # (ii) 618 square feet (iii) 1 bedroom	(i) -- (ii) 28-09-2005 (iii) 25-10-2005 (iv) \$3,443,000	(i) -- (ii) 07-05-2009 (iii) 18-06-2009 (iv) \$3,240,000
(d)	(i) Flat E (‘Property 4’) (ii) 1,250 square feet (iii) 3 bedrooms	(i) 22-05-2009 (ii) 04-06-2009 (iii) 10-07-2009 (iv) \$7,800,000	(i) 26-02-2010 (ii) 11-03-2010 (iii) 17-05-2010 (iv) \$9,800,000
(e)	(i) Flat F (‘Property 5’) (ii) 1,023 square feet (iii) 2 bedrooms	(i) 03-10-2009 (ii) 16-10-2009 (iii) 16-11-2009 (iv) \$6,150,000	(i) 08-02-2010 (ii) 26-02-2010 (iii) 16-04-2010 (iv) \$7,080,000
(f)	(i) Car parking space G (‘Property 6’) (ii) -- (iii) --	(i) -- (ii) -- (iii) 02-02-2010 (iv) \$1,012,000	Unsold

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	<u>Property</u>	<u>Purchase</u>	<u>Sale</u>
	(i) Address (ii) Gross floor area (iii) Number of bedrooms	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration
(g)	(i) Car parking space H ('Property 7') (ii) -- (iii) --	(i) -- (ii) 13-12-2009 (iii) 02-02-2010 (iv) \$1,012,000	(i) 19-02-2011 (ii) 04-03-2011 (iii) 06-04-2011 (iv) \$1,410,000
(h)	(i) Flat J ('Property 8') (ii) 983 square feet (iii) 2 bedrooms	(i) -- (ii) 22-03-2010 (iii) 26-04-2010 (iv) \$6,380,000	(i) -- (ii) 20-04-2012 (iii) 09-07-2012 (iv) \$8,800,000
(i)	(i) Flat K ('Property 9') (ii) 867 square feet (iii) 2 bedrooms	(i) 09-03-2010 (ii) 22-03-2010 (iii) 26-07-2010 (iv) \$5,950,000	(i) 24-10-2010 (ii) 10-11-2010 (iii) 31-01-2011 (iv) \$7,750,000
(j)	(i) Flat L ('Property 10') (ii) 867 square feet (iii) 2 bedrooms	(i) 16-06-2010 (ii) 30-06-2010 (iii) 28-09-2010 (iv) \$5,800,000	(i) 08-10-2010 (ii) 21-10-2010 (iii) 18-11-2010 (iv) \$7,380,000
(k)	(i) Flat M ('Property 11') (ii) 983 square feet (iii) 2 bedrooms	(i) -- (ii) 28-04-2011 (iii) 30-05-2011 (iv) \$8,000,000	Unsold
(l)	(i) Flat N ('Property 12') (ii) 991 square feet (iii) 2 bedrooms	(i) -- (ii) 06-05-2011 (iii) 23-06-2010 (iv) \$9,060,000	Unsold

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	<u>Property</u>	<u>Purchase</u>	<u>Sale</u>
	(i) Address (ii) Gross floor area (iii) Number of bedrooms	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration
(m)	(i) Flat P ('Property 13') (ii) 680 square feet (iii) 1 bedroom	(i) -- (ii) 05-03-2012 (iii) 05-04-2012 (iv) \$5,280,000	Unsold
(n)	(i) Flat Q ('Property 14') (ii) 1,270 square feet (iii) 3 bedrooms	(i) -- (ii) 11-05-2012 (iii) 15-08-2012 (iv) \$11,000,000	Unsold

# Property 1, Property 2 and Property 3 were purchased in the joint names of the Appellant and his spouse.

- (2) The Appellant is married with two children born in August 1986 and March 1989 respectively. The Appellant previously resided in Property 1 and moved to Property 2 in 2004/05. In February 2011, the Appellant moved to quarters provided by his employer located at Address R.
- (3) In reply to the Assessor's questionnaires on the purchase and sale of Property 4, Property 5 and Property 9, the Appellant provided the following information:

