

**Case No. D30/22**

**Profits tax** – whether or not the disposed of subject units as capital assets or as trading stocks – apportionment of the purchase and purchase transaction costs of the Property – Board’s function on hearing – assertions and submissions not supported by undisputed contemporaneous documents – self-serving statements or minutes – adverse inferences drawn in the absence of material evidence – whether or not benefit of the doubt and assumptions should be made in its favour in the absence of evidence – burden to prove that the Property was acquired as a capital asset - flexible intention – intention of a company inferred and defined from the acts and intentions of its controlling minds – insignificance of the property yielded rental income – Whether the offers were unsolicited or not is a significant factor – The Board’s duty to consider the valuation

Panel: William M F Wong SC (chairman), Lau Yee Cheung and Lee Ian Philip.

Date of hearing: 22 September 2022.

Date of decision: 13 March 2023.

The Appellant is a company incorporated in Hong Kong. On 28 March 2013, the Appellant purchased the Property. In less than one year after the completion of the purchase of the Property, the Appellant sold the Subject Units of the Property and received gains from the sale of the subject units of the Property. The Appellant excluded the gains from its assessable profits. The Assessor disagreed and issued the assessments on the basis that the gains should be included because the purchases and sales of the subject units amounted to adventures in the nature of trade and so the gains should be chargeable to profits tax. The Appellant appealed against the determination.

The central issue in this appeal is whether the Appellant purchased the Property and disposed of the Subject Units as capital assets or as trading stocks. The Commissioner of Inland Revenue’s case is that the Appellant acquired the Property at a bargain price with the intention to sub-divide it and did sell the Subject Units at a massive profit. The Appellant filed its Notice of Appeal and its case is that the Property was acquired for long term investment. The other issue is the proper apportionment of the purchase and purchase transaction costs of the Property.

**Held:**

1. The Board’s function on hearing an appeal under section 68 of the Ordinance is to consider the matter de novo (Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392 followed).
2. Where the facts are in dispute, it is for the Board to make findings on the

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

basis of the evidence before it. The assessor is entitled to have his assessment confirmed unless it is satisfactorily challenged by the taxpayer and shown to be excessive (CIR v Crown Brilliance Ltd [2016] 3 HKC 140 and CIR v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224 followed).

3. If the taxpayer gives no evidence, the Board should deal with the case on the material before it (CIR v Crown Brilliance Ltd [2016] 3 HKC 140 followed).
4. It is important to note that unless they are accepted by the CIR as being true and accurate, the representations made on behalf of the taxpayer are not themselves evidence supporting the truth of their contents. Assertions and submissions that are not supported by the undisputed contemporaneous documents ought not, without more, be treated as evidence (CIR v Crown Brilliance Ltd [2016] 3 HKC 140 followed).
5. This Board takes into account all the facts and circumstances of the case. Any self-serving statements or minutes by any taxpayer, if not supported by surrounding facts, have little, if any, probative evidential value in establishing the relevant intention. It is very easy for every property speculators to set out in a template board minutes that it intends to hold the relevant property as a capital asset. When assessing the documentary evidence, the Board should not take documents produced by the Appellant at face value. In respect of board minutes, they are neither conclusive nor decisive of the issue and must be assessed against all the surrounding circumstances (Brand Dragon Limited v Commissioner of Inland Revenue [2002] HKRC 90-115; and D62/91 6 IRBRD 476 followed). The same applies to the self-classification of the properties as non-current assets.
6. A taxpayer's tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. Adverse inferences may be drawn in the absence of material evidence, or where a witness who might be expected to have material evidence is not called (D14/08 (2008-09) 23 IRBRD 244 and D8/16 (2016-17) 31 IRBRD 502 followed).
7. An Appellant cannot be in a position to benefit from the sparsity of evidence. This means that the Appellant should not be given the benefit of the doubt in the absence of evidence, and no assumptions should be made in its favour (Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213 followed).
8. Where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, it is open to the Board to infer that that person's evidence would not have helped that party's case. The same principle would apply to a failure without proper explanation to produce a

document or other real evidence that a party might reasonably be expected to disclose (South China Securities Ltd v Lam Kwen Yuen [2012] 5 HKLRD 524 followed).

9. This Board agrees that the Appellant can only succeed on this ground of appeal if it can positively prove that its intention was to acquire the Subject Units as a capital asset. This Board has carefully considered the submissions of the Appellant and the CIR and the evidence in this Appeal. This Board has come to the clear view that the Appellant fails to discharge its burden to prove that the Property was acquired as a capital asset. Rather, the totality of the evidence shows that the Property was purchased as a trading stock and the Appellant had an intention to trade. This Board agrees that, on the facts, it is more probable that the Shareholders pooled their funds together to exploit the bargain price of the Property, and re-sell it at a profit. (Church Body of Hong Kong Sheng Kung Hui v CIR (2016) 19 HKCFAR 54; Simmons v IRC [1980] 1 WLR 1196; All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750; Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6 and Real Estate Investments (NT) Ltd v CIR [2007] 1 HKLRD 198 followed).
10. As to the possibility that the Appellant purchased the Property for either rent or sale, given the burden of proof rests with the Appellant, it would fail to prove it had a capital intention (D129/00 15 IRBRD 981 followed). A flexible intention is necessarily and logically inconsistent with an intention to hold the Property for a long-term investment – an intention to sell at the first available opportunity cannot be an intention to hold the property as a long-term investment. Therefore a flexible intention is in fact an intention to trade (Simmons v IRC [1980] 1 WLR 1196 followed). It was not possible for an asset to be both trading stock and permanent investment at the same time (D23/13 (2013-14) 28 IRBRD 618 followed).
11. As to the possibility that the Appellant purchased the Property intending to sell some of the units for profit and to keep some of the units for long term investment, in such scenario the Appellant would still have a trading intention for at least those units that were sold (Iswera v CIR [1965] 1 WLR 663 and D21/01 16 IRBRD 2016 followed).
12. The Appellant is a company, so the relevant intention can only be inferred and defined from the acts and intentions of its controlling minds (Brand Dragon Limited v CIR [2002] HKRC 90-115 followed).
13. It is not difficult to imagine that property speculators engaged in property trading would borrow money to acquire property which they would use to resale. The fact that the property yielded rental income would simply be a bonus to the speculator, as he would not need to fork out additional money to cover the interest payments. The insignificance of the rental point has been recognised in the authorities (D37/16 32 IRBRD 450; Chinachem

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

Investment Co Ltd v CIR (1987) 2 HKTC 261; and Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433 followed).

14. Whether the offers were unsolicited or not is not a significant factor. The fact that the Appellant was not actively looking for purchasers at the material time does not mean that it did not intend to sell at all (D76/94, IRBRD, vol 9, 394; D11/14, (2014-15) IRBRD, vol 29, 602 followed).
15. The Appellant did not spend time, money or effort in selling the Subject Units does not assist the Appellant's case. The amount of effort, etc., that the Appellant expended is consistent with a property trader and therefore does not provide any support to its case (Church Body of Hong Kong Sheng Kung Hui v CIR (2016) 19 HKCFAR 54 followed).
16. The Board is duty bound to come to its own conclusion after considering the evidence on valuation presented to it. The Board may, in an appropriate case, adjust the valuations provided by one party or another (Aust-Key Co Ltd v CIR [2001] 2 HKLRD 275; and Wing Tai Development Co Ltd v CIR [1979] HKLR 642 followed).

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

Cases referred to:

Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392  
Commissioner of Inland Revenue v Crown Brilliance Ltd [2016] 3 HKC 140  
Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224  
D14/08, (2008-09) IRBRD, vol 23, 244  
D8/16, (2016-17) IRBRD, vol 31, 502  
Kim Eng Securities (Hong Kong) Ltd v Commissioner of Inland Revenue (2007) 10 HKCFAR 213  
South China Securities Ltd v Lam Kwen Yuen [2012] 5 HKLRD 524  
Church Body of Hong Kong Sheng Kung Hui v CIR (2016) 19 HKCFAR 54  
Simmons v IRC [1980] 1 WLR 1196  
All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750  
Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6  
Real Estate Investments (NT) Ltd v CIR [2007] 1 HKLRD 198  
D129/00, IRBRD, vol 15, 981  
D23/13, (2013-14) IRBRD, vol 28, 618  
Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663  
D21/01, IRBRD, vol 16, 206  
Brand Dragon Limited v Commissioner of Inland Revenue [2002] HKRC 90-115  
D62/91, IRBRD, vol 6, 476  
D37/16, (2017-18) IRBRD, vol 32, 450  
Chinachem Investment Co Ltd v Commissioner of Inland Revenue (1987) 2 HKTC

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

261

Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433

D76/94, IRBRD, vol 9, 394

D11/14, (2014-15) IRBRD, vol 29, 602

Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275

Wing Tai Development Co Ltd v Commissioner of Inland Revenue [1979] HKLR 642

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:**

**A. The Appeal**

1. This is the taxpayer, Company A's (the 'Appellant') appeal to the Board of Review (the 'Board') from the Determination of the Acting Deputy Commissioner of Inland Revenue dated 29 September 2021 (the 'Determination').

