CACV 41/2010

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NO. 41 OF 2010
(ON APPEAL FROM HCIA NOS. 2 & 3 OF 2009)

BETWEEN

CHURCH BODY OF THE HONG KONG SHENG KUNG HUI	1st Appellant
HONG KONG SHENG KUNG HUI FOUNDATION	2nd Appellant
and	
COMMISSIONER OF INLAND REVENUE	Respondent

Before: Hon Cheung, Yuen JJA and Au J in Court
Dates of Hearing: 24-25 October 2014
Date of Judgment: 11 September 2014

J U D G M E N T

Hon Cheung JA:

I. The appeal

1. This is an appeal by the Church Body of the Hong Kong Sheng Kung Hui ('The Church Body') and Hong Kong Sheng Kung Hui Foundation ('The Foundation') ('the taxpayers') against the judgment of Reyes J who dismissed their appeal by way of case stated against the decisions of the Board of Review ('the Board'). The Board affirmed the assessment by the assessors that the respective gains of the taxpayers from the sales of units and car parking spaces in their Deerhill Bay project in the years of assessment 1998/99 – 2004/05 are liable to profits tax.

II. The facts

2.1 The facts are summarised by the Judge which I will adopt with supplements from the decision of the Board. The Church Body is the incorporation of the Anglican Church in Hong Kong. The Foundation is the incorporation of the Anglican Bishop of Hong Kong. Both the Church Body and the Foundation are charitable bodies.

2.2 The Church Body and the Foundation owned certain land ('the Old Lots') in Tai Po, New Territories. Part of the Old Lots was occupied by an orphanage known as the St Christopher's Home ('the Home'). The Old Lots had belonged to the Church Body and the Foundation since the 1930s. The Church Body and the Foundation had planned since the 1970s to develop the Old Lots.

2.3 Although there had been discussions in the 1970s to use the land adjacent to the Home as a retirement village for the clergy, that plan was put on hold in the 1980s and never revived.

2.4 In the 1980s there had also been talk about refurbishing the Home. But the Home was so old that renovation was unlikely to prolong its life for more than 5 years. Eventually, from September 1989 at the latest, the re-provisioning of the Home was treated as a separate project from the development of the Old Lots. In September 1989, the proposal being seriously considered in relation to the Home was to re-locate the children's section of the Home to an adjacent site, the babies' section to Yuen Long, and the rest of the Home to another location in Tai Po owned by the Foundation.

2.5 In the early 1990s, architects commissioned by the Church Body and the Foundation submitted various plans to the Government for the purpose of obtaining town planning permission for a substantial residential development in the Old Lots. A set of plans were approved by the Town Planning Board in July 1990.

2.6 In December 1990 architects applied on behalf of the Church Body and the Foundation to the Districts Land Office Tai Po for a land exchange of the Old Lots to permit the building of the residential development as approved.

2.7 In May 1993 a premium of some $704 million was agreed between Government, the Church Body and the Foundation.

2.8 In July 1993 the Church Body and the Foundation invited various developers to submit tender offers for two options. Option A was for the outright purchase of the Old Lots at a consideration inclusive of the $704 million premium. Option B entailed the establishment of a joint venture with the Church Body and Foundation for the redevelopment of the Old Lots.

2.9 In August 1993 the Church Body and the Foundation accepted a tender from Cheung Kong (Holdings) Limited ('Cheung Kong') for Option B.

2.10 In November 1993 the Church Body and the Foundation surrendered the Old Lots to the Government in exchange for a new grant of the land ('the New Lot'). The Church Body and the Foundation owned the New Lot as tenants-in-common in the ratio of 44:56.

2.11 In December 1993 the Church Body and the Foundation entered into a joint venture agreement with Cheung Kong and one of its subsidiaries (collectively, the Developers) for the development of the New Lot as a private residential area.

2.12 In March 1998 the Church Body, the Foundation and the Developers agreed that 129 residential units and 94 car parking spaces in the development would be allocated to the Church Body and the Foundation.

2.13 In August 1998 the Government issued an occupation permit for the development (which had been named 'Deerhill Bay'). Deerhill Bay comprised 22 houses, five blocks of low-rise buildings and five blocks of high-rise buildings. It had 381 residential units in all.

2.14 Between 1998 and 2006, the Church Body and the Foundation sold their residential units and car-parking spaces at Deerhill Bay. From the sales, the Church Body derived a profit of some $452 million, while the Foundation made a profit of some $667 million.

2.15 The Church Body's tax liability is $75,881,426. The Foundation's tax liability is $108,912,965.

2.16 The parties agreed, and the Board found as facts, that the values of the Old Lots, and the subsequently re-granted New Lot, were as follows :

Valuation date	Land value ($)
28 September 1989	192.5 million
1 May 1990	222.48 million
12 August 1993	1.11 billion (exclusive of premium)
3 December 1993	2.3 billion (premium paid)

III. **The Board's decision**

3.1 The Board held that, although the Church Body and Foundation had initially acquired the Old Lots as a capital asset, their initial intention changed to one of using the Old Lots (or parts thereof) for the purpose of trading or business. According to the Board, that change of intention had occurred by September 1989 or, alternatively, December 1990 at the latest. The reasonings of the Board are as follows :

> ' 70. Mr Li Fook Hing was appointed a co-chairman of the Tai Po Kau Joint Development Committee in May 1989, after the re-provisioning of the Home had been separated from the development of the Old Lots and the retirement village project had been frozen for a long time. It is clear from the evidence of Mr. Li [Fook Hing] that he approached the matter on commercial principles, with the laudable object of raising as much income as possible for [the Church] and its charitable activities. [The Church and the Foundation] actively marketed the disposal of the Old Lots by approaching leading developers in Hong Kong for offers and tenders. They sought and subsequently obtained town planning permission. [They] have performed activities in relation to the Old Lots in an organised and coherent way with a view to maximising the income from their development. They sought and subsequently obtained a new grant by surrendering the Old Lots, thereby substituting the Olds Lots by the new Lot. They have chosen to carry on a separate adventure or enterprise of a lucrative commercial and trade character, different and distinct from their charitable work.'

3.2 The Board also rejected the taxpayers' argument that the income is exempted from taxation under section 88 of the *Inland Revenue Ordinance* (Cap.112) ('*IRO*').

The two questions

4.1 The two questions certified by the Board for the Judge to answer are:

(1) Whether, on the facts found by the Board, and on the true construction of the *IRO*, the true and only reasonable conclusion is that there was no

change of intention from capital holding to trading/business, whether by September 1989 or December 1990 or at all.

