HCIA 1/2004

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 1 OF 2004

BETWEEN

THE COMMISSIONER OF INLAND REVENUE Appellant

and

COMMON EMPIRE LIMITED Respondent

Before: Deputy High Court Judge To in Court
Dates of Hearing: 3 - 4 October 2006
Date of Decision: 8 November 2006

D E C I S I O N

Introduction

1. This is an appeal by the Commissioner of Inland Revenue (the "Commissioner") and a cross-appeal by the taxpayer, Common Empire Limited (the "Taxpayer"), by way of a case stated against the decision of the Board of Review (the "Board") in B/R 103/02 and D13/03 dated

10 May 2003 pursuant to section 69 of the Inland Revenue Ordinance (Cap 112). The Commissioner's appeal was heard and judgment was handed down on 17 January 2006. The present hearing is in respect of the Taxpayer's cross-appeal. Two questions of law were posed for the opinion of this Court.

The background

2. The Taxpayer was incorporated in Hong Kong in December 1984. In January 1990, the Taxpayer purchased twenty-four house lots and sixteen agricultural lots of land (the "1st Acquisition") for about $15 million. Those lots include the First Lots, the Second Lot and the Fourth Lots referred to hereinafter. They were entered in its account as "land held for development".

3. In May 1990, the Taxpayer sold two lots of land acquired from the 1st Acquisition, referred to in the Amended Case Stated as the "First Lots" and made a gain of $321,616. This gain was recorded in the accounts as an exceptional item of capital gain and was not offered for assessment. This gain attracted no response from the assessor.

4. In March 1991, the Taxpayer acquired two more lots of agricultural land (the "2nd Acquisition) for $750,000. Those two lots were also entered in its account as "land held for development".

5. In 1996, the Taxpayer sold one lot of land acquired from the 1st Acquisition, referred to in the Amended Case Stated as the "Second Lot" and made a gain of $37,053. It also made a gain of $3,490,917 from resumption by Government of part of the land lots acquired under the 2nd Acquisition, referred to in the Amended Case Stated as the "Third Lots". The total gain of $3,527,970 was treated as capital gain by the Taxpayer and not offered for assessment. Again, this attracted no response from the assessor.

6. In January 1998, the Taxpayer sold thirteen agricultural land lots and twenty-four house lots, referred to in the Amended Case Stated as the "Fourth Lots". This sale gave rise to a gain of $15,479,734. This gain was also treated as capital gain by the Taxpayer and not offered for assessment. It should be noted that the Taxpayer's subsequent appeal to the Board was in relation to the Fourth Lots only, i.e. the lots acquired under the 1st Acquisition other than the First Lots and Second Lot.

7. Between 1993 and 1999, the assessor issued statements of loss to the Taxpayer in respect of the years of assessment from 1993/94 to 1998/99. The Taxpayer did not express any disagreement with those statements.

8. On 10 August 2000, the Commissioner issued a notice of assessment to the Taxpayer for the year of assessment 1998/99 taxing gains from the sale of the Fourth Lots after setting off

losses brought forward from the previous years. On 18 October 2000, the Commissioner issued a revised statement of loss and additional profits tax assessment to the Taxpayer covering the years of assessment from 1996/97 to 1998/99 which resulted in an additional profits tax liability of $564,476 for the year of assessment 1998/99 after assessing the gains from the disposal of the Second Lot and the Third Lots to profits tax.

9. At the Taxpayer's request, the assessor allowed a revision to be made to the tax return for the year of assessment 1996/97 on the basis that the resumption of the Third Lots actually took place in the financial year ending 31 December 1993 and hence the gains therefrom should be removed from the profits for the year of assessment 1996/97. The assessor issued revised statements of loss for the years 1993/94 to 1997/98 and revised additional tax assessments for the year 1998/99, which involved revising the statements of loss for those years. Those matters are mentioned here as part of the background. They were relevant to the Commissioner's appeal only and were dealt with in that appeal.

10. The Taxpayer was not satisfied with the assessments and objected to the assessments pursuant to section 64 of the Inland Revenue Ordinance. The Acting Deputy Commissioner disagreed with the Taxpayer's objection and confirmed the assessments. Pursuant to section 66, the Taxpayer appealed to the Board against the determination of the Acting Deputy Commissioner. The following two issues were raised at the hearing before the Board:

(1) whether the Fourth Lots were capital assets; and

(2) whether, in the absence of fraud, the Commissioner could revise the loss brought forward from more than six years back in raising the assessments for the year of assessment 1998/99.

11. The Board decided both issues in the negative, that is it decided against the Taxpayer on the first issue and against the Commissioner on the second issue.

12. Four questions were posed for the opinion of this Court. The first two were dealt with in the Commissioner's appeal. The remaining two questions were posed by the Taxpayer in this cross-appeal. Before turning to these two questions, it would be of assistance to examine the regime of appeal to the Board under which these questions arose, the burden of proof before the Board and the basis on which the Court of First Instance may interfere with the fact finding of the Board.

The regime of appeal to the Board of Review

13. If a taxpayer is aggrieved by an assessment, his first recourse is to object to the assessment under section 64 of the Inland Revenue Ordinance by giving a written notice to the Commissioner stating his grounds of his objection. The Commissioner shall make a determination.

If the Commissioner agrees with the objection, adjustments will be made to the assessment. If the Commissioner disagrees with the objection, he shall, in accordance with section 64(4), inform the taxpayer of his determination in writing together with the reasons therefor and a statement of facts upon which the determination was arrived at. The taxpayer may, within one month of receipt of the determination, give written notice to the Board to appeal against the Commissioner' s determination pursuant to section 66(1). At the same time, the taxpayer shall serve on the Commissioner a copy of his Notice of Appeal and a copy of the statement of the grounds of appeal pursuant to section 66(2).

14. The Board is constituted of a chairman, ten deputy chairmen who shall be persons with legal training and experience, and 150 members appointed by the Chief Executive: section 65(1) of the Inland Revenue Ordinance. The members are usually professionals of a relevant discipline. An appeal to the Board shall be heard by a panel of three or more members, one of whom shall always be either the chairman or a deputy chairman: section 65(4). In this particular Board, two of the members are from the legal profession and one from the accounting profession.

15. The proceedings before the Board are prescribed by section 68 of the Inland Revenue Ordinance. In the proceedings before the Board, a taxpayer presents his appeal and is entitled to call witnesses. He is bound by his statement of grounds of appeal as if it were his pleading in a civil action. Under section 66(3), save with the consent of the Board and on such terms as the Board may determine, a taxpayer may not at the hearing of his appeal rely on any grounds of appeal other than those contained in his statement of grounds of appeal. Section 68(3) requires the assessor who made the assessment appealed against to attend the Board in support of the assessment. The assessor does not have to prove anything though he may call witnesses. The Board has before it the assessment, the determination of the Commissioner affirming the assessment, his statement of fact and reasons for his determination. The onus is on the taxpayer to prove that the assessment appealed against is excessive or incorrect under section 68(4). Save for a limited right of appeal to the Court of First Instance by way of case stated on a question of law under section 69, the decision of the Board is final. Thus the finding of fact by the Board is conclusive.

16. The Board is a fact-finding tribunal. Its status as a fact-finding tribunal was considered in the time-honoured judgment of Blair-Kerr J in *In re Herald International Ltd* (1964) 1 HKTC 393. He said at 401-2:

> "Mr Sneath, I think, also put the matter succinctly when he said that the assessor and the Commissioner are simply inquisitors seeking to find out all facts by any means in order to levy an assessment according to law.
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> The first judicial tribunal to consider an assessment is the Board of Review. The name "Board of Review" has been criticized; but it may not be entirely inappropriate. If the taxpayer has made a full disclosure in his return to the assessor, ordinarily there should

> be no issues of fact by the time the Commissioner has dealt with the assessment. The Commissioner in his reasons may give his view of the law, and the appellant may appeal to the Board of Review if he considers that the Commissioner's view is erroneous. To that extent, the Board is truly a reviewing body. But, I do not agree that the Board sits as an appellate tribunal from "findings of fact" made by the Commissioner; and, is so far as the facts are not agreed by the parties when the case has been dealt with by the Commissioner, in my view the Board is the fact-finding body. I do not agree with Mr Litton's view that the Legislature ever intended that there should be some kind of division of labour between the Commissioner and the Board; and that the Commissioner, (probably with one party, the taxpayer, before him) should be the initial fact-finding tribunal; that the Board of Review should sit in judgment on his "findings of fact" (having been supplied only with part of the material on which he made such findings); that the Board should then somehow come to a conclusion on whether the Commissioner's "findings" were correct and make any further findings which they consider to be necessary for the disposal of the case on such evidence as they call. I cannot imagine a more unsatisfactory state of affairs from the point of view of the Board and the administration of justice generally."

17. The above analysis of the learned judge is absolutely correct and is fully supported by the regime of appeal to the Board of Review as I have outlined above. Thus, the Board is a judicial body as well as a fact-finding tribunal. As a fact-finding tribunal, its finding of fact is final and conclusive unless that finding constitutes an error of law: section 69 of Inland Revenue Ordinance (see paragraphs 33 - 35).

Burden of proof before the Board of Review

18. It is Mr Ho SC's submission on behalf of the Commissioner that the Taxpayer bears the burden of proving that the assessment appealed against is incorrect or excessive by virtue of section 68(4). In his skeleton reply, Mr Barlow, counsel for the Taxpayer, accepts that the Taxpayer has both the evidentiary onus and the onus of persuasion. But he argues by relying on *Pinson on Revenue Law*, 17th edition and *Commissioner of Inland Revenue v Rheinhold* (1953) 34 TC 389 cited therein that there is nothing to suggest that the persuasive burden cannot shift. With respect, his acceptance of this onus is equivocal. The thrust of his argument in respect of Question (3) is that the Taxpayer has not been shown to have acquired the lots with the intention of trading in them and under Question (4) is that Taxpayer was not required to prove that it acquired the lots as capital investment and that the Taxpayer has discharged the evidentiary onus before the Board. Thus the Taxpayer's appeal is premised on the assumption that the legal burden or onus of persuasion is on the Commissioner rather than on the Taxpayer. In view of that, it is important that I should determine on whom the legal or persuasive burden lies.