	<u>Property 4</u>	<u>Property 5</u>	<u>Property 9</u>
Intended or actual usage:	For letting \$	For letting \$	For letting \$
Sale proceeds	9,800,000	7,080,000	7,750,000
<u>Less: Purchase cost</u>	<u>7,800,000</u>	<u>6,150,000</u>	<u>5,950,000</u>
Gross profit	2,000,000	930,000	1,800,000
<u>Less: Expenses</u>			
Legal fees on purchase	6,000	6,000	6,310
Stamp duty	292,500	195,310	178,500
Commission on purchase	60,000	50,000	30,000
Bank interest	128,791	61,279	28,033

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	<u>Property 4</u>	<u>Property 5</u>	<u>Property 9</u>
Intended or actual usage:	For letting	For letting	For letting
	\$	\$	\$
Decoration	34,100	--	25,000
Furniture, fixtures, etc.	65,600	--	23,000
Legal fees on sale	4,500	4,500	4,500
Commission on sale	--	<u>70,800</u>	<u>50,000</u>
Net profit	1,408,509	542,111	1,454,657

- (4) Despite reasons given by the Appellant for selling the properties, the Assessor considered the purchase and sale of Property 4, Property 5 and Property 9 by the Appellant amounted to adventures in the nature of trade and raised on the Appellant the following 2010/11 Profits Tax Assessment:

	\$
Net profit on sale of –	
Property 4	1,408,509
Property 5	542,111
Property 9	<u>1,454,657</u>
Assessable profits	3,405,277
Tax payable thereon	510,791

- (5) The Appellant objected to the assessment. Based on the information and documents provided by the Appellant, the Assessor summarized the relevant details on mortgage loan and rental income as follows:

	<u>Property</u>	<u>Mortgage loan</u> (i) Loan amount (ii) Monthly repayment	<u>Rental income</u>		
			(i) Period (ii) Monthly rent	2010/11	2011/12
(a)	Property 1*	(i) \$2,000,000 (ii) Around \$4,400 bi-weekly	(i) 01-04-2009 – 24-08-2009 (ii) \$23,000	--	--
(b)	Property 3	(i) \$2,410,000 (ii) Around \$5,500 bi-weekly	(i) 01-04-2009 – 08-04-2009 (ii) \$18,000	--	--
(c)	Property 4	(i) \$5,460,000 (ii) \$23,677	(i) 01-08-2009 – 31-03-2010 (ii) \$27,000	(i) 01-04-2010 – 17-05-2010 (ii) \$27,000	--
(d)	Property 5	(i) \$4,305,000 (ii) \$18,669	(i) 01-08-2009 – 31-03-2010 (ii) \$20,000	--	--

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	<u>Property</u>	<u>Mortgage loan</u> (i) Loan amount (ii) Monthly repayment	<u>Rental income</u>		
			(i) Period (ii) Monthly rent	2009/10	2010/11
(e)	Property 8	Information not provided	--	(i) 29-05-2010 – 31-03-2011 (ii) \$28,000	(i) 01-04-2011 – 31-03-2012 (ii) \$28,000
(f)	Property 9	(i) \$4,165,000 (ii) \$15,675	--	(i) 22-08-2010 – 31-01-2011 (ii) \$26,000	--
(g)	Property 10	(i) \$4,060,000 (ii) \$15,187	--	(i) 01-12-2010 – 31-03-2011 (ii) \$28,500	(i) 01-04-2011 – 18-11-2011 (ii) \$28,500
(h)	Property 11	Information not provided	--	--	(i) 01-08-2011 – 31-03-2012 (ii) \$30,000
(i)	Property 12	Information not provided	--	--	(i) 23-06-2011 – 31-03-2012 (ii) \$24,000

\* The original loan of \$2,378,600 was replaced in May 2008.

The Determination was so made and handed down. The Appellant lodged an appeal with this Board.

4. The Appellant did not challenge such further documentary evidence adduced by the Respondent. Particularly we find the following additional facts:

- (1) The Appellant is the executive director of a listed company in Hong Kong. At all relevant times, he was the Position S of the group and he was responsible for the commercial management, property and hotel development and investment, and project management for Hong Kong and the Mainland.
- (2) Company T, on the Respondent's request, provided the following information:

***Property 4***

- (a) The Appellant first appointed Company T to sell Property 4 on 2 July 2009, before the assignment of the property to the Appellant on 10 July 2009, at an asking price of \$8,800,000 or for lease at a monthly rent of \$33,000.

