

Case No. D2/24

Profits tax – whether gains on sale of parking spaces capital in nature – whether the parking spaces were trading stocks or capital assets – whether the sale is ‘in the nature of trade’ or merely a realization of capital assets – burden of proof on Appellant – sections 2(1), 14(1) and 68(4) of the Inland Revenue Ordinance (‘Ordinance’)

Panel: Wu Pui Ching Teresa (chairman), Fung Chih Shing Firmus and Xi Chao.

Date of hearing: 28 June 2023.

Date of decision: 24 April 2024.

The Taxpayer is a Hong Kong company which is engaged in the business of properties holding and investment. One of its shareholders, Mr D, conducted a Feasibility Study for various parties (‘Investors’), including two of the Taxpayer’s shareholders, in which he recommended 238 commercial and residential parking spaces (‘Parking Spaces’) for the Investors’ consideration. After discussing the Feasibility Study with Mr D, some of the Investors decided to acquire the Parking Spaces through the Taxpayer, an existing corporate vehicle, for the consideration of HK\$92,800,000.

It is the Taxpayer’s case that various disagreements arose among its shareholders (‘Alleged Shareholders’ Dispute’) shortly after the acquisition of the Parking Spaces and as a result, the Taxpayer resolved to sell and did sell 23 out of the 43 residential parking spaces (‘Parking Spaces Sold’) held by it, generating gains of HK\$19,678,100 (‘Gains’).

In their profits tax returns, the Taxpayer had excluded the Gains from its assessable profits, claiming that they were capital in nature under section 14 of the Ordinance. The same was not accepted by the assessor who, upon enquiry, maintained the view that the Gains were not capital in nature and should not be excluded.

The Taxpayer objected to the above and the Taxpayer’s objection was dismissed by the Commissioner who confirmed, *inter alia*, the profits tax assessments. The Taxpayer now appeals to the Board.

Held:

1. The true and only reasonable conclusion is that the Parking Spaces Sold were capital assets. There is insufficient evidence to support the Taxpayer’s claim that the Parking Spaces were acquired for long-term investment.
2. The Feasibility Study and resolutions presented by the Taxpayer did not

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conclusively demonstrate an intention to hold the Parking Spaces as capital assets. The Taxpayer also failed to prove the Alleged Shareholders' Dispute and that such dispute led to the sale of Parking Spaces Sold.

3. While the Board did not draw an adverse inference against the Taxpayer's case on account of the Taxpayer's failure to call its material witnesses, in arriving at its conclusion, the Board took into account of the fact that Ms AE, the Taxpayer's sole witness, lacks personal knowledge of the relevant transactions.
4. The Taxpayer's arguments that (1) it did not make proactive attempts to sell the Parking Spaces Sold and had only acted upon unsolicited offers from estate agents, and (2) the restriction on the sale of the commercial parking spaces show that the Parking Spaces were not acquired by the Taxpayer for trading purposes, were also rejected.

Appeal dismissed and costs order in the amount of \$25,000 imposed.

Cases referred to:

Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392
Church Body of Hong Kong Sheng Kung Hui & Another v Commissioner of Inland Revenue (2016) 19 HKCFAR 54
Perfekta Enterprises Ltd v Commissioner of Inland Revenue (2019) 22 HKCFAR 203
Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6
Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Brand Dragon Ltd (in liquidation) v Commissioner of Inland Revenue [2002] 1 HKC 660

Prisca Cheung, Counsel, instructed by Messrs Kok & Ha Solicitors, for the Appellant.
Julian Lam, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

INTRODUCTION

1. Before the Board of Review ('the **Board**') is the appeal ('the **Appeal**') brought by Company A ('the **Taxpayer**') against the Determination of the Acting Deputy Commissioner of Inland Revenue ('the **Commissioner**') dated 20 June 2022 (i) confirming the profits tax assessments for the years of assessment 2016/17 and 2017/18; and (ii) reducing the profits tax assessment for the year of assessment 2018/19 ('the **Assessments**').

2. For the reasons below, the Board has decided to dismiss the Appeal and make a costs order against the Taxpayer pursuant to section 68(9) of the Inland Revenue Ordinance (Chapter 112) ('the **Ordinance**').

A. FACTUAL BACKGROUND

3. In the Appeal, the Taxpayer highlights the following facts.

A1. The Taxpayer

4. The Taxpayer was incorporated in Hong Kong in 2015, engaging principally in the business of properties holding and investment:

- (1) Ms B was a Position F from 9 October 2015 to 29 January 2016.
- (2) Mr C was a Position F from 29 January 2016 to 23 June 2017.
- (3) Mr D was a Position F from 23 June 2017 to 18 April 2018.
- (4) Ms E has become a Position F from 18 April 2018 onwards.

5. In 2016/2017, the Taxpayer's shares were held by the following parties (generally referred to as 'the **Shareholders**');

Shareholders	2016	2017
Company G (whose beneficial shareholder was Mr H engaging in the entertainment business)	20	20
Company J (whose beneficial shareholders were Mr K and Ms L engaging in the jewellery business)	20	20
Mr M, the chairman and major shareholder of Company N	10	10
Mr C, an experienced property investor	50	-
Mr D, the brother of Mr C and an experienced property investor	-	50

A2. The acquisition of the Parking Spaces

6. On 3 October 2015, Mr D conducted a Feasibility Study ('the **Feasibility Study**') for Mr C, Mr M, Mr P, Mr H, Mr Q, Mr K and Mr R (generally referred to as 'the **Investors**').

7. In the Feasibility Study, Mr D stated that he was aware of the Investors' search for properties intended for long-term investment.

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8. Mr D recommended 238 car parking spaces ('the **Parking Spaces**'), comprising (i) 195 commercial parking spaces ('the **Commercial Parking Spaces**'); and (ii) 43 residential parking spaces ('the **Residential Parking Spaces**'), situated respectively at Nos 1-195 and Nos 1-3, 5,6, 9-12, 37-62, 64, 65, 67, 68, 72, 73, 75 and 76, Location S to the Investors for consideration.

