Case No. D5/22

Profits tax – capital asset – adventure in nature of trade – change of intention from holding for investment to holding for trading – badges of trade – sections 2(1), 14, (1), 66(3), 68, (4) of the Inland Revenue Ordinance ('the IRO')

Panel: Wu Pui Ching Teresa (chairman), Hui Lap Tak and Tai Chiu Ki Kennis.

Date of hearing: 19 & 20 October 2021 and 12 November 2021.
Date of decision: 13 May 2022.

The Taxpayer was a private company incorporated in Hong Kong on 24 August 2001. Relevant to the Appeal, the Taxpayer was involved as the sole owner in the transactions of Property 1-4 (collectively, 'the Subject Properties'). The Taxpayer sold Property 2 through Company L and Company M, with payment of commission to them respectively, and sold Property 3 subject to tenancies through Company R.

The Assessor was of the view that the transactions of Property 1, Property 2 and Property 3 by the Taxpayer were in the nature of trade and the profits obtained by the Taxpayer therefrom should be chargeable to profits tax. By letter dated 2 February 2017, the Assessor explained his view to the Taxpayer and requested the Taxpayer to provide further information about Property 4 for consideration. The Assessor equally did not accept that the gain obtained by the Taxpayer from the sale of Property 4 was not chargeable to profits tax.

The Assessor came to Profits Tax Assessments for the years of assessment 2010/2011 and 2013/2014 and Additional Profits Tax Assessments for the years of assessment 2011/2012 and 2012/2013. The Taxpayer objected to all the assessments above, contending that the gains derived from the sale of the Subject Properties were capital in nature and not subject to profits tax.

By letter dated 30 November 2020, the Commissioner informed the Taxpayer that it was unable to agree with the Taxpayer's objections to the Assessments and enclosed the Determination which set out the reasons for the Commissioner's decision and the statement of facts. In gist, the Commissioner was of the view that the transactions of the Subject Properties amounted to an adventure in the nature of trade by the Taxpayer and hence the profits arising therefrom should be chargeable to profits tax.

On 30 December 2020, the Taxpayer brought the Appeal against the Assessments in respect of the gains obtained from the sale of the Subject Properties, namely, HK$11,965,296 (Property 1), HK$12,398,380 (Property 2), HK$33,637,227 (Property 3) and HK$16,699,992 (Property 4), in the years of assessment 2010/11, 2012/13, 2011/12 and 2013/14.

The questions to be determined in the Appeal were whether the Subject Properties were 'capital assets' as contended by the Taxpayer and hence the profits obtained from the sale of them should be excluded and not chargeable to profits tax under section 14 of the IRO.

Held:

1. The Taxpayer bore the burden of proof in the Appeal. The Taxpayer would fail the Appeal unless it satisfied the Board that the true and only reasonable conclusion was that the Subject Properties were capital assets. The question of whether the sale of the Subject Properties by the Taxpayer amounted to the carrying on of a trade was a question of fact and degree. In answering it, the Board had considered all the circumstances of the present case as required (Lee Yee Shing v Commissioner of inland Revenue (2008) 11 HKCFAR 6, Real Estate Investment (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433, and Commissioner of Inland Revenue v Church Body of the Hong Kong Sheng Kung Hui & Another (2016) 19 HKCFAR 54 followed).

2. On the facts, the Taxpayer had acquired various properties, including the Subject Properties, one after the other. The Taxpayer was frequently engaging in similar conveyances or transactions over that period of time. By objective standard, the Taxpayer could hardly be considered to have held the Subject Properties for a lengthy period. The Taxpayer had derived substantial gains from the sale of all of the Subject Properties within a short period of time. The fact that the Taxpayer had acquired the Subject Properties with finance from banks so as to enable it to dispose of them shortly afterwards was a relevant badge of trade or factor supporting that there was an intention to trade or the carrying on of a trade by the Taxpayer in the present case.