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- (b) The asking price of Property 4 was revised from time to time subsequently as follows:

Date	Asking price (\$)
2 Jul 2009	8,800,000
5 Jul 2009	8,950,000
13 Jul 2009	9,000,000
15 Sept 2009	9,500,000
15 Oct 2009	9,250,000
7 Nov 2009	9,300,000
24 Nov 2009	Over 9,200,000
24 Dec 2009	9,500,000
3 Jan 2010	9,380,000
19 Jan 2010	9,500,000
6 Feb 2010	9,800,000
26 Feb 2010	10,080,000

Property 4 was finally sold through another agent on the date and at the consideration as shown in paragraph 3(1)(d) above.

***Property 5***

- (a) The Appellant first appointed Company T to sell Property 5 on 15 October 2009, before the assignment of the property to the Appellant on 16 November 2009, at an asking price of \$7,180,000.
- (b) The asking price of Property 5 was revised from time to time subsequently as follows:

Date	Asking price (\$)
15 Oct 2009	7,180,000
5 Nov 2009	7,000,000
24 Dec 2009	7,500,000
5 Jan 2010	7,000,000
15 Jan 2010	7,500,000

Property 5 was finally sold through another agent on the date and at the consideration as shown in paragraph 3(1)(e) above.

***Property 9***

- (a) The Appellant first appointed Company T to sell Property 9 on 29 April 2010, before the assignment of the property to the Appellant on 26 July 2010, at an asking price of \$7,000,000.



- (b) The asking price of Property 9 was revised from time to time subsequently as follows:

Date	Asking price (\$)
29 Apr 2010	7,000,000
7 Jul 2010	7,800,000
2 Aug 2010	7,500,000
12 Aug 2010	7,800,000

Property 9 was finally sold to the sitting tenant on the date and at the consideration as shown in paragraph 3(1)(i) above.

- (3) The Hong Kong Property Reviews 2010 to 2012 published by the Rating and Valuation Department indicate that the overall rental market had improved after the first quarter of 2009.

### **Grounds of appeal and the Appellant's submissions**

5. The Appellant set out his grounds of appeal in his notice of appeal. As he summarized, his grounds are understood as follows:

- (1) His property portfolios are held for long term investment purposes with proven track records.
- (2) He paid 30% to 50% of the purchase price as down payment.
- (3) The properties were purchased with over 20-year bank mortgages at completion.
- (4) The properties were acquired by him as an individual with tenancies and/or intention to lease subsequent to completion.
- (5) The properties were provided with new furniture, fixtures, equipment and decoration.
- (6) The sale transactions were solicited by the agents and he never placed any advertisement for sale for the properties.
- (7) The Appellant still held other properties subsequent to the sales for long-term investment.

6. His oral submission at the hearing did not differ much from his stated grounds of appeal. We shall deal with his grounds in our analysis below.

**The law**

7. We agree with the Respondent's submissions which the Appellant did not challenge that the following provisions of the Inland Revenue Ordinance apply.

(a) Section 14 provides:

*'(1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'*

(b) Section 2(1) defines 'trade' to include 'every trade and manufacture, and every adventure and concern in the nature of trade.'

(c) Section 68(4) provides:

*'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

8. We also accept the Respondent's submission which, again, the Appellant did not dispute that the following cases apply.

- (a) Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461;
- (b) All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750;
- (c) Marson v Morton [1986] STC 463;
- (d) Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51;
- (e) Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433;
- (f) Pickford v Quirke (1927) 13 TC 251;
- (g) D58/09, (2010-11) IRBRD, vol 25, 54; and
- (h) D33/12, (2012-13) IRBRD, vol 27, 701.

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9. According to Simmons, *‘trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock – and, I suppose, vice versa.’* (per Lord Wilberforce at page 491).