2. The central issue in this appeal is whether the Appellant purchased the Property (to be defined below) and disposed of the Subject Units (as defined below) as capital assets or as trading stocks.

3. The Commissioner of Inland Revenue's ('CIR') case is that the Appellant acquired the Property at a bargain price with the intention to sub-divide it and did sell the Subject Units at a massive profit. The Appellant filed its Notice of Appeal on 28 October 2021. Its case is that the Property was acquired for long term investment.

4. In the Determination, CIR took the view that taking into account the figures in the Feasibility Study and applying a modicum of commercial sense, the Appellant would most likely not yield any positive cash flow, but instead would require continuous injections of funds from the Appellant's shareholders until the bank loan relating to the purchase (the 'Bank Loan') was fully paid off. In such circumstances, it is inconceivable that a group of otherwise unassociated businessmen – without any shareholders agreement binding them to the deal and to prevent them from calling on their portion of the shareholder's loan on demand – would have come together to acquire the Property with the intention to hold it for the long-term, and forsake the much quicker and larger profits that could be made from resale.

**B. Material Facts**

5. In 2012, the Appellant was incorporated as a private company in Hong Kong. Its first shareholder and director was Company B.

6. On 11 September 2012, Ms C replaced Company B as the sole director. On 16 November 2012, Ms C was replaced by Mr D as sole director. Mr D remained sole director during the relevant years of assessment.

7. Since 17 October 2012 and thereafter for the relevant years of assessment, the Appellant's shareholders were:

7.1. Company E, with a 40% shareholding, which is beneficially owned by Mr F and Mr G (together, the 'Mr F & G').

7.2. Company H, with a 40% shareholding, which is beneficially owned by Mr J; and

7.3. Ms C, with a 20% shareholding. This was subsequently transferred to Mr D on 19 November 2012.

Mr D and the beneficial owners behind the corporate shareholders are collectively referred to as the 'Shareholders'.

8. Mr D is said to be the brother of Mr K. Mr K is said to be '*an experienced property investor in Hong Kong in commercial and retail premises.*'

9. On XX September 2012, the Appellant entered into a provisional agreement for sale and purchase ('2012 SPA') to purchase Property L (the 'Property') for HK\$420 million.

10. By Clause 5 of the 2012 SPA, the purchase was subject to tenancies, as set out in Schedule 1 to the 2012 SPA:

10.1. The Property was *de facto* subdivided into 8 portions/units, ie A1, A2, A3, A5, B1, B2, B3 and B4, though the 8 portions had not yet been formally segregated. Except A2, all units were let out for rental income.

10.2. It is pertinent to note that:

10.2.1. For B1, B3 and B4, at the time of the 2012 SPA, the monthly rental was only HK\$317,646. It was only increased to HK\$560,000 upon the renewed tenancy signed on 17 December 2012.

10.2.2. Therefore the total monthly rental income from the existing tenancies was only HK\$1,192,754 (ie HK\$1,435,107.6 - HK\$560,000 + HK\$317,646).

10.2.3. Accounting for management and air-conditioning charges

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

and rent-free periods, the average monthly rental income based on existing tenancy agreements on the date of the 2012 SPA was HK\$1,088,237.10.

11. In the documentation provided by the Appellant to the Inland Revenue Department ('IRD'), there is also:

11.1. A memorandum purportedly of a resolution of the Appellant's then-sole director, Ms C, made on 14 September 2012 (the '2012 SPA MOR') for the SPA.

11.2. A feasibility study purportedly dated 10 September 2012 (the 'Feasibility Study') made by Mr K.

12. On 28 March 2013, the transaction was completed and the Property was assigned to the Appellant. The total purchase transaction cost was HK\$22,436,160.

13. The Appellant's purchase of the Property was partially financed by a loan of HK\$210 million, the Bank Loan, from Bank M:

13.1. The facility letter from Bank M was addressed to Mr K, who had apparently negotiated its terms.

13.2. The principal of the Bank Loan was repayable by 59 equal monthly instalments of HK\$875,000, plus a final instalment of HK\$158,375,000. Interest was charged at 1 month HIBOR plus 2% per annum.

13.3. The Bank Loan was secured by, *inter alia*, a mortgage over the Property and the following limited personal guarantees from the Shareholders:

<u>Guarantors</u>	<u>Amount of Guarantee</u>
Mr D and Mr K	HK\$42 million
Mr J and Ms N	HK\$84 million
The Mr F & G	HK\$84 million

14. The remainder of the purchase price in the amount of HK\$210 million, and apparently further costs, were said to be funded by unsecured interest-free loans from the Shareholders and a related company, totalling HK\$234,759,378 as at year-end 2013.

15. However, in less than one year after completion of the purchase of the Property, the Appellant started selling the Subject Units in accordance with the following sequence:

## (2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

<u>Date</u>	<u>Event</u>
XX-XX-XXXX	Provisional agreement for the sale of A1 and A2, for HK\$185,537,000 ('A1A2 SPA').  There is also a memorandum purportedly of a director's resolution made on 7 August 2013 by Mr D ('A1A2 SPA MOR') for the transaction.
XX-XX-XXXX	Sub-sub-deed of mutual covenant ('DMC') for Units A1 and A2.  Assignment of Units A1 and A2.
XX-XX-XXXX	Provisional agreement for the sale of Unit A5 for HK\$129,673,500 ('A5 SPA').  There is also a memorandum purportedly of a director's resolution made on 15 July 2014 by Mr D ('A5 SPA MOR') for the transaction.
XX-XX-XXXX	Sub-sub-sub-DMC for Unit A5.  Assignment of Unit A5.

16. According to the Appellant, the gains on the disposal of the Subject Units ('Gains') were computed as follows:

<u>Item (HK\$)</u>	<u>Units A1 and A2</u>	<u>Unit A5</u>	<u>Total</u>
Apportioned purchase price and purchase transaction costs	(185,401,819)	(61,098,327)	(246,500,146)
Transaction costs for sale	(4,158,120)	(1,529,665)	(5,687,785)
Sale proceeds	185,537,000	129,673,500	315,210,500
Add accumulated Depreciation	3,708,036	1,221,967	4,930,003
<u>Total Gain/(Loss)</u>	<u>(314,903)</u>	<u>68,267,475</u>	<u>67,952,572</u>

17. In the Appellant's Tax Returns:

17.1. The Appellant excluded the Gains from its assessable profits.

17.2. The Appellant applied a commercial building allowance ('CBA') of HK\$1,716,373 for the year of assessment 2013/14, and included a balancing charge of HK\$1,716,373 for year of assessment 2014/15.

18. The Assessor disagreed, and issued the Assessments on the basis that:

18.1. The Gains should be included because the purchases and sales of the Subject Units amounted to adventures in the nature of trade and so the



(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

Gains should be chargeable to profits tax.

18.2. Since the Subject Units were not capital assets, the CBA for year of assessment 2013/14 should be disappplied and the balancing charge for year of assessment 2014/15 should be excluded.

18.3. The Appellant's apportionment of the purchase price and purchase transaction costs was incorrect. The Assessor instead apportioned the purchase price and purchase transaction costs based on the ratio of the gross floor area of the Subject Units to that of the Property. This resulted in total apportioned purchase price and purchase transaction costs of HK\$215,945,460.

