

Case No. D29/22

Profits tax - whether or not the sale of the Property amount to an adventure in the nature of trade – the intention at the time of acquisition of the property – stated intention has to be tested against objective facts and circumstances – whether or not the taxpayer’s evidence unchallenged by the Revenue could be taken as accepted by the Revenue as the fact – the Appellant’s burden of proof that the Property was purchased as a capital asset and the intention was to hold it on a long term basis – quick offer for sale and short holding period point to an intention to trade – whether or not leasing out a property for rental income follow that the Property must be held for long-term investment.

Panel: William M F Wong SC (chairman), Lam Karen and Tang Kim Hung Andy.

Dates of hearing: 30 June 2022.

Date of decision: 13 March 2023.

The taxpayer entered into a provisional agreement to purchase the Property on January 2010 and the Property was assigned to the taxpayer on June 2010. The taxpayer offered the Property for sale on February 2010 about one month after the signing of the provisional agreement to purchase the Property. The taxpayer continued to put up the Property for sale and increased the asking price on March 2010. The Taxpayer finally entered into a provisional agreement to sell the Property on September 2010, within 3 months the Property was assigned to the Taxpayer. The Assessor maintained the view that the sale of the Property amounted to an adventure in the nature of trade, and that the profit on the sale of the Property should be chargeable to Profits tax. The Taxpayer claimed that the intention for acquisition of the property was for use as the religious centre of Company H and there was no intention of trading for the purchase and sale of the Property.

Held:

1. In determining whether a property is a capital asset or a trading asset, the intention of the Appellant at the time of acquisition of the property is crucial (Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 2 All ER 798 followed).
2. The Appellant’s stated intention is not decisive and has to be tested against objective facts and circumstances (All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 followed).
3. The evidence put forward by the Taxpayer which was not challenged by the Revenue could not be taken as accepted by the Revenue as the fact. The Board may consider the whole of the circumstances presented to it and find

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whether the oral evidence is acceptable or not (All Best Wishes Ltd v CIR, HCIA 1/1992 and Hui Cheung Fai v Daiwa Development Ltd HCA 1734/2009 followed).

4. This Board comes to the view that this appeal must be dismissed because the Appellant fails to discharge its burden of proof that the Property was purchased as a capital asset and the intention was to hold it on a long term basis.
5. This Board agrees that the actions taken by the Appellant, ie quick offer for sale and short holding period clearly point to an intention to trade (Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6 followed).
6. In the circumstances, this Board agrees that the Appellant failed to demonstrate that she would be able to hold the Property in the long-term and repay the Loan had the Property not been sold.
7. This Board also agrees that even if the Appellant did lease out the Property, leasing out a property for rental income does not necessarily follow that the Property must be held for long-term investment. A property leasing out at market rents serves equally well as a trading stock. The fact that a property was leased out before disposal shed little, if any light on whether the property concerned was trading stock or capital asset, not to mention that the tenancy agreement was not executed in the present case (Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433 followed).

Appeal dismissed and costs order in the amount of \$20,000 imposed.

Cases referred to:

Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 2 All ER 798
All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750
Marson (Inspector of Taxes) v Morton and Others [1986] 1 WLR 1343
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
D99/98, IRBRD, vol 13, 486
Commissioner of Inland Revenue v Crown Brilliance Ltd [2016] 3 HKC 140

Tong Wai Han Kelly, instructed by KTG Consulting Limited, for the Appellant.
Lai Ming Yee and Chan Wai Lin, for the Commissioner of Inland Revenue.

Decision:

THE APPEAL

1. The issue in the present appeal is whether the profit derived by the Appellant from the sale of Property A(‘the Property’) should be chargeable to Profits Tax.

MATERIAL FACTS

2. Ms C (‘the Appellant’) has objected to the Profits Tax Assessment and the Second Additional Personal Assessment for the year of assessment 2010/11. The Appellant claims that the profit from sale of property should not be chargeable to Profits Tax.

3. At the relevant times, the Appellant entered into the following transactions in properties:

<u>Location</u>	<u>Date of Purchase</u>	<u>Date of Sale</u>
	(i) Provisional agreement	(i) Provisional agreement
	(ii) Formal agreement	(ii) Formal agreement
	(iii) Assignment	(iii) Assignment
	(iv) Purchase consideration	(iv) Sales proceeds
The Property	(i) XX-XX-2010	(i) XX-XX-2010
	(ii) XX-XX-2010	(ii) XX-XX-2010
	(iii) XX-XX-2010	(iii) XX-XX-2010
	(iv) \$17,150,000	(iv) \$19,830,000
The Other Property	(i) XX-XX-2009	(i) XX-XX-2010
	(ii) XX-XX-2009	(ii) XX-XX-2010
	(iii) XX-XX-2009	(iii) XX-XX-2010
	(iv) \$4,730,000	(iv) \$5,700,000