19. Section 68(4) is pertinent. It provides as follows:

> "(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant."

In *In re Herald International Ltd*, Blair-Kerr J approached the question of onus of proof before the Board as follows. Following the passage quoted in paragraph 16 above, he continued at 402 and said:

> "The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive. As Mr Sneath so aptly put it:-
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> > "The question is: 'Did the Commissioner get the correct answer'; not 'did the Commissioner get the correct answer by the wrong method'."
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> And the onus of proving that the assessment is excessive lies on the taxpayer-appellant. If the facts are agreed, and only points of law are involved, no difficulty should arise. If certain facts are not agreed, the onus of introducing evidence before the Board in the first instance lies upon the taxpayer. If he gives no evidence, the Board should deal with the case on the material before it. The assessor is entitled to have his assessment confirmed unless it is satisfactorily challenged by the taxpayer and shown to be excessive. If the taxpayer has given *prima facie* evidence of disputed facts, the assessor will be entitled to introduce evidence in rebuttal; and the Board will then resolve any conflict of evidence in the ordinary way on the basis of the evidence before them – not on the basis of evidence called by the Commissioner. It is the Board of Review which states the case for purpose of any subsequent appeal to a judge on a point of law. No tribunal can resolve disputed questions of fact except by evidence called before itself."

Thus, according to Blair-Kerr J, the effect of section 68(4) is as follows. If the facts are not in dispute, the Board determines the question whether the assessment is excessive on the basis of the Commissioner's statement of fact. If the facts are disputed by the taxpayer, the taxpayer has the onus to adduce evidence to prove the facts that he relies on. If the taxpayer does not give evidence, the Board determines the appeal on the basis of the material before it, i.e. the reasons of the Commissioner in affirming the assessment, his statement of facts and no more. If the taxpayer has given *prima facie* evidence of the disputed facts, it is up to the assessor to decide whether to call any witness. In that event, the Board determines the facts on the basis of the evidence before the Board and not on the basis of the statement of fact of the Commissioner.

20. Mr Barlow criticised the question posed by Blair-Kerr J as incorrect because the proper question posed under section 68(4) is whether the assessment appealed against is excessive or incorrect. I think that criticism is both unjustified and irrelevant. Firstly, at the time of the decision in *In re Herald International Ltd* in 1964, the then applicable section 68(4) was in the following terms:

> "The onus of proving that the assessment as determined by the Commissioner on appeal, or as referred by him under section 67 as the case may be, is excessive shall be on the appellant."

Thus the applicable test at the time of that decision was whether the assessment was excessive. The section was amended in 1965 by Ordinance No 35 of 1965 to its present form by expanding "excessive" to "excessive or incorrect". 'Incorrect' is a term of wider import than 'excessive'. An assessment which is excessive must be incorrect but it is inappropriate to label an assessment which is wrong in principle and which should not have been issued at all as excessive. Such an assessment should be properly labelled as incorrect rather than as excessive. This is in fact what the present appeal is about. Probably, one of the purposes of the 1965 amendment was to cover such incorrect assessments. But whether this is so, the amendment does not detract from the correctness of the way in which the onus operates in proceedings before the Board as described by Blair-Kerr J. Secondly, the above dicta of Blair-Kerr J has also been approved by the Court of Appeal in *Cheung Wah Keung and Commissioner of Inland Revenue* [2002] 3 HKLRD 773 at 789 where Woo JA, as he then was, said:

> "Nothing that Mr Thomson has shown to us persuades us that the determination or the Board's decision was wrong. Mr Cooney points out that the method by which an assessment was made by the Revenue is quiet irrelevant at the stage of proceedings before the Board, and that the crux is whether the assessment is correct. He refers us to *CIR v Board of Review, ex p Herald International Ltd* [1964] HKLR 224 as to how the Board should deal with a appeal against an assessment, Blair-Kerr J in the Full Court said at p.237:
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> > '(the dicta of Blair-Kerr J quoted in paragraph 19 above).'
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> And the onus of proving that the assessment is excessive lies on the taxpayer-appellant."

Though Woo JA did not use the term 'excessive or incorrect', it is understood that the onus of proof falls on the taxpayer whether he wishes to prove that the assessment is excessive or is otherwise incorrect. Woo JA must be taken to have approved that the onus operates exactly in the way as described by Blair-Kerr J.

21. In *ING Baring Securities (Hong Kong) Ltd and Commissioner of Inland Revenue* [2006] 3 HKLRD 315, the Court of Appeal, without even referring to *In re Herald International Ltd*, held that the taxpayer's burden is not just an evidentiary burden but the legal burden of satisfying the Board of the disputed issue by adducing sufficient and relevant evidence. Le Pichon JA said at paragraph 29:

> "With respect, the question was not whether the Taxpayer had established a *prima facie* case. Rather, it had to satisfy the Board that the profits in question had an offshore source by adducing sufficient and relevant evidence. The question the Judge should have addressed was whether, given its findings, it was open to the Board to take the view that the Taxpayer had failed to satisfy it that the profits in question had an offshore source."

22. In *Stanwell Investments Ltd and Commissioner of Inland Revenue* [2004] 2 HKLRD 227, in which Mr Barlow also appeared on behalf of the taxpayer, Reyes J rejected Mr Barlow's suggestion that the taxpayer's burden was an evidentiary one. He held at paragraph 42:

> "IRO s.68(4) puts "[t]he onus of proving that the assessment appealed against is excessive or incorrect" on the taxpayer. Mr Barlow suggested that such onus was purely an evidential (as opposed to a persuasive or probative) burden. I disagree. The phrase "the onus of proving" in IRO s.68(4) plainly imposes more than an evidential burden."

Thus, the effect of section 68(4) and how the onus operates in an appeal before the Board is very well settled in our law.

23. How this onus operates is demonstrated in two recent decisions in this Court. In *Real Estate Investments (NT) Ltd and Commissioner of Inland Revenue* [2006] 1 HKLRD 821, the Board dismissed the taxpayer's appeal despite it was unable to reach a positive conclusion as to the intention of the taxpayer at the time of acquisition of properties due to the taxpayer's failure to adduce evidence. On appeal to the Court of First Instance, the taxpayer argued that as the Board failed to come to a positive finding as to the relevant intention it was wrong to conclude that it had not discharged its burden of proof. In dismissing the appeal, Deputy High Court Judge Carlson went as far as to hold that an appeal before the Board may be disposed of simply on the basis of burden of proof and the taxpayer failed for having failed to discharge that burden. He quoted *All Best Wishes Ltd* and *Cheung Wah Keung* as authorities for the proposition that the burden of proof is on the taxpayer. Then he reached the above conclusion by drawing support from Lord Brandon's dicta in *Rhesa Shipping Co SA v Edmunds & Another* [1985] 1 WLR 948 and the Court of Appeal decision in *Li Tim Sang v Poon Bum Chak* (unrep., CACV No 153 of 2002). He said in paragraphs 44, 46 and 47 as follows:

> "44. It is also abundantly clear that where the tribunal of fact is not able to come to a positive decision one way or the other, as is the case in this matter, it is open to it to say that the party which bears the onus of proof has failed to discharge that burden and must therefore be taken to have lost. This principle was expressed as follows by Lord Brandon in *Rhesa Shipping Co SA v Edmunds & Another* [1985] 1 WLR 948 at pp 995H-956A:

> … the judge is not always bound to make a finding of fact one way or the other with regard to facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so. There are cases however in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.
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> 45. This was the course that was also adopted by the Court of Appeal in *Li Tim Sang v Poon Bum Chak* (unrep., CACV No 153 of 2002); all three Justices, Le Pichon and Cheung JJA's, and Stone J referring to this part of Lord Brandon's speech in *Rhesa Shipping Co SA v Edmunds & Another* [1985] 1 WLR 948.
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> 46. Unquestionably, it was therefore open to the Board to decide the matter on the basis of the burden of proof. …
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> 47. … Once no finding could be made by the Board the burden of proof engaged and it followed that the appellant will have failed."

I respectfully adopt the above reasoning of Deputy High Court Judge Carlson which accords with well established legal principles.

24. Chung J took a similar approach in *China Map Limited and Commissioner of Inland Revenue* (unreported, HCIA 4/2005). In that case, the Commissioner's contention was that the taxpayer acquired the property for trading purpose. The Board dismissed the taxpayer's appeal though it failed to make any finding as to the taxpayer's intention for acquiring the property. Chung J explained at paragraphs 27 to 29 as follows:

> "27. Because of the evidence placed before, and the facts found by, the board, the main dispute between the parties was in gist whether the subject lots were intended by the taxpayers to be capital assets. As stated above, it is the taxpayers' own case … that the acquisition of the subject lots arose from their parent company's property redevelopment plan.
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> 28. Whether the subject lots were intended by the taxpayers to be capital assets was closely related to the use to which the redeveloped property would be put. As has been pointed out in All Best Wishes Ltd., the last-mentioned matter could only be properly determined by the board 'upon the whole of the evidence'. The onus of proving this fell on the taxpayers: s.68(4), Cap. 112 and *In re Herald International Ltd.*

> 29. In brief, the board's decision was that the taxpayers had failed to discharge the burden cast upon them by s.68(4), Cap. 112: para 12 and 16 above. Having done so, and in the factual context of the case-stated, the board, in exercise of its discretion, could have gone further and made positive findings regarding the intended use of the redeveloped property and the like. But it was just as proper an exercise of the board's discretion for it not to do so. …"

I agree with the above approach.