19. The Assessor subsequently received a valuation from the Rating and Valuation Department ('RVD'):

<u>Portion</u>	<u>Gross floor area</u>	<u>Saleable area</u>	<u>Valuation provided by</u>	
			<u>The Valuer</u>	<u>RVD</u>
	Square foot	Square foot	\$	\$
A1	11,500	7,005	106,000,000	79,000,000
A2	5,367	4,733	70,000,000	57,000,000
A3	3,958	2,515	25,000,000	38,000,000
A5	11,065	5,774	58,000,000	72,000,000
B1, B3 and B4	17,647	10,840	112,000,000	118,000,000
B2	<u>6,691</u>	<u>4,550</u>	<u>49,000,000</u>	<u>56,000,000</u>
Total	<u>56,228</u>	<u>35,417</u>	<u>420,000,000</u>	<u>420,000,000</u>

Note: Gross floor area, saleable area and valuation provided by the Valuer are those shown in the Valuation Reports at Appendices J1 to J6.

20. Accordingly, the Assessor revised the apportionment of the purchase and transaction costs to HK\$219,111,241. The adjustments to the Appellant's assessable profits, as confirmed by the Determination, may be summarised as follows:

<u>Item (HK\$)</u>	<u>2013/14</u>	<u>2014/15</u>
<u>Add: Gains</u>	-	90,411,474
<i>Comprised of:</i>		
- <i>Sale proceeds</i>		315,210,500
- <i>Less apportioned purchase price</i>		(208,000,000)
- <i>Less apportioned purchase transaction cost</i>		(11,111,241)
- <i>Less transaction cost for sale</i>		(5,687,785)
<u>Add: Disallowance of the CBA</u>	1,716,373	-
<u>Less: Balancing charge</u>	-	(1,716,373)
<u>Total additional assessable profits</u>	<u>1,716,373</u>	<u>88,695,101</u>

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

21. Upon the CIR's request, Ms P of the RVD has produced an expert report for the purpose of this appeal, which encloses a valuation report of the six units of the Property. The valuations are slightly different from the ones referred to in the Determination: the apportioned value of Unit A2 has been revised from HK\$57 million to HK\$55 million and apportioned value of Unit A5 has been revised from HK\$72 million to HK\$75 million. There is a net increase in the purchase price of the Subject Units of HK\$1 million.

22. Based on the revised valuations of RVD, the Appellant's assessable profits would be adjusted as follows:

<u>Item (HK\$)</u>	<u>2013/14</u>	<u>2014/15</u>
<u>Add: Gains</u>	-	89,358,054
<i>Comprised of:</i>		
- <i>Sale proceeds</i>		315,210,500
- <i>Less apportioned purchase price</i>		(209,000,000)
- <i>Less apportioned purchase transaction cost</i>		(11,164,661) <sup>1</sup>
- <i>Less transaction cost for sale</i>		(5,687,785)
<u>Add: Disallowance of the CBA</u>	1,716,373	-
<u>Less: Balancing charge</u>	-	(1,716,373)
<u>Total additional assessable profits</u>	<u>1,716,373</u>	<u>87,641,681</u>

### C. The Issues

23. The relevant charging provision is section 14(1) of the IRO, which provides:

*'...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)...'*

24. Section 2(1) defines 'trade' as including 'every trade and manufacture, and every adventure and concern in the nature of trade.'

25. For the purposes of this appeal, there are two essential issues, namely,  
(1) Whether the Appellant's intention at the time of the acquisition of the Subject Units was to acquire the said properties as capital assets.  
(2) What is the proper apportionment of the purchase price and purchase transaction costs of the Property.

---

<sup>1</sup> 209,000,000 / 420,000,000 x HK\$22,436,160.

#### **D. Basic Legal Principles of Procedure and Evidence**

26. This Board's function, on hearing an appeal under section 68 of the IRO, is to consider the matter *de novo*: Shui On Credit Co Ltd v CIR (2009) 12 HKCFAR 392 at paragraph 29 *per* Lord Walker NPJ.

27. The burden of proving that the assessment appealed against is excessive or incorrect is on the taxpayer: section 68(4).

28. Where the facts are in dispute, it is for the Board to make findings on the basis of the evidence before it. The assessor is entitled to have his assessment confirmed unless it is satisfactorily challenged by the taxpayer and shown to be excessive: CIR v Crown Brilliance Ltd [2016] 3 HKC 140 at paragraph 16 *per* G Lam J, citing CIR v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224 at 237 *per* Blair-Kerr J.

29. If the taxpayer gives no evidence, the Board should deal with the case on the material before it: CIR v Crown Brilliance Ltd at paragraph 16.

30. It is important to note that unless they are accepted by the CIR as being true and accurate, the representations made on behalf of the taxpayer are not themselves evidence supporting the truth of their contents. Assertions and submissions that are not supported by the undisputed contemporaneous documents ought not, without more, be treated as evidence: CIR v Crown Brilliance Ltd at paragraphs 15 and 19.

31. A taxpayer's tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. Adverse inferences may be drawn in the absence of material evidence, or where a witness who might be expected to have material evidence is not called. See: D14/08 (2008-09) 23 IRBRD 244 at paragraph 53; D8/16 (2016-17) 31 IRBRD 502 at paragraph 19. Certainly, an appellant cannot be in a position to benefit from the sparsity of evidence: Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213 at paragraph 50 *per* Bokhary PJ.

32. Where a person without explanation fails to call as a witness a person who he might reasonably be expected to call, it is open to the Court (or in this case, the Board) to infer that that person's evidence would not have helped that party's case. The same principle would apply to a failure without proper explanation to produce a document or other real evidence that a party might reasonably be expected to disclose: South China Securities Ltd v Lam Kwen Yuen [2012] 5 HKLRD 524 at paragraph 7 *per* DHCJ Lisa Wong SC (as she then was).

#### **E. Analysis – Issue 1: Whether the Subject Units were the Appellant's Capital Assets**

33. The relevant principles are well-established and were set out by Fok PJ in Church Body of Hong Kong Sheng Kung Hui v CIR (2016) 19 HKCFAR 54 (*'HKSKH'*)

at paragraphs 43-52. For present purposes, they may be summarised as follows:

- 33.1. The material issue of fact is whether the taxpayer was 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. This is a question of fact and degree to be answered by the relevant fact-finding body on a consideration of all the circumstances (paragraphs 44-45).
- 33.2. An intention to trade is essential. The relevant time to consider intention is when the relevant asset is purchased, but unless it is contended that there was a change in intention, normally the question to be asked is whether the intention to trade existed at the time of the acquisition of the asset (paragraphs 46-47, citing Simmons v IRC at 1199A-D).
- 33.3. The disposal of land may or may not be in the nature of trade. 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 the disposal is a one-off transaction (paragraphs 48-49).
- 33.4. Upon considering all the circumstances, the Board will have to make a value judgment as to whether this constitutes trading and whether the requisite intention to trade can be inferred (paragraph 50).
- 33.5. Regardless of what is claimed to be the intention subjectively, the question falls to be determined objectively having regard to all the surrounding circumstances (at paragraph 50, citing All Best Wishes Ltd v CIR (1992) 3 HKTC 750 at 771 *per* Mortimer J). It is apt to quote from Mortimer J's *dictum* in full:
- ‘the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person’s intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.’*
- 33.6. 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 – these have been listed in Lee Yee Shing v CIR (2008) 11 HKCFAR 6 at paragraphs 56 and 62 *per* McHugh NPJ. However, the badges of trade are in no sense a comprehensive list of

factors. Their purpose 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 (paragraphs 51-52).

34. The taxpayer can only have one intention in respect of the asset – it is ‘*not possible ... 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 the other ...*’: Simmons v IRC [1980] 1 WLR 1196 at 1199C-D *per* Lord Wilberforce.

35. Given section 68(4), the burden is on the taxpayer to establish that it did not have an intention to trade.

35.1. As A Cheung J (as he then was) put it in Real Estate Investments (NT) Ltd v CIR [2007] 1 HKLRD 198 at paragraph 67:

*‘it is for the taxpayer to prove that the profits in question arose from the sale of a capital asset, and therefore they were not chargeable to tax and thus the assessment was wrong. If he fails to prove that the asset in question was a capital asset, his appeal against the assessment must fail. Put another way, for the purpose of an appeal, it is for the taxpayer to prove that an asset was a capital asset; it is not for the Commissioner to prove that it was a trading stock – he may, if he so chooses, simply sit back and put the taxpayer to proof...’* (emphasis added)

35.2. To similar effect is Bokhary and Chan PJJ’s *dictum* on appeal in (2008) 11 HKCFAR 433 at paragraphs 47-48. The Appellant will have to prove its contention that the Subject Units were its capital assets. Its appeal would fail if the Board positively determines that the Subject Units were trading stocks. It would likewise fail if the Board merely determines that the Appellant has not proved its contention that the Subject Units were capital assets.