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4. Company D was incorporated as a private company in Hong Kong in 2010. At the relevant times, the shareholders and directors of Company D were:

	Date becoming <u>shareholder</u>	Date appointed <u>as director</u>
(i) Mr E	XX January 2010	XX January 2010
(ii) The Appellant	XX April 2010	XX April 2010

5. The formal sale and purchase agreement for purchasing the Property was signed by Company D. By a nomination dated 30 April 2010, Company D confirmed, among other things, that:

- (1) The deposit of \$1,715,000 for purchasing the Property was money belonging to the Taxpayer.
- (2) The Property was agreed to be purchased by Company D as agent for and on behalf of the Taxpayer.
- (3) Company D nominated the Appellant to take up the assignment of the Property.
- (4) The balance of the purchase price would be paid by the Taxpayer.
- (5) Company D renounced and relinquished all its rights and interests of and in the Property and the formal sale and purchase agreement.

6. At the relevant times, Mr E entered into the following transactions in properties:

<u>Location</u>	<u>Date of Purchase</u>	<u>Date of Sale</u>
Property F	(i) Provisional agreement	(i) Provisional agreement
	(ii) Formal agreement	(ii) Formal agreement
	(iii) Assignment	(iii) Assignment
	(iv) Purchase consideration	(iv) Sales proceeds
	(i) -	(i) XX-XX-2010
	(ii) XX-XX-2002	(ii) XX-XX-2010
	(iii) XX-XX-2002	(iii) XX-XX-2010
	(iv) \$3,977,778	(iv) \$17,000,000

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<u>Location</u>	<u>Date of Purchase</u>	<u>Date of Sale</u>
	(i) Provisional agreement	(i) Provisional agreement
	(ii) Formal agreement	(ii) Formal agreement
	(iii) Assignment	(iii) Assignment
	(iv) Purchase consideration	(iv) Sales proceeds
Property G	(i) XX-XX-2010	(i) XX-XX-2013
	(ii) XX-XX-2010	(ii) XX-XX-2013
	(iii) XX-XX-2010	(iii) XX-XX-2013
	(iv) \$17,800,000	(iv) \$30,000,000

7. Company H was incorporated by guarantee in Hong Kong in XXXX. Company H has been approved as a charitable institution under section 88 of the Inland Revenue Ordinance ('the Ordinance') since XX November XXXX.

8. At the relevant times, the directors of Company H were:

- (1) The Appellant
- (2) Mr J
- (3) Mr K (appointed on 15 April 2010)
- (4) Mr L (appointed on 15 April 2010)
- (5) Mr M (appointed on 15 April 2010)
- (6) Mr N (appointed on 15 April 2010)
- (7) Mr P (resigned on 15 April 2010)
- (8) Mr Q(resigned on 15 April 2010)
- (9) Mr R (resigned on 15 April 2010)

9. According to the notifications of change of address of registered office filed by Company H to the Companies Registry, Company H's addresses of registered office at the relevant times were:

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	<u>Address of registered office</u>	<u>Effective date</u>
(i)	Property F	XX October 2009
(ii)	Property G	XX January 2012

10. In reply to a questionnaire issued by the Assessor, the Appellant provided, among other things, the following particulars concerning the transactions in properties :

	<u>The Property</u>	<u>The Other Property</u>
(a)	Intended or actual usage of the property	As a religious centre As residence of the Appellant's sister
(b)	Reason(s) for selling the property	Found Property G which location was more suitable for the religious centre (not provided)
(c)	Gross profits	
	\$	\$
	2,680,000	970,000
(d)	Total expenses involved	
	Legal fees on purchase	20,000 10,000
	Stamp duty	643,125 177,375
	Commission on purchase	171,500 47,300
	Bank interest	44,339 50,000
	Decoration	600,000 500,000
	Legal fees on sale	20,000 10,000
	Commission on sale	<u>198,300</u> <u>57,000</u>
	Total expenses	1,697,264 851,675
(e)	Net profits	<u>982,736</u> <u>118,325</u>

11. The Assessor was of the view that the Appellant's property transactions amounted to an adventure in the nature of trade, and that the profit on sale of the Property and the Other Property was chargeable to Profits Tax. The Assessor raised on the Appellant the following Profits Tax Assessment for the year of assessment 2010/11:

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	\$
Profits on sale of properties	
The Property	1,582,736
The Other Property	<u>703,800</u>
Assessable Profits transferred to Personal Assessment ³	<u>2,286,536</u>

Note:

¹ Profit on sale of the Property:

Net profit	982,736
<u>Add: Decoration</u>	<u>600,000</u>
Profit on sale of the Property	<u>1,582,736</u>

² Profit on sale of the Other Property:

Net profit	118,325
<u>Add: Stamp duty overclaimed</u>	
\$(177,375 – 141,900)	35,475
Bank interest	50,000
Decoration	<u>500,000</u>
Profit on sale of the Other Property	<u>703,800</u>

³ No tax was demanded under Profits Tax as the Assessable Profits were transferred to Personal Assessment.