10. Mortimer J in All Best Wishes at page 771 stated that *‘the intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realizable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person’s intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.’*

11. In Lee Yee Shing, Bokhary and Chan PJJ ruled that the question whether something amounts to the carrying of a trade (or business) *‘is a question of fact and degree to be determined by the fact-finding body upon a consideration of all the circumstances.’* In the words of McHugh NPJ, the intention to trade to which Lord Wilberforce referred in Simmons is not subjective but objective and it requires an examination of all the circumstances to see whether the ‘badges of trade’ are present. Specifically, they are whether the taxpayer:

- (a) has frequently engaged in similar transactions
- (b) has held the asset or commodity for a lengthy period
- (c) has acquired an asset or commodity that is normally the subject of trading rather than investment
- (d) has bought large quantities or numbers of the commodity or asset
- (e) has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition
- (f) has sought to add re-sale value to the asset by additions or repair
- (g) has expended time, money or effort in selling the asset or commodity

that goes beyond what might be expected of a non-trader seeking to sell and asset of that class

- (h) has conceded an actual intention to resell at a profit when the asset or commodity was acquired
- (i) has purchased the asset or commodity for personal use or pleasure or for income.

12. In Marson v Morton [1986] STC 463, Sir Nicolas Browne-Wilkinson V-C held that '*a single, one-off transaction can be an adventure in the nature of trade*' and that '*the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case.*' Nonetheless, the list of factors was in no sense comprehensive, nor was any one of those decisive in all cases. They would provide common sense guidance to an appropriate conclusion. The matters which are apparently treated as a badge of trade consists of:

- (a) That the transaction was a one-off transaction although a one-off transaction is in law capable of being an adventure in the nature of trade.
- (b) Is the transaction in some way related to the trade which the taxpayer otherwise carries on?
- (c) Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realization?
- (d) Was the transaction carried through in a way typical of the trade in a commodity of that nature?
- (e) What was the source of finance of the transaction?
- (f) Was the item which was purchased resold as it stood or was work done it or relating to it for the purposes of resale?
- (g) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots?
- (h) What were the purchasers' intentions as to resale at the time of purchase?
- (i) Did the item purchased either provide enjoyment for the purchaser or pride of possession or produce income pending resale?

In his words, *‘in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to go back to the words of the statute – was this an adventure in the nature of trade?’* Alternatively, one may ask, *‘was the taxpayer investing the money or was he doing a deal?’*

13. In Real Estate Investments (NT) Limited, Bokhary and Chan PJJ considered ‘badges of trade’ to mean the circumstances that shed light on the issue of intention and held that the question of whether property is trading stock or capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case. Regarding the taxpayer’s burden of proof, *‘the taxpayer will have to prove his contention’* and so *‘his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X [which is the footing on which the tax assessment is made]. And it would likewise fail if the Board merely determines that he has not proved his contention.’* This means that no appeal by the taxpayer could succeed unless the court is of the view that the true and only reasonable conclusion is that the position is what the taxpayer contends.

14. In both D58/09 and D33/12, this Board applied the above principles. Specifically in D33/12, the taxpayer alleged that he intended to purchase the property as his residence. He drew down a mortgage loan with a repayment term over 30 years to finance the purchase and carried out renovation for the property but he alleged that he was forced to sell the property because of changes in circumstances. He had put up the property for lease but it was found that he had also put up the property for sale through different agents. Furthermore, the taxpayer purchased and sold other properties in the same estate before. The Board found against the taxpayer and dismissed the appeal.

15. Pickford is relevant to this appeal because it involved repeated transactions. The taxpayer in Pickford formed a syndicate for buying and selling cotton mills. After making a profit from the first transaction, the taxpayer conducted another three transactions. He was assessed on the profits for all four transactions. Lord Hanworth MR of the Court of Appeal agreed and stated:

*‘ Now you may have an isolated transaction so independent and separate that it does not give you any indication of carrying on a trade. It must be remembered that under the interpretation clause trade “includes every trade, manufacture, adventure or concern in the nature of trade”. When, however, you come to look at four successive transactions you may hold that what was, considered separately and apart, a transaction to which the words “trade or concern in the nature of trade” could not be applied, yet when you have the transaction repeated, not once nor twice but three times, at least, you may draw a completely different inference from those incidents taken together. That is what the Commissioners have done. They have stated the problem, and they have considered all these several elements which had to be considered in determining whether or not Mr. Pickford had carried on a trade. They go on:*

*“The question, as we have stated it, is we think a question of degree” and they deal with the matter further. I think they are right. If it is a question of degree it is a question of fact, and in my judgment, the Commissioners were quite right in applying, or in reconsidering, the facts known to them beforehand in the previous case which they had decided, but the true measure of which they had not taken from the point of view of whether a particular individual was carrying on a trade or an adventure in the nature of trade when those several matters are threadled up together and considered from a general point of view. It appears to me therefore that this case is one of fact, that the Commissioners were bound to exercise their judgment upon the materials rightly before them, that they have done so, and that the matter is determined by their conclusions on the facts.*

...