36. This Board agrees that the Appellant can only succeed on this ground of appeal if it can positively prove that its intention was to acquire the Subject Units as a capital asset.

37. This Board has carefully considered the submissions of the Appellant and the CIR and the evidence in this Appeal. This Board has come to the clear view that the Appellant fails to discharge its burden to prove that the Property was acquired as a capital asset. Rather, the totality of the evidence shows that the Property was purchased as a trading stock and the Appellant had an intention to trade.

38. First, absent any credible explanation, it appears to this Board that the speed of the sale of the Subject Units (10 months and 25 days for A1 and A2; and 1 year and 10

months for A5<sup>2</sup>) is a strong indication that the Appellant had an intention to trade. The only explanatory offered was that there were difficulties in locating tenants and there was an attractive unsolicited offer.

39. This Board notes that for any genuine intention to hold properties for long term investment purposes, the fact that tenancies expired and it would take some considerable time to locate new tenants is an inevitable and necessary incidence of long term holding of assets for investment purposes. The mere fact that a tenancy expires and the subject property would be sold, then subject to the Board's consideration of all other factors, is an *indicum* that the subject property was not purchased as a capital asset.

40. This is particularly so when in the present case the Appellant has not produced any evidence that it had ever attempted to locate new tenants. This Board accepts that it is not inevitable that there will be documentary evidence on this issue. However, given that the Shareholders, at least Mr K, are experienced property investors, it would not be difficult for them to locate estate agents and to tender them as factual witnesses. The complete absence of such evidence other than the bare assertion of Ms Q does not help the Appellant in discharging its burden of proof.

41. Secondly, given that one of the key reasons was an unsolicited attractive offer, and given the fact that the Subject Units were purchased at bargain price, this, in our Board's view, tends to show that objectively, with no intention to hold as a long term asset, once an attractive offer was made, the Appellant would have no hesitation to sell the Subject Units and to make a quick profit. This does not sit well with the intention to hold the Property for a long term investment.

42. Thirdly, it is a fact that the Appellant is a Special Purpose Vehicle ('SPV') in which three different investors came together to purchase the Property. This Board agrees that it is more probable than not that they pooled their funds together with the intention of buying and selling the Property at a (reasonably) quick profit, rather than to keep the Property long-term to earn rental income.

43. Mr Lam for the CIR submitted that it is extremely unlikely, if not incredible, that unassociated businessmen would have deliberately intended to keep the Property for the long term, given the following commercial considerations:

43.1. By pursuing a long-term rental plan instead of making a quick sale on the Property, the Shareholders would be giving up on the potentially massive profits to the tune of some HK\$350 million. By comparison, the rental income was extremely modest and they would not see any meaningful positive cash flow for a very long time.

43.2. There was a real cost of pursuing a long-term rental plan instead of making a quick sale on the Property:

---

<sup>2</sup> Between 14-09-2012 and the date of the A5 SPA on 15-07-2014.

- 43.2.1. There is no evidence on the cost of funds of the Shareholders, or how long they would be able to sustain the funding.
- 43.2.2. In any event, the likelihood is that the Shareholders had to bear a cost of funds to provide the shareholders' loans, either by borrowing the money themselves or (at the very least) the opportunity cost of not being able to deploy those funds elsewhere.
- 43.2.3. Further, by pursuing a long-term rental plan, the Shareholders would also give up on the possibility of making massive profits of a quick resale, which itself is a significant opportunity cost.

44. This Board agrees with Mr Lam's submissions. This Board also notes that when the Subject Units were sold, the funds were instantly returned to the shareholders instead of being redeployed to purchase substitute long-term properties.

45. Ms Cheung for the Appellant submitted that it is important that the Shareholders did provide personal guarantees to secure the Bank Loan. The personal guarantees unequivocally demonstrate the joint commitment of the shareholders towards a long-term investment. This Board disagrees. It is simply a matter of reality in the commercial world that as the Appellant is an SPV, commercial banks would normally require personal guarantees from its ultimate shareholders whether the Property was purchased for short term sales or for long term investment.

46. In any event, what is absent in this case is evidence of firm commitment from the Shareholders to continuously provide additional funding to the Appellant to support the mortgage payments and other financial obligations of the Appellant. The complete absence of such mature consideration is an *indicum* of a short term trading strategy.

47. Fourthly, Mr Lam for the CIR also submitted that had the Shareholders truly intended to make a long-term investment, one would have expected them to draw up a shareholders' agreement committing them to the investment for the long term, to ensure that one or more of the shareholders did not change their mind and seek an exit by unilaterally calling on their shareholder's loan (which was repayable on demand). However, there is no evidence that there was any such agreement – in cross-examination, Ms Q could not say so one way or the other.

48. This Board agrees that, on the facts, it is more probable that the Shareholders pooled their funds together to exploit the bargain price of the Property, and re-sell it at a profit.

49. At the appeal hearing, this Board raised the possibility that the Appellant purchased the Property for either rent or sale – if no one made an offer, it would keep the Property for rent, but as and when there was an attractive offer for any unit, it would be

sold.

50. Mr Lam for the CIR submitted that the short answer is that given the burden of proof rests with the Appellant, it would fail to prove it had a capital intention. (See. eg D129/00 15 IRBRD 981 at paragraph 37.)

51. It is also submitted that a flexible intention is necessarily and logically inconsistent with an intention to hold the Property for a long-term investment – an intention to sell at the first available opportunity cannot be an intention to hold the property as a long-term investment. Therefore, and particularly given Simmons, a flexible intention is in fact an intention to trade. This Board agrees.

52. Ms Cheung for the Appellant also fairly drawn to this Board’s attention the case of D23/13 (2013-14) 28 IRBRD 618 for the proposition that it was not possible for an asset to be both trading stock and permanent investment at the same time. Indeed, it has never been the Appellant’s case that it had dual intentions.

53. As to the possibility that the Appellant purchased the Property intending to sell some of the units for profit and to keep some of the units for long term investment, it is submitted that in such scenario the Appellant would still have a trading intention for (at least) those units that were sold. This is analogous to what happened in Iswera v CIR [1965] 1 WLR 663 (PC for Ceylon), where Lord Reid concluded that the taxpayer had conducted a trade (See also D21/01 16 IRBRD 2016 (with Benjamin Yu SC as chairman) at paragraphs 16-22.) This Board also agrees.

54. Fifthly and importantly, this Board finds that the Appellant fails to discharge its burden to prove that it had purchase the Property with the intention to keep it as a capital asset. The only witness called by the Appellant is Ms Q. This Board finds Ms Q’s evidence unhelpful in proving the Appellant’s intention at the time of acquisition of the Property. She could not give any evidence as to intention as she was not one of the decision makers insofar as acquisition of the Property is concerned.

55. This Board agrees with Mr Lam for the CIR that the Appellant is a company, so the relevant intention can only be inferred and defined from the acts and intentions of its controlling minds: Brand Dragon Limited v CIR [2002] HKRC 90-115 (‘Brand Dragon’) at paragraphs 18-19 *per* Chu J. In particular, given the fact that the Appellant had no other business and is clearly an SPV of the Shareholders, so its directors and Shareholders should also be treated as its controlling minds.

56. However, the Appellant has not called any of the Shareholders (the Mr F & G, Mr J, Ms C and Mr D) or directors (Ms C or Mr D). The Appellant has also not called Mr K, who was not only involved in producing the Feasibility Study, but also a co-guarantor of the Bank Loan, and intimately involved in all aspects of the relevant transactions.

57. This Board agrees that there is no reasonable explanation for why they were not called, even though their evidence is of obvious importance and, as will be apparent from the discussion of the facts and evidence, there is a lot for them to assist in explaining



the intention behind the acquisition of the Property.

58. In the circumstances, there is simply no direct evidence to establish the relevant intention at the time of the acquisition of the Property. There is force in Mr Lam's submission that the Board should draw the inference against the Appellant that the oral evidence of the factual witnesses would not have helped (and indeed probably harmed) the Appellant's case upon scrutiny in cross-examination.