12. The Assessor raised on the Appellant the following Second Additional Personal Assessment for the year of assessment 2010/11:

	\$
Net Assessable Value	133,460
Assessable Profits	<u>2,286,536</u>
Total income	2,419,996
<u>Less: Deductions</u>	<u>126,300</u>
	2,293,696
<u>Less: Basic allowance</u>	<u>108,000</u>
Net Chargeable Income	<u>2,185,696</u>
Tax Payable thereon	338,054
<u>Less: Tax already charged</u>	<u>35,992</u>
Additional Tax Payable	<u>302,062</u>

13. KTG Consulting Limited ('the Representative'), on behalf of the Appellant, objected to the above assessments claiming that the profit on sale of the Property was not trading in nature and should not be chargeable to Profits Tax.

14. In response to the Assessor's enquiries concerning the purchase and sale of the Property, the Appellant put forth, among other things, the following contentions:

- (1) The Property was purchased for use as a religious centre of Company H ('the religious centre') because Property F, where the religious centre was originally located, was a very old building and no longer suitable for the operation of the religious centre.
- (2) Mr E advised the Appellant to purchase another property for the operation of the religious centre. The purchase was financed by Mr E. The Appellant purchased the Property after obtaining verbal agreement from Mr E.
- (3) The Appellant and Mr E had a joint bank account maintained with Bank S. The Appellant could use the fund in the bank account to purchase the Property on Mr E's behalf.
- (4) As Mr E was always not in Hong Kong, the Appellant and Mr E established Company D for the purpose of purchasing the Property. The Property was purchased in the name of the Appellant personally because it was easier for a natural person to obtain bank loan.
- (5) The Appellant considered the size and location of the Property was suitable for the operation of the religious centre. The Property was near to the Location T MTR station and the surrounding environment was better than other properties referred by property agent.
- (6) The down payment of the Property was financed by Mr E whose source of fund came from the sale proceeds of Property F.
- (7) Both the Appellant and Mr E had no business income. The Appellant needed to obtain a mortgage loan before the completion date of the purchase, ie XX June 2010. In order to show the bank that she had regular income to secure the mortgage loan, the Appellant entered into a tenancy agreement with Company U. Although the tenancy agreement was stamped, it was not executed and the Property was left vacant during the period of ownership.

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- (8) The Appellant obtained a mortgage loan of \$9,000,000 from Bank V on XX June 2010 ('the Loan'). The Loan was repayable by 240 monthly instalments of \$45,363.75 each.
- (9) After purchase of the Property, the directors of Company H visited the Property. They were of the view that the interior layout of the Property was not suitable for the operation of the religious centre. Also, the Property was near to the Place AA. Therefore, Mr E decided to sell the Property and the Appellant appointed property agents for the sale.
- (10) The Property was sold through Company W.
- (11) A director of Company H found Property G which was more suitable for the operation of the religious centre. The sales proceeds of the Property were used to purchase Property G.

15.
as follows:

Concerning the roles of Company H's directors, the Appellant gave replies

- (1) The Appellant was the director and chairman of Company H. Her role included:
 - (i) making decision for all day to day operation;
 - (ii) contacting donors and sponsors for fund raising;
 - (iii) reviewing and approving daily expenses;
 - (iv) signing cheques; and
 - (v) acting as secretary for Mr E.
- (1) Mr M was director and co chairman of Company H. His role included:
 - (i) making decision for teaching programs and monthly newsletters; and
 - (ii) signing cheques.

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- (2) The remaining directors were inactive and only involved in attending annual meetings or periodical activity of fund raising for Company H.

16. The Appellant provided, among other things, copies of the following documents:

- (1) A general power of attorney dated 9 July 2009 executed by Mr E appointing the Appellant to be his attorney.
- (2) A debit note dated 29 January 2010 from Company W to the Appellant for professional service fee of \$40,000 for the purchase of the Property.
- (3) A completion statement dated 28 June 2010 from Solicitors X ('the Solicitors') to the Appellant showing the balance due for the purchase of the Property was \$7,087,560.20, including legal fees on purchase of \$9,000.
- (4) A minutes of meeting of the board of directors of Company H dated 12 August 2010 ('the Minutes').
- (5) A completion statement dated 29 October 2010 from the Solicitors to the Appellant showing the balance for the sale of the Property was \$8,768,796.87, including legal fees on sale of \$10,000.
- (6) An official receipt dated 4 November 2010 from Company W to the Appellant showing that an amount of \$198,300 being payment for agency fee for sale of the Property was received.

17. The Appellant provided the Minutes to support her claim that the directors of Company H were of the view that the Property was not suitable for the operation of the religious centre. In respect of the Minutes supplied, the Representative put forth the following contention:

'... the purchase of [the Property] was totally NOT the normal business of ... Company H ... However, as per your department recommendation to [the Appellant], a minute was prepared to link up the Board of director of Company H to do the approval on the purchase and sales of [the Property] of which [the Appellant] considers that was prepared wrongly'.