9. Mr D outlined, in the Feasibility Report, the reasons behind his belief in the strong potential of the Parking Spaces:

- (1) First, it was anticipated that there would be a substantial influx of cars from the neighbouring areas to District T due to its proximity to the border and these cars would generate demand for car parking spaces. It was also expected that there would be high levels of demand for the Parking Spaces as they were located in a bustling and convenient area in District T, close to Station T.
- (2) Second, there were limited car parking spaces in District T available for sale and the asking price of the Parking Spaces (\$92,800,000) offered in bulk was set relatively low.
- (3) Third, the Parking Spaces' asking price was comparatively low in relation to the transaction price (\$1,300,000) of other car parking spaces in the vicinity (eg Estate U), making it economically advantageous to acquire them in bulk.
- (4) Fourth, while the Residential Parking Spaces were to be used by the residents of Location S or their visitors, the Commercial Parking Spaces could be used by the public for hourly parking. It was anticipated that the Parking Spaces would appeal to the investors as most private residential car parks were not accessible to the public.
- (5) Fifth, the Parking Spaces were projected to yield, as a whole, a 4.27% annual return (ie $\$330,000 \times 12 / \$92,800,000$). Mr D held the personal opinion that the current licence fee of the Parking Spaces was relatively low and expected that there would be a higher yield following re-organization and renovation.
- (6) Lastly, Mr D had inquired with Bank V, and the preliminary valuation of the Parking Spaces was determined to be \$92,800,000. Bank V expressed interest in providing financing and indicated a willingness to extend a 5-year loan of up to 40% of the valued price at an interest rate of HIBOR+2% per annum.
- (7) Assuming that the Investors were planning to borrow \$37,120,000 from Bank V, the monthly repayment would be \$210,000 (at the interest rate of 2.2% per annum) and the monthly licence fee would be more than sufficient to cover it leaving a surplus.

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10. After discussing the Feasibility Study with Mr D, some of the Investors decided to acquire the Parking Spaces through an existing corporate vehicle, the Taxpayer.

11. On 9 October 2015:

(1) Ms B, a nominee of Mr C, executed a Memorandum of Resolution ('the **October 2015 Resolution**') that the Taxpayer would purchase the Parking Spaces '*for long-term investment purpose...*':

(a) The Parking Spaces were subject to an existing licence ('the **Licence**') held by Company W for operation of '*a public fee paying car parking lot*'.

(b) The Licence was for a term of 3 years, from 1 January 2015 to 31 December 2017. The monthly licence fee payable was \$330,000 for the first year and \$350,000 for the second and third years.

(2) By a preliminary agreement for sale and purchase, the Taxpayer purchased the Parking Spaces for \$92,800,000.

12. On XX October 2015, the agreement for sale and purchase of the Parking Spaces was executed.

13. On 29 March 2016, the assignment of the Parking Spaces was completed.

14. The acquisition of the Parking Spaces was financed through a combination of bank loan and shareholders' loans ('the **Shareholders' Loans**') as follows:

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Parties	Amount (HK\$)	Terms
Mortgage from Bank V (' Bank V Loan ')	\$36,800,000	Interest bearing at 1 month HIBOR plus 1.97% per annum and repayable by 59 monthly instalments of \$204,500 (which was intended to be paid with the income generated from the licence fee of the Parking Spaces), with a final instalment of \$24,834,500 (which was planned to be refinanced by a new loan from the bank). The Bank V Loan was guaranteed by an unlimited guarantee from Company X, a wholly-owned subsidiary of Mr D's Company Y, of which Mr C was the sole Position F and shareholder, and a personal guarantee from Mr D up to \$36,800,000.
Shareholder's loan from Company G	\$13,001,389.80	Interest-free, unsecured, with no fixed terms of repayment; no loan agreement was signed.
Shareholder's loan from Company J	\$13,001,389.80	Interest-free, unsecured, with no fixed terms of repayment; no loan agreement was signed.
Shareholder's loan from Mr M	\$6,500,694.90	Interest-free, unsecured, with no fixed terms of repayment; no loan agreement was signed.
Shareholder's loan from Mr C	\$32,208,454.00	Interest-free, unsecured, with no fixed terms of repayment; no loan agreement was signed.

A3. Disposal of the Parking Spaces

15. The Taxpayer alleges that there were various disagreements among the Shareholders ('the **Shareholders' Dispute**') shortly after the acquisition of the Parking Spaces:

- (1) Both Mr M and Mr K were dissatisfied that Company W had not put in enough effort to promote the Parking Spaces and as a result, there was no increase in the monthly licence fee.
- (2) Mr K expressed the desire for the Taxpayer to handle the leasing matters directly with the end users, but the Taxpayer's management believed that they did not have sufficient manpower and experience to do so.

- (3) Both Mr M and Mr K intended to sell their shares.
- (4) Due to the dissatisfaction of Mr M and Mr K, the Licence with Company W was terminated by the Taxpayer, with effect from 31 December 2016.

16. On the Taxpayer's case, there was then an unsolicited offer from Agency Z proposing the Taxpayer to sell the Residential Parking Spaces. The Taxpayer emphasizes that it had not actively marketed the Residential Parking Spaces for sale and it only agreed to sell after being approached by Agency Z. Once the Taxpayer made known its intention to sell, other agents like Agency AA and Agency AB approached and solicited the sales for it.

17. On 14 November 2016, Mr C, the sole Position F of the Taxpayer, executed the following resolution ('the **November 2016 Resolution**')

'1 ...It is noted that some shareholders complained that the income arising from the existing tenancy with Company W was unsatisfactory.

2. In order to improve the revenue of the Company, the Company may have to deal with the leasing of the Parking Spaces directly with end users. However, it was regretted that the Company did not have the manpower nor experience to do so.

3. Thus, in order to resolve the complaints of the shareholders and for the best commercial interest of the Company, it was considered and resolved that the Company do proceed to terminate the existing tenancy with Company W and sell the residential car parking spaces...on the price proposed and terms tabled at the Meeting.'

18. By a licence agreement dated 25 January 2017 entered into by Mr D, the Taxpayer licensed the Parking Spaces to Company AC :

- (1) The licence was for a term of 3 years, from 1 February 2017 to 31 January 2020.
- (2) The basic monthly fee was \$350,000.
- (3) If the gross revenue received by Company AC exceeded \$500,000, it should pay the Taxpayer 50% of the excess additional to the basic monthly fee.