59. As to Ms Q's evidence, this Board finds the same to be unhelpful. First, she could not confirm all the facts stated in the NOA and the correspondence from the Appellant to the IRD, claiming that she believed they were true and correct in every respect. As a matter of fact, contrary to the extensive assertions made in the correspondence, from Ms Q's cross-examination, she confirmed that she could not speak to the knowledge or intentions of the persons in control of the Appellant at all, or the dealings between them. She had no idea what the persons in control of the Appellant were thinking when they purchased the Property. She had no idea if there were any shareholders agreement or transactions between the Shareholders. She did not know why Mr K was a co-guarantor of the Bank Loan. She did not know how the Shareholders funded the acquisition of the Property, and she had no basis for her belief that the Mr F & G had a sound financial background besides a bare assertion from them. She did not have any personal knowledge about the negotiation of the 2012 SPA or when it was signed. Finally, she did not know why the persons in control of the Appellant sold the Subject Units.

60. As to the key documents, ie the Feasibility Study and 3 MORs, Ms Q typed up the Feasibility Study on Mr K's instructions and did not have any personal knowledge of its contents. For the MORs, Mr K told Ms Q what contents they should contain and she passed on the message to the accountants. She had no personal knowledge of its contents. There is no credible explanation as to why people in the know were not called and Ms Q who knew nothing about the intention behind the acquisition was called instead. She obviously could not give evidence on matters not within her knowledge. She cannot confirm matters to be true and accurate if those matters were not within her knowledge.

61. Even on matters which should have been within her purview, this Board agrees with Mr Lam's submission that Ms Q in fact also could not recall any details or was not personally involved, and also gave evidence which was inconsistent with the Appellant's correspondence. For Unit A1, Ms Q could not recall whether the Appellant had chased the tenant of A1 for rent, although she said that if a tenant failed to pay rental, the Appellant would issue letters. Ms Q also confirmed that rental was paid by the tenant of A1 up to July 2013, even though in correspondence, the Appellant claimed that the tenant of A1 was in default, with the outstanding rental paid by the forfeit of the deposit. When Ms Q was asked about this, she could not recall. Ms Q was not involved in the negotiations with the tenant.

62. For Unit A5, Ms Q could not recall whether or not, and to what extent, the rent was recovered when the Appellant chased the tenant for it. By contrast, in correspondence, the Appellant claimed that active legal actions had been taken to recover the rent from the tenant but to no avail (although the Appellant later admitted that at least

part of the rent – from May to November 2013 – had been recovered).

63. For the sale of the Subject Units, it is clear that Ms Q was not involved in communicating with the property agent. Ms Q claimed that the subdivision of the Property to demarcate Units A1, A2 and A5 was only done during the sale process, but in fact in correspondence the Appellant said that a remark was made in the 2012 SPA reflecting the intention to divide up the units. This Board agrees that the intention to divide up the units at the time of acquisition of the Property is an *indicium* that the Property was acquired for trading purpose.

64. This Board agrees that, all of the assertions in the NOA and correspondence about the persons in control of the Appellant, including their state of mind and intentions when purchasing and selling the Subject Units, agreements between them, their funding of the Property, are not supported by any witness evidence and are thereby rejected.

65. This Board also rejects the assertions in the NOA and correspondence unsupported by undisputed contemporaneous evidence on matters that Ms Q could not recall. It is also correct that there is no evidential basis for Ms Q to confirm all of the assertions in the NOA and correspondence unsupported by undisputed contemporaneous evidence. It is wrong and irresponsible for Ms Q to make a blanket affirmation of their contents when she had no knowledge of the same.

66. Mr Lam for the CIR also rightly submitted that the Appellant should not be allowed to benefit from the sparsity of its evidence (Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213 at paragraph 50 *per* Bokhary PJ). This means that the Appellant should not be given the benefit of the doubt in the absence of evidence, and no assumptions should be made in its favour. This Board agrees.

67. For the reasons set out above, this Board has no hesitation to come to view that the Appellant has wholly failed to establish even a *prima facie* case in its favour, that the CIR has no case to answer, and hence the present appeal should be dismissed.

68. Sixthly, the Appellant relied on its contemporaneous board minutes to establish its intention at the time of acquisition. This is wrong as a matter of law. This Board takes into account all the facts and circumstances of the case. Any self-serving statements or minutes by any taxpayer, if not supported by surrounding facts, have little, if any, probative evidential value in establishing the relevant intention. It is very easy for every property speculators to set out in a template board minutes that it intends to hold the relevant property as a capital asset. Mr Lam for the CIR is right that when assessing the documentary evidence, the Board should not take documents produced by the Appellant at face value. As Chu J said in Brand Dragon at paragraph 21 in respect of board minutes, they are neither conclusive nor decisive of the issue and must be assessed against all the surrounding circumstances. In D62/91 6 IRBRD 476, the Board rightly did not place any weight on the board minutes in that case, saying:

*‘The board minutes are self-serving documents created by the Taxpayer which on their own are of limited evidentiary value. If supported by*

*surrounding facts, contemporaneous minutes can be of the greatest importance, but in the present case they stand out in stark contrast to the other facts and little weight can be placed upon them.'*

69. Similarly, this Board attaches no weight to the board minutes. Not only were makers of the documents not called as factual witnesses to testify in the present appeal, the content of the same is simply self-serving. This Board notes that the documents contain 'key words' such as '長線投資' in the Feasibility Study and 'long term investment' in the MORs, and whoever drafted the A1A2 and A5 SPA MORs was careful to expressly say that the reason for sale was rental difficulties.

70. The same applies to the self-classification of the properties as non-current assets.

71. In the present case, it is said that (1) the Shareholders were '*renowned and substantive business persons*', Mr D in particular was an '*experienced investor in property*'; and (2) Mr D was advised by his family member Mr K, also said to be an experienced property investor. This Board agrees that they must therefore have been well aware of the tax implications of having a trading intention when acquiring property, and could be expected to create a paper-trail to show that their intention in purchasing the property was for long-term investment. The fact that they did not give evidence does not help the Appellant to establish its relevant intention at the time of the acquisition of the Property.

72. Accordingly, this Board does not consider that these contemporaneous self-generated documents are helpful.

73. In relation to the home made Feasibility Study, this Board agrees that it lacks basic analysis that one would expect to support a HK\$420 million investment. There is no long-term projection or discussion of rental income; no analysis of expenses; no analysis of net profits.

74. Instead, the reasons set out in the Feasibility Study, in the Board's view, tends to support CIR's view that the Property was purchased for trading purpose. In the Feasibility Study, it is stated that (1) the location of the property was attractive and the purchase price of the property was a bargain (paragraphs 1, 2 & 5); and (2) the monthly rent receivable would be '*almost sufficient*' to cover the repayments of principal and interest on the bank loan (paragraph 7). There was no discussion on the rate of return in so far as rental income is concerned. It is a study to purchase the Property as a trading stock so that it could be sold at an appropriate time for a profit. In the meantime, the carrying cost was within an acceptable level.

75. Mr Lam is right in submitting that the Property was purchased mainly because of its bargain price. The Board finds that the Appellant knew as a matter of fact that the price per square foot of the 1/F units was HK\$13,824; whilst the price per square foot of the 2/F Property was HK\$7,470 (at the final purchase price of HK\$420 million). If the units of the Property could be sold at the price per square foot of the 1/F units, the Appellant would make HK\$777,295,872 or a massive profit of HK\$357,295,872 (before expenses and

interest).

76. Whilst this Board agrees with Ms Cheung for the Appellant that it may not be right to directly compare the price per square foot of the 1/F units with the price of the 2/F units, the hard fact is that the sale of the Subject Units did yield a very substantial profit for the Appellant. In that sense, the Property was indeed purchased at a bargain price as set out in the Feasibility Study. It is true that everyone likes to buy things at a bargain and this does not apply only to speculators or traders. However, the fact that a quick and big profit could be made within a short timeframe as a result of purchasing the Property at a bargain price, on balance, tends to show that it makes more commercial sense for seasoned businessmen to capture such profit rather than to sit and wait to face an uncertain market in the long term.

77. Mr Lam is right that it would take decades for the Property to earn that much from rental income, net of interest and expenses. Indeed, it would have been obvious to any sophisticated businessman that it would make much more commercial sense to flip the Property, make the massive profit. All these points in fact support the business case for acquiring the Property and selling it at a profit, rather than keeping the Property long-term to earn rental income.

78. Mr Lam for the CIR also submitted that the Feasibility Study (dated 10 September 2012) was only produced four days before the date of the 2012 SPA (on 14 September 2012). Indeed, Ms Q's evidence was that the Feasibility Study was produced after the Shareholders had gotten together for a meeting. Therefore, what is more likely is that the Shareholders had already identified the Property and decided to purchase it, and Mr K created the 2-page Feasibility Study as part of the paper trail to support a 'long-term investment' intention.