(2) If the Answer to Question (1) is in the negative, whether, on the facts found by the Board, and on the true construction of the *IRO*, it was open to the Board to conclude that the proviso to *IRO* section 88 does not apply.

IV. **Question 1**

The taxpayers' position before the Board

5. The primary position of the taxpayers before the Board was that there was no change of intention in respect of the purpose of holding the Old Lots. It had always been held for investment purpose and not for trade. As an alternative, any change of intention only occurred in 1993 either when it accepted Option B of the Cheung Kong's offer on 12 August 1993 or when it entered into the Joint Venture on 3 December 1993.

The taxpayers' position before Reyes J

6.1 Before the Judge, the taxpayers took two points. First, the Old Lots were trust property and the taxpayers, as charities, were not empowered to venture their trust property in any sort of trade or business. Hence, there was no change of intention.

6.2 Second, September 1989 or December 1990 was the wrong date for a change of intention, simply because the Church Body and the Foundation were not irrevocably bound to develop the Old Lots at that point in time. It was not until 1993 when the two bodies entered into a joint venture with Cheung Kong was the die irrevocably cast and the Rubicon crossed. After the deal with Cheung Kong was struck, the Church Body and the Foundation were contractually bound to go through with the development of the Old Lots. But before then, the Church Body and the Foundation could have put a stop to any development plans. Everything before 1993 was thus merely exploratory and tentative. Nothing became fixed as a matter of intention until 1993.

Reyes J's decision

7.1 The Judge rejected both points.

7.2 The first point is not maintained in this appeal and hence it is not necessary to deal with the Judge's reasons.

7.3 As to the second point, the Judge held that :

' 38. Mr. Neoh's suggestion may be one way to read the facts. But it is by no means the only reasonable reading. The Board's interpretation of the

> facts in relation to the intentions of the Church and the Foundation is equally plausible. One does not necessarily change one's intention only when one is irrevocably bound. One can change one's intention long before that point in time. The Board so found on the facts. I cannot say on the material before me that there was anything perverse or unreasonable in that conclusion.'

The taxpayers' position before this Court

8.1 Although the notice of appeal seems to suggest that there was no change of position at all, Mr Denis Chang SC and Mr Newman Lam, counsel for the taxpayers who appeared in this appeal but not below, did not persist with this position before us. Instead the argument was focused on whether there was an error of law committed by the Board when it held the change of intention occurred in 1989 or 1990. As to the question whether the change of intention occurred in 1993 (either in August or December), the argument was whether the Court could decide this issue or whether this issue should be remitted to the Board for consideration.

Can the taxpayers now take this point?

8.2 Mr Eugene Fung SC, counsel for the Commissioner, took the point that the taxpayers are now precluded from arguing that no change of intention occurred in 1989 or 1990 because of the wording of Question 1, specifically with reference to the words 'or at all'.

8.3 I disagree. While the primary position of the taxpayers before the Board was that there was no change of intention at all, the Board had allowed them to pursue the alternative case that the change of intention only occurred in 1993 as well. When the taxpayers applied to the Board to state a case for appeal, included in their 15 drafted questions was the question (Question 10) of whether the Board had erred in failing to consider the taxpayers had or could have commenced trade or business prior to August or December 1993. Although the Board refused to allow the 15 questions drafted by the taxpayers and proceeded to draft the two questions in the case stated by itself, the reason given by the Board for the refusal was that the questions were, amongst other things, 'prolix and argumentative'. The issue raised by the taxpayers on the timing of the change of intention before the Judge and this Court clearly arises from the Board's decision. In my view the fact that the taxpayers could have applied by way of judicial review to challenge the refusal to include Question 10 or to apply to Court to direct the Board to include Question 10 begs the issue whether Question 1 includes an issue on the timing of the change of intention. In my view it does. The phrase 'or at all' in the context of this case does not envisage an 'all or nothing' situation but a reference to 'any other date'. Accordingly the taxpayers are entitled to pursue this issue before us.

Enhancement principle

9.1 The underlying theme of the taxpayers' argument now advanced before us is a narrow one, namely, the Board had erred on a principle of law espoused by the *Taylor v Good (Inspector of Taxes)* [1973] STC 383 line of cases which followed the approach of *Hudson's Bay Co Ltd v. Stevens* (1909) 5 TC 424 and other similar authorities. *Taylor* was not cited before the Board or the Judge. And there is no reference by the Board or the Judge to it.

9.2 In *Taylor*, the taxpayer bought a large house at auction. The commissioners found that 'the taxpayer had not decided what to do with the property if he bought it; but had in mind going with his wife to live in it if that proved to be feasible'. That intention was abandoned later on that very same day when he visited the property with his wife and children. She 'soon realised that their thoughts of using it as a residence for themselves were impracticable'. Thereafter the taxpayer made a successful application to turn it into flats and sold the property at a large profit with the benefit of the planning consent. The commissioners held that the transaction, the purchase and sale, was an adventure in the nature of trade. On appeal the commissioners conceded that the purchase could not be regarded as part of an adventure in the nature of trade but submitted that the activities of the taxpayer after the purchase, culminating in the sale, constituted an adventure in the nature of trade. That contention succeeded before Megarry J ([1973] 1 W.L.R. 1249) but was rejected on appeal by the Court of Appeal ([1974] 1 WLR 556).

9.3 Megarry J at page 1257 stated that :

> ' However much the transaction initially lacked the characteristics of trade, once the series of transactions relating to the obtaining of planning permission had begun, <u>there came into existence material upon which it was possible for the special commissioners to reach the conclusion that thereafter the transaction as a whole fell within the statutory definition of "trade."</u> Once the slate had been wiped clean of whatever initial residential aspirations the taxpayer had, there was little to displace, and the new intention certainly had some of the characteristics of trading. Action was being taken and money was being spent with a view to enhancing the value of the property for the purpose of selling it. In the taxpayer's hands, the house had never been a residence or home, and never became anything save a source of future profit. True, although he owned a few small properties as investments, he was in no sense a dealer in property. True also, he did not advertise the property for resale, although in fact a sufficiency of offers came in. True, the obtaining of planning permission was unexpected; but then so is success in a number of admittedly trading transactions. True again, there is nothing to show that the taxpayer could not afford to retain the property : but what he did was to pursue a course which would realise the best price on a sale. That by itself does not necessarily establish that there was trading : the owner-occupier of a house may improve it before he sells it without it being held after the sale that he has been engaging in

trade. But a process of enhancing the value of a house which the owner has never lived in with a view to selling it at a profit, especially if that enhancement consists not merely of improving the house as it is but of a prolonged process of obtaining planning permission for an entirely new development, certainly provides some evidence which can support a finding of trading.' (emphasis added)

9.4 In the Court of Appeal, Russell LJ at page 559 identified the issue as follows :

> '...The question is raised whether, on the facts found in the case stated, not including the purchase within the alleged adventure, any reasonable body of commissioners properly instructed in the law could find here an adventure in the nature of trade. If not, then the proper course for this court would be to decide all along the line in favour of the taxpayer and not remit to the commissioners at all.'