19. On 28 February 2017, the Taxpayer executed the assignment of 20 residential parking spaces ('the **First Lot of Residential Car Parking Spaces**'), subject to a verbal licence-back arrangement.

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20. The Taxpayer utilised the proceeds of \$27,260,000 received from the sale of the First Lot of Residential Car Parking Spaces to repay a portion of the Shareholders' Loans and a portion of the Bank V Loan as follows:

Date	Party /loan repaid	Amount (HK\$)
2 March 2017	Bank V Loan	\$3,120,000
14 March 2017	Mr M	\$2,071,673.80
	Company J	\$4,143,347.60
	Company G	\$4,143,347.60
	Mr C	\$12,000,000
	Total:	<u>\$25,478,369</u>

21. In or about early 2018, some of the Shareholders offered to sell their shares to Mr D:

- (1) Mr D agreed to purchase their shares through Company AD, a company which Mr D had 99% interest. In April 2018, the relevant share transfers were completed.
- (2) The disputes among the Shareholders regarding the Taxpayer's business strategy were finally settled and the reorganization of the Taxpayer was completed. There has been no change in the Taxpayer's shareholding ever since.

22. On 21 December 2018, the Taxpayer executed assignment of 3 residential parking spaces ('the **Second Lot of Residential Car Parking Spaces**'), subject to a licence-back arrangement. The proceeds received from the sale of the Second Lot of Residential Car Parking Spaces were \$4,140,000.

23. The First Lot of Residential Car Parking Space and the Second Lot of Residential Car Parking Spaces are collectively referred to as 'the **Two Lots of Residential Car Parking Spaces**' below.

B. THE APPEAL

24. From the Taxpayer's profits tax computations ('the **Tax Computations**') attached to the profits tax returns ('the **Returns**'), it can be seen that the Taxpayer had made the following net gains ('the **Gains**') from the sale of the Two Lots of Residential Car Parking Spaces:

<u>Year of assessment</u>	<u>Number of Residential Car Parking Spaces Sold</u>	<u>Amount of gain (HK\$)</u>
2016/17	20	\$17,065,664
2018/19	3	\$2,612,436
Total	<u>23</u>	<u>19,678,100</u>

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25. In the Returns, the Taxpayer had excluded the Gains made in the years of assessment 2016/17 and 2018/19 from its assessable profits, taking the view that they were capital in nature under section 14 of the Ordinance. The Taxpayer had also deducted certain commercial building allowances ('the CBA')¹.

26. The Taxpayer's exclusion of the Gains was not accepted by the assessor, and the following assessments were raised on the Taxpayer:²

<u>Year of Assessment</u>	<u>2015/16</u>	<u>2016/17</u>	<u>2017/18</u>	<u>2018/19</u>
	\$	\$	\$	\$
Profit/(Loss) per return [Fact (7)(a)]	(1,928,192)	357,250	(137,372)	779,618
<u>Add:</u> CBA [Fact (7)(b)]	1,857,777	1,701,662	1,701,662	1,678,244
Deposit forfeited [Fact (7)(b)]	-	90,000	-	-
Gain on disposal of car parking spaces [Fact (7)(b)]	-	17,065,664	-	2,612,436
	<u>(70,415)</u>	<u>19,214,576</u>	<u>1,564,290</u>	<u>5,070,298</u>
<u>Less:</u> Balancing charge reversed [Fact (7)(b)]	<u>-</u>	<u>156,115</u>	<u>-</u>	<u>70,254</u>
Assessable Profits/(Adjusted Loss)	<u>(70,415)</u>	<u>19,058,461</u>	<u>1,564,290</u>	<u>5,000,044</u>
<u>Less:</u> Loss set-off		<u>70,415</u>		
Net Assessable Profits		<u>18,988,046</u>		
 Tax Payable Thereon		<u>3,113,027</u>	<u>228,107</u>	<u>805,007</u>

27. The assessor maintained the view, after making inquiries with the Taxpayer, that the Gains were not capital in nature and should not be excluded from the assessable profits. The assessor however agreed, out of fairness, to allow the Taxpayer to include the accumulated depreciation as part of the costs of the sale of the Two Lots of Residential Car Parking Spaces, thereby reducing the Taxpayer's assessable profits.

28. Accordingly, the following revisions were made to the year of assessment 2018/19:

<u>Year of Assessment</u>	<u>2018/19</u>
	\$
Profits previously assessed [Fact (8)]	5,000,044
<u>Less:</u> Accumulated depreciation [Fact (7)(d)]	<u>82,491</u>
Revised Assessable Profits	<u>4,917,553</u>
 Tax Payable thereon	<u>791,396</u>

¹ \$1,706,622 for the year of assessment 2016/17, \$1,701,662 for the year of assessment 2017/18 and \$1,678,244 for the year of assessment 2018/19

² See the Determination at paragraph 1(8); the first row 'Profit/(Loss) per return' was the assessable profit calculated by the Taxpayer in the Returns.

29. The Taxpayer objected to the above.

30. In the Determination, the Commissioner dismissed the Taxpayer's objection and confirmed (i) the profits tax assessments for the years of assessment 2016/17 and 2017/18; and (ii) the revisions for the year of assessment 2018/19.

31. The Taxpayer appeals, pursuant to section 66 of the Ordinance, to the Board.

32. The question for determination in the Appeal is whether the Gains were capital in nature which should be excluded or were the Taxpayer's assessable profits arising in or derived from the carrying on of a trade in Hong Kong for which the Taxpayer shall be charged profits tax under section 14 of the Ordinance.

33. The Board's function is to consider the matter de novo (see Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392 at paragraphs 29-30 *per* Lord Walker of Gestingthorpe NPJ).

C. APPLICABLE LEGAL PRINCIPLES

34. Section 14(1) of the Ordinance provides:

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

35. Section 2(1) of the Ordinance defines ‘*trade*’ to include ‘*every trade and manufacture, and every adventure and concern in the nature of trade*’.