*... But it appears to me that a system of trading is quite a different thing from a single act which may or may not be held to be an adventure in the nature of trade, and that the Commissioners were quite right in resetting the problem before themselves and estimating whether or not these several enterprises as a matter of degree formed a system of trade to which Income Tax attached. For these reasons it appears to me that the judgment given by Mr. Justice Rowlatt was quite right and the appeal ought to be dismissed...’*

### **Our analysis**

16. Pursuant to section 68(4) of the Ordinance, the onus of proving that the 2010/11 Profits Tax Assessment is excessive or incorrect is on the Appellant. The appeal is against the assessment, not the reasons of the Deputy Commissioner in the Determination.

17. The fact that the Appellant chose not to give any evidence at the hearing to substantiate and establish his stated intention that those properties were acquired for an investment purpose is sufficient to put this appeal to its end. In CIR v Common Empire Ltd (No 2) [2007] 3 HKLRD 75, To Dep J stated, in relation to section 68(4):

*‘ ... The Commissioner has no burden of proving anything.... The Board is not bound to make any finding of fact one way or the other. If the taxpayer fails to adduce any evidence to discharge its legal or persuasive burden, or if the evidence is not believed, the appeal shall be resolved on the burden of proof by dismissing the appeal and upholding the assessment.’*

18. Further or alternatively, on the facts found and evidence adduced before us, we would hold that the Appellant acquired those properties as trading assets. His declared intention cannot stand in the light of objective facts and the whole of the surrounding circumstances, including things said and done, before and after.

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19. As in Pickford, this case involves repeated transactions within a short span of time. What a transaction might have been considered, separately and apart, not trade or concern in the nature of trade, one may draw a completely different inference from repeated transactions taken together. Indeed, the more often a person undertakes a similar transaction, the more likely it is that the person is trading.

20. Moreover, the Appellant held the relevant properties for less than a year. While this is not decisive a short period of ownership implies that the property was bought to make a profit on resale.

21. The relevant properties were let out for rental income during the short period of the Appellant's ownership. However, as the Court of Final Appeal held in Real Estate Investments, the fact that a property was producing rental income before disposal shed little, if any, light on whether the property concerned was trading stock or not:

*'... [the taxpayer] may have been waiting for a favourable opportunity to sell and merely have been turning the properties to good account in the meantime. Equally, the fact that the properties were let at full economic rents is consistent with the case of both sides, although if the lettings had been at rents below the economic rents that would clearly have supported [the Revenue's] contention.... These facts may indicate nothing more than that the 'favourable opportunity to sell' had not arrived...'*

22. The same analysis can apply to the decoration done to those properties. The fact that the properties were decorated is consistent with the case of both sides, although extensive renovation on properties before reselling them will almost clearly infer trading.

23. Similarly for the way and means by which the Appellant financed his purchases. A mortgage loan with a repayment term of over 20 years as claimed by the Appellant is not unusual to finance the purchase of a property, whether for long term investment or for trading, although any terms outside the norm may tip the balance to one side or another.

24. The Appellant did not place any advertisement for disposal of those properties. However, the information from Company T also shows that the properties were in fact put up for sale before they were assigned to the Appellant. Although we appreciate that this might be the way how property agents operate, the information from Company T also shows the asking prices were revised from time to time until they were finally sold. The Appellant could have chosen not to respond to any request for asking price, or the revision of it, from the agent.

25. The Appellant also claimed that he received offers from property agents for Property 4 and Property 5 and he sold Property 9 because of the repeated requests from the sitting tenant. We agree with the Respondent's submission that if the Appellant intended to hold those properties for long term investment purpose, it is doubtful that he would consider

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to sell those properties solely because of the offers made to him. In fact, as pointed out by the Respondent, the Appellant should have no particular need to sell those properties since rental income was sufficient to cover the mortgage repayments.