9.5 Russell LJ reviewed the authorities and held at page 560 that :

> 'All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property in the eyes of a developer who might wish to buy for development.' (emphasis added)

9.6 He concluded at the same page that :

> 'But where, as here, there is no question at all of absorption into a trade of dealing in land of lands previously acquired with no thought of dealing, in my judgment there is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the market, are to be taken as pointing to, still less as establishing, an adventure in the nature of trade. Were the commissioners, on a remission to them, to decide otherwise, it seems to me they would be wrong in law.'

9.7 Amongst the authorities referred to by Russell LJ were the following cited at pages 559 and 560 :

> 'I refer first to some cases cited to us. The first is *Hudson's Bay Co. Ltd. v. Stevens* (1909) 5 T.C. 424 in this court. The details do not matter. The importance of the case lies in the fact that, in accepting the finding that there was no trade of buying and selling land, it was stated that the case was no different in substance from the case of a landowner minded to sell, or sell from time to time, inherited land for building purposes at a profit: it was equivalent, it was said, to dealing with land merely as owner: the fact that a landowner lays out part of his estate with roads and sewers for sale in building lots does not

constitute a trade, nor the fact that he may have expended money in getting the property up for sale: it was no different, it was said, in substance from an ordinary landowner who sells parts of an estate which he acquired by purchase. My references are to pp. 436, 437, 438 and 440 of that report.

In *Rand v. Alberni Land Co. Ltd.* (1920) 7 T.C. 629, before Rowlatt J., the same principle, it appears to me, was followed. It was a case in which lands were owned in the ordinary sense (that is to say, not acquired with a view to sale) by a number of people who set up a company purely as machinery to realise their interests in the land—to turn land into money. The company expended money in clearing the land and forming roads, and even in procuring a railway company to bring a line to open up the area. This was only a course, it was said, of enhancing the value of the land and not of trading: see in particular pp. 638, 639 of the report.

In *Alabama Coal, Iron, Land & Colonization Co Ltd. v. Mylam* (1926) 11 T.C. 232, the decision as to the company was the other way: but that was because there was an element of buying for sale: and at p. 254 the distinction was drawn with a case of activities in the course of a mere turning of land into money. Here again, it seems to me, the same principle underlay.

Pilkington v. Randall (1965) 42 T.C. 662, in this court, was a case in which the taxpayer bought his sister's interest in land with the intention of improving and selling it and his own interest. Here was the element of purchase and sale with which we are not concerned as a combination indicating trade.'

9.8 *Taylor* was applied in Hong Kong by the Board of Review in Case No. D65/87, chaired by Mr Andrew Li Q.C. (later Chief Justice of the Court of Final Appeal).

9.9 Mr Chang referred to this line of authorities as the 'Enhancement for realisation principle'.

Ambit of *Taylor*

10.1 Mr Fung first argued that the *Taylor* line of cases say no more than making it clear that the enhancement of the value of one's capital asset and the subsequent disposal of it would not amount to trading. But he argued that these authorities plainly have no application where there was a change of intention on the part of the taxpayer to hold the property from a capital asset to a trading asset. He argued that this much was made clear by Nourse LJ in *Kirkham v Williams* [1991] 1 WLR 863 at 869E.

10.2 Nourse LJ in the Court of Appeal judgment of *Kirkham* at 869 held that :

' It was established by the decision of this court in *Taylor v. Good* [1974] 1 W.L.R. 556 that where a taxpayer, not being a dealer in land, acquires a

> property, enhances its value and disposes of it at a profit, there is no adventure in the nature of trade unless he had the intention of so disposing of it at the time of its acquisition. In *Simmons (as liquidator of Lionel Simmons Properties Ltd.) v. Inland Revenue Commissioners* [1980] 1 W.L.R. 1196, in a passage which both sides accept as a correct statement of the law, Lord Wilberforce said, at p. 1199:
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> > "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] A.C. 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 commercial operations, namely that situations are open to review."
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> In the present case the Crown has never suggested that there was any change in the character of the asset between its acquisition in 1977 and its disposal in 1982. ...' (emphasis added)

10.3 I do not read the *Taylor* line of authorities as restrictive as that urged upon us by Mr Fung. It is not helpful to say that *Taylor* only applies to the issue of disposal and not to a change of intention. It is necessary to consider the context in which Nourse LJ made his statement.

10.4 In *Kirkham*, the taxpayer acquired 10 acres of land in 1977 principally to provide office and storage space for the taxpayer's demolition and plant hire business. Subsequently the taxpayer used the site for the storage of materials for use in connection with his business. He used part of the mill as his office. He grew a few crops on the land and bought a few calves for fattening up for resale; but the level of his farming activities were very limited to the extent that they were never recorded in his books of account. Subsequently in or about October 1977, the taxpayer applied for planning permission for the erection of an agricultural workers dwelling on his land. That application was refused. A

further application was submitted to the local planning authority and outline planning permission was granted on 22 August 1980 for the erection of an industrial/agricultural dwelling house for the taxpayer on the land. He then built a dwelling house on the land. He then sold the land at a profit. He was assessed to income tax on the profit.

10.5 The case, as stressed in both the first instance judgment of Vinelott J (at page 340) and the Court of Appeal judgment by Nourse LJ, was not concerned with a change in the character of the assets between the acquisition and disposal and implicitly not concerned with change of intention to trading. The case was concerned with the Commissioner's finding that the land was bought as a trading stock. The Court of Appeal held that the land was not acquired as trading stock but as a capital asset of the taxpayer's business.