36. In determining whether a transaction is ‘*in the nature of trade*’ or merely a realization of capital assets, the legal principles are well-established as set out by Fok PJ in Church Body of Hong Kong Sheng Kung Hui & Another v Commissioner of Inland Revenue (2016) 19 HKCFAR 54 at paragraphs 43-52³:

‘43. Profits tax is chargeable only on profits arising in or derived from the carrying on by a taxpayer of “a trade, profession or business” in Hong Kong and profits arising from the sale of capital assets are excluded from such charge: Inland Revenue Ordinance (Chapter 112), section 14(1).

³ See also Perfekta Enterprises Ltd v Commissioner of Inland Revenue (2019) 22 HKCFAR 203 at paragraphs 24-27 *per* Fok PJ

44. It clearly follows from this statutory charging provision that a landowner may sell his land at an enhanced price above his acquisition cost but not be subject to tax on the profits thereby generated unless in doing so he is embarking on a trade or business of selling land. **So the material issue of fact in the present case was whether the taxpayers were carrying on a trade or business when they made the profits sought to be taxed, or whether those profits arose from the sale of a capital asset.**

45. **The question of whether an activity amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the relevant fact-finding body on a consideration of all the circumstances:** see *Lee Yee Shing v Commissioner of Inland Revenue* and *Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue*.

46. **An intention to trade is essential.** As Lord Wilberforce said in *Simmons v IRC*:

“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 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 commercial operations, namely that situations are open to review.”

47. **As this passage shows: (1) the relevant time to consider intention is when the relevant asset is sold; (2) the intention then may be different to the intention when the asset was originally acquired; but (3) if a change of intention is to be relied upon as the basis for a finding of an intention to trade, precision in the fact finding process is required.**

...

48. It is well-settled that an owner of land may dispose of his land at a higher price than that for which he acquired it and not be liable for profits tax on the gain, since his gain is “a mere enhancement of value” which may simply be the result of market forces. Moreover, he may expend money improving the property in advance of such disposal without being held to have embarked on an adventure in the nature of trade. So, a landowner may lay out roads and sewers on his land or sub-divide it into smaller plots prior to sale, or re-invest the sale proceeds from part of the land to further improve the remaining parts of the land for further sales, without being found to have been carrying on a trade or business.

49. Equally, however, a landowner may act in relation to the sale of his land in such a way that he will be found to have disposed of it in the course of a trade or business even if he did not himself buy the land but instead inherited it or has held the land for a long time for his own use. This may be so even if the disposal is a “one-off” transaction.

50. As indicated above, in determining whether an activity amounts to trading, the fact-finding tribunal must consider all the circumstances involved in the activity. It will then have to make a “value judgment” as to whether this constitutes trading and whether the requisite intention to trade can be inferred. Regardless of what is claimed to be the intention subjectively, the question falls to be determined objectively having regard to all the surrounding circumstances.

51. For this purpose, various factors have been identified as constituting ‘badges of trade’, the presence or absence of which may assist in the ultimate determination of whether there is an intention to trade or the carrying on of a trade. In *Lee Yee Shing*, McHugh NPJ identified the following ‘badges’ at [60], namely:

‘...whether the taxpayer:

- (1) has frequently engaged in similar transactions?
- (2) has held the asset or commodity for a lengthy period?
- (3) has acquired an asset or commodity that is normally the subject of trading rather than investment?
- (4) has bought large quantities or numbers of the commodity or asset?
- (5) has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition?
- (6) has sought to add re-sale value to the asset by additions or repair?

(7) has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell an asset of that class?

(8) has conceded an actual intention to resell at a profit when the asset or commodity was acquired?

(9) has purchased the asset or commodity for personal use or pleasure or for income?’

These are very similar to the “badges of trade” listed by Sir Nicholas Browne-Wilkinson V-C (as he then was) in *Marson (Inspector of Taxes) v Morton*, which McHugh NPJ also set out in his judgment in *Lee Yee Shing* at [62].

52. It is important to note that Sir Nicholas Browne-Wilkinson V-C stated that it was clear the question of whether or not there was an adventure in the nature of trade depended on (a) “all the facts and circumstances of each particular case” and (b) “the intention between the various factors that are present in any given case”. He was also at pains to emphasize that “the factors...are in no sense a comprehensive list of all relevant matters, nor is any one of them, decisive in all cases”. As Lord Bridge has observed, “the law has never succeeded in establishing precise rules which can be applied to all situations to distinguish between trading stock and capital assets”. Indeed, it is perhaps unfortunate that the various factors are referred to as “badges of trade”, since that phrase tends to suggest that the mere presence of one or more of those badges may mean that an activity is in the nature of a trade. **This is not the intent of the list of factors, the purpose of which is to identify the facts and matters to which a fact-finding tribunal will look holistically in order to determine if the inference of an intention to trade is or is not to be drawn...(emphasis added).**’

37. To determine whether or not there was an intention to trade, the Court of Final Appeal in *Lee Yee Shing v Commissioner of Inland Revenue* (2008) 11 HKCFAR 6 held as follows:

‘59. **The intention to trade to which Lord Wilberforce referred is not subjective but objective:** *Iswera v Commissioner of Inland Revenue* [1965] 1 WLR 663 at 668. **It is inferred from all the circumstances of the case,** as Mortimer J pointed out in *All Best Wishes Ltd v Commissioner of Inland Revenue* (1992) 3 HKTC 750 at 771. A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit when the asset or commodity was acquired and the case where the taxpayer asserts that no such intention existed. If the taxpayer concedes the intention in a case where the taxing authority claims that a profit is assessable to tax, the concession is generally but not always decisive of intention: *Commissioners of Inland Revenue v Reinhold* (1953)

34 TC 389. However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition, the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case. It examines the circumstances to see whether the “badges of trade” are or are not present. In substance, it is the ‘badges of trade’ that are criteria for determining what Lord Wilberforce called “an operation of trade”.

...

61. In some cases, the source of finance for the purchaser may also be a badge of trade, particularly where the asset or commodity is sold shortly after purchase. But borrowing to acquire an asset or commodity is usually a neutral factor.’