18. The Appellant considered that the profit on sale of the Property was not

subject to Profits Tax due to the following reasons:

- (1) There was no intention of trading for the purchase and sale of the Property.
- (2) The Property was sold within a short period of time because the directors of Company H concluded that the interior layout of the Property was not suitable for the operation of the religious centre.
- (3) The purchase and sale of the Property was executed on behalf of Mr E. The purchase of the Property was financed by sales proceeds of the Property F, which was owned by Mr E. The sales proceeds of the Property were used to purchase Property G, which was also owned by Mr E.
- (4) The sales proceeds of the Property were used to cover the costs incurred in purchasing Property G on behalf of Mr E.

19. In December 2014, the Assessor commenced a tax audit on the tax matters of the Taxpayer. Upon enquiries, the Appellant put forth, among other things, the following contentions:

- (1) The Appellant claimed that she purchased the Property on behalf of Company H for the religious centre.
- (2) Company H had six directors and the Appellant was one of them. All along, only the Appellant was actively participated in the operation of Company H and she made decision and took action on behalf of Company H.
- (3) Company H planned to move the religious centre in 2010. The Appellant purchased the Property on behalf of Company H. She once arranged Company D to purchase the Property because she and Mr E thought that it would be easier to execute legal documents as Mr E was always absent from Hong Kong. The Property was later purchased in the name of the Appellant because it was difficult for Company D to apply for mortgage loan.
- (4) Before the purchase of the Property, the Appellant only consulted Mr E and funds were received from him for the purchase. After the purchase, the other directors and some voluntary workers of

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Company H expressed their adverse comment that the Property was near the Place AA. The Appellant sold the Property and looked for a replacement.

- (5) No legal document such as declaration of trust or power of attorney were signed between the Taxpayer, Mr E and Company H regarding the purchase of the Property on Mr E or Company H's behalf.

20. The Assessor has obtained the following information and documents:

- (1) A tenancy agreement dated 20 May 2010 entered into between the Appellant and Company U showing that the Property was leased out at a monthly rent of \$70,000 for the period from 13 July 2010 to 12 July 2012;
- (2) A repayment schedule history from Bank V showing that mortgage interest totaling \$66,621.41 was paid in respect of the Loan for the period from 28 July 2010 to 29 October 2010.
- (3) A letter dated 13 June 2014 from Company W concerning the Property:
- (i) The Appellant appointed Company W to sell the Property on 26 February 2010.
- (ii) The original asking price of the Property was \$30,220,000 and had been changed as follows:

<u>Date</u>	<u>Asking price</u>
	\$
26 February 2010	30,220,000
22 March 2010	35,000,000
12 April 2010	24,000,000
26 April 2010	22,800,000

- (iii) The Appellant appointed Company W to let out the Property on 3 May 2010 and the asking rent was \$113,325.

21. The Assessor maintained the view that the sale of the Property amounted to an adventure in the nature of trade, and that the profit on sale of the Property should be chargeable to Profits Tax for the year of assessment 2010/11. Having regard to the information provided by the Taxpayer, the Assessor opines that the Profits Tax Assessment

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and the Second Additional Personal Assessment for the year of assessment 2010/11 should be revised as follows:

(1) Profits Tax Assessment:

	\$
Profits on sale of properties	
The Property	1,712,954
The Other Property	<u>703,800</u>
Assessable Profits transferred to Personal Assessment	<u>2,416,754</u>

Note:

¹ Profit on sale of the Property:

	\$	\$
Gross Profit		2,680,000
<u>Less:</u> Legal fees on purchase [Fact (11)(c)]	9,000	
Stamp duty	643,125	
Commission on purchase [Fact (11)(b)]	40,000	
Bank interest [Fact (15)(b)]	66,621	
Legal fees on sale [Fact (11)(e)]	10,000	
Commission on sale [Fact (11)(f)]	<u>198,300</u>	<u>967,046</u>
Profit on sale of the Property		<u>1,712,954</u>

² No tax was demanded under Profits Tax as the Assessable Profits were transferred to Personal Assessment.

(2) Personal Assessment:

	\$
Net Assessable Value	133,460
Assessable Profits [Fact (16)(a)]	<u>2,416,754</u>
Total income	2,550,214
<u>Less:</u> Deductions	<u>126,300</u>
	2,423,914
<u>Less:</u> Basic allowance	<u>108,000</u>
Net Chargeable Income	<u>2,315,914</u>
Tax Payable thereon	357,587
<u>Less:</u> Tax already charged	<u>35,992</u>
Additional Tax Payable	<u>321,595</u>

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22. The above are facts relied upon by the Commissioner of the Inland Revenue ('CIR') in its determination dated 29 July 2021 ('the Determination').