26. The Appellant emphasized repeatedly that Property 9 was purchased after the sale of Property 4 and Property 5 which was only a change of 'better' investment. He considered Property 9 to be a better investment in terms of monthly rent per square feet. The Appellant further claims that the monthly rent per square feet for other properties he acquired after the disposal of Property 4 and Property 5 is much higher than Property 4 and Property 5 to show his 'swap another good investment opportunity'.

27. The increase in monthly rent is consistent with the statements in the Hong Kong Property Reviews 2010 to 2012 published by the Rating and Valuation Department about the overall rental market after the first quarter of 2009. The Appellant could have asked for an increase in monthly rent in respect of Property 4 and Property 5 when the tenancies were to be renewed.

28. Even if we accepted what the Appellant said about Property 9, in spite of a better investment, he entered into a provisional agreement to sell the property only about two months after he entered into the tenancy agreement. Although the provisional agreement was then cancelled, the property was resold to the same person at a higher consideration.

29. The Appellant also claimed that a property trader does not like properties with sitting tenancies because it is inconvenient for physical inspection by potential buyer and increase the difficulty for sale. However, among the three properties in dispute, only Property 4 was sold subject to tenancy. Property 9 was sold to the sitting tenant.

30. The Appellant further claims that his intention of acquiring Property 4, Property 5 and Property 9 for long term investment purpose can be demonstrated by his holding records of other properties. We cannot see how intention of acquiring other properties could attribute to that of acquiring those properties in dispute. After all, only intention of the Appellant at the time of acquiring Property 4, Property 5 and Property 9 and not his intention of acquiring other properties is relevant in determining the issue for this appeal.

31. Similarly, the fact that the Appellant used the proceeds from disposing of Property 4, Property 5 and Property 9 to acquire other properties and the usage of those properties are at most neutral and not determinative for the intention of the Appellant in acquiring Property 4, Property 5 and Property 9. In other words, there is nothing to preclude a property trade from utilizing his proceeds from the sale of his trading assets to acquire another asset, capital or otherwise.

32. His claim that a property trader would use a shelf company to hold the properties but he held the properties under his own name does not help to advance the



Appellant's case. In fact, the same legal principles apply, whether or not the properties are held by an individual or a company. Equally, the absence of a long completion period, as claimed by the Appellant as typical for a property trader, and we would add in the context of confirmor sales, does not necessarily mean that the property is not acquired for trading. So far as the properties in dispute in this case, the Appellant did not buy and sell as a confirmor, which would otherwise have led to an even stronger case for the Respondent.

33. The Appellant's allegation of acquiring those three properties for his family members does not win much, if any, sympathy. He claimed that he had discussed with his family members but none of them liked those properties. The Appellant chose to go ahead because, as he claimed, he did not want to miss the investment opportunity in view of the rising property market, further given that there were not many choices in the market within his budget at that time. We accept the Respondent's submission that the Appellant's self-serving intention to acquire the properties for family members is not convincing. Indeed, in our view, the indication that the Appellant wanted to grasp the opportunity given by the rising property market infers much that he is a trader.

34. Taking a holistic consideration of the circumstances of this case, we do not find the objective facts consistent with the Appellant's stated intention. Indeed, we find the Appellant more likely than not a property trader. Further or alternatively, he fails to discharge the onus of proof under section 68(4) of the Ordinance.

35. For the reasons and analysis set out above, we dismiss the Appellant's appeal and confirm the assessment as set out in paragraph 3(4) above.

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**Case No. D41/13**

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Date of Decision: 21 October 2013

Date of Corrigendum: 20 March 2015

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**CORRIGENDUM**

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At page 225, “Tso Lam Ching of Anne of Tan Pround Accounting Consultant for the Appellant” should read “The Appellant appeared in person”.

At page 225, “Leung Wing Chau and Li Mei Foon for the Commissioner of Inland Revenue” should read “Yu Wai Lim, Leung Kin Wa and Wong Pui Ki for the Commissioner of Inland Revenue”.

Clerk to the Board of Review  
(Ms Vivian LAI)