10.6 Nourse LJ's statement in *Kirkham* that in that case the Crown has never suggested that there was any change in the character of the asset between the time of its acquisition and its disposal is clearly an attempt to distinguish the situation of that case from the situation where it was said that the land originally acquired as a capital asset was later appropriated as trading stock by reason of improvement to the land with a view to enhancing the value of that asset for the purpose of resale. The difficulty which would confront such an argument in the latter situation is illustrated by *Taylor*. This clearly is recognized by Vinelott J in the first instance judgment of *Kirkham*. Whether the land initially held as investment is subject to profit tax on its disposal because of the trading nature must necessarily involve a change of intention on the part of the taxpayer to that of trading in accordance with the principles stated by Lord Wilberforce in *Simmons* cited in *Kirkham*.

10.7 In my view the ambit of the *Taylor* line of authorities is that the activities relating to the enhancement of the value of the property for the purpose of sale would not necessarily point towards a change of intention to one of trading (rendering the transaction an adventure in the nature of a trade) when the property was initially held for investment and later disposed of. If a finding of change of intention is solely based on such enhancement activities then this amounts to an error of law in the context of a tax appeal. The following part of the discussion by the Board in Case No. D65/87 under the heading 'Capital Asset or adventure in the nature of trade?' is illustrative :

> ' If a property was acquired originally as an investment, it remains an investment unless the owner changes his intention to that of trading. There must be evidence which establishes that change of intention. An investment does not turn into trading stock because it is sold – per Lord Salmon in *Simmons* at 356h. Further, where the property was acquired originally as an investment, acts and activities designed to enhance the value of the investment in the market, or to achieve the most advantageous realisation of the investment, would not establish a change of intention to that of trading. As Russell LJ pointed out in Taylor v Good (1974) 49 TC 277 at 297:
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> > 'There is no ground at all for holding that activities such as those in the present case, designed only to enhance the value of the land in the

market, are to be taken as pointing to, still less establishing, an adventure in the nature of trade.'

In considering the evidence concerning a change of intention, it is important to take into account the reason for the change. 'The reason for the change colours and colours heavily the whole matter': see West v Phillips (1958) 38 TC 203 at 213.' (emphasis aded)

Appeal on a point of law

11.1 The question whether the Board had erred on law by finding the change of intention occurred in 1989 or 1990 must necessarily require an examination of the facts found by the Board which led to this conclusion. The limited scope of intervention in an appeal on a point of law by way of case stated is well established. The position is best summarised by the Court of Final Appeal per Bokhary and Chan PJJ in *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6 at paragraph 28 said :

' 28. Let it be remembered that appellate intervention on the "true and only reasonable conclusion" basis is intervention for error of law. This was explained in *Kwong Mile Services Ltd v. Commissioner of Inland Revenue* (2004) 7 HKCFAR 275 at pp. 287G–289H. 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. If the true and only reasonable conclusion contradicts the determination appealed against, the appellate court will assume that the determination resulted from an error of law. Where it regards the contrary conclusion as the true and only reasonable one, the appellate court will substitute the contrary conclusion for the one reached by the fact-finding tribunal. But 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. And the appellate court will not disturb the fact-finding tribunal's conclusion merely because its own preference is for a contrary conclusion.'

11.2 McHugh NPJ at paragraph 45 of *Lee Yee Shing* referred to the principles regulating the contents of cases stated as expounded by the judgment of the High Court of Australia (Dixon CJ, McTiernan, Webb, Kitto and Taylor JJ) in *The Queen v. Rigby* (1956) 100 CLR 146 at 150–151 :

' Upon a case stated the court cannot determine questions of fact and it cannot draw inferences of fact from what is stated in the case. Its authority is limited to ascertaining from the contents of the case stated what are the ultimate facts, and not the evidentiary facts, from which the legal consequences ensue that govern the determination of the rights of parties. The question may be one of

> the relevance of evidence and then the nature of the evidence becomes in a sense an ultimate facts for the purpose of that question. But that is not a common case. ...... The general rule is clearly stated by Isaacs J in the three following passages: "It cannot be too clearly understood that on a 'case stated' the facts stated are to be taken as the ultimate facts for whatever purpose the case is stated. The Court is not at liberty to draw inferences unless the power is, by express words or by necessary implication, specially conferred by some enactment" … "Unless care is taken to distinguish between 'inference' and 'implication', confusion is likely to occur. An implication is included in what is expressed: an implication of fact in a case stated is something which the Court stating the case must, on a proper interpretation of the facts stated, be understood to have meant by what is actually said, though not so stated in express terms. But an inference is something additional to the statements. It may or may not reasonably follow from them: but even if no other conclusion is reasonable, the conclusion itself is an independent fact; it is the ultimate fact, the statements upon which it rests however weak or strong being the evidentiary or subsidiary facts" …'

Had the Board erred in law?

12.1 Conscious most acutely of the limited scope of the Court's jurisdiction on an appeal by way of case stated on a point of law, I have to be satisfied that, in order for the taxpayers to succeed in this appeal, the Board's conclusion on the change of intention in trading in 1989 or 1990 and hence the sale was an adventure in the nature of trade, is a conclusion that no reasonable body of Board of Review properly instructed in the law could find. Further if the primary facts as found are capable of supporting two alternative inferences it is no function of the appellate court to substitute its preferred inference for that legitimately drawn by the body in question (*Furniss v Dawson* [1984] STC 153 at 166 per Lord Brightman, *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] STC 255 at 259 per Lord Oliver and reaffirmed in *Richfield International Land and Investment Co Ltd v IRC* [1989] STC 820).

12.2 In this case the Board referred to *Marson v Morton* [1986] 1 WLR 1343 and *Lee Yee Shing* which cited *Marson*. *Lee Yee Shing* deals with trading activity of shares. In *Marson* at page 1347-1349 enhancement was discussed under the context of badges of trade. Sir Nicolas Browne-Wilkinson VC at page 1348 stated that :

> ' (vi) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade.'

As can be seen from this statement, the issue of enhancement was discussed in general terms and not specifically in the context of enhancement of the value of land in the process

of realization. In fact in the example given, the improvement was suggested to be an indication of a trading activity. In that case the taxpayers bought land which had planning permission for the purpose of investment with no intention of using the land or redeveloping it. Later they sold the land and were assessed to profits tax. On appeal the assessment was set aside. A further appeal by the Crown was dismissed. Unlike the present appeal, the issue of enhancement was not considered. As the Vice-chancellor observed at 1349 :

> ' ..... this is essentially a case which falls in the "no-man's-land" where different minds might reach different conclusions on the facts found. It was a one-off deal and it was a deal for land which was right outside the ordinary trade of the taxpayers as wholesale potato merchants.'