23. By the Determination:

- (1) Profits Tax Assessment for the year of assessment 2010/11, dated 16 March 2015, showing Assessable Profits of \$2,286,536 is increased to Assessable Profits of \$2,416,754.
- (2) The Second Additional Personal Assessment for the year of assessment 2010/11 under Charge Number X-XXXXXXX-XX-X, dated 16 March 2015, showing Net Chargeable Income of \$2,185,696 with Additional Tax Payable of \$302,062 is increased to Net Chargeable Income of \$2,315,914 with Additional Tax Payable of \$321,595.

GROUND OF APPEAL

24. In the Notice of Appeal, the Appellant, through KTG Consulting Limited, claimed that:

- (1) The Appellant, as one of the executive director of Company H, purchased the Property in the absence of Mr E (the spiritual head of Company H) in Hong Kong for use as a religious centre by Company H. Before the purchase, the action to purchase the Property was agreed by Mr E and other major directors of Company H.
- (2) After the Property was purchased, the other major directors of Company H visited the Property. The directors disagreed to use the Property as religious centre of Company H because of the special floor plan. They proposed to dispose of the Property and buy another property for use as the religious centre. The quick offer for sale and short holding period of the Property did not mean that the Appellant had an intention to trade.
- (3) The money obtained from the sale of Property F, though legally owned by Mr E, was used to purchase the Property. The money obtained from the sale of the Property was used to purchase the next religious centre at Property G.

- (4) The Appellant entered into a tenancy agreement in order to earn more funds for purchasing a replacement property and to assist the Appellant to secure a mortgage for the Property more easily.

APPLICABLE LEGAL PRINCIPLES

25. Section 14(1) of the Inland Revenue Ordinance (‘the Ordinance’) provides that:

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

26. Section 2(1) of the Ordinance provides:

“‘Person”(人、人士) includes a corporation, partnership, trustee, whether incorporated or unincorporated, or body of persons;’

“‘Trade”(行業、生意) includes every trade and manufacture, and every adventure and concern in the nature of trade;’

“‘Trustee”(受託人) includes any trustee, guardian, curator, manager, or other person having the direction, control, or management of any property on behalf of any person, but does not include an executor.’

27. Section 68(4) of the Ordinance provides that:

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

28. In determining whether a property is a capital asset or a trading asset, the intention of the Appellant at the time of acquisition of the property is crucial. In Simmons (as liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 2 All ER 798, Lord Wilberforce said at pages 800e to f:

‘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?'

29. The Appellant's stated intention is not decisive and has to be tested against objective facts and circumstances. In All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750, Mortimer J (as he then was) said at page 771:

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

30. In Marson (Inspector of Taxes) v Morton and Others [1986] 1 WLR 1343, Sir Nicolas Browne-Wilkinson VC summarized the relevant principles:

- (a) Only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade (at page 1347H).
- (b) The question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case (at page 1348B).

31. In Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6, Bokhary and Chan PJJ emphasized in paragraph 38 that the question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. On the question of 'trade', McHugh NPJ stated in paragraph 60 that for most cases, the 'badges of trade' that indicate the carrying on of a trade are whether the taxpayer:

'(1) has frequently engaged in similar transactions?'

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- (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 Appellant 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?'*

32. In Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433, one of the questions posed in the case stated was whether in distinguishing trading stock from a capital asset, one must only focus on the Appellant's intention at the time the property was acquired or to consider all the circumstances (the badges of trade), Bokhary and Chan PJJ answering the question in paragraphs 40 and 55 as follows:

'40. It is clear that question (ii)(b) uses the expression 'badges of trade' to mean the circumstances that shed light on the issue of intention. Those circumstances simply do not fall to be considered separately from the issue of intention or any assertion made by the Appellant or on its behalf as to intention.'

'55. The question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case.'

33. In the Board's case D99/98, the taxpayer claimed that the property was purchased on behalf of his brother-in-law and was sold because it was found to be unaffordable to his brother-in-law. The Board was not satisfied that the cost of purchase

of the property was met by the brother-in-law or that the net proceeds of sale were paid over to him. Further, there was no clear evidence of the existence of a trust. Hence, the taxpayer had failed to discharge its burden of proof under section 68(4) of the Ordinance that he purchased the property on behalf of the brother-in-law. The fact that the property was sold only 9 days after being assigned to the taxpayer was inconsistent with a long-term investment intention towards the property. The taxpayer had purchased the property for his own benefit. As an *obiter dictum*, if the taxpayer had been found to have purchased the property on behalf of his brother-in-law, any trading profit derived from the sale of the property should be assessed to the taxpayer as trustee because he was more than a mere nominee – his trading activities embraced purchase, financing and sale.

