

out the prices offered by one of the buyers for the purchase of logs from N.A.K. for the month of December 1973, long after the Company is supposed to have ceased to deal with N.A.K. The existence of such a letter was never satisfactorily explained to us. Then there is the fact that in the minutes of the Board Meeting held on the 20th January 1973, more than 7 months after the business had supposedly ceased, all that was recorded was that the "Sales Agreement" with N.A.K. Co. Ltd. had not been renewed. No mention was made that the business had ceased—a fact which could have been easily proved by calling a director or officer of the Company. In the circumstances, we have been left with considerable doubt in our mind, and we must hold that the Company has failed to discharge the onus of proving that there was a cessation in the Company's business as claimed.

In view of the conclusions we have come to, the appeal is dismissed and the assessment for the year of assessment 1972/73 as determined by the Commissioner is confirmed.

Case No. BR 6/75

Board of Review:

L. J. D'Almada Remedios, *Chairman*, K. H. A. Gordon, Wong Tok-sau & A. Zimmern, *Members*.

19th December 1975.

Profits tax—company acquired property fit for redevelopment but sold it without redevelopment—profits on sale assessed to tax—whether property was a capital or trading asset.

The appellant, a company having as its principal objects the acquisition and development of and investment in land, purchased a piece of property fit for redevelopment purposes. No redevelopment was carried out and the property was subsequently sold. On being assessed to profits tax in respect of the sale the appellant claimed that the property should be treated as a capital asset on the grounds that it was acquired with the intention of redevelopment so as to obtain rental income, and that abandonment of the scheme for redevelopment resulted from the failure of Government to indicate what part of the property had to be surrendered for road-widening purposes. On Appeal.

Decision: Appeal dismissed. Assessment confirmed.

Kenneth K. C. Wong for appellant.

Chan Kam-cheong for the Commissioner of Inland Revenue.

Reasons:

The issue in this case is whether the profits derived from the sale of No. X, B Road is liable to tax under section 14 of the Inland Revenue Ordinance.

The Company was incorporated in 1969. Its principal objects are the acquisition and development of, and investment in, land. The Company's first transaction, shortly after its incorporation, was the purchase of land at Castle Peak Road on which a factory building was constructed and sold immediately on completion. Profits arising from sale were assessed to tax and paid.

The only other transaction the Company had was the purchase and sale of No. X, B Road (hereinafter referred to as "the property") and this appeal is against the tax raised on the profits derived from sale.

It is contended by the Company that the sale was of a capital asset as the Company purchased the property with the intention of redeveloping it for the purpose of obtaining rental income. It has been urged upon us that the reason for the Company's subsequent disposal of the property without redevelopment was due to the failure of the relevant Government authorities to indicate any positive decision as to what portion of the lot had to be surrendered to the Crown for road widening purposes with the result that the Company abandoned the scheme for redevelopment and decided to sell the property.

It may well be that the Company intended to redevelop the property; but because the Company's patience may have been exhausted by Government's indecision, the property does not, for that reason, bear the stamp of a capital asset. Abandonment of the scheme, in this sense, is neutral as it can apply equally to property held as a trading asset. However, we are not unmindful of the Company's argument that the sale was brought about by the frustration of the Company's objective to build and retain the property as an investment. Minutes of directors' meeting to show that the Company resolved to retain the property as an investment were adduced in evidence in support of the Company's claim.

It is not disputed on the evidence that at the time the property was purchased the Company knew that it could not immediately put a redevelopment project into effect; that negotiations would

have to be concluded and a decision awaited in respect of Government's decision regarding B. Road in relation to this and other properties on that road. When the property was purchased in April 1970, the Company had a liability of \$3,500,000 on a building mortgage in connection with the development of its Castle Peak Road property.

In the circumstances, it is reasonable to expect some evidence to be forthcoming that the B. Road scheme was viable as a lock-up investment. We have no evidence of this. No attempt was made to show if any projected accounts were formulated even as a rough guide or estimates considered whereby the professed intention of the Company could be implemented or, indeed, what returns could be expected of such investment taking into account the Company's existing liabilities measured against interest on loans for the scheme and the ability (if any) to repay advances without necessitating a sale of the property.

We have not found the evidence of a director of the Company satisfactory. His answers to questions put were evasive. In early 1970 he was informed that the cost to construct a new building would be approximately \$3,500,000. In the middle of 1972 he said that he still intended to develop the property, yet he made no enquiries of what the cost would be at that time. It would seem to us that the Company also acted in a manner inconsistent with its intention by paying out a dividend of \$4,500,000.00 in March 1972 when such sum or a major portion of it would be required to meet the cost of development. There is also evidence to show that prior to 1972 the Company contemplated the selling of the property without development.

It is for the Company to satisfy us that the property was purchased and held as a capital asset. The character of the property in the hands of the Company is a question of fact. It is not to be decided simply by the label which the Company chooses to attach to the property by declaring at the time of purchase that it is intended to be held as an investment. If a property dealer, as in this case, purchases undeveloped property with the idea of redevelopment, frustration of the development plan is not, on that account, characteristic of the property being a capital asset. It is for the Company to establish to our satisfaction that the property was purchased and held as a capital asset. We are not so satisfied with the result that this appeal is dismissed and the assessment confirmed.