25. I now turn to Mr Barlow's argument based on *Pinson on Revenue Law* and *Reinhold*. The learned authors in *Pinson* wrote at paragraph 17-17 as follows:

> "Initially the onus lies on the taxpayer to adduce evidence showing that he has been overcharged by the assessment; so where the taxpayer adduces no evidence on the basis of which the Commissioners can reduce this amount of the assessment, they must confirm it in the amount assessed. Hence, when the quantum of the assessment is the only point in issue (as is common in a back-duty case) the onus may be said to lie solely on the taxpayer. Where fraud, wilful default or neglect is alleged by the Crown, however, the onus lies on the Crown to prove such fraud, etc.
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> Although the initial *evidential* onus lies on the taxpayer, this does not exonerate the Appeal Commissioners from satisfying themselves that the taxpayer is properly chargeable to tax nor the Crown from satisfying the Commissioners on this point. For example, where the issue is whether activities of the taxpayer do, or do not, constitute the carrying on of a trade, and the taxpayer adduces facts consistent with either alternative, it is for the Crown to satisfy the Commissioners that the activities constitute the carrying on of a trade (quoting *Reinhold*)."

The above passage suggests that the taxpayer has an evidentiary burden only and once he has discharged the evidentiary burden, the persuasive onus is shifted to the Crown (i.e. Commissioners of Inland Revenue) to satisfy the Appeal Commissioners of the relevant issue. This is in quite a stark contrast with the local line of authorities. The learned authors in *Pinson* quoted *Reinhold* as the authority in support of their proposition.

26. *Reinhold* was a Scottish case. In that case, the respondent bought four houses with a view to re-sell and made some profits. He was assessed to tax. On appeal before the General Commissioners, he contended that the profits on resale was not taxable. The Crown contended that the purchase and sale constituted an adventure in the nature of trade and that the profits arising therefrom were chargeable to income tax. The General Commissioners, being equally divided, allowed the appeal. The Crown appealed by way of case stated pursuant to section 64 of the Income Tax Act 1952. The question of law posed for the opinion of the court was whether the

General Commissioners were justified in treating the profits in question as not assessable to income tax. The court answered that question in the affirmative and dismissed the appeal. Lord Carmont held at 393:

> "On such an enquiry in the present case, we find that the Respondent is a warehouse company director and not a property agent or speculator, and that the only purchases of property of which we are made aware are two separated by ten years, and that the first heritage was acquired without intention to sell, which only arose fortuitously. I would therefore say that the Commissioners of Inland Revenue have failed to prove – and the onus is on them – the case they sought to make out."

In conclusion, Lord Carmont said at 394:

> "So weighing them I reach the conclusion that the Appellants have failed to discharge the burden on them of shewing that the determination of the Commissioners is wrong. I therefore propose that we should answer the question put to us in the affirmative."

27. Mr Ho, SC, submits that the burden of proof referred to in the first quoted passage above was that of the Commissioners of Inland Revenue as appellants in appealing against the decision of the General Commissioners and not as the taxing authority in the taxpayer's appeal before the General Commissioners. I respectfully disagree. In the first quoted passage, Lord Carmont was referring to the enquiry, which must be the fact-finding enquiry by the General Commissioners, the equivalent of our Board. Lord Carmont must be talking about the burden of the Commissioners of Inland Revenue as the taxing authority in the enquiry before the General Commissioners. The burden referred to in the second quoted passage is, obviously, the burden on the Commissioners of Inland Revenue as the appellant before the court in the appeal against the decision of the General Commissioners. In my view, Lord Carmont's dicta did support the proposition of the learned authors in *Pinson on Revenue Law*.

28. However, revenue law is particularly a creation of the statute which determines the tax regime of a particular jurisdiction. There was some suggestion in *Reinhold* itself that Scottish revenue law was not entirely the same as English law, let alone that of Hong Kong. In *Reinhold*, Lord Carmont recognised at page 394 that under the English law the question posed for the opinion of the court would not have been permissible as being a question of fact, but was permissible under Scottish law as a question of law or at least of mixed law and fact. I have not been shown any Scottish statute about the appeal regime before the General Commissioners. I have no knowledge whether under Scottish law there was any provision equivalent to our section 68(4) which imposed on the taxpayer the onus of proving that the assessment was excessive or incorrect. I have seen commentaries on section 52 of the Income Tax Act 1952 and section 50 of the Taxes Management Act 1970 suggesting that the burden of proving that an assessment is excessive is on the taxpayer. However, those commentaries appear to be based on ordinary principle rather than on any statutory provision.

29. It must be borne in mind that *Reinhold* is a Scottish authority. It is inconsistent with a number of earlier English authorities, including those of the English Court of Appeal. For example, in *Haythornthwaite And Sons, Ltd v Kelly (Inspector of Taxes)* (1927) 11 TC 657, Lord Hanworth MR said at 667:

> "Now it is to be remembered that under the law as it stands the duty of the Commissioners who hear the appeal is this: Parties are entitled to produce any lawful evidence, and if on appeal it appears to the majority of the Commissioners by examination of the Appellant on oath or affirmation, or by other lawful evidence, that the Appellant is over-charged by any assessment, the Commissioners shall abate or reduce the assessment accordingly; but otherwise every such assessment or surcharge shall stand good. Hence it is quite plain that the Commissioners are to hold the assessment standing good unless the subject – the Appellant – establishes before the Commissioners, by evidence satisfactory to them, that the assessment ought to be reduced or set aside."

Those authorities to the contrary were not referred to in *Reinhold*. It was unlikely that those authorities or the principle therein were unknown to the court. The greater likelihood was that the regime under Scottish Law was different from that of England.

30. On the principle of *stari decisis*, I do not consider I am bound by *Reinhold*. Blair-Kerr J' s dictum has stood the test of time. The principle in *In re Herald International Ltd* was approved by the Court of Appeal in *Cheung Wah Keung* in 2002. It was cited by the Court of Appeal almost as a trite principle in *ING Baring Securities (Hong Kong) Ltd* in 2006. It is now beyond dispute. On the other hand, Mr Barlow' s argument was rejected by Reyes J in *Stanwell Investments Ltd*; while similar arguments were rejected in other local authorities. I can see no room for me to depart from the above well established authorities.

31. Section 68(4) as a rule of evidence is peculiar. The parties in any civil proceedings, for example, in the Small Claims Tribunal or the Labour Tribunal, bear their burden of proof in accordance with ordinary rules of evidence subject to statutory modifications. Thus, an employee bears the burden of proving the existence of a contract of employment under ordinary legal principles. Once that is proven, if the employer wishes to dispute that the employee is employed under a continuous contract of employment, he bears the burden of proof: section 3(2) of the Employment Ordinance. But in respect of appeals against the determination of the Commissioner, section 68(4) provides that the burden is borne by the taxpayer throughout the entire proceeding. The Commissioner, or the assessor who attends on his behalf, has no burden of proving anything. He can simply rely on the assessment as correct. It is for the taxpayer to prove that it is not by showing that the reasons relied on by the Commissioner in affirming the assessment is wrong as a matter of law or that the facts upon which the determination was made was factually incorrect. If the taxpayer calls no evidence on any disputed facts, or if he has given evidence but is disbelieved,

the Board shall determine the appeal on the basis of the material before it, i.e. the Commissioner's reasons for his determination and his statement of facts. Unless the Commissioner has misapplied the law, the assessment shall be upheld by the Board and the appeal dismissed.

32. Thus, the law is very well settled. Section 68(4) of the Inland Revenue Ordinance imposes on the taxpayer the legal or persuasive burden of proving that the assessment appealed against is excessive or incorrect. The Commissioner has no burden of proving that the assessment is correct. Hence, 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 his burden, or if his evidence is disbelieved, the appeal shall be resolved on burden of proof by dismissing the appeal and upholding the assessment.

The basis of intervention of the Board's finding of fact on appeal to the Court of First Instance

33. Having set out the regime of appeal to the Board, I now turn to the appeal from the Board to the Court of First Instance. Section 69 of the Inland Revenue Ordinance provides that the decision of the Board is final save that either the taxpayer or the Commissioner may request the Board to state a case on a question of law for the opinion of the Court of First Instance. Where the appeal is purely on point of law, there is no problem. Where the appeal is framed as a question of law but for the purpose of impugning the finding of fact of the Board, the question arises as to the extent when it is permissible for the court to intervene. The landmark case is the House of Lords decision in *Edwards (Inspector of Taxes) And Bairstow And Another* [1956] AC 14. A more recent decision is *Begum (Runa) v Tower Hamlets London Borough Council* [2003] 2 AC 430.

34. There is no need for me to go into either of those cases as the principles in those cases have been thoroughly considered and usefully summarised by Bokhary PJ in *Kwong Mile Services Ltd v Commissioner of Inland Revenue* [2004] 3 HKLRD 168, which of course is binding on me. His Lordship considered the basis of intervention in an appeal from the Board to the Court of First Instance at paragraphs 31 to 37. His Lordship summarised the legal principles at paragraphs 31 to 33 as follows:

> "31. Appeals from the Board of Review to the courts lie only on questions of law. But intervention in an appeal on law only is not confined to instances in which it is apparent on the face of the record that the determination appealed against resulted from a specifically identifiable error of law. Just because there is no appeal on facts, it does not mean that the appellate court is precluded from detecting and correcting errors of law buried beneath conclusions ostensibly of fact. Sometimes, as Lord Radcliffe put it in *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at p.36, "the true and only reasonable conclusion contradicts" the determination appealed against. If so, the appellate court will assume that the determination resulted from an error of law. And that opens the way for the appellate court to intervene on the ground of an error of law.

> 32. Mr John Griffiths SC for the Commissioner placed reliance on – although not solely on – what Lord Millett said in his speech in *Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430 at p.462G-H. There Lord Millett summarised the *Edwards (Inspector of Taxes) v Bairstow* basis of appellate intervention in this way:
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> A decision may be quashed if it is based on a finding of fact or inference from the facts which is perverse or irrational; or there was no evidence to support it; or it was made by reference to irrelevant factors or without regard to relevant factors. It is not necessary to identify a specific error of law; if the decision cannot be supported the court will infer that the decision-making authority misunderstood or overlooked relevant evidence or misdirected itself in law.
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> 33. … But, as it seems to me, taking irrelevant factors into account or leaving relevant ones out of account can lead a fact-finding tribunal so far astray as to reach a conclusion contrary to the true and only reasonable one."