34. In Real Estate Investments, Bokhary and Chan PJJ said the following about taxpayer's burden of proof in paragraphs 32 and 47:

'32. It is natural and appropriate to strive to decide on something more satisfying than the onus of proof. And it should generally be possible to do so. But tax appeals do begin on the basis that, as s.68(4) of the Inland Revenue Ordinance provides, '[t]he onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant'. And it is possible although rare for such an appeal to end – and be disposed of – on that basis.'

'47. 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 Property was a trading stock]. And it would likewise fail if the Board merely determines that he has not proved his contention that [the Property was a capital asset].'

35. In Commissioner of Inland Revenue v Crown Brilliance Ltd [2016] 3 HKC 140, the Commissioner of Inland Revenue, pursuant to section 69 of the Ordinance, applied to the Court of First Instance for leave to appeal against the Board's decision. One of the questions of law proposed by the Commissioner was whether the Board misdirected itself in law and/or erred in law in relying on and/or giving undue weight to the Appellant's representatives' assertions or representations which were unsupported by any evidence or were not adduced as evidence. G Lam J held in the affirmative and stated the following:

'15. In my respectful opinion, it is clear in this case that the representations made on behalf of the Taxpayer were not agreed facts. ... What was agreed was the fact that the Taxpayer made those representations, or 'claims', to the Revenue. There was no agreement that the contents of the representations were in fact true and correct. Nor, in my view, were the representations made by the tax representative in themselves evidence supporting the truth of their contents.'

‘18. Where it went wrong, with respect, was in treating the representations that had been made by the tax representative in letters to the Revenue as agreed facts or effectively unchallenged evidence, when those matters were in fact contentious.’

‘19. In the present context, I accept the submission of Mr Leung, who appeared for the Commissioner on this appeal, that a fact is not proved by its assertion in argument. It is proved by evidence, oral or documentary. The representations and oral submissions made by the tax representative, without more, do not amount to evidence. This has been the practice of the Board itself: see Board of Review Decisions Nos D7/08 at §64, D35/10 at §§12-13, D18/13 at §50 and D28/12 at §§16-17. Mr Leung accepted that the contemporaneous documents submitted by the tax representative, at any rate those documents whose authenticity is not in dispute, may be considered by the Board as admissible documentary evidence. But the assertions and submissions that are not supported by the undisputed contemporaneous documents stand on a different footing and ought not, without more, to be treated as evidence.’

ANALYSIS

36. Having considered the parties’ evidence and submissions, this Board comes to the view that this appeal must be dismissed because the Appellant fails to discharge its burden of proof that the Property was purchased as a capital asset and the intention was to hold it on a long term basis.

37. First, it is fact and the Appellant purchased and then effected a sale of the Property within a relative short period of time. The Appellant entered into a provisional agreement to purchase the Property on XX January 2010 and the Property was assigned to the Appellant on XX June 2010.

38. Information from Company W showed that the Appellant offered the Property for sale on XX February 2010 at \$30,220,000, about one month after the signing of the provisional agreement to purchase the Property.

39. The Appellant continued to put up the Property for sale and increased the asking price to \$35,000,000 on XX March 2010. The Appellant finally entered into a provisional agreement to sell the Property through Company W on XX September 2010, ie within 3 months the Property was assigned to the Appellant.

40. This Board agrees that the actions taken by the Appellant, ie quick offer for

sale and short holding period clearly point to an intention to trade: Lee Yee Shing.

41. Secondly, there is no evidence to show that the Appellant has the financial ability to hold the Property on a long-term basis. The Appellant obtained a mortgage loan of \$9,000,000 (about 52% of the purchase price) from Bank V ('the Loan') to finance the purchase of the Property and the Loan was repayable by 240 monthly instalments of \$45,363.75 each.

42. However, the Appellant admitted that neither she nor Mr E had any regular income and had to enter into a tenancy agreement with Company U in order to secure the Loan. It must be noted that there is no evidence as to how the Appellant could handle the mortgage payments if there were any changes in tenants and/or the tenants were not able to pay rent due to a variety of reasons. It is apparent that no mature considerations were given to such an inevitable incidence of property holding.

43. The Appellant submitted that as the centre was owned by Mr E, whether Company H were able to pay rent or not to Mr E was totally depended on the instructions from Mr E. Company H has sufficient fund to pay rent to the Appellant which can be used for the repayment of the mortgage loan. However, there is no evidence from Mr E at all.

44. In any event, the Appellant admitted that the tenancy agreement was not executed because she was going to sell the Property.

45. In the circumstances, this Board agrees that the Appellant failed to demonstrate that she would be able to hold the Property in the long-term and repay the Loan had the Property not been sold.

46. Further, for the remaining balance of the purchase cost of \$6,435,000, it is the Appellant's claim that it was financed by the sales proceeds from Property F. However, Mr E only entered into a provisional agreement to sell Property F on XX March 2010, which was after the Property was purchased on XX January 2010.

47. The CIR is correct in submitting that apart from bare assertions, there is no evidence to show that, at the time when the Appellant purchased the Property, Property F had been put up for sale and could be successfully sold out so that its sale proceeds could be used to finance the purchase of the Property.