D. DISCUSSION

D1. Burden of proof

38. Section 68(4) of the Ordinance provides that the burden of proving that the Assessments are excessive or incorrect falls on the Taxpayer as the appellant.

39. Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433 provides a succinct summary of the matters which the Taxpayer must establish to succeed the Appeal, as well as the circumstances under which the Appeal may fail:

‘46. On the question of whether the Property was trading stock or a capital asset, the Board stopped short of coming to any positive determination one way or the other. **It merely determined that the Taxpayer had not discharged its onus of proving that the Property was a capital asset.**

47. Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y. **The Taxpayer will have to prove his contention. So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y. Either way, no appeal by the taxpayer against the Board’s decision could succeed on the “true and only reasonable conclusion” basis unless the court is of the view that the true and only reasonable conclusion is that the position is Y.**

48. For ‘the position is X’ read “the Property was trading stock” and for “the position is Y” read “the Property was a capital asset”. That gives you the situation in the present case. **In other words, the Taxpayer fails unless**

the true and only reasonable conclusion is that the Property was a capital asset (emphasis added).

40. After considering all relevant circumstances objectively, with reference to the various factors identified as constituting the ‘*badges of trade*’, the Board is not satisfied that the Taxpayer has successfully shown the true and only reasonable conclusion in the present case to be that the Two Lots of Residential Car Parking Spaces were capital assets.

D2. The Taxpayer’s decision not to call material witnesses

41. It is clear that the material question which the Board has to determine, ie whether the Two Lots of Residential Car Parking Spaces were trading stocks or capital assets, is a question of fact. It is also clear that whether or not the Taxpayer had the intention to trade could only be inferred and defined from the acts and intentions of its controlling minds (see Brand Dragon Ltd (in liquidation) v Commissioner of Inland Revenue [2002] 1 HKC 660 at paragraphs 18-19 *per* Chu J (as she then was)).

42. However, the Taxpayer has decided not to call its Position Fs or shareholders at the material time to be witnesses in the Appeal:

- (1) Ms B was the Position F of the Taxpayer from 9 October 2015 to 29 January 2016, and she executed the October 2015 Resolution as Mr C’s ‘*nominee*’.
- (2) Mr C was the Position F of the Taxpayer from 29 January 2016 to 23 June 2017, and Mr D succeeded him from 23 June 2017 to 18 April 2018. In 2016, Mr C was a 50% shareholder of the Taxpayer. In 2017, Mr C transferred his shares to Mr D:
- (3) The Taxpayer describes Mr C and Mr D to be ‘*renowned and substantive business persons*’ with a lot of experiences in buying and selling properties. Both of them were extensively involved in the acquisition of the Parking Spaces and the subsequent sale of the Two Lots of Residential Car Parking Spaces:
 - (a) Mr D was the author of the Feasibility Report. He had provided personal guarantee to Bank V for the Bank V Loan to be advanced to the Taxpayer and was the addressee of the Bank V’s facility letter. The Commissioner highlights that Mr D was also authorised to sign the agreement relating to the purchase of the Parking Spaces and had signed the Company AC Licence Agreement, the licence-back agreements, the Sale and Purchase Agreements in respect of the Second Lot of Residential Car Parking Spaces and the cheques for repaying the Shareholders’ Loans in March 2017.

- (b) As for Mr C, he was the one executing the November 2016 Resolution as the sole Position F of the Taxpayer. He had also signed the Company AC Supplemental Licence Agreement and was involved in the management of the Taxpayer.
- (4) Ms AE, the property manager of the Taxpayer and the sole witness in the Appeal, gives evidence that Mr C *was* living in the Mainland recovering from cancer and Mr D *was* suffering from long COVID symptoms in Hong Kong:
 - (a) No satisfactory supporting medical evidence or explanation of Mr C's and Mr D's *current* physical condition have however been produced to the Board.
 - (b) Neither Mr C nor Mr D has prepared witness statements for the Taxpayer. The Taxpayer also has not attempted to secure their presence in the Appeal; the Taxpayer has not applied adjournment for them or tried to seek leave for them to give evidence by alternative means such as video links etc.
- (5) The Taxpayer equally has not called Mr H, the beneficial shareholder of Company G; Mr K, the beneficial shareholder of Company J; or Mr M to give evidence, alleging that they were mere '*passive*' investors with minimal involvement in the Taxpayer's daily management.
- (6) The Taxpayer has instead decided to rely solely on Ms AE's evidence.

43. The Commissioner, in these circumstances, invites the Board to draw adverse inference against the Taxpayer's case, on the ground that all material witnesses are not called when they should have been called. But the Board does not see it necessary to delve into that matter, as it is quite apparent, to be shown below, that the Taxpayer is not able to prove, with the limited evidence available, its contention.

D3. Reliance on Ms AE as the sole witness

44. Ms AE, the Taxpayer's sole witness, lacks personal knowledge of the transactions pertaining to the subject matter currently under consideration. Her evidence does not stem from direct involvement or first-hand experience, but is largely based on second-hand information. By way of general observations:

- (1) Despite Ms AE's assertion that she had participated in some meetings, spoken with her boss, Mr D, at office, and occasionally communicated with the Shareholders either through WhatsApp, WeChat or over the phone, her role was limited to listening. Ms AE

could not verify the truth or correctness of the statements or information heard by her.

- (2) Ms AE also asserts having direct communications with the Shareholders and being informed about the Shareholders' Dispute. These assertions are not however accompanied by specific details or corroborating evidence and can hardly be accepted as credible or reliable.
- (3) Ms AE acknowledges that while Mr D and Mr C were her bosses, she did not know Mr H, and she was introduced, out of courtesy, to Mr M and Mr K when they came to office by Mr D. Ms AE admits that she had limited understanding of the Shareholders and had maintained distant relationship with them. She did not know whether the Shareholders had made declarations to the Taxpayer that they would not pursue repayment of the Shareholders' Loans.
- (4) Despite Ms AE's attempt to 'affirm' the truth of the Taxpayer's correspondence ('the **Correspondence**') with the Commissioner regarding the Two Lots of Residential Car Parking Spaces, she admits that she had no personal knowledge or direct involvement in the matter. It was Mr D who had given her instructions and she had acted entirely in accordance with those instructions.