79. Seventhly, this Board also considers that it is not sustainable and economically sensible for the Property to be purchased as a long term capital investment. The total rental income could not even defray the expenses in relation to the holding of the Property as a long term asset. The Feasibility Study only mentions two figures for anticipated monthly rental income: (1) HK\$1,087,081; and (2) HK\$1,259,146, whilst the anticipated monthly bank payments were HK\$1,250,000. Even on the unrealistic and uncommercial assumption that the interest rates and rents would be stable even the higher rental figure only barely covers the bank payments by around HK\$9,146 per month. This is without taking into consideration, management fees, government rates and rents, routine renovation and repairs etc.

80. Even if one were to take the figure of HK\$1,435,107.60 as monthly rent for the Property, it only gives a gross return of 3.82%  $[(HK\$1,435,107.60 \times 12)/HK\$450,000,000]$ . This has not taken into account of the interest expenses in relation to the purchase price which was HIBOR plus 2%. If one were to take the net rental figure of HK\$9,146 per month, the net cash return is 0.025%. If one were to take into account of other expenses and the fact that one is assuming that the occupying rate could not always be 100%, it is more probable than not that the net return would be negative. There is no evidence as to whether and if so how the Shareholders would keep on financing a negative

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

cash flow asset on a long term basis. This Board could not engage itself in a speculative exercise that simply because the Shareholders had deep pockets, it means that they would finance the Property on a long term basis. This does not accord with the conduct of seasoned businessmen.

81. When one is comparing such rates of return with the return for a sale of the Property at a profit of HK\$357,295,872, namely, 83%, it is inherently more probable that the Shareholders had intended for a sale of the Property rather than to keep the Property on a long term basis.

82. Mr Lam for the CIR is also correct in submitting there is no evidence that the Shareholders took this into account the figure of HK\$1,435,107.60 in their deliberations – the Feasibility Study does not contain any projected rental figure aside from the HK\$1,259,146.

83. This Board fully agrees with Mr Lam’s submission that any reasonable commercial investor would have also accounted for the Appellant’s probable expenses in its ‘break-even’ calculation.

83.1. According to the Appellant’s AFSs,<sup>3</sup> its apparent recurring expenses (excluding depreciation and the building management fee<sup>4</sup>) for (1) 2013/14, comprising the 18 months from 26 June 2012 to 31 December 2013; and (2) 2014/15, comprising the 12 months in the 2014 calendar year, were:

<u>Item</u>	<u>Year ended 31 December</u> <u>2014</u>	<u>26 June 2012 to 31</u> <u>December 2013</u>
Auditors’ remuneration	22,000	22,000
Accounting fee	6,000	6,000
Business registration fee	2,250	900
Government rent and rates	16,918	95,571
Insurance	74,123	74,123
Management fee <sup>5</sup>	240,000	240,000
Repairs and maintenance	59,416	55,213
Utilities	2,272	-
<u>Total:</u>	<u>422,979</u>	<u>493,807</u>

83.2. Based on the foregoing figures, a reasonable investor in the Appellant’s position should have anticipated paying at least around HK\$400,000 per year (and HK\$30,000 per month) in expenses. This would wipe out the minimal excess of HK\$9,146 per month identified

<sup>3</sup> AFS for 2014/15 which records the figures for both periods.

<sup>4</sup> The building management fee would be netted off against the ‘management and air-conditioning charges’ as recorded under ‘Other Revenue’.

<sup>5</sup> This was the property management fee, and different from the building management fee: profits tax computations. Company R was Ms Q’s employer.

in the Feasibility Study.

84. Further, any reasonable commercial investor – particularly a long-term investor – would not have assumed that (1) the Property would always achieve 100% occupancy and there would be no empty-tenant periods; (2) the rent would never go down; and (3) the interest rate would stay as low as 2.2% per annum.

85. This Board considers that any investor with a long term view would have taken the above figures and its long term sustainability into consideration when making the decision to purchase the Property. From the Feasibility Study, no consideration was given to such factors at all. There is no evidence that the Shareholders would have personally funded the Property on a long term basis.

86. Mr Lam for the CIR is right that it is not difficult to imagine that property speculators engaged in property trading would borrow money to acquire property which they would use to resale. The fact that the property yielded rental income would simply be a bonus to the speculator, as he would not need to fork out additional money to cover the interest payments.

87. The insignificance of the rental point has been recognised in the authorities. See in particular D37/16 32 IRBRD 450 at paragraphs 44-46, citing Chinachem Investment Co Ltd v CIR (1987) 2 HKTC 261 at 311 *per* Huggins VP; and Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433 at paragraph 50 *per* Bokhary and Chan PJJ.

88. Eighthly, it is a fact that the Subject Units were indeed sold within a relatively short period of time and the reasons offered by the Appellant for such sales are not convincing. There are difficulties with renting out a certain unit of property at any particular point of time is an incident of property holding. It is rare that a property can be rented out continuously without any breaks. The Appellant said that the Subject Units were sold due to rental issues and fortuitous unsolicited offers.

89. However, Mr Lam for the CIR is correct that there is no evidence that the Appellant decided to sell the Subject Units because of the alleged rental issues and/or fortuitous unsolicited offers. Ms Q expressly confirmed that she had no idea why the Appellant sold the Subject Units.

90. Further, Mr Lam submitted that there is no evidence that the tenant of Unit A1 was in default at all. The rent was paid up to the termination of the lease in July 2013. The negotiations with the tenant of A1 were said to be conducted by Mr K, but he was not called to give evidence. The Appellant claimed in correspondence that the tenant of Unit A1 was in default since May 2013 and the outstanding rent was paid by the forfeiture of its deposit, but this was not supported by Ms Q in cross-examination, who simply could not recall whether the deposit was forfeited or not.

91. In any event, there is there is no evidence that any serious attempt was made to rent out Units A1 and A2 to any other tenant. The A1A2 SPA was signed on 7 August 2013, less than a month after the A1 tenancy was cancelled on 12 July 2013. Even if the

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

Unit A1 tenant was in default since May 2013, that was still only a handful of months before it was sold.

92. Ms Q also claimed that the Appellant had retained agents to find tenants for Units A1 and A2. However, there is no evidence apart from Ms Q's bare allegation.

93. Further, there is no evidence that the tenant of Unit A5 was ultimately in default when the Appellant agreed to sell it on 15 July 2014. In cross-examination, Ms Q could not recall what rent was actually recovered. In fact, the outstanding rent from May 2013 to September 2014 was recovered.

94. In any event, the Appellant made no attempt to find a new tenant for Unit A5 – the Appellant admitted that Unit A5 had not been offered for lease. If indeed the tenant of Unit A5 was being difficult, any reasonable commercial landlord would have tried to find a new one instead of disposing of the unit altogether.

95. Further, this Board reject the Appellant's evidence that the businesses of the other tenants impacted its ability to rent out Units A1, A2 or A5. First, the units running private clubs/bars were Units A5; Units B1, B3 & B4; and Unit B2. From the floor plan, Units B1, B3 & B4 and B2 were on the other side of the building and had their own escalator access. Ms Q accepted in cross-examination that Units A1, A2 and A5 were not affected by the B Units. Ms Q also accepted that Unit A5 also did not affect Units A3 and A1 because: A3 operated during the day whilst A5 operated at night; and A1 had its own escalator access.

96. Ms Q claimed that there were some tenants who were not happy to rent Units A1, A2 and A3 because of the neighbouring units. However, apparently the Appellant has no difficulties in selling Units A1 and A2 with ease. In fact, according to the Appellant, despite the alleged difficulties in finding suitable tenants, there were unsolicited favourable offers made to the Appellant which allowed the Appellant to make a quick and big profit.

97. This Board also agrees with Mr Lam for the CIR that if indeed the Property was intended to be a long term capital asset, the Appellant would not be surprised or troubled by any short term difficulties in leasing Units A1 and A2 or in recovering rents from the tenants. These are typical experiences faced by commercial landlords and any reasonable commercial investor would have anticipated them.

98. It is a matter of fact that at the time of the acquisition of the Property, the Appellant knew who the existing tenants were, by reference to the tenancy agreements and because the Shareholders had visited the Property. In particular, the Appellant knew full well that Unit A2 was vacant, and should have anticipated that it might remain vacant for a further period.