48. Thirdly, there is no evidence to support the Appellant's central case that the Property was purchased on behalf of Mr E. The Appellant claims that the purchase of the Property was executed on behalf of Mr E in his absence from Hong Kong at the time of purchase. Both Property F and Property G, being used as religious centres of Company H, were purchased in the name of Mr E and legally owned by him. The agreement on purchase of Property F dated 30 January 2002 was signed by Mr R as duly authorized agent of Mr E. Similarly, the provisional agreement, agreement and assignment on sale of Property F dated 2 March 2010, 16 March 2010 and 25 June 2010 respectively were signed by the Appellant as lawful attorney of Mr E. Mr E had been appointing agent and attorney in handling his property transactions.

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49. This Board accepts that had the purchase of the Property been genuinely executed on behalf of Mr E, there is no credible explanation as to why similar arrangement could not be made for the purchase of the Property. In particular, Mr E was able to sign the agreement on purchase of the Property and the Nomination on 28 January 2010 and 30 April 2010 respectively.

50. In particular, this Board notes that in the previous correspondences with the Revenue, the Appellant claimed that she used Company D to purchase the Property as the company was owned by Mr E and herself on a 50:50 shareholdings. Later on, the Appellant realized that it was inconvenient to obtain Mr E's signature during the time of purchase as Mr E was constantly not in Hong Kong. Therefore, the Appellant purchased the Property personally.

51. This Board agrees that if Mr E genuinely intended to purchase the Property himself for use as a Religious centre, being the sole shareholder and director of Company D when it was incorporated, he could continue to use Company D to hold the Property. It is not necessary for him to transfer 50% of Company D's shareholdings to the Appellant.

52. The Appellant alleged that Mr E was unable to obtain mortgage loan under the name of Company D. However, no evidence was provided to support such allegation. This Board notes that both the purchase of Property F and Property G owned by Mr E was financed by mortgage loans.

53. The Appellant also submitted that the purchase cost of the Property was not borne by her but Mr E and Company D. The Appellant submitted that the first deposit of \$800,000 was paid by her for urgency and it was later returned to her after Property F was sold.

54. However, the amount of \$1,259,117.80 received by the Appellant did not match with the amount of the first deposit. There is no evidence to show that the amount was a repayment of the first deposit.

55. The Appellant also claimed that the second deposit of \$915,000 was paid by Company D on 27 January 2010 to support the Property was purchased on behalf of Mr E. However, in the previous correspondences with the Revenue, the Appellant confirmed that the first and the second deposit was paid by her and supplied extract of bank statements issued by The Hongkong and Shanghai Banking Cooperation in support.

56. Additionally, Company D was incorporated in 2010. The mere fact that Company D was set up in 2010 is not probative in proving that the Property was purchased on behalf of Mr E.

57. The fact is that the Nomination dated 30 April 2010 signed by both Company D and the Appellant explicitly stated that the deposit of \$1,715,000 (ie first deposit of \$800,000 and second deposit of \$915,000) was money belonged to the Appellant and Company D was an agent acting for and on behalf of the Appellant. This directly

contradicts the Appellant's case.

58. The Appellant submitted that in the provisional purchase agreement, the purchaser was stated as 'Ms C or its nominee(s)'. This, it is argued, tends to show that the Property was purchased on behalf Mr E. This Board disagrees. It could well mean that the Appellant was planning to sell the Property as a confirmor as well.

59. CIR also submitted that regarding the Appellant's claim that the purchase cost of the Property was borne by Mr E from the sales proceeds of Property F, even if the purchase cost came from the sales proceeds of the Property, it did not necessarily follow that the Property was purchased on behalf of Mr E. It is the Appellant who entered into the Assignment to purchase the Property.

60. This Board also agrees that even if the Appellant had been found to have purchased the Property on behalf of Mr E, any trading profit derived from the sale of the Property should be assessed to the Appellant as trustee because she was more than a mere nominee – her trading activities embraced purchasing the Property, putting it up for sale and letting, entering into tenancy agreement to facilitate the application of the Loan and finally selling the Property: D99/08.

61. Fourthly, the Appellant's reasons for effecting a quick sale of the Property are not convincing. The Appellant's case is that before the purchase, the action to purchase the Property was agreed by Mr E and the other major directors of Company H. It is also the Appellant's case that after the Property was purchased, the other major directors of Company H disagreed to use the Property as religious centre. However, it is unclear to this Board as to why there was such a sudden change of stance from the other major directors. The purchase of a property is a serious matter. This Board does not accept that the major directors preferred to defer to the decision of Mr E without inspection the Property before its purchase and then after inspection of the same post completion decided that the Property was not suitable and had to be sold. This is hardly convincing.