12.3 It is of note that in the present case the Board and Reyes J also did not specifically discuss the issue focused in this appeal because, as pointed out earlier, the *Taylor* line of cases was not referred to them. What then were the matters that the Board had taken into account in its conclusion that the change of intention occurred in 1989 or 1990?

12.4 First, the Old Lots were no longer to be used to house the Home. The evidence is that, by then, the various sections of the Home would be relocated to different areas. But how would this change in the nature of the use of the land point towards a change of intention to trading? The purpose of acquiring the Old Lots (upon which an orphanage had since been in operation) in the 1930s was not for trading purpose. This is the bedrock (a term heavily relied upon by Mr Chang) upon which the analysis must proceed. When the original use of the Old Lots as an orphanage was exhausted and the taxpayers wished to dispose of it, the realisation would not turn it into trading even with the work done on it for the purpose of maximizing the profit in the disposal.

12.5 I find the reasoning of Williams J of the High Court of Australia in *Scottish Australian Mining Co Ltd v Federal Commissioner of Taxation* [1950] 81 CLR 188 at 195 most persuasive. In that case the taxpayer acquired land in 1863 for the purpose of carrying on coal-mining operations. After the company ceased those operations in 1924, the land was sold, from time to time in parcels, at a considerable profit, for residential and other purposes, and for which the land had been subdivided, roads and a railway station constructed, sites made available for schools and churches and areas set aside for parks.

12.6 The Board of Review decided that the taxpayer was engaged in trade and profit arising from the sale was subject to income tax. This was reversed on appeal. Williams J set aside the assessments in respect of the two year periods both before and after the sale. With respect to the two earlier years he found that all that the appellant was engaged in was realizing a capital asset. Williams J held that he was aware that in this class of case the ultimate finding was often one of degree and fact but the evidence was, he thought, consistent and consistent only with the finding that the appellant was engaged and engaged only in realizing a capital asset. This is what he held :

'... The crucial question is therefore whether the facts justify the conclusion that the appellant embarked on such a business or undertaking or scheme in 1924. The facts would, in my opinion, have to be very strong indeed before a court could be induced to hold that a company which had not purchased or otherwise acquired land for the purpose of profit-making by sale was engaged in the business of selling land and not merely realizing it when all that the company had done was to take the necessary steps to realize the land to the best advantage, especially land which had been acquired and used for a different purpose which it was no longer businesslike to carry out. The plain facts of the present case are that the appellant purchased the Lambton lands for the purpose of carrying on the business of coal mining and carried on that business on the land until it was no longer businesslike to do so. It then had the land on its hands and it was land which because of its locality and size could only be sold to advantage in sub-division. A sale in sub-division inevitably requires the building of roads. If it is advantageous to the sale of the land as a whole to set aside part of the land for parks and other amenities, this does not convert the transaction from one of mere realization into a business. It is simply part of the process of realizing a capital asset. The facts are, in my opinion, such that the appellant is entitled to rely on the principles laid down in *Hudson's Bay Co. Ltd. v, Stevens* (1909) 5 Tax. Cas. 424 and *Rand v. Alberni Land Co. Ltd.* (1920) 7 Tax. Cas. 629. The facts in these cases where the court decided in favour of the taxpayer and also in *Alabama Coal, Iron, Land and Colinization Co. Ltd. v. Mylam* (1926) 11 Tax. Cas. 232 where the court decided the other way were all special to those cases and unlike the present facts in many respects. But the judgments contain important statements of principle. There is the statement in the judgment of the Master of the Rolls in *Hudson's Bay Co. Ltd. v. Stevens* (1909) 5 Tax. Cas. at p 436 that he was unable to attach any weight to the circumstance that large sales were made every year. There is also the statement of Farwell L.J. (1909) 5 Tax. Cas. at p. 437 that "a land owner may lay out part of his estate with roads and sewers and sell it in lots for building, but he does this as an owner not as a land speculator ... it would be different if a land owner, an individual, entered into the business of buying and developing and selling land; but the case of the owner, whether of land, or pictures, or jewels, selling his own property, although he may have expended money on them in getting them up for sale, is entirely different; he sells as owner, not as trader." There is also the statement of Rowlatt J. in *Alabama Coal, Iron, Land and Colonization Co. Ltd. v. Mylam* (1926) 11 Tax. Cas. at p. 254, that "in order to see clearly that the *Hudson's Bay Case* (1909) 5 Tax. Cas. 424, for instance, does not apply, there must be something in the nature of buying at any rate, and not merely selling, which is mere turning your property into money." His Lordship's statement (1926) 11 Tax. Cas. at p. 252 that "merely realizing is not trading. It is no good saying it is a trade of realizing. But I think what they (the commissioners) mean is: they have taken a process of realizing and embedded it in a trade so that in the course of carrying on a trade they have in fact done some realizing" received the approval of the Privy

> Council in *Commissioner of Taxes v. British Australian Wool Realization Association* (1931) AC 224 at p. 252. In that case the Privy Council pointed out that the mere extensiveness of the organization set up to realize an asset or assets does not of itself cause the realization to become a business. Lord Blanesburgh said that was "a proposition not to be entertained (1931) A.C., 224 at p. 252." ' (emphasis added)

12.7 In *McClelland v Taxation Comr* (PC) [1971] WLR 191 at 197, the Privy Council approved of *Scottish Australian Mining Co Ltd* and held that the lower court had not properly applied the body of judicial authority 'to the effect that a landowner may develop and realise his land without making a profit which partakes of the character of income : even though he goes about the realisation in an enterprising way so as to secure the best price.'

12.8 Second, the appointment of Mr Li Fook Hing who had previous experience in redevelopment to be the Vice-chairman of the Joint Development Committee in May 1989. The Board held that :

> ' It is clear from the evidence of Mr Li Fook Hing that he approached the matter on commercial principles, with the laudable object of raising as much income as possible for HKSKH and its charitable activities.'

12.9 Clearly the 'commercial principles' approach in this context means and can only mean 'raising as much income as possible' for the taxpayers and its charitable activities. It was to realize the land to its best advantage and it does not mean that the taxpayers were then engaged in trading. The Board had not elaborated or made other findings in respect of the 'commercial principles'.

12.10 Third, the appointment of professional advisers including architects and lawyers to work on the development. As the taxpayers are engaged in religious and charitable work, inevitably professionals have to be engaged. In any event, the mere extensiveness of the organisation set up to realise an asset does not of itself cause the realisation to become a business.