His Lordship then considered the various ways of putting the terms in which the court may intervene in paragraphs 34 and 35 as follows:

> "34. Lord Radcliffe, having noted various ways of putting it, ultimately preferred to put it in terms of the determination appealed against being contradicted by the true and only reasonable conclusion. And I respectfully share that preference. But I of course acknowledge, as he did, that there are other ways of saying the same thing. To impugn a determination by saying that a contrary conclusion is the true and only reasonable one is in substance the same as saying that there was no evidence upon which the impugned determination could be reached. An observation to this effect appears in Viscount Simonds' s speech in *Griffiths v JP Harrison (Watford) Ltd* [1963] AC 1 at pp.10-11. It is of course well-established that whether there is evidence upon which to find a fact is a question of law. The essence of the exercise was, if I may say so, neatly captured by Nourse J (as he then was) in *Cooper (Inspector of Taxes) v C&J Clark Ltd* [1982] STC 335. Building on the reference in Lord Simon of Glaisdale' s speech in *Ransom (Inspector of Taxes) v Higgs* [1974] 1 WLR 1594 at p.1619C-D to "a 'no-man' s land' of fact and degree", Nourse J said (at p.341D) that the appellate court "can only interfere where the degree of fact is so inclined towards one frontier or the other as to lead it to believe that there is only one conclusion to which [the fact-finding tribunal] could reasonably have come."

> 35. Yet another way of putting it is to be found in the judgment of the English Court of Appeal in *Coker v Lord Chancellor* [2002] IRLR 80 delivered by Lord Phillips of Worth Matravers MR. At p.82, the Master of the Rolls said that an error of law can "consist in a finding of fact which is perverse".

Then in paragraph 37, his Lordship summarised the approach of the appellate court in an appeal in three propositions. He said:

> "37. In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions. These propositions complement each other, although the understandable tendency is for those attacking the fact-finding tribunal's conclusion to stress the third one while those defending that conclusion stress the first two."

35. I shall therefore test the decision of the Board against these three propositions. The question is whether the decision of the Board is reasonable or within the range for reasonable minds to differ or is the contrary conclusion the true and only reasonable one.

The questions of law

36. The remaining two questions posed by the Taxpayer for the opinion of this Court in its cross-appeal are:

> Question (3):
>
> Whether the Board's conclusion that the Taxpayer had failed to discharge the onus of proving that the assessments were incorrect or excessive was contrary to the true and only reasonable conclusion on the primary facts and evidence?
>
> Question (4):
>
> Whether having regard to all the facts as found by the Board of Review and on the true construction of Cap 112 and in particular s14 thereof, the Board of Review was correct in law in holding that the profits from the relevant transactions arose from or were derived from trading in property?

37. Before considering these two questions, I shall first examine the Taxpayer's ground of appeal before the Board. Because of the provisions of section 66(3), the latitude with which the Taxpayer may argue its case before the Board is limited by its ground of appeal, which is equivalent to the pleading in a civil action. The ground of appeal which led to the decision of the Board from which Questions (3) and (4) arose is:

> "In January 1998, the Taxpayer sold a plot of land … identified as the 'Fourth Lots' in Paragraph 8(c) of the Acting Deputy Commissioner's Determination, for the consideration of $27,000,000 and from which the Taxpayer derived a gain of $15,479,734.
>
> In the assessment for 1998/99, this gain was brought to tax as the assessor, and as confirmed by the Acting Deputy Commissioner, considered that the Taxpayer had carried on a trade in respect of the purchase and sales of the Fourth Lots. The Taxpayer denies that it had carry *(sic)* on a trade in respect of the Fourth Lots as it had acquired the property for long term investment purposes. In selling the property the Taxpayer had disposed of a capital asset and the gain therefrom is not subject to tax under the IRO. The Taxpayer objects to this gain being treated as a taxable profit."

38. There are two points to be noted. Firstly, this ground of appeal was directed to the acquisition and sale of the Fourth Lots only, which were acquired under the 1st Acquisition. The Taxpayer raised no issue in respect of the two lots acquired under the 2nd Acquisition, which included the Third Lots resumed by the Government. Secondly, at the hearing of the appeal before the Board, the Chairman specifically invited the Taxpayer's representative, Mr Lew, to adduce evidence relevant to the 2nd Acquisition, but Mr Lew declined and confirmed that no issue would be raised in respect of the 2nd Acquisition. Thus there was no evidence whatever of the Taxpayer's intention in respect of the 2nd Acquisition. As a result, the Board held at paragraph 31 of the Amended Case Stated that there was no evidence on the intended use of the lots acquired under the 2nd Acquisition and the Taxpayer's case of the 2nd Acquisition (i.e. the Third Lots) as capital assets failed at the outset. Thus the issue before the Board was whether the 1st Acquisition was a capital transaction or a trading transaction. There was no appeal against the Commissioner's determination that the 2nd Acquisition was a trading transaction. By virtue of section 66(3) of the Inland Revenue Ordinance, the Taxpayer may not rely on any other ground in its appeal before the Board, save with the leave of the Board. No leave was sought by the Taxpayer to rely on any other ground. Thus the way in which the Taxpayer's ground of appeal before the Board was drafted likewise limits the latitude in which the appeal before this Court could be argued. Mr Barlow may not advance any argument based on the intention of the Taxpayer in respect of the 2nd Acquisition, in respect of which there was no evidence before the Board.

39. Mr Barlow suggests to consider the two questions posed for this Court in reverse order because if my answer to Question (4) is in the affirmative, there is no need to consider Question (3). Having set out the applicable legal principles, I think it makes no difference the order in which I deal with the two questions, but I accept Mr Barlow's suggestion.

Question (4) - Whether on the facts found by the Board the profits were derived from trading in property

40. The thrust of Mr Barlow's argument in relation to Question (4) is that (1) the Board erred in requiring the Taxpayer to prove that it acquired the lots as capital assets; (2) the Board applied the wrong test for ascertaining the Taxpayer's intention at the time of acquisition of the lots and (3) on the facts as found by the Board, it must have necessarily reached the conclusion that the transactions concerned were capital in nature.

41. Mr Barlow's first line of argument is that the Board was wrong to require the Taxpayer to prove that it acquired the lots as capital assets because not only that this is not required by the Ordinance, it is the antithesis of the House of Lords' conclusions in *Simmons (As Liquidator of Lionel Simmons Properties Ltd) and Inland Revenue Commissioners* [1980] 1 WLR 1196. I have thoroughly considered the question of burden of proof in paragraphs 18 to 32. Mr Barlow's submission is contrary to section 68(4) of the Inland Revenue Ordinance and the established authorities. The Taxpayer bears the burden of proving that the assessment was excessive or incorrect. That must necessitate the Taxpayer proving that the lots were acquired as capital assets for investment and not as trading stock. Therefore, I respectfully reject Mr Barlow's submission.

42. Secondly, Mr Barlow argues that the Board applied the wrong test for ascertaining the Taxpayer's intention at the time of acquisition of the lots, which must necessarily lead the Board to the wrong conclusion. He refers to paragraph 29 of the Amended Case Stated in which the Board held:

> "29. Whether the Taxpayer's intention at the time of the 1st acquisition was to build holiday resort houses of about 700 sq ft each and to hold them for an indefinite period for rental income was a question of fact. … the Board decided against the Taxpayer on this factual issue and held that the Taxpayer had not proved any of the following and its case of the 1st acquisition as capital assets failed:
>
> (a) that at the time of the 1st acquisition, the intention of the Taxpayer was to build holiday resort houses and to hold the houses on a long term basis;
>
> (b) that such intention was genuinely held, realistic or realisable;

> (c) its financial ability, with or without its shareholders, to build and retain the houses for an indefinite period."

Mr Barlow contends that the test adopted by the Board requires a much higher threshold than that required under the Inland Revenue Ordinance. He submits the test is simply that stated by Yuen J, as she then was, in *Wong Ning Investment Co Ltd and Commissioner of Inland Revenue* 5 HKTC 222 at 259, i.e. whether the property had been acquired by the taxpayer as trading stock or as investment because as was held in *Simmons* that an asset cannot be acquired as both trading stock and as investment and what matters is the taxpayer's intention at the time of acquisition.

43. With respect, I do not think Yuen J was formulating any test of what is trading stock and what is investment. In the dictum referred to by Mr Barlow, Yuen J was just stating the issue before the Board. She said at paragraph 19:

> "The hearing did not take place until March 1996. The appeal in respect of Assessment (i) was abandoned. Accordingly, the issues before the Board of Review were:-
>
> (a) whether s.70A applied to Assessment (ii); and
>
> (b) whether the property had been acquired by the Taxpayer in 1977 as trading stock or as an investment. It was held in *Lionel Simmons Properties Ltd v CIR* 53 TC 461 that an asset cannot be acquired as both trading stock and an investment, and what matters is the Taxpayer's intention at the time of acquisition (subject to changes of intention)."

44. In my view, the true test is as stated by Lord Wilberforce in *Simmons* at 1199. His Lordship said:

> "One must ask, first, what the commissioners were required or entitled to find. 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. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax: see *Sharkey v Wernher* [1956] AC 58. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status –

> neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all the commercial operations, namely that situations are open to review."

Two principles can be distilled from the above speech. Firstly, the starting point normally is to ask what was the intention of the taxpayer at the time of acquisition of the asset. This intention is a question of fact which can only be ascertained by looking at all the surrounding circumstances. I stress the word 'normally' because his Lordship said that the intention at the time of acquisition is usually of great significance but very often more questions have to be asked depending on all the circumstances. Secondly, while intention can change, at any particular time, an asset must be either trading stock or permanent investment; it cannot be neither or both.

45. Yuen J quoted *Simmons*. She did not indicate her disagreement with the above speech of Lord Wilberforce. Thus, she must be taken to have accepted that the taxpayer's intention at the time of acquisition was important but that was only one of the questions to be asked and there were a lot more questions to be asked depending on the circumstances. I think by no reading of the passage quoted by Mr Barlow could Yuen J be taken to have laid down a very simple test for a complicated issue which according to Lord Wilberforce could not be determined by asking a single question.