62. The Appellant provided a minutes of meeting of the board of directors of Company H dated 12 August 2010 ('the Minutes') to support her claim. The Minutes were printed on letterhead of Company H containing the address of Property G. The purchase of Property G was completed on 31 December 2010 and according to the record of the Companies Registry, Property G was the registered office of Company H with effect from 16 January 2012. It is not explained how Company H could have held the meeting at Property G on 12 August 2010. When being queried by the IRD, the Appellant shifted her stance and claimed that the Minutes was wrongly prepared. This Board agrees that it casts doubt on the authenticity of the Minutes and circumstances leading to the sale of the Property. This Board attaches little weight to the Minutes which is a self-serving document in any event.

63. Fifthly, the Appellant submitted that the sales proceeds of the Property were used to purchase Property G and thus the Property was purchased for use as religious centre. This Board agrees that the application of sales proceeds had no relevance to the Appellant's intention at the time of the purchase of the Property. Even if the Appellant allowed Mr E

to use the sales proceeds to purchase Property G, which was used as a religious centre, there is no implication that the Property is also intended to be used as a religious centre in the first place.

64. Sixthly, the Appellant submitted that she entered into a tenancy agreement in order to earn more funds for purchasing a replacement property. However, the Appellant admitted that the purpose of the tenancy agreement was to secure the Loan only. The tenancy agreement had never been executed as the Appellant was going to sell the Property. As a matter of fact, the Property was left vacant during the period of ownership.

65. This Board also agrees that even if the Appellant did lease out the Property, leasing out a property for rental income does not necessarily follow that the Property must be held for long-term investment. A property leasing out at market rents serves equally well as a trading stock. The fact that a property was leased out before disposal shed little, if any light on whether the property concerned was trading stock or capital asset: Real Estate Investments, not to mention that the tenancy agreement was not executed in the present case.

66. Seventhly, in the Notice of Appeal, the Appellant claimed that the purchase of the Property was agreed by Mr E and other major directors of Company H and that the major directors can provide personal declaration and written confirmation in support. However, no such documents were provided by the Appellant. The Appellant also claimed in the Notice of Appeal that the Property was sold because the other major directors were of the view that it was not suitable for the operation of a religious centre. Even though the other directors' opinion was so crucial and led to the sale of the Property, the Appellant failed to call the other directors of Company H as witnesses.

67. Insofar as Mr Y is concerned, he was not the founder or director of Company H at the relevant times and did not have a role in the acquisition and sale of the Property. He assisted to look after a religious centre in Country Z. Hence, this Board agrees that he had no knowledge on the intention of the Appellant and Mr E at the time of acquisition of the Property and the circumstances leading to its sale. He could not have confirmed for all what happened from his own personal knowledge.

68. Finally, the CIR relies on the following badges of trade as summarized by McHugh NPJ in Lee Yee Shing:

(1) ***Whether the Appellant has frequently engaged in similar transactions?***

The Appellant had purchased and sold properties from 2006 to 2013, the profits on sale of which were assessed under Profits Tax.

(2) ***Whether the Appellant has held the asset or commodity for a lengthy period?***

No. The Appellant held the Property for a short period of time, within 3 months after the Property was assigned to the Appellant.

- (3) ***Whether the Appellant has acquired an asset or commodity that is normally the subject of trading rather than investment?***

In Hong Kong, real property can be acquired for trading or investment purposes.

- (4) ***Whether the Appellant has bought large quantities or numbers of the commodity or asset?***

The Appellant purchased two units in the present transaction. It is also well-settled that a single, one-off transaction can be an adventure in the nature of trade: Marson.

- (5) ***Whether the Appellant has sold the commodity or asset for reasons that would not exist if the Appellant had an intention to resell at the time of acquisition?***

The Appellant claimed that the Property was sold because the major directors of Company H were of the view that it was not suitable for the operation of a Religious centre after the purchase of the Property.

- (6) ***Whether the Appellant has sought to add re-sale value to the asset by additions or repair?***

The Appellant acquired and sold the Property with vacant possession. The Appellant had once claimed decoration expenses of \$600,000 being incurred for the Property. When being queried by the IRD, the Appellant failed to provide documentary evidence to support the expenses claim.

- (7) ***Whether the Appellant 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?***

The Appellant offered the Property for sale on XX February 2010 at \$30,220,000 prior to its assignment to the Appellant. The Appellant

continued to put up the Property for sale and increased the asking price to \$35,000,000 on 22 March 2010. The Property was sold through Company W on XX September 2010 ie within 3 months the Property was assigned to the Appellant.

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

The Appellant claimed that the intention for acquisition of the Property was for use as the religious centre of Company H.

- (9) *Whether the Appellant has purchased the asset or commodity for personal use or pleasure or for income?*

No. The Property was not used or leased out during the period of ownership. It was left vacant.

DISPOSITION

69. For all the reasons stated above, this appeal is dismissed and the Appellant is order to pay costs in the sum of HK\$20,000 to the IRD.