12.11 Fourth, the taxpayers in September 1989 applied for planning permissions to build 20 blocks of multi-storey towers and 20 houses with commercial use such as supermarkets, laundry, coffee shop. This was followed by another application in May 1990. The approval was granted in July 1990 by the Town Planning Board. Again, as discussed in the authorities, to seek planning permissions for the purpose of maximizing the development potentials does not point towards the change of intention to trading where the land in the first place was not acquired for the purpose of trading. This was part of the process of realizing the land.

12.12 Fifth, the Board referred to the application for land exchange to permit residential development and the granting of the exchange. The application for the exchange was made in December 1990. After the Government indicated the terms of the exchange in August 1991, the taxpayers and the Government entered into negotiation on those terms and

the taxpayers' acceptance only took place in May 1993 and the surrender and regrant only took place in November 1993. This was nearly three years after the date of change of intention as found by the Board. The application for exchange was again part of the process of realizing the land to achieve the best return.

12.13 Sixth, the Board held that the taxpayers actively marketed the disposal of the land by approaching developers in Hong Kong for offers and tenders. According to the agreed facts the invitation to submit tender offers to purchase the New Lot or to enter into a joint venture agreement for the development of the New Lot only took place in July 1993 which was a substantial period after 1989 or 1990. Even, if, for the purpose of argument, the approach to developers was made earlier (of which there was no specific finding), this was part of the process of realizing the assets which obviously required time. In *Cunliffe v. Goodman* [1950] 2 KB 237 at 254 Asquith LJ discussed the distinction between intention and mere contemplation :

> ' ...Not merely is the term "intention" unsatisfied if the person professing it has too many hurdles to overcome, or too little control of events : it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while.
>
> A purpose so qualified and suspended does not in my view amount to an "intention" or "decision" within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision. ...... In the case of neither scheme did she form a settled intention to proceed. Neither project moved out of the zone of contemplation—out of the sphere of the tentative, the provisional and the exploratory—into the valley of decision.' (emphasis added)

12.14 Contrast the 1989 or 1990 situation with what happened in 1993. According to the agreed facts, on 23 July 1993, Cheung Kong submitted two tender offers : Option A being a sale and purchase offer and Option B being a joint venture offer. On 12 August 1993, the taxpayers accepted Option B. On 3 December 1993, the taxpayers entered into a joint venture agreement ('the Joint Venture Agreement') with Cheung Kong and its subsidiaries for the development of the New Lot into a private residential development. In my view the events in 1993 exemplifies the rather elegant example used by Asquith LJ : they suggested that it was only then the development moved out of the 'zone of contemplation' into the 'valley of decision'.

12.15 The Board also referred to *Crawford Realty Ltd v CIR* (1991) 3 HKTC 674 where the discussion was focused on 'enhancement' and 'substitution' of the subject matter. In that case, the taxpayer was a property development company. It held property ('the old property') upon which two buildings were built. The old property was held for investment. The taxpayer then entered into a development agreement with a developer to redevelop the

old property into a new building on a joint venture basis. The Board dismissed the taxpayer's appeal that the sale of the new building after development was not a trading venture. On appeal to the High Court, the taxpayer's argument was that having regard to the intention of the taxpayer in relation to the old property and the new property, to its motivation in entering the development agreement and in the light of the terms of the agreement, 'the unequivocal and only construction that could be put on the activity was the realization albeit considerably enhanced of the taxpayer's asset'.

12.16 Barnett J disagreed with this submission. It is in this context that he discussed enhancement and substitution. It is important to bear in mind that *Crawford Realty Ltd* was an attempt by the taxpayer to extend the enhancement principle well beyond its legitimate scope to the further stage where the taxpayer had actually entered into an agreement with a developer to completely redevelop the old property. This being the case it is not difficult to see that the agreement to construct a new building cannot possibly be treated as a mere enhancement. Barnett J at page 693 used the example of restoring an old car for resale to highlight the difference of these two concepts :

> ' ......Enhancement of an asset, making it as attractive and saleable as reasonable expenditure of time and money can achieve, is one thing. The end product remains substantially the same. Substitution, however, is another matter. It is the taking of one's old car, removing the bodywork, engine and suspension from the chassis and replacing them with the latest styling and mechanical components. And that is effectively what happened here. The appellant obtained a price for the old car far in excess of its apparent value (about which no complaint is made by the Commissioner) but then went on to participate in the expenditure of time and money on rebuilding the car with new components in the hope of another profit therefrom. The appellant was actively involved in this process. Without going so far as to say the Board could have come to no other conclusion, I do not find it difficult to see why the Board reached the conclusion it did. As the Board says, "the document speaks for itself." '

12.17 Although the example given may not be an appropriate one in the context of a land development, in my view, what Barnett J really wanted to say was that by the time the taxpayer had entered into the development agreement, the activities had gone beyond mere enhancement for the purpose of realizing the old property for its maximum profit. The taxpayer was then engaged in trade. Hence earlier he emphasized the importance of the development agreement that the taxpayer had entered into with the developer :

> ' the nature and implications of the agreement seem to me to be crucial. I do not find it surprising that the Board should focus upon the agreement albeit not to the total exclusion of the other relevant factors. As I have already said I do not find the Board to have excluded those other factors.'

12.18 *Hong Kong Oxygen & Acetylene Co Ltd v CIR* [2001] 1 HKLRD 489 is another example that the taxpayer formed the trading intention when its board gave its approval and decided to proceed with the joint venture agreement.

12.19 In the present case, while a charity may be engaged in trade, in my view, an error of law had been made by the Board when it held that there was a change of intention in 1989 or 1990 when, on the facts found by the Board, all that the taxpayers had done was to have engaged in the process of realizing the Old Lots. It cannot be said that in 1989 or 1990 the taxpayers had become a property developer engaged in the trade of selling flats. In my view, even if the Board purported to apply the enhancement principle, it had not properly done so.

Post 1990 event

12.20 Mr Fung argued that the Board did not need to refer to the post 1990 events in order to reach its finding on the change of intention. In my view, if that is the case, then the pre 1990 activities, whether singularly or collectively, do not support the Board's finding on the change of intention at all.

12.21 Mr Fung then argued that, in any event, the following post 1990 events are consistent with the finding of change of intention in 1989 or 1990, namely, the matter of the land exchange, the approach to developers, the surrender and regrant, the Joint Venture Agreement, together with the following events namely :

(1) On 18 March 1998, a supplemental agreement was entered into between the taxpayers and Cheung Kong, under which 129 residential units and 194 car parking spaces were chosen by and allocated to Church Body and Foundation pursuant to the Joint Venture Agreement.