46. In *All Best Wishes Ltd and Commissioner of Inland Revenue* (1992) 3 HKTC 750, the taxpayer quoted Lord Wilberforce's dicta in *Simmons* and argued that the taxpayer's intention once established was determinative of the issue and was conclusive in the absence of any finding of a change of intention. Mortimer J, as he then was, rejected that argument as over-sweeping. He said at 771:

> "I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the *Simmons* case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute – was this an adventure and concern in the nature of trade? 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 realisable, 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."

Mortimer J accepted the principles in *Simmons* but not as far as the taxpayer urged him to. He accepted that trading requires an intention to trade and that the taxpayer's intention at the time of acquisition is of very great weight. He said that intention is a question of fact which could only be determined upon the whole of the evidence and no single test can produce the answer. A person's express intention is not conclusive. It must be tested against the whole of the circumstances. In that context, Mortimer J said the intention must be genuinely held, realistic and realisable. Whether an express intention is realistic and realisable are indicators whether that intention is genuine. These are some of the questions that the Board should ask in its fact-finding process. What is important is, as Mortimer J pointed out, there is no single decisive test. This contradicts Mr Barlow's submission that the test is simply whether the asset was acquired as a capital asset or a trading stock. With respect the so called test suggested by Mr Barlow is only the issue in that particular case and not a test of general application.

47. In paragraphs 26 and 27 of the Amended Case Stated, the Board reminded itself of the relevant authorities, including *Simmons* and *All Best Wishes Ltd.* It is only too obvious that paragraph 29(b) of the Amended Case Stated had its origin in Mortimer J's dicta in *All Best Wishes Ltd* and paragraph 29(c) was the test adopted by the Board to ascertain whether the express intention of the Taxpayer was genuine, realistic and realisable. The question in paragraph 29(c) was just one of the many questions asked by the Board and it was a very basic question. A lot more questions were raised and considered by the Board in paragraphs 29B through to 29L of the Amended Case Stated. I do not think the Board could be criticised of applying the wrong test.

48. I now turn to the third line of Mr Barlow's argument. Section 14 of the Inland Revenue Ordinance is the charging section for profits tax. It provides that profits tax is chargeable upon the assessable profits of "every person carrying on a trade, profession or business in Hong Kong" from "such trade, profession or business (excluding profits arising from the sale of capital assets)". Thus the issue arsing from Question (4) is whether on the facts as found by the Board it was correct in concluding that the proceeds of sale of the Fourth Lots were profits of the Taxpayer arising from a trading transaction as distinct from that arising from the sale of capital assets.

49. Mr Barlow reminds me that there is no capital gains tax in Hong Kong and that where a taxpayer acquires property that is capable of being either a capital investment or stock in trade and the taxpayer has not made a business of trading in property of that kind, there is no presumption or predisposition towards it being either a capital investment or trading stock. He submits that characteristics of such transactions which are common to both capital investment and trading operations do not colour such transaction. He emphasizes that the categorisation of the land lots in the Taxpayer's annual accounts bespeaks the Taxpayer's assertion as to whether it was acquired as a capital investment or as trading stock and that if the assessor accepted that categorisation it is prima facie correct.

50. Mr Barlow quotes and relies on the following propositions of law:

(1) A one off transaction is less likely to be a trading transaction than a realisation of capital investment: *Jones and Leeming* [1930] AC 415 at 419 and 420.

(2) The acquisition of property with the contemplation of ultimately realising it for more than its purchase price does not, of itself, constitute an intention to trade: *Commissioners of Inland Revenue v Reinhold* (1953) 34 TC 389 at 397; *Jones and Leeming* at 420 and 425; *Simmons* at 1199B, 1202 E-F and 1203H and *Marson (H M Inspector of Taxes) v Morton and Others* (1986) STC 463 at 471 d-f.

(3) The fact that a property is sold for a higher consideration than its purchase price does not, of itself, constitute trading, e.g. *Jones and Leeming*, *West v Phillips* (1958) 38 TC 203; *Taylor v Good (Inspector of Taxes)* [1974] 1 WLR 556 (CA); *Simmons*; *Mamor Sdn Bhd v Director General of Inland Revenue* [1985] STC 801 (PC); *Kirkham v Williams (Inspector of Taxes)* [1991] 1 WLR 863; and *Waylee Investment Ltd and The Commissioner of Inland Revenue* [1991] 1 HKLR 237 (PC).

(4) The disposition of capital investments due to the impracticality of retaining them as such does not constitute trading, e.g. *West v Phillips* at 212-214; *Simmons* at 1202B and 1203 F-G and *Stanwell Investments Ltd and Commissioner of Inland Revenue*.

(5) A trading operation, normally always commences at the time of acquisition of the trading stock: *Simmons* at 1199A-D.

(6) An intention to pay for the redevelopment of a capital investment by selling off part of the redeveloped investment does not constitute trading, e.g. *All Best Wishes Ltd AND Commissioner of Inland Revenue* (1992) HKTC 750 at 771; and

(7) Frustration of a plan for investment, which compels realisation, even if foreseen as a possibility, cannot give rise to an intention to trade: *Simmons* at 1202B.

51. Mr Ho SC has no dispute with those authorities. Apart from the seventh proposition which I agree is a legal principle, the other six propositions are just examples of possible factual conclusions which may be reached by the application of some other principles of general application. I think the true statement of principle is to be found in Lord Wilberforce's speech in *Simmons* at 1199 which I have quoted above. The intention at the time of acquisition of an asset is

usually of great significance in determining if it is a capital investment or a trading stock and an asset cannot be neither and it cannot be both. Furthermore, except for the fifth and seventh propositions, what were said in those authorities were not in absolute terms but in permissive and negative terms, i.e. the sale in those circumstances as such is not to be regarded as trading in nature. The contrary conclusion is not excluded by those authorities. Thus, depending on the Board's view of the totality of the evidence in the appeal before it, those authorities do not compel the Board to find the Fourth Lots as capital assets, nor do they preclude the Board from reaching the contrary conclusion or from not reaching any conclusion at all.

52. Having set out the relevant legal principles, I now turn to examine the decision of the Board. The reasoning of the Board's decision is contained in paragraphs 29A through to 29L, 30 and 31 of the Amended Case Stated. These paragraphs are as follows:

> "29A. The area of the house lots varies from 330 sq ft to 484 sq ft. The land between each of the 3 rows of the 24 house lots was government land. The Board had not been told anything about:
>
> (a) the intended location of the 17 holiday resort houses of about 700 sq ft each;
> (b) what the houses would look like;
> (c) the use, if any, of the agricultural land with an area of about 77,000 sq ft; or
> (d) what facilities, if any, would be built or developed for the use [of] the tenants of the resort houses.
>
> 29B. The 1st acquisition was on 3 January 1990. By letter dated 4 or 6 March 1990 (the date on the Board's copies was illegible), the Taxpayer applied for certificates of exemption in respect of all the house lots. Within a matter of days, the Taxpayer requested the District Lands Office by letter dated 12 March 1990 to "withhold" its application because there were "certain changes to the intended development". On 2 May 1990, the Taxpayer sold the First Lots. These were objective facts and they were objective facts which contradicted the stated intention. The sale was important because it took place within 4 months of the 1st acquisition (and probably explained the request to the District Lands Office to withhold consideration of the Taxpayer's application) and because the land sold, i.e. the First Lots, lied in the heart of the Taxpayer's land. The explanation given was that:
>
> "Because at that time a friend of mine told me that he needed that piece of land. He liked it. And we have calculated that we have enough land for development. And one of the reasons is to cut down the cost of development."

The Board rejected the explanation. The Taxpayer claimed that the whole of the land (or pieces of land) acquired in the 1st acquisition was to be redeveloped. It was not a question of whether there would be "enough" land left after selling the heart of the Taxpayer's land. It was a question of how much the sale would cut into the original development plan and how the Taxpayer intended to redevelop the leftovers. The Board had not been told how the leftovers fitted, if at all, into the original development plan, or how the original plan was modified to accommodate the sale of the First Lots.

29C. Having sold the First Lots on 2 May 1990, the Taxpayer applied by letter dated 15 May 1990 for certificates of exemption in respect of 6 out of the 24 house lots on the basis of *in situ* re-development. This was an objective fact against the stated intention to build 17 houses of about 700 sq ft each, bearing in mind that the area of these 6 house lots varies from 441 sq ft to 484 sq ft. Moreover, despite the fact that the certificates of exemption were issued on 29 August 1990, the Taxpayer took no step to build any house. This belied the stated intention or any intention to build.

29D. The Taxpayer's case was anything but coherent. The next event which the Taxpayer chose to tell the Board about was an application more than one year later by letter dated 10 October 1991 to apply for certificates of exemption in respect of 16 more house lots. The Board had not been told why the Taxpayer left out 2 house lots.

29E. The Board had yet another unexplained gap. About 11 months later, the Taxpayer applied for land exchange by letter dated 4 September 1992. The Board had not been told why the Taxpayer applied for land exchange. Nor had the Board been told why the Taxpayer did not apply for land exchange until 2 years and 8 months after the 1st acquisition. On 8 October 1992, the application was rejected on the ground that:

"[the] application for land exchange for development of New Territories Exempted Houses cannot be proceeded as no exempt buildings will be allowed in an exchange."

29F. The Taxpayer then skipped to a letter dated 1 September 1993, leaving the Board with an unexplained gap of about 10½ months. By 13 February 1995, the application had not been approved because the District Lands Office required:

"Building plans/sketch plans showing the redevelopment proposal containing relevant information such as dimensions, area, height, position of staircase, stairhood, projections, entrance, position of septic tank, etc."

29G. The Taxpayer agreed that the set of plans said to be drawn up in 1992 fitted the description of the sketch plans called for. The Taxpayer also agreed that this set of plans had not been submitted to the District Lands Office. The Taxpayer's case on why the purported 1992 plans had not been submitted was that:

"Because there is no need to submit the plans for application for exemption."

With such evidence, the Board were unable to see how the Taxpayer could succeed on the factual issue.

29H. The balance sheet of the Taxpayer as at 31 December 1989 showed that it had net current liabilities of $7,760,774 and a net asset value of $1,504,110. The 1st acquisition was on 3 January 1990. The balance sheet of the Taxpayer as at 31 December 1990 showed that it had net current liabilities of $32, 766,829 and a net deficit of $1,194,197.