99. Furthermore, whether the offers were unsolicited or not is not a significant factor. The fact that the Appellant was not actively looking for purchasers at the material time does not mean that it did not intend to sell at all. Mr Lam for the CIR helpfully referred this Board to the authorities which do not place significant weight on the fact of a fortuitous unsolicited offer. In D76/94, the Board did not even find that the offer was unsolicited,

concluding that it would not affect the BOR's decision (paragraph 50). In D11/14, the Board mentioned the unsolicited offer as being '*fortuitous and irresistible*', which the taxpayer could not have anticipated at the time of acquiring the property (paragraph 47). In *Beautiland*, the fortuitous offer was also seen in a similar light (p.517I). This Board agrees that such observations do not apply in the present case when the Shareholders knew at the outset that massive profits could potentially be made on resale.

100. In any event, as a matter of evidence, there is no documentary evidence to support such unsolicited offer. Ms Q was not involved in dealing with the agents for the sale of the Subject Units, so her evidence on this does not carry any weight. Mr Lam for the CIR insightfully pointed out that in fact there is also evidence against such assertion: the Appellant, and not the purchaser, was solely responsible for paying the estate agent's fees. Further, at least for the A1#A2 SPA, the agent was for the Appellant only. The Appellant called no evidence to explain such disturbing features of the evidence.

101. Ms Cheung for the Appellant submitted that there are many reasons why the purchaser may not have paid commission to the estate agent. It is correct that the Appellant could not control if others did or did not pay commission. However, the Appellant has tendered no witness to explain the many reasons as postulated by Ms Cheung. Mr Lam is perfectly entitled to make the submission that if indeed it was an unsolicited offer, it would have meant that it was the purchaser who was keen to purchase the Subject Units. Under such circumstances, common and commercial sense dictate that normally the agent will look towards the purchaser to pay for its commission.

102. Nonetheless, this Board agrees that this fact alone is not sufficient to establish that the estate agent was instructed by the Appellant to put Units A1 and A2 on the market for sale. The critical issue is that there is no evidence of this asserted unsolicited offer.

103. Ninthly, this Board considers that the fact (even if proved) that the Appellant did not spend time, money or effort in selling the Subject Units does not assist the Appellant's case. This Board agrees that the amount of effort, etc., that the Appellant expended is consistent with a property trader and therefore does not provide any support to its case. As Fok PJ explained in *HKSKH* at paragraph 54, whether '*time, effort or money expended on an asset to enhance its sale price is or is not such as to justify a finding of intention to trade must be a matter of fact and degree and depend on the extent of such expenditure.*' In the present case, the amount of effort, etc., that the Appellant expended is consistent with a property trader who would not need to do much to the Property at all (except, possibly, to sub-divide it, which Queen Best did).

104. In any event, the Appellant did formally subdivide the Property for the purpose of future disposal. The Appellant incurred fees to hire architects to draw up the partition plans, and solicitors to prepare the necessary DMCs. These were preparatory steps for disposal of the Subject Units.

105. Tenthly, the fact that the Appellant continues to hold Units B1 to B4 does not take its case any further. The Board notes that the Appellant had apparently sold an



additional unit (Unit A3) in October 2017. This sale is contrary to the Appellant's intention expressly stated to the IRD only 1 year earlier that it had 'no plan to dispose of the remaining units, but to keep them for long term rental income purpose.' (Emphasis added). This Board agrees that insofar as the Appellant's conduct in relation to the other units is relevant, this sale supports the CIR's case that the Appellant did not genuinely intend to keep the units for long term rental income.

106. Further, this Board agrees that it is unsafe to infer from the Appellant's conduct in relation to Units B1 to B4 that the Appellant had an intention to hold the Subject Units which were sold off at relatively quick speed as capital assets. The Appellant could have decided to hold the remaining units for any number of reasons, which would not necessarily be inconsistent with the Appellant's trading intention. Amongst other things, the Appellant could have decided that the market was not attractive and they would rather hold onto the units to achieve a greater profit. This is a matter which needs to be examined in detail, with extensive factual evidence as to the circumstances of Units B1 to B4. In the absence of such evidence, this Board could not make any speculations as to the Appellant's holding of Units B1 to B4.

107. Ms Cheung for the Appellant submitted that if the Appellant had really intended to flip or trade the properties, it would not be holding half of the properties after about 9.5 years. This is not necessarily correct. Mr Lam for the CIR is right that the period of holding – 9.5 years – is not such a long period of time that one can simply assume in a vacuum that Units B1 to B4 were acquired for the purpose of a long-term investment: see eg Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433 at paragraph 50 *per* Bokhary and Chan PJJ.

108. It will be wrong, as a matter of logic and common sense for the Board to conclude that because the Appellant is still holding Units B1 to B4, therefore the intention of buying the Subject Units were for long term investment rather than for trading. That would involve a quantum jump in reasoning. This Board does not consider it correct that simply because the 8 units in the Property were purchased together, the Appellant's intention must be judged collectively. There is no reason why certain units were acquired (or to be sub-divided) to achieve a quick profit with the rest to be disposed of and/or keep a period of time depending on the market condition. The sale of Unit A3 is a prime example.

109. Ms Cheung for the Appellant submitted that it remains a fact that the Property was not partitioned until after the PSPA to sell Units A1, A2 and A5 had been entered into. If the Property was indeed purchased for trading purposes with the intention to sub-divide it, one would have thought that the Appellant would have immediately carried out the partitioning shortly after the acquisition, rather than after the PSPA was entered into. This Board disagrees. It makes perfect commercial sense for the partition to take place when the PSPA had entered into. At the end of the day, there were costs relating to such partition. It is perfectly sensible for seasoned businessmen to incur such expenses when a firm offer was secured.

110. Finally, this Board notes that Mr Lam for the CIR relies on the following badges for trade.

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

Whether the taxpayer has frequently engaged in similar transactions	<p>This factor cannot assist the Appellant.</p> <p>The Appellant is an SPV.</p> <p>There is no evidence as to whether the Shareholders have engaged in similar transactions; it certainly cannot be assumed that they did not.</p>
Whether the taxpayer has held the asset or commodity for a lengthy period	No. The Subject Units were sold within 1 and 2 years, respectively (10 months and 25 days for A1 and A2; and 1 year and 10 months for A5).
Whether the taxpayer has acquired an asset or commodity that is normally the subject of trading rather than investment	Generally, neutral. However, given the short-term profit potential of the Property identified by the Appellant itself, the inherent probability is that it was acquired for trading.
Whether the taxpayer has bought large quantities or numbers of the commodity or asset	No, but this is a neutral factor.
Whether the taxpayer 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	No. The Appellant has failed to prove that it sold the Subject Units because of the alleged rental difficulties and allegedly unsolicited fortuitous offers. In fact, it did not.
Whether the taxpayer has sought to add re-sale value to the asset by additions or repair	There have been no additions or repair, but the Appellant did spend funds to sub-divide the Property for the purpose of disposal.
Whether the taxpayer 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	No, but this is a neutral factor when the burden is on the Appellant to prove that it had a long-term investment intention.
Whether the taxpayer has conceded an actual intention to resell at a profit when the asset or commodity was acquired	No.
Whether the taxpayer has purchased the asset or commodity for personal use or pleasure or for income	No. It is the CIR's case that the Appellant acquired the Property for trading. But even if the Appellant had an intention to earn rental income, that is a neutral factor.
Source of finance	This is a neutral factor.

111. For all the reasons stated above, this Board, on balance, come to the view that the Appellant has failed to prove that it had a long-term investment intention when it purchased the Subject Units, and in fact had a trading intention.

**F. Analysis: Issue 2 – The proper apportionment of the purchase and purchase transaction costs of the Property**

112. As a matter of principle, the Board is duty bound to come to its own conclusion after considering the evidence on valuation presented to it: Aust-Key Co Ltd v CIR [2001] 2 HKLRD 275 at 282I *per* Chung J; Wing Tai Development Co Ltd v CIR [1979] HKLR 642 at 648-649 *per* Roberts CJ.

113. The Board may, in an appropriate case, adjust the valuations provided by one party or another: Aust-Key, at 281C-G.

114. In the present case, the Board has been presented with the RVD's revised valuations, which are supported by Ms P's valuation report. This Board accepts Ms P's valuation report.