D4. The Feasibility Study

45. The Taxpayer also alleges that there is '*clear*' contemporaneous evidence to support its professed intention of acquiring the Parking Spaces for '*long-term investment*'.

46. The first contemporaneous evidence which the Taxpayer relies on is the Feasibility Study.

47. The Taxpayer's reliance on the Feasibility Report as the primary document showing that the Parking Spaces were acquired for '*long-term investment*' is fraught with difficulties. As accepted by the Taxpayer, the Feasibility Study contained Mr D's '*subjective assertions as to why the Parking Spaces would be a viable long-term investment*'. Mr D, the maker of such document, is however not called to give evidence.

48. On the other hand, Ms AE, the sole witness available, does not possess personal knowledge of the matters in the Feasibility Report, as it was Mr D who had obtained the information of the Parking Spaces from Agency Z, studied the information and conducted the site visit. Moreover, it was also Mr D who had dictated, over the phone, the contents of the Feasibility Report to Ms AE, whose sole responsibility was merely to type them up for the Investors' reference.

49. The Board is not satisfied that the Taxpayer can successfully prove, with the Feasibility Report, the contention that the Two Lots of Residential Car Parking Spaces were capital assets by reason of the following matters.

50. First of all, Ms AE's evidence that the '*focus*' of the Feasibility Study was the '*rental income and investment yield*' of the Parking Spaces does not appear to be compatible with Mr D's assessment, elsewhere in the Feasibility Report, that the '*average*' price of the Parking Spaces was '*very low*' in comparison to the '*transaction price*' (\$1,300,000) of a car parking space in the neighbourhood of District T. When viewed objectively, such assessment had the effect of attracting the Investors by highlighting or emphasizing the potential for a quick sale and the opportunity to realize substantial profits, thereby motivating them to acquire the Parking Spaces.

51. Second, the Taxpayer places reliance on Mr D's assessment of the Parking Spaces and their potential in the Feasibility Report. However, the credibility of this assessment is heavily contested by the Commissioner:

- (1) Mr D stated, in the Feasibility Report, the annual return of the Parking Spaces to be 4.27% up to the end of 2015 (ie \$330,000 x 12 months) and 4.53% from January 2016 to the end of 2017 (\$350,000 x 12 months) ('the **Annual Return on Investment**') respectively.
- (2) Mr D estimated there to be surplus each month, as the monthly licence fee receivable would be more than sufficient to cover the monthly mortgage repayment to Bank V (\$204,500).
- (3) However, in reaching the Annual Return on Investment, Mr D had omitted the interest that the Shareholders would have to bear for the Shareholders' Loans, or where such loans came out of the Shareholders' own funds, the Shareholders' opportunity costs for not being able to deploy those funds elsewhere.
- (4) Furthermore, Mr D had also neglected expenses such as the building management and maintenance fees etc.
- (5) These items of costs could hardly be regarded as '*unknown*' costs which Mr D would not be able to anticipate without the benefit of '*hindsight*' as argued by the Taxpayer.

52. While it is true, as argued by the Taxpayer, that Mr D had the discretion whether or not to factor certain costs into the equation when calculating the Annual Return on Investment, it is important to recognize that the more unreasonable Mr D was, the less accurate his assessment became, making it increasingly difficult for the Taxpayer to justify and eventually to prove the contention that the Parking Spaces were acquired for long-term investment.

53. Third, the Taxpayer makes the general observation that it is not ‘*uncommon*’ for a taxpayer to buy a property with mortgage and then rent the property out and use the rental to repay the mortgage each month:

- (1) The Taxpayer makes the point that there maybe months when the property is vacant or where the rental could not fully repay the mortgage; there may also be months where the taxpayer has to pay Government rates, or expend money on repairing the property etc.
- (2) The Taxpayer submits that an investment which may be loss-making from time to time does not *ipso facto* mean that the property owner did not intend, at the outset, to hold the property for long-term investment.

54. However, relying on general statement as such is unlikely to advance the Taxpayer’s case very far, considering that in the present case, there is no evidence to show the amount of costs which the Shareholders had to bear in keeping the Parking Spaces. There is also no evidence to show the terms agreed upon by the Shareholders concerning their investment of the Parking Spaces, such as the duration of their investment, the amount of capital involved, and whether they had an exit strategy in place.

55. Without concrete evidence or documentation, it is not for the Board to speculate that the financing arrangement was not, as argued by the Taxpayer, so ‘*precarious*’ or ‘*unreasonable*’.

56. On the other hand, the Commissioner submits that the longer the period before which the Shareholders could receive cash returns from the investment the more uncommercial the ‘*long-term*’ investment would indeed appear to be.

57. Furthermore, the Taxpayer also accepts that a profit could be made if the Residential Parking Spaces were sold, and indeed, the Feasibility Study also highlighted the ‘*reasonable*’ asking price to be one attraction of the investment. These matters, viewed together, would support that the better strategy for the Taxpayer was to sell the Residential Parking Spaces for immediate, substantial profits. The Taxpayer does not contest the validity of this; instead, the Taxpayer merely asserts that this was not necessarily the ‘*irresistible conclusion*’ in the present case.

58. Fifth, the Board is unable to accept the Taxpayer’s argument suggesting that the restriction on the individual sale of the Commercial Parking Spaces could be taken to imply that the Taxpayer had the intention to hold the Parking Spaces for long-term investment:

- (1) On the Taxpayer’s own case, the purpose of the Feasibility Report was to offer the Investors an evaluation of the viability of the investment of the Parking Spaces. However, it should be noted that Mr D did not mention, in the Feasibility Report, that the Commercial

Parking Spaces could not be sold individually but only as a whole, let alone citing it as a reason or factor contributing to his evaluation one way or the other.

- (2) Mr D merely mentioned that the Investors should '*prioritize*' acquiring car parking spaces being offered for sale '*in one lot*' as there would be less competition. He also mentioned that the asking price of those car parking spaces being offered for sale individually would usually be higher on the other hand; '*a vast amount of resources and manpower*' would also have to be incurred in negotiating and buying from individual owners.
- (3) The reason for not including the restriction in the Feasibility Report by Mr D was not specified or evident. The Taxpayer has not called Mr D to give evidence on this in the Appeal.