(2) The occupation permit for Deerhill Bay was issued in August 1998 and the taxpayers sold various units and car parking spaces at Deerhill Bay from 1999 to 2006 for profits.

12.22 I have already discussed the issue of the land exchange, the approach to developers and the surrender and regrant. Although it is not necessary for me to decide, and I will refrain from so deciding, there may well be a valid argument that there was a change of intention to trade when the taxpayers entered into the Joint Venture Agreement on 12 August 1993 with Cheung Kong. But it is of note that the Board had not made any finding that, prior to the taxpayers entering into the Joint Venture Agreement, there was already a decision by the taxpayers to embark on a joint venture. Without such a finding, in the light of my discussion of the 1989 and 1990 activities, I just do not see how such a 'backward inference' can be justified.

12.23 Mr Chang further argued (in the context that the change of intention might have occurred with the Joint Venture Agreement) that any possible backward inference from the

taxpayers' subsequent entering into the Joint Venture Agreement is impermissible or unjustified. First, even in July 1993, the invitation to submit tenders for two options was only an option in the taxpayers' contemplation - the feasibility of which obviously depends on the terms of offers provided by any potential developers. Second, the Board simply did not undergo any analysis of the terms of the invitation of tenders and the Joint Venture Agreement. He argued that it is wrong in law to assume that a joint venture agreement must involve trading/business. Reliance was placed by Mr Chang on the comments by Barnett J in *Crawford Realty Ltd* that it was 'not permissible' to assume that a joint venture agreement (instead of a sale and purchase) must involve trading (p.688); and that: '[t]he nature and implications of the Agreement' were 'crucial' (p.693).

12.24 In my view the further point taken by Mr Chang does not call for discussion in view of the lack of analysis by the Board on this topic. It is sufficient for the purpose of this appeal, in relation to Question 1, to decide whether the conclusion of the Board that there was a change of intention in 1989 or 1990 was in error. The issue whether the change occurred in some other subsequent dates could only be decided by the Board when the matter is remitted to it for consideration.

12.25 In view of the way that Question 1 is framed, either a 'yes' or 'no' answer is not sufficient to dispose of the appeal. My answer to Question 1 is that on the facts found by the Board and on the true construction of the *IRO*, the true and only reasonable conclusion is that there was no change of intention from capital holding to trading/business by September 1989 or December 1990. However, I would remit the matter to the Board to consider whether the change of intention occurred in August 1993 or December 1993 or alternatively some other date or dates (other than September 1989 or December 1990).

V. **<u>Question 2</u>**

13. Having reached the conclusion on Question 1, it is not necessary for me to reach a conclusion on the correctness of the Board's decision on Question 2. This being the case, I will simply set out the parties' respective case on this topic.

<u>The taxpayers' case</u>

14.1 First, the Board in holding that the taxpayers had adduced no evidence on the application of the profits erred in law in disregarding Bishop Tsui's evidence to the effect that *all* income of the taxpayers would be applied for charitable purposes in Hong Kong and to finance the Church's charitable work. There was no evidence or facts found to the contrary. Insofar as the Board relied on the lack of accounts showing the *actual* application of the profits in question in disregarding Bishop Tsui's evidence, it was based on a misdirection in law. The proviso to section 88 requires that the profits 'are applied solely for charitable purposes and are not expended substantially outside Hong Kong'; it does not say that the profits must 'have been' or 'were' applied or expended or require that all profits received must have been expended during a particular year of assessment in order to qualify for the exemption. In its context the use of the continuous present tense 'are' plainly covers

a situation where the profits received are *to be* used for charitable purposes. The taxpayers had discharged the burden of proof in adducing Bishop Tsui's evidence in the light of the background and other facts found. The Board erred in law in disregarding it.

14.2 Second, the Board's holding that the taxpayers had not been able to identify any expressed object of the taxpayers is based on an error of law regarding what constituted an expressed object of the taxpayers. It is provided in section 3 of the *Church Body of the Hong Kong Sheng Kung Hui Ordinance* ('*CBHKSKHO*') (Cap. 1158) that one of the purposes of the incorporation of the Church Body is 'to enable property to be held by the Church Body' and section 6(2)(a) empowers it to 'either alone or jointly with other persons, to improve, develop, redevelop and turn to account any land belonging to the Church Body'. The same applies for the Foundation by sections 3 and 6(2)(a) of the *Hong Kong Sheng Kung Hui Foundation Ordinance* ('*HKSKHFO*') (Cap. 1159). The taxpayers held land *on behalf* of the Church Body as has been found by the Board. There the Board referred to the Foundation. But the same applied to the Church Body by reference to paragraph 20.1 of the Constitution of the Church, regulations 3.1 and 3.2 of the Foundation's Regulations, which provide that 'The Foundation shall provide financial support to the Church' (reg. 3.1) and '…assets of the Foundation shall only be applied or used as grants solely for the Church by the instruction of the House of Bishops' (reg. 3.2) and regulations 12.1 & 12.2 of the Church Body's Regulations which are to similar effect. The members constituting the Church Body and the Foundation are personnel of the Church (section 5 of their respective incorporation ordinance). In the circumstances, one of the expressed objects of the taxpayers must be to exercise their powers conferred under the ordinances to deal with the property held by them for the Church Body, whose expressed object is 'to be a community to exemplify in the world the good news of Jesus Christ born out of God's love, and heralded in the power of the Holy Spirit' (as stated in the Preamble to the Church's Constitution). An institution could be charitable even where it did not engage in charitable activities beyond making profits that were directed to other charitable institutions which did engage in such activities: see *FCT v Word Investments Ltd* (2008) 236 CLR 204, at 224-226.

14.3 In the premises, the Board's holding that the trade or business in this case was not exercised in the course of the actual carrying out of the objects of the taxpayers constituted an error of law as improvement, development or turning to account land held by them was one of their expressed objects as explained.

<u>The Commissioner's case</u>

15. The Commissioner argued that three conditions set out in the proviso of section 88 have to be satisfied before the section 88 exemption can be invoked. The taxpayers have failed to do so. The three conditions are :

(1) the profits in question are applied solely for charitable purposes;

(2) the profits in question are not expended substantially outside Hong Kong; and

(3) the trade or business is exercised in the course of the actual carrying out of the expressed objects of the charitable body.

Conditions 1 and 2

16.1 Before the Board, the taxpayers adduced no evidence on (1) the application of profits for the purpose of Condition 1 and (2) the profits not being expended substantially outside Hong Kong for the purpose of Condition 2.