29I. There was no evidence on the cash flow of the Taxpayer as at the date of the 1st acquisition.

29J. There was no evidence on the personal net worth of the shareholders or directors of the Taxpayer as at the date of the 1st acquisition. There was also no evidence on the cash flow of any of them.

29K. There was no evidence on the Taxpayer's financial ability to build and hold the houses for an indefinite period. The reason given for the sale of the First Lots quoted in paragraph [29B] above suggested that the Taxpayer had to "cut down the cost of development" within 4 months of the 1st acquisition.

29L. There was no evidence on the actual rental of any or any comparable "resort" houses.

30. The Board held that the appeal on the gain from the disposals of land acquired in the 1st acquisition failed.

31. There was no allegation or evidence that the 2nd acquisition was for long term holding or for redevelopment. There was no evidence on the intended use of the agricultural land. The Acting Deputy Commissioner held that the Land

> Lots (which comprised land acquired in both acquisitions) were purchased by the Taxpayer with the intention of reselling them at a profit. The Board held that any case of the 2nd acquisition as capital assets failed at the outset."

53. From the above paragraphs of the Amended Case Stated, it can seen that the Board bore in mind that the Taxpayer had the burden of proving that the assessment was excessive or incorrect and in that connection, the burden of proving what its intention was at the time of acquisition of the Fourth Lots, i.e. the 1st Acquisition. The approach of the Board was to test the express intention of the Taxpayer at the time of the acquisition against objective facts. One objective fact found by the Board and to which the Board attached great weight was the sale of the First Lots in the heart of the Taxpayer's land in May 1990, four months after their acquisition. The Taxpayer's former director, Mr Chan, explained that the First Lots were sold to a friend who wanted them and he acceded as the Taxpayer had enough land for development and the sale could cut down the redevelopment cost. Were that explanation accepted, the authorities relied on by Mr Barlow in paragraph 50, particularly sub-paragraphs (1), (2), (3) and (6) are relevant. As I have already noted, what was said in those authorities was not in absolute terms but in permissive and negative terms. Therefore, it was still open to the Board to find on the totality of the evidence that the Fourth Lots were trading stock or not to reach any conclusion what they were. The Board considered that explanation but in the end rejected it for reasons as given in paragraph 29B of the Amended Case Stated. The Board considered the lack of progress in redeveloping the Fourth Lots into resort houses and held that the Taxpayer had no intention to build. The Board considered the financial position of the Taxpayer and held there was no evidence of the Taxpayer's financial ability to build and hold the houses for an indefinite period. Then having rejected the Taxpayer's explanation for the sale of the First Lots, the Board also rejected the Taxpayer's evidence of its intention of acquiring the Fourth Lots for investment. Though the Board could not be satisfied what the Taxpayer's intention was at the time of the 1st Acquisition, it concluded that the Taxpayer failed to discharge the burden of proving that the assessment was incorrect or excessive. On that basis, the Board concluded that the Taxpayer's appeal failed.

54. Mr Barlow lists out twenty-one findings of fact of the Board. I do not intend to set them all out. Some of those findings have been included as part of background above. In essence, those findings are as follows. The Taxpayer acquired twenty-four house lots and sixteen agricultural land lots in January 1990. He sold the First Lots in May 1990 and acquired two lots in March 1991. All the lots were entered in the Taxpayer's accounts as "land held for development". The profits from the sale of the First Lots sold in May 1990 were treated by the Taxpayer as capital gain and not as trading profits. In 1996, the Taxpayer sold the Second Lot acquired from the 1st Acquisition making a profit of $37,053. In the same year, Government resumed the Third Lots acquired from the 2nd Acquisition generating a gain of $3.49 million. Lastly, the Taxpayer sold twenty-four house lots and thirteen agricultural land lots in January 1998 creating a gain of $15.48 million. From 1990 through to 2000, the assessor treated the gain as capital gain. Then the additional and revised assessments complained of were issued by the Commissioner.

55. The evidence given by Mr Chan (but not the fact found by the Board) of the Taxpayer's intention at the time of acquisition of the lots was that the lots were acquired with the intention of building holiday resort houses of about 700 square feet each for rental, the total floor area of the house lots was 12,000 square feet and the total area of the agricultural lots was 77,000 square feet. Mr Chan also gave evidence about the progress of the redevelopment. He said that on 6 March 1990, the Taxpayer applied for certificates of exemption in respect of the house lots for the purpose of building small houses on the lots. On 12 March 1990, it requested the District Lands Office to withhold that application. Following that request, the First Lots in the heart of the Taxpayer's land were sold on 2 May 1990. Then the Taxpayer applied for certificates of exemption for six of the twenty-four house lots on the basis of *in situ* re-development. Those certificates were issued on 29 August 1990, but no houses were built. On 10 October 1991, the Taxpayer applied for certificates of exemption for sixteen more house lots. On 4 September 1992, it applied for land exchange, but the application was rejected on 8 October 1992. That application was renewed on 1 September 1993 but was refused on 13 February 1995. The Taxpayer's balance sheet showed net current liabilities of $7.76 million and a net asset value of $1.5 million as at 31 December 1989. The balance sheet showed net current liabilities of $32.76 million and a net deficit of $1.2 million as at 31 December 1990.

56. Mr Barlow submits that the above facts found by the Board necessarily lead to the following conclusions:

(a) the categorisation of the Taxpayer's trade or business was to be made from the view taken of the transactions concerned by the Taxpayer, i.e. the Taxpayer was not a property trader in its ordinary course of business;

(b) all of the forty lots were presumably contracted for purchase in late 1989;

(c) two agricultural land lots were acquired in early 1991 (the 2nd Acquisition);

(d) the lots were acquired for the purpose of redeveloping them into rented holiday houses;

(e) the gain from the First Lots sold by the Taxpayer in May 1990 was treated by the Taxpayer and the assessor as a non-trading capital gain;

(f) between May 1990 and February 1995, the Taxpayer had taken some steps towards redeveloping the lots – albeit no actual redevelopment resulted;

(g) the gain from the resumption by Government of the Third Lots in 1993/94 was treated as non-trading capital gain by the Taxpayer and the assessor;

(h) the gain from the sale of the Second Lot in 1996/97 was treated as non-trading capital gain by the Taxpayer and the assessor;

(i) the Taxpayer sold thirteen agricultural land lots and twenty four house lots producing a gain of $15.48 million; and

(j) the Taxpayer retained the balance of the agricultural land lots.

It is Mr Barlow's submission that on these facts the Board should have found that the lots were acquired as capital investment and not as trading stock.

57. Items (b), (c), (i) and (j) above were neutral facts which were not in dispute. Items (e), (g) and (h) were facts relating to disposal of some of the lots which were treated by the Taxpayer as capital disposal and accepted by the assessor as such at the time which support the Taxpayer's evidence that the lots were acquired for investment. Items (a) and (f) were facts which were not in dispute which support the Taxpayer's evidence and from which the inference that the lots were acquired for investment may be drawn. Item (d) was the very issue which the Board had to determine. Apart from item (d), the other items were some of the facts on which inference could be drawn one way or the other. That the lots had been held for six to eight years, that the lots had been entered in the accounts as property held for investment and that the gain from the sale of some of the lots had been treated as capital gains by the Taxpayer point to the Taxpayer's intention of acquiring the lots as capital investment. On the other hand, the sale of the First Lots at the heart of the Taxpayer's land within four months of their acquisition and the subsequent sale of the other lots suggest that the lots were originally acquired as trading stock.

58. Then Mr Barlow submits that both the Acting Deputy Commissioner and the Board erroneously considered that an inference of trading intention can be drawn from an inference of intention to resell at a higher price later or from subsequent sales at a gain. He submits that even though this erroneous reasoning could be applied to the sale of the Second Lot in 1996, that reasoning could not be applied to the sale of the other lots because the Taxpayer and the assessor treated them as non-trading gains and that the compulsory resumption of the Third Lots by Government was an involuntary realisation of the assets. He submits that the sale of the lots between six to eight years after acquisition is not suggestive of trading but to the contrary, those facts do not assist in identifying the purpose of the acquisition but imply that the lots were not held as trading stocks otherwise they would have been turned to account earlier. Accordingly, he submits that on the facts found by the Board, the Taxpayer has not been shown to have acquired the lots with the intention of trading them and as the Taxpayer was not a property trader independently of those transactions, the only reasonable conclusion is that the lots acquired under the 1st Acquisition in 1990 were capital investment as the assessor had so accepted from 1990/91 through until 1995/96.

59. With respect, Mr Barlow's argument is misconceived and is premised on his misunderstanding of the burden of proof and the reasoning of the Board. Firstly, the Board was conscious that the burden of proving investment intention was on the Taxpayer and there was no burden on the Commissioner to prove trading intention on the part of the Taxpayer. From paragraphs 29B to 29D of the Amended Case Stated, it is clear that the Board did not approach the appeal by trying to find trading intention or drawing inference of trading intention. Instead, the Board bore in mind the Taxpayer had the burden of proving that the assessments were excessive or incorrect. The Board did take into account the sale of the First Lots within a few months of acquisition when rejecting the Taxpayer's evidence of intention. Then it held that the Taxpayer failed to prove that it acquired the lots for the purpose of investment after taking into account all the circumstances including, on the one hand the long time during which the lots had been held, and on the other hand the lack of progress in the alleged redevelopment, the Taxpayer's lack of financial ability and the resale, especially that of the First Lots at the heart of the Taxpayer's land and within four months of their acquisition. The resale, if at all relevant, was to trigger the Board's inquiry or to call for explanation from the Taxpayer.

60. Secondly, Mr Barlow also misunderstood the reasoning of the Board. Presumably, Mr Barlow's complaint arose out of paragraph 31 of the Amended Case Stated, in which the Board referred to the Commissioner's, but not the Board's, opinion that the lots acquired under the 2nd Acquisition were purchased by the Taxpayer with the intention of reselling them at a profit. But it should be noted that the 2nd Acquisition comprised of the Third Lots resumed by Government and some residual land, all of which fell outside the ground of appeal. When Mr Lew's attention was specifically drawn to this issue, he confirmed that there was no issue arising from the 2nd Acquisition and he decidedly adduced no evidence about the intention of the 2nd Acquisition. Hence, the Board said at the beginning of paragraph 31 that there was no allegation or evidence of the intention of the 2nd Acquisition and concluded that paragraph by holding that any case of the 2nd Acquisition as capital assets failed at the outset. This argument of Mr Barlow simply falls away.