59. Sixth, although it was stated, on the face of the Feasibility Report, that the Parking Spaces were acquired for '*long-term*' investment purposes, the same should not be readily accepted. Despite the allegation that the Investors were each given a copy of the Feasibility Report, and were further being made aware of the Taxpayer's business model of properties holding and investment in Hong Kong, neither the Investors nor the Shareholders come forth to testify. There is simply a lack of evidence available to substantiate the actual terms which were agreed upon by the Shareholders. According to Ms AE's account, there is no written shareholders' agreement; the Shareholders had only agreed among themselves '*orally*'. However, as accepted by Ms AE, her evidence regarding their agreement is all hearsay.

60. Seventh, the Taxpayer has adduced no evidence, whether from the Investors or the Shareholders, to dispel satisfactorily the doubt, as raised by the Commissioner, that the Feasibility Report, which was dated a few days before the preliminary agreement for sale and purchase of the Parking Spaces, had indeed been considered and led to the acquisition of the Parking Spaces.

61. The Taxpayer also accepts, and it is in any event indisputable, that the Investors or the Shareholders might have in mind considerations other than those stated in the Feasibility Study. It is not for the Board to speculate what those other considerations were, or the respective weight given to them by the Investors or the Shareholders in comparison to the Feasibility Report.

62. Lastly, the absence of specific repayments terms and the understanding among the Shareholders that repayment would occur when there was a sufficient reserve aligns or is consistent with the commercial reality being that the Shareholders had intended to combine their resources to acquire the reasonably priced Parking Spaces for trading purposes.

D5. The October 2015 Resolution

63. The October 2015 Resolution, stating that the Parking Spaces were acquired for the purposes of ‘*long-term investment*’, is the other piece of contemporaneous evidence relied on by the Taxpayer.

64. Ms AE’s evidence is that the October 2015 Resolution was drafted by Company AF, upon her instructions as directed by Mr D. But the Taxpayer has not called either Mr D or Ms B, the then sole Position F and shareholder of the Taxpayer making the October 2015 Resolution, to testify.

65. There is, therefore, no evidence from the Taxpayer to answer the Commissioner’s challenges of the October 2015 Resolution regarding the following matters:

- (1) According to Ms AE, Ms B was an ‘*acquaintance*’ of Mr C, and as Ms B happened to have an existing company, ie the Taxpayer, at that time, she agreed to ‘*lend*’ it out.
- (2) Ms AE also gives evidence that Ms B had passed the October 2015 Resolution on Mr D’s instruction and as his ‘*nominee*’.
- (3) However, at the material time, neither Mr C nor Mr D was a Position F of the Taxpayer. Mr C replaced Ms B and became a Position F from 29 January 2016 to 23 June 2017. Mr D only became a Position F after Mr C from 23 June 2017 to 18 April 2018. Mr C also only became a shareholder of the Taxpayer in 2016 and Mr D in 2017.
- (4) Additionally, notwithstanding that the October 2015 Resolution was stated, on the face of it, to have been passed by Ms B at Location AG, Ms B was actually not in Hong Kong at that time.
- (5) Ms AE also acknowledges that she could not recall for sure where the October 2015 Resolution had in fact been passed.

D6. The alleged Shareholders’ Dispute

66. To recap:

- (1) The assignment of the Parking Spaces was completed on 29 March 2016.
- (2) On 28 February 2017, the Taxpayer effected the assignment of the First Lot of Residential Car Parking Spaces.

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- (3) By February 2017, ie 11 months after the assignment of the Parking Spaces, the Taxpayer had already sold 20 out of 43 (almost 50%) of the Residential Parking Spaces.
- (4) On 21 December 2018, the Taxpayer effected the assignment of the Second Lot of Residential Car Parking Spaces.

67. The Taxpayer explains that the relatively quick sale was caused by the Shareholders' Dispute. Bearing the burden of proof, the Taxpayer is required to show both the Shareholders' Dispute and that such dispute had indeed caused the sale of the Two Lots of Residential Car Parking Spaces.

68. The Taxpayer has, however, elected not to call the Shareholders like Mr K and Mr M to give evidence:

- (1) Ms AE asserts that these Shareholders were only 'indirectly' involved and were not familiar with the details.
- (2) Ms AE also alleges that the Shareholders have requested her to '*represent*' them, notwithstanding that Ms AE was not personally involved and had no knowledge of the decision-making process relating to the Parking Spaces and the Shareholders' Dispute.

69. The Taxpayer alleges that the November 2016 Resolution would show that the sale of the Two Lots of Residential Car Parking Spaces was caused by the Shareholders' Dispute. But as accepted by Ms AE, she was merely dictated the contents of the November 2016 Resolution by Mr D without having any personal knowledge or information of the underlying thinking or the deliberations involved.

70. Ms AE could not, therefore, confirm whether or not the matters described in the November 2016 Resolution are accurate. Nor would she be able to provide satisfactory answers to the Commissioner's challenges of the November 2016 Resolution below.

71. First, contrary to the Taxpayer's case that the November 2016 Resolution was allegedly passed (in part) for authorising the early termination of the Licence with Company W, it appears that the termination had been effected by the Taxpayer long before the passing of the November 2016 Resolution. Pursuant to the Licence, early termination must be effected by a 6-month advance written notice. Ms AE's evidence also supports that the termination had been effected by the notice of 1 May 2016.

72. Second, the Shareholders (including Mr M and Mr K) must have, before deciding to proceed with the purchase of the Parking Spaces, agreed with the Annual Return on Investment set out in the Feasibility Report, ie 4.27% (based on the monthly income of \$330,000 for the first year) and 4.53% (based on the monthly income of \$350,000 for the second and third years):

- (1) With the above being the case, there appears to be no discernible basis for the Shareholders' Dispute.
- (2) According to Ms AE, the Shareholders made the '*complaints*' in early 2016 while the assignment of the Parking Spaces was completed on 29 March 2016. In view of this, the Taxpayer's case that the Shareholders were unsatisfied with the rental income of the Parking Spaces, either before or shortly after the completion, is inherently improbable.
- (3) In fact, the Taxpayer received, essentially, the same basic monthly fee of \$350,000 from Company AC as from Company W; there was no certainty or guarantee that Company AC's gross revenue would exceed \$500,000 for the Taxpayer to have a 50% share of the excess.