115. First, the Appellant has not filed any expert evidence in this appeal to support its contentions.

116. Secondly, this Board agrees that no weight should be put on the valuation reports produced by company S. First, the valuer has not been tendered for cross-examination. Secondly, company S's valuations are bare assertions with no supporting explanations. In particular, having regard to the table in paragraph 1(11) of the Determination, this Board agrees that the following points call out for explanation:

116.1. A1's valuation (HK\$106 million and HK\$15,132 per square foot) is 82% more than A5's valuation (HK\$58 million and HK\$10,045 per square foot) in absolute terms and 50% more on a per square foot -basis, even though A1 is only 21% larger (7,005 square foot compared with 5,774 square foot).

116.2. A2's valuation (HK\$70 million and HK\$14,790 per square foot) is 21% more than A5's valuation in absolute terms and 47% more on a per square foot -basis, even though A2 is 18% smaller than A5 (4,733 square foot compared with 5,774 square foot) and they are similarly accessible from the same set of escalators.

116.3. A2's valuation is also 43% more than B2's valuation (HK\$49 million and HK\$10,769 per square foot) in absolute terms and 37% more on a per square foot -basis, even though they are of similar size (4,733 square foot compared with 4,550 square foot).

117. This Board agrees that without any explanation for the foregoing anomalies,

the BOR cannot rely on company S's valuations at all.

118. Further, according to the 'Limiting Conditions' of each company S report:

118.1. The valuation was merely a '*desk valuation for the purpose of preliminary indication only*'.

118.2. In producing the reports, company S has relied to a '*very considerable extent on the information given by you*.' The Appellant has not explained what that information was, so it is impossible to know whether that information is reliable and can properly support company S's valuations.

118.3. Company S's reports were for the use of the Appellant only and not to be disclosed to any other parties.

119. Thirdly, this Board also agrees that the credibility of the Appellant's objections, and its reliance on company S's reports, is put in serious doubt because it did not contend that company S's valuation of Unit A5 should be adopted. Company S gave valuations for Units A1 and A2 (at HK\$106 million and HK\$70 million) which were higher than the RVD's. This benefits the Appellant because it reduces its profits. However, company S gave a valuation for Unit A5 at HK\$58 million which was lower than the RVD's (then at HK\$72 million, now revised by Ms P to HK\$75 million). The Appellant cannot credibly challenge the reliability of RVD's valuation for Units A1 and A2, yet have no complaint about the RVD's valuation for Unit A5 (and vice versa for company S's valuations).

120. Fourthly, Mr Lam for the CIR is definitely right in submitting absent proper expert evidence from the Appellant, the hands of the Appellant's counsel are tied and this Board cannot take the Appellant's submissions as akin to expert evidence. Mr Lam is correct that had such points been made by an expert called by the Appellant, they could have been properly tested, but they were not.

121. In any event, Mr Lam first submitted that in re-examination, Ms P explained that the trading potential of each of the units was similar, so she did not feel the need to make an adjustment on that basis. Likewise, since the tenancies were short, their existing rental would not have a big impact on the value. Indeed, in the Appellant's letter dated 6 June 2018 at (II), it said that the price would be the same whether the properties were tenanted or not.

122. Further, it is difficult to see how the price discrepancy between A1 and A5 can be explained by the difference in size, because size did not play such a huge factor in company S's other valuations – A2 is even smaller than A5 but costs more (HK\$70 million or HK\$14,790 per square foot). Further, Ms P explained in evidence that a larger unit should in fact result in a smaller unit rate and there is of course no expert evidence to rebut her view. Nor can it be explained by any alleged difference in monthly rent, which is obviously subject to market conditions at the time the rental prices were agreed.

123. In addition, insofar as the assertion that A1 faces the elevators is concerned, this ‘elevator’ factor is of questionable importance given that the Property is on the 2/F and most people would be accessing the units by the escalators, to which A1 and A5 have similar access. Indeed, A5’s position is arguably better than A1’s as it is accessible from the centre escalators of the building and viewable through the centre void.

124. Moreover, the difference in layout between A2 and B2 does not obviously explain the significant difference in price between them. B2 also has access to elevators so this is not a distinguishing factor at all. Ms P had taken into account the difference in layout (described as ‘Shape’ in her table and did not make any significant adjustment.

125. This Board accepts Ms P’s expert opinion as solid and reliable. She has fully analysed the circumstances of the Property and each of the units thereof, and made appropriate adjustments based on the particular circumstances of the units.

126. Ms P properly and convincingly explained in cross-examination that the adjustments were not arbitrary but based on her own analysis. She had considered other factors as well, but did not mention them because they did not require adjustments. This Board accepts that this does not undermine the reliability of her opinions. Ms P did visit the Property and analyse its environs (paragraph 4) and gave thoughtful responses to the questions put to her about the other possible factors.

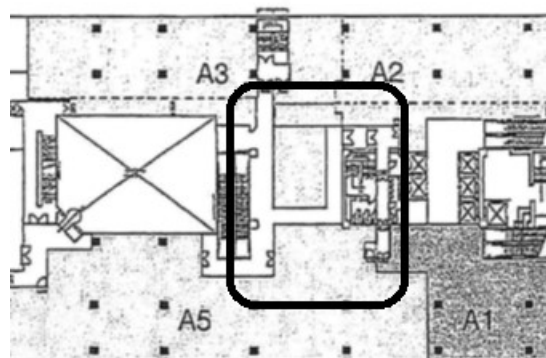
127. As to the point that Ms P’s report did not mention other comparable transactions which she had in fact used to form the basis of her adjustments and to support the approach that the larger the unit the lower the unit rate, the Appellant did not put forward any positive evidence to contradict her analysis. Therefore, the only relevance of this point is if the omissions could support inferences which would undermine Ms P’s credibility, such as Ms P deliberately did not include them to escape scrutiny, or she was lying and in fact did not make such comparisons. This Board accepts that none of those inferences can be drawn. Ms P was an honest and thoughtful witness. Indeed, she even corrected her earlier valuation which the Deputy CIR had previously relied on in the Determination. The Board agrees that such omission is not fatal to the probative value of Ms P’s expert evidence.

128. As to the figures for area of the Subject Units adopted by Ms P:

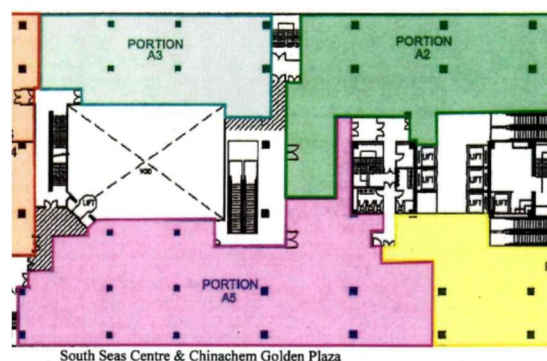
128.1. Ms P’s report says that she measured the internal floor area by reference to the Land Registry plan: paragraphs 5.2-5.3.

128.2. By contrast, company S apparently relied on ‘*information provided by the instruction party*’ to calculate gross floor area, and ‘*the measurement from the floor plan provided by the instruction party*’ to calculate saleable area. There is no evidence of what that ‘*information*’ or ‘*floor plan*’ was provided. If, for example, company S had used the floor plan at, then it would have wrongly excluded a whole corridor that belonged to A5.

The corridor is circled in this extract from:



Compare with the Land Registry plan at:



128.3. The incorrect exclusion of A5's corridor might indeed explain why company S said that A5's saleable area was less than A1's, whilst the RVD said that A5's IFA was more than A1's. Since company S was not made available for cross-examination, this Board has no way of testing the accuracy of the saleable area figures.

129. The Appellant bears the burden of proving that Ms P's valuations should be adjusted, and it has failed in discharging such burden.

130. For all the reasons stated above, this Board rejects the valuations produced by company S. There is also no reason for Ms P's valuations to be adjusted or varied.

131. Further, this Board duly adopts the revised valuations provided by the RVD, which results in a revised additional profits tax assessment of HK\$87,641,681 as set out in paragraph 222 above.

## Disposition

132. For all the reasons set out above, this Board:

121.1 Dismisses the present Appeal;

121.2 Revises the additional profits tax assessment to HK\$87,641,681;

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

121.3 Orders the Appellant to pay costs of this Appeal to the CIR at the sum of HK\$20,000.

133. Finally, it remains for this Board to thank counsel for the CIR and the Appellant for their helpful assistance. In particular, this Board finds Mr Lam's closing submissions very helpful and comprehensive.