61. While still on the issue about the 2nd Acquisition and the gain from the resumption of the Third Lots, it would be convenient to deal with Mr Barlow's argument about the effect of resumption by Government of the Third Lots in 1993/94. Mr Barlow referred to Lord Wilberforce's speech in *Simmons* that frustration of a plan of investment which led to an involuntary realization of an asset cannot give rise to any intention to trade. While I accept this proposition as correct, the effect of that dictum is to negative any inference of trading intention created by the involuntary realization of the asset or the consequential gain. That dictum does not have the effect of altering the original intention with which the asset was acquired. If the asset was acquired as capital stock, it remained as a capital stock despite the involuntary realization or its associated gain. Similarly, if the asset was acquired as a trading stock, it remained a trading stock at the time of the involuntary realization and its gain is chargeable to profits tax. Thus Mr Barlow's argument based on the involuntary realization of the Third Lots is a non-issue. The question is what was the Taxpayer's intention at the time of the acquisition of the Fourth Lots. In any event, as I

have explained, the gain from the resumption fell outside the ground of appeal before the Board and therefore outside the scope of this appeal.

62. Mr Barlow further submits that neither the Acting Deputy Commissioner nor the Board has suggested that there is any evidence or other reason upon which to conclude that the Taxpayer's intention since acquiring the lots has changed. Thus the assessor's acceptance of the sale in May 1990 as sale of capital assets must mean that the Taxpayer began its involvement with those lots as an investor and not as a trader. Thus, he argues that in the absence of any suggestion of a change of intention, the Taxpayer's status as an investor now could not be re-classified as that of a trader. This argument is premised on the assumption that the Board was satisfied that the lots were acquired with the intention of holding them as investment. But that never was the finding of the Board. There was not even any evidentiary burden on the Commissioner to show a change of intention on the part of the Taxpayer. This submission is again premised on Mr Barlow's misunderstanding of the burden of proof and the finding and the reasoning of the Board.

63. In the above paragraphs I have dealt with Mr Barlow's criticism of the approach of the Board. The rest of Mr Barlow's argument is aimed at attacking the correctness of the Board in rejecting Mr Chan's evidence, which I think is more appropriate for consideration under Question (3) and to which I shall return later. I now turn to some negative findings of the Board, which Mr Barlow has not alluded to and which are relevant to Question (4). These are the Board's rejection of Mr Chan's evidence of the Taxpayer's intention in the 1st Acquisition and of his explanation for the sale of the First Lots. The Board also found there was a lack of evidence on the cash flow of the Taxpayer and lack of evidence of the personal net worth and cash flow of the shareholders or directors of the Taxpayer at the date of the 1st Acquisition. The Board found an inexplicable lack of progress in building the resort houses. All these are objective facts, albeit of a negative nature, which the Board should and did take into account in reaching its conclusion.

64. The thrust of the Taxpayer's case is that it is not a trader in property and it acquired the lots with the intention of redeveloping them into resort houses for investment. It held the lots for six to eight years during which it made applications to the District Lands Office for certificates of exemption and land exchange. The Taxpayer's intention was frustrated by the refusal by the District Lands Office of its applications and redevelopment plans and by the resumption in 1993/94. Such evidence, by itself, raises strong inference which supports the Taxpayer's evidence that its intention at time of acquisition of the lots was for investment.

65. However, the problem with Mr Barlow's submission is that quite apart from the fact that he is wrong about the burden of proof, he omitted the negative finding of facts by the Board. The Taxpayer's inexplicable refusal to produce redevelopment plans to the District Lands Office neutralised the inference of investment that could be drawn from the Taxpayer's efforts in applying for certificates of exemption and land exchange during the preceding five years. That refusal led the Board to conclude in paragraph 29G that "with such evidence, the Board were unable to see how the Taxpayer could succeed on the factual issue." The rejection of Mr Chan's explanation for

selling the First Lots at the heart of the Taxpayer's land and the rejection of his evidence of the Taxpayer's intention of the 1st Acquisition negatived the Taxpayer's evidence of its intention to build resort houses for holding in the long term and neutralised the inference that could be drawn from the treatment by the Taxpayer in its accounts of the lots acquired and of the gain from the sale of some of the lots.

66. What is left of the Taxpayer's case is the mere fact of holding of the lots acquired under the 1st Acquisition for six to eight years. But as against that is the objective fact of the sale of the First Lots at the heart of the Taxpayer's land within four months of their acquisition, the 2nd Acquisition and the sale of the Second Lot in 1996 at a profit which the Taxpayer did not seek to challenge were trading transactions. On these objective facts, the inference that the Fourth Lots acquired under the 1st Acquisition were acquired as investment and as trading stock could equally be drawn. The Board chose not to draw either inference as it cannot decide which inference is more likely than not. The burden of proof was brought into play. It was therefore open to the Board to find that the Taxpayer failed to prove its case that the Fourth Lots were acquired as capital assets and dismiss the Taxpayer's appeal.

67. Mr Barlow vehemently argues, quoting Lord Wilberforce's dictum, that an asset can only be either an investment or a trading stock at any one time and cannot be neither or both. He submits that as the Board failed to come to any conclusion whether the lots were acquired as investment or as trading stock, the decision of the Board must be quashed. The fallacy of Mr Barlow's argument is that while the correctness of Lord Wilberforce's dictum cannot be doubted, the difficulty of the Taxpayer is that it has the burden of proof and it could not prove what its intention was, or more precisely it could not prove that it acquired the lots as investment. The burden is never on the Commissioner to show that the lots were acquired as trading stock. Under such circumstances, the burden of proof operates against the party who has the onus of proof: *Rhesa Shipping Co SA v Edmunds & Another* and *Li Tim Sang v Poon Bum Chak*. This is precisely the situation in *Real Estate Investments (NT) Ltd* and *China Map Ltd.* In both cases, the taxpayers' appeals were dismissed by the Board on the basis of burden of proof without the Board making any finding on whether the relevant transactions were capital or trading in nature. The appeals from the Board were also dismissed by Deputy High Court Judge Carlson and Chung J. The finding of the Board in this appeal is not that the lots were both capital stock and trading stock or were neither, but that the Taxpayer has failed to show what they were or more particularly has failed to show that they were capital stock. This argument of Mr Barlow must similarly fail.

68. It is not necessary for me to consider the Taxpayer's intention in the 2nd Acquisition. Likewise, the Board did not make any finding of what the Taxpayer's intention was in respect of the 2nd Acquisition. It only held in paragraph 31 of the Amended Case Stated that in the absence of evidence that the 2nd Acquisition was for long term holding or for redevelopment, any case of the 2nd Acquisition as capital assets failed at the outset. In other words, the Board also resolved this issue against the Taxpayer by operation of the burden of proof.

69. Question (4) posed for the Court was not particularly worded to fit with the conclusion of the Board reached by operation of the burden of proof. However, I do not find it necessary to amend the question because the failure of the Board to make any finding of the Taxpayer's intention has the same effect as if the Board had found the profits from the relevant transactions arose from or were derived from trading in property. Because of the Taxpayer's failure to discharge the burden of proving that the lots were acquired as capital investment, Question (4) must be answered in the affirmative. The only way the Taxpayer could challenge the decision of the Board is to argue that the contrary conclusion is the only true and reasonable conclusion.

Question (3) - Whether the Board's conclusion was contrary to the true and only reasonable conclusion on the facts

70. In relation to Question (3), the thrust of the Taxpayer's case is (1) that the Board posed the wrong question, (2) that the Taxpayer was not required to prove that it acquired the lots as capital investment nor that it was financially capable of retaining the lots as a long-term investment and (3) that the Taxpayer has discharged the evidentiary onus. I have considered all these arguments in relation to Question (4) and have rejected all of them as a matter of law.

71. The decision of the Board was predicated upon its finding of fact and in particular its rejection of Mr Chan's evidence of the Taxpayer's intention in acquiring the Fourth Lots under the 1st Acquisition and rejection of Mr Chan's explanation for the sale of the First Lots at the heart of the Taxpayer's land. Thus, the only remaining ground left for the Taxpayer to challenge the decision of the Board is to argue that the Board's conclusion in rejecting Mr Chan's evidence of the Taxpayer's intention at the time of the 1st Acquisition and explanation for the sale of the First Lots was perverse or that the true and only reasonable conclusion was to accept that evidence and explanation.

72. In that context, Mr Barlow complained that in rejecting the Taxpayer's explanation, the Board failed to give sufficient consideration to the Taxpayer's assertion that a circular road would be built surrounding and giving access to the remaining lots after the sale of the First Lots in May 1990. Though not specifically mentioned in the Amended Case Stated, the Board must have taken that into account when concluding that such a sale would cut into the original redevelopment plan and the Taxpayer had failed to show how the leftover lots would fit into the original plan or how the original plan would be modified to accommodate the sale.

73. Mr Barlow complained that the Board failed to take into account that two lots were purchased under the 2nd Acquisition to replace the First Lots sold. Though the Board did not specifically deal with this argument, it is only too obvious that the replacement lots could not replace the heart that was sold. There was also no evidence on how the lots purchased under the 2nd Acquisition would fit into the Taxpayer's redevelopment plan or how the plan would be modified to accommodate the additional lots. Furthermore, the 2nd Acquisition is inconsistent with Mr Chan's

evidence that the Taxpayer had enough land for development and the sale could reduce its redevelopment costs. It should be noted that the Taxpayer had not sought to appeal to the Board on the ground that the 2nd Acquisition was capital investment. The Taxpayer must be taken to have accepted that the 2nd Acquisition was a trading transaction. At the hearing before the Board, Mr Lew decidedly refrained from dealing with the 2nd Acquisition or the Taxpayer's intention in respect of that acquisition. There was therefore a total absence of evidence that the lots acquired under the 2nd Acquisition were acquired as capital investment. Any argument based on the lots acquired under the 2nd Acquisition as replacement lots for capital investment in conjunction with the Fourth Lots must be very flimsy and weak.