16.2 The taxpayers seek to rely on certain paragraphs of Bishop Tsui's witness statement and oral testimony to contend that 'all income of the Taxpayers would be applied for charitable purposes in Hong Kong and to finance the Church's charitable work'. The taxpayers cannot be allowed to advance such a contention in these appeals.

(1) First, Question 2 does not permit Bishop Tsui's witness statement and oral testimony to be examined because the question can only be answered by looking at the facts found by the Board and on the true construction of the *IRO*.

(2) Second, the taxpayers have previously sought to pose a question of law in the stated cases to challenge the Board's findings in paragraphs 81 and 82 of the Decision about the absence of evidence concerning Conditions 1 and 2 in disregard of the testimony of Bishop Tsui. They further sought to have Bishop Tsui's witness statement and transcript of oral testimony to be annexed to the stated cases. The Board found the proposed question and the proposed annexures objectionable and declined to state a case on that question. No judicial review or application under section 69(4) of the *IRO* was brought by the taxpayers against the ruling of the Board. The taxpayers cannot now seek to go behind the Board's ruling by asking this Court to examine Bishop Tsui's evidence to impugn the Board's findings.

16.3 Third, and in any event, the Board concluded that the taxpayers failed to discharge their burden under section 68(4) of the *IRO* to prove the satisfaction of these conditions. The Board also stated that if any inference was to be drawn in relation to Conditions 1 and 2, it was one adverse to the taxpayers. As a tribunal of fact, it was entirely a matter for the Board to decide (a) the extent to which a piece of evidence should be accepted, (b) the extent to which a piece of evidence should be rejected, and (c) the use to which the evidence which has been accepted by the Board should be put: see *Aust-Key Co Ltd v CIR* [2001] 2 HKLRD 275 at 281H-I (Chung J). In these appeals, the taxpayers have not sought to challenge the Board's conclusions at paragraphs 81 and 82 of the Decision and it is simply not open to the taxpayers now to make submissions regarding certain evidence which the Board did not accept.

16.4 Mr Fung further relied on paragraph 46 of the Judge's judgment which held that :

> '46. My difficulty is that the Board were plainly unimpressed by Bishop [Tsui's] Statement as a whole. At paragraph 42 of its Decision, the Board observed, for instance, that Bishop [Tsui] had failed in his evidence to define what he meant by "the charitable activities of the Church". It is far from clear that when referring to "charitable purposes" or "charitable activities" generally, Bishop [Tsui] had in mind what the law regards as "charitable". The quoted sentence was challenged by the Commissioner's lawyers in submissions before the Board. The Commissioner through counsel asked to see relevant accounts showing just how and where (in Hong Kong or elsewhere) profit monies were expended. No such accounts were provided. Thus, Bishop [Tsui] having unfortunately given no further written or oral particulars, the Board plainly could not and did not attach much (if any) weight to his evidence.'

<u>Condition 3</u>

16.5 Before the Board, the taxpayers failed to identify any expressed object of the taxpayers.

16.6 The taxpayers seek to rely on a combination of the provisions in the CBHKSKHO, the HKSKHFO, paragraph 12 of the Decision, and the Preamble to the Church's Constitution to contend that one of the expressed objects of the taxpayers is 'to exercise their powers conferred under the ordinance to deal with the property held by them for the Church, whose expressed object is "to be a community to exemplify in the world the good news of Jesus Christ born out of God's love, and heralded in the power of the Holy Spirit" '. The taxpayers cannot be allowed to advance such a contention in these appeals for similar reasons given in relation to Conditions 1 and 2.

16.7 In any event, the taxpayers' submissions on the expressed objects are misconceived.

> (1) As a matter of proper construction, the words 'expressed objects' in section 88(a) of the IRO must refer to the written objects. The Chinese language text reinforces this construction. Under sections 10B(1) and (2) of the Interpretation and General Clauses Ordinance (Cap. 1), both the English and Chinese texts of an ordinance are equally authentic and are presumed to have the same meaning. The court should construe the statutory provisions on this basis: see HKSAR v Tam Yuk Ha [1997] HKLRD 1031 at 1037J (Chan CJHC).

(2) Accordingly, the expressed objects of the taxpayers must be something already in writing, and cannot be put together through a combination of different legislative provisions, a particular finding made by the Board and the Constitution of the Church.

VI. **Extraneous materials**

17. There were arguments whether the taxpayers' reliance on extraneous materials not attached to the case stated although produced before the Board was improper. There is a difference in approach between the English and Hong Kong courts. The Hong Kong courts had held that the appellate court is confined to the findings of fact contained in the Board's decision and may not look at documentation which did not form part of the case stated : Lee Yee Shing Jacky v CIR [2007] 2 HKC 256 at 261C-D (Court of Appeal per Le Pichon JA). The English practice to the contrary is found in Carvill v CIR 70 TC126 and referred to in the Hong Kong case of CIR v Indosuez WI Carr Securities Ltd [2002] 1 HKLRD 308 which noted the different approach.

18. For my part, I would prefer a more flexible approach. Circumstances may require documents not attached to the case stated to be produced for elucidation. To resort to different proceedings in order to obtain those documents is really not conducive to an efficient and speedy resolution of disputes. However since I have confined myself in this appeal to the facts as found by the Board, it is not necessary for me to reach a final view on this controversy.

Conclusion

19. For my part, I would allow the taxpayers' appeal to the extent as I have indicated.

Hon Yuen JA :

20. I agree with the judgment of Cheung JA.

Hon Au J :

21. I agree with Cheung JA's judgment.

Disposition of the appeal

22. Accordingly the appeal is allowed to the extent that in respect of Question 1, on the facts found by the Board and on the true construction of the *IRO*, the true and only conclusion is that there was no change of intention from capital holding to trading/business by September 1989 or December 1990. The matter is remitted to the Board for it to consider

whether the change of intention occurred in August 1993 or December 1993 or alternatively some other date or dates (other than September 1989 or December 1990).

23. The Court apologizes for the delay in rendering this judgment. This is due to the initial difference in views on the outcome of the appeal which has now been resolved in a unanimous decision.

Costs

24. The taxpayers are entitled on a provisional basis to the costs of the appeal and below.

(Peter Cheung) Justice of Appeal	(Maria Yuen) Justice of Appeal	(Thomas Au) Judge of the Court of First Instance

Mr Denis Chang SC and Mr Newman Lam, instructed by P.C. Woo & Co., for the 1st and 2nd appellants
Mr Eugene Fung SC, instructed by Department of Justice, for the respondent