73. Fourth, had the Shareholders intended to hold the Parking Spaces for long-term investment purposes as alleged, they would not have aborted the plan altogether without first trying to address the grievances of Mr M and Mr K or to buy them out at that stage:

- (1) It is relevant to note that Mr D only acquired the shares from other Shareholders in 2018.
- (2) By the time when the Taxpayer effected the Second Lot of Residential Parking Spaces on 21 December 2018, the relevant share transfers had already been completed (in April 2018).
- (3) By then, the alleged Shareholders' Dispute regarding the Taxpayer's business strategy had already been resolved and the reorganization of the Taxpayer was concluded.

74. Fifth, the fact that the Taxpayer did not have sufficient manpower and experience to deal with the leasing of the Parking Spaces directly with the end users as stated in the November 2016 Resolution would be inconsistent with the Taxpayer's case that it had intended to hold the Parking Spaces for long-term investment purposes. As further pointed out by the Commissioner, the Licence held by Company W was originally only fixed for a term of 3 years, from 1 January 2015 to 31 December 2017.

75. Lastly, the Shareholders' Dispute, even if established, would not necessarily negate the Taxpayer's intention to trade. The Shareholders might have initially intended to pool their funds to trade the Parking Spaces but only subsequently decided to withdraw due to the inability to effectively collaborate or work together. In such case, the Appeal would still fail.

76. In the premises, the Board is not satisfied that the Taxpayer has satisfactorily proved the Shareholders' Dispute and that such dispute led to the sale of the Two Lots of Residential Car Parking Spaces.

D7. The engagement of estate agents

77. The Board also rejects the Taxpayer's argument that it did not make proactive attempts to sell the Two Lots of Residential Car Parking Spaces and had only acted upon the 'unsolicited' offers from the estate agents for the following reasons:

- (1) The ultimate decision regarding whether or not to sell the Two Lots of Residential Car Parking Spaces rested with the Taxpayer.
- (2) The Taxpayer might not have taken active steps to market the sale, but the estate agents appointed had done so for the Taxpayer. It was not necessary for the Taxpayer to personally handle the selling. The Taxpayer could certainly engage or delegate all the tasks to the estate agents. The Taxpayer could rely on the estate agents' expertise and network to actively promote the sale of the Residential Parking Spaces and solicit potential purchasers.
- (3) After the Taxpayer announced the decision to sell the Residential Parking Spaces, it prompted more estate agencies to solicit business, and in the end, Agency Z, Agency AA and Agency AH were appointed.
- (4) To offer greater incentives, the Taxpayer agreed to pay bonuses to the estate agents successfully selling the Two Lots of Residential Car Parking Spaces. According to Ms AE, the bonus arrangement was suggested by some more senior estate agents to the Taxpayer to incentivize the sale, noting that the lump sum of each individual car parking space was relatively small.
- (5) While there is certainly nothing right or wrong for the Taxpayer to give bonuses to the estate agents, the effort and financial resources invested by the Taxpayer were indicative of a consistent intention to trade the Residential Parking Spaces. If there was no such intention to trade, it was unlikely that the Taxpayer would have taken all these actions and incurred the expenditures.

D8. The restrictions on the sale of the Commercial Parking Spaces

78. Ms AE gives evidence that:

- (1) The Investors or the Shareholders were aware of the restriction that the Commercial Parking Spaces could only be disposed of as a whole and not individually.

- (2) It was clear that the Commercial Parking Spaces '*could not be readily flipped on the property market for quick profits*', nor would they '*appeal*' to '*short-term*' investors or speculators.
- (3) The purchase of the Residential Parking Spaces formed part of the same transaction as the purchase of the Commercial Parking Spaces. Both purchases were made under the same agreement without differentiation.

79. First of all, it falls on the Taxpayer to prove the investment strategy of the Parking Spaces. However, the Taxpayer has called neither the Position Fs nor the Shareholders to give evidence on this. As for Ms AE, she accepts that she had no part to play in the decision making process of the acquisition of the Parking Spaces.

80. In any event, the restriction on the sale of the Commercial Parking Spaces does not necessarily show that the Parking Spaces were not acquired by the Taxpayer for trading purposes:

- (1) The Taxpayer could have acquired the Parking Spaces with different investment strategies for the Commercial Parking Spaces and the Residential Parking Spaces.
- (2) The Taxpayer could have sold the Residential Parking Spaces separately from the Commercial Parking Spaces. The fact that the Residential Parking Spaces (43 in number) and the Commercial Parking Spaces (195 in number) respectively made up 18% and 82% of the Parking Spaces (238 in total number), as submitted by the Taxpayer, is neither here nor there.
- (3) The fact that the Two Lots of Residential Car Parking Spaces (23 in number) only formed a small part of the Parking Spaces (9.6%) also would not prove the Taxpayer's case that the Parking Spaces were capital assets.
- (4) The Taxpayer is free to sell the Residential Parking Spaces individually, and also at different times. The fact that the Taxpayer has continued to hold the remaining 201 Parking Spaces, out of a total of 238 in number, does not necessarily refute the Taxpayer's intention to trade. The Taxpayer may wish to retain the remainder of the Parking Spaces for different reasons; among others, the Taxpayer could have decided that the market was not attractive and would rather put things on hold for the time being to achieve a greater profit etc. The Taxpayer has not provided evidence to show that these are not possible reasons.

E. CONCLUSION

81. For the reasons above, it cannot be shown by the Taxpayer that the true and only reasonable conclusion in the present case is that the Two Lots of Residential Car Parking Spaces were capital assets. Consequently, the Appeal should fail and the Assessments should be confirmed.

82. The Taxpayer is further ordered to pay, pursuant to section 68(9) of the Ordinance, the costs of the Board in the sum of \$25,000.