74. From paragraph 29C through to paragraph 29G, the Board considered the steps taken by the Taxpayer in redeveloping the lots. Again, the Board tested the Taxpayer's express intention of developing resort houses of 700 square feet against the objective facts. The Board found that the Taxpayer's application for certificates of exemption in respect of six of the house lots on the basis of *in situ* redevelopment inconsistent with its intention to build resort houses of 700 square feet for investment. Mr Barlow argues that such finding is perverse because either form of development would be capital investment. In my view, the real basis of the Board's finding was not that the intention to build smaller houses negatived the Taxpayer's intention to build resort houses for investment. The real basis of the Board's finding was that there was no proven intention to build for investment purpose, whether houses of 700 square feet or of about 440 square feet or at all because the Taxpayer took no steps since obtaining the certificates of exemption on 29 August 1990 to build. More than two years lapsed between then and the Taxpayer's next move to apply for land exchange on 4 September 1992. This failure to build when all the conditions were met for the Taxpayer to proceed was what made the Board find belied the stated intention to build resort houses of 700 square feet or any intention to build at all.

75. Mr Barlow argues that the Taxpayer has been negotiating with the District Lands Office for five years in applying for certificates of exemption, or land exchange which would facilitate one form of development or another which supported the Taxpayer's intention. The Board found that despite all those steps taken, in practical terms when the Taxpayer was asked to produce plans for the District Lands Office consideration, the Taxpayer refused. The Taxpayer's evidence was that it had plans drawn up in 1992 but refused to produce them to the District Lands Office because in its view there was no need to and it was afraid that its land would be demarcated. If demarcation was a matter of course upon production of redevelopment plan, the Taxpayer could not do anything but to let the event take its course if it intended to redevelop the lots, otherwise the redevelopment could not progress further. It was on the basis of such evidence that the Board concluded paragraph 29G by saying "with such evidence, the Board were unable to see how the Taxpayer could succeed on the factual issue". By "factual issue", the Board must mean the intention to acquire the lots for investment.

76. Mr Barlow stresses on the significance that the Taxpayer held the lots for the past eight years, which is evidence of its ability to hold the lots as a long-term investment. This is a strong

argument. However, when ascertaining the Taxpayer's intention at the time of the acquisition, its financial position at that time must carry more weight than inference to be drawn from subsequent events. The Board duly considered the financial means of the Taxpayer at the time of the 1st Acquisition in paragraph 29H through to 29L. The Board was concerned that the balance sheets of the Taxpayer showed it had a net asset value of $1.5 million as at 31 December 1989 and a net deficit of $1.2 million as at 31 December 1990. Indeed there was no evidence on the cash flow of the Taxpayer, no evidence on the personal net worth or cash flow of its shareholders or directors as at the date of the 1st Acquisition and no evidence of the Taxpayer's financial ability to build and hold the houses for an indefinite period. The Board also drew some unfavourable inference of the Taxpayer's financial ability from Mr Chan's evidence that one of the reasons for the sale of the First Lots was to reduce the redevelopment cost.

77. Mr Barlow argues that there was unchallenged evidence that the Taxpayer's shareholder and former director, Mr Chan who gave evidence before the Board, had $40 million given by his father which he could use for this project. Mr Barlow also argues that there was unchallenged evidence that the building cost of the houses was only $3.8 million. Thus, he submits that allowing for the cost of the lots of $16 million and building costs of $3.8 million, Mr Chan had about $20 million to finance the redevelopment and to hold the houses for an indefinite period. Mr Barlow emphasizes the importance that Mr Chan was not cross-examined in respect of this evidence which must be taken as unchallenged.

78. At the hearing before the Board, the Taxpayer's representative, Mr Lew, was advised by the Chairman of the Board that the Taxpayer was a negative equity company at the relevant time and its financial ability to develop and hold the resort houses for an indefinite period was in issue. The Chairman reminded Mr Lew to deal with this issue in the evidence. In his evidence under cross-examination, Mr Chan confirmed that he indirectly financed the 1st Acquisition. The balance sheet showed an "amount due to a director" of $27.88 million as at 31 December 1990. This amount was reduced to zero in the balance sheet as at 31 December 1991, a point which Mr Ho SC commented in his submission. It is Mr Barlow's reply submission that had Mr Chan been cross-examined on this issue, he would have explained that the amount due to a director as at 31 December 1990 was transferred to "amount due to holding company" in the sum of $33 million as at 31 December 1991. Though Mr Ho SC criticised that this suggestion did not come form Mr Chan's mouth, it must be assumed that had the Board considered this issue, it must have drawn that inference.

79. What emerged from the balance sheets for the years ending 1990 and 1991 is this. The "amount due to a director" was only due to one director, who was Mr Chan. Assuming Mr Chan had $40 million from his father to invest in the project, he had spent $27.88 million by the end of 1990 by way of advance to the Taxpayer, whatever may have been the purchase price of the lots. This amount has grown for whatever reasons to $33 million by 31 December 1991. This would leave Mr Chan with $7 million to develop and hold the project or just $3.2 million net of building

costs to hold the developed project for some time. This supports the Taxpayer's case that it had the financial ability to carry out the project.

80. On the other hand, the financial position of the Taxpayer was very vulnerable and fragile. As at 31 December 1991, it had current assets of $40.55 million but current liability of $71.20 million, i.e. a net current liability of $30.65 million. It could be argued that this net current liability was just money due to the holding company, i.e. Mr Chan's alter ego, and there was no real likelihood of the loan being called for by Mr Chan who still had another $9.35 million to finance the redevelopment and to hold the resort houses for an indefinite period. But a closer examination of the current asset position of the Taxpayer shows that its current asset consisted of a sum of $35 million being amount due from a related company. This asset may not be readily available without upsetting the financial stability of that related company or without that company realising some of its assets, including possibly fixed assets. There is no evidence that this asset was readily available to discharge the Taxpayer's current liabilities such as bank loan of $32.8 million, bank overdraft of $1.54 million and creditors and accrued charges of $3.64 million, which may be due within a short time or on demand. Furthermore, one of the current assets was a loan due from a director of $2.47 million. This raises doubt whether Mr Chan indeed had $40 million from his father to finance the project. The Taxpayer chose not to exhibit the explanatory notes in respect of amount due to its director, amount due from its director and amount due from its related company. On the face, the Taxpayer has serious cash flow or liquidity problems to explain. He chose not to. On this analysis, it was open to the Board to find that the Taxpayer did not have financial ability to redevelop the lots into resort houses for long term investment.

81. I think all these support the Board's conclusion in paragraphs 29I to 29K. Though the Board did not give reasons for its conclusion, one of the members of the Board was an accountant. The Board as a fact- finding tribunal must have no difficulties in interpreting the balance sheets and company accounts and drawing inferences in a more professional way than I did and could not have been faulted in its conclusions.

82. As for treatment by the Taxpayer in its accounts of the gain from sale of the lots, it is only some evidence of the Taxpayer's categorisation or intention. It is not conclusive. The question is whether the intention is genuinely held. That has to be tested against all the surrounding circumstances. A taxpayer may report its gain as capital gain instead of as trading profits for reasons other than that it is true. Acceptance by the assessor that the gains were capital gains at the time when the profits were entered in the Taxpayer's accounts is *prima facie* evidence of the view taken by the authority or by a reasonable accountant of the nature of the gain on the basis of the facts known to the assessor at the time but it is also not conclusive. This is particularly so as section 60(1) of the Inland Revenue Ordinance specifically empowers the assessor to issue additional assessment within six years after the expiration of the year of assessment.

83. The thrust of Mr Barlow's argument in support of the Taxpayer's case and Mr Chan's credibility is that the Taxpayer is not a trader in property and had held the lots for six to eight

years during which it made numerous applications to the District Lands Office for certificates of exemption and land exchange for the purpose of redeveloping the lots. These demonstrated the Taxpayer's intention to hold the lots as investment on a long term basis. He argues that the sale of the First Lots being a one-off transaction by a non trader in property was not indicative of trading and the sale of the First Lots did not affect the Taxpayer's redevelopment plan because there was a plan to construct a circular road around the left-over lots. On the other hand, the sale of the First Lots which was at the heart of the Taxpayer's land was inconsistent with any long term redevelopment plan in respect of the lots, while the sale of the First Lots within four months of their acquisition was more consistent with the 1st Acquisition being a trading transaction than capital investment. The lack of progress in carrying out the alleged redevelopment, the failure to build the houses after certificates for exemption were granted and the inexplicable refusal to provide redevelopment plans when requested to do so by the District Lands Office all pointed to a lack of genuine intention to redevelop the lots into resort houses. The lack of evidence of the Taxpayer's financial ability also suggested that its express intention to hold the lots as investment was not realistic and not realisable.

84. In summary, there are evidence going one way and evidence going the other. What Mr Barlow submits is, at the highest, one possible view of the evidence. Equally, the conclusion of the Board in rejecting Mr Chan's explanation for the sale of the First Lots and in rejecting the evidence of the Taxpayer's intention is also a reasonable conclusion which may properly be drawn on the totality of the evidence. Applying the three propositions of Bokhary PJ in *Kwong Mile Services Ltd*, I think that conclusion is a reasonable one or, to say the least, one which is well within the limits for reasonable minds to differ. It can hardly be said that the contrary conclusion is the only true and reasonable conclusion. It is not a conclusion which an appellate court would intervene. I therefore answer Question (3) in the negative.

Conclusion

85. In conclusion, I answer Question (3) in the negative and Question (4) in the affirmative. Accordingly, I dismiss the Taxpayer's cross-appeal with costs to the Commissioner.

(Anthony To)
Deputy High Court Judge

Mr Ambrose Ho, SC and Mr Michael Yin, assigned by the Department of Justice, for the Appellant

Mr Barrie Barlow, instructed by Messrs Pang & Associates, for the Respondent