3. The Board was satisfied that Property 1 was a trading stock of the Taxpayer and the sale of it was in the nature of the trade by the Taxpayer for the following reasons. First of all, the question of whether there was any intention to trade by the Taxpayer had to be determined objectively by the Board, having regard to all the surrounding circumstances regardless of what was claimed by the Taxpayer. Second, the Taxpayer only held Property 1 for a short period of time, and there was an intention to trade or the carrying on of a trade by the Taxpayer. Third, the fact that the Taxpayer concluded the Estate Agency Agreement for Leasing of Residential Properties in Hong Kong (Form 5) on 1 June 2008 did not advance the Taxpayer's case any further. Fourth, the fact that the rental income to be obtained by the Taxpayer from leasing out Property 1 was likely to be a negative yield would also support that the Taxpayer was waiting for a favourable opportunity to sell Property 1 instead of treating it as a long-

term investment. Fifth, the Board was not satisfied that the Taxpayer had any intention to change the character of Property 1 from a trading stock to a capital investment in August 2009 and afterwards. (Real Estate Investment (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433, and Commissioner of Inland Revenue v Church Body of the Hong Kong Sheng Kung Hui & Another (2016) 19 HKCFAR 54 followed)

4. Turning to Property 2, the Board was also satisfied that it was a trading stock of the Taxpayer and the sale of it was an adventure in the nature of trade. First of all, the fact that the Taxpayer sold Property 2 not long after it was acquired did not support the Taxpayer's case that Property 2 was acquired as long-term investment. Second, the Taxpayer's case that the intention at the time of acquisition of Property 2 was to hold it as long-term investment was not credible, taking into account the fact that Property 2 was not generating much, if not nil, net gain to the Taxpayer. Third, the Taxpayer had appointed 'many different estate agents' to look for a buyer of Property 2 prior to the appointment of Company M and Company L in August 2012. In addition, the Taxpayer had not provided the Board with the details of its investment plan with proper support of evidence. It was highly questionable whether there was such investment plan, and if so, what it precisely was. All the above matters viewed as a whole would support that the Taxpayer had the intention of trade when acquiring Property 2 and it was not a capital asset and the gain obtained by the Taxpayer from the sale of it was subject to profits tax.

5. The Board was of the view that Property 3 was a trading stock of the Taxpayer and the sale of it was an adventure in the nature of trade. First of all, the Taxpayer sold Property 3 not long after it was acquired in 2010. Second, had the Taxpayer intended to treat Property 3 as a long-term investment to generate rental income as alleged, the Taxpayer would not have granted the sole agent licence to Company R to sell it in the first place. Third, it was simply unrealistic for the Taxpayer to suggest that it did not have any intention to sell Property 3 and had only decided to do so after the 'repeated solicitation' of Company R. Fourth, it was showed or supported in the present case that the Taxpayer had intention to resell Property 3 for profits throughout. For the above reasons, the sale of Property 3 was an adventure in the nature of trade and the profits derived therefrom should be subject to profits tax.

6. The Board was satisfied that the Taxpayer acquired Property 4 with the intention of reselling it for profits. First, the time span between the Taxpayer's acquisition of Property 4 and its eventual sale was short, which was indicative of Property 4 being intended as a trading stock. Second, the Taxpayer derived not much gain from holding Property 4 as long-term investment. Third, the fact that Property 4 was leased by the Taxpayer at the material time might simply mean that the Taxpayer was putting it to good use pending sale. Fourth, the risk of issue of a building order against

Property 4 was not the cause of the sale of Property 4 by the Taxpayer. Had the Taxpayer been concerned about the illegality of the sub-division of Property 4, it simply would have not have acquired it in the first place. In the premises, the gain obtained by the Taxpayer from the sale of Property 4 was not capital in nature and should be subject to profits tax.

7. Subject to the deduction of the stamp duty paid by the Taxpayer in the acquisition of Property 3 being made in the calculation of the Taxpayer's Profits Tax Assessment for the year of assessment 2010/2011, the Assessments were confirmed and the Appeal was dismissed with no order as to costs of the Board.

Appeal dismissed.

Cases referred to:

Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392

Commissioner of Inland Revenue v Church Body of the Hong Kong Sheng Kung Hui & Another (2016) 19 HKCFAR 54

Perfekta Enterprises Ltd v Commissioner of Inland Revenue (2019) 22 HKCFAR 203

Lee Yee Shing v Commissioner of inland Revenue (2008) 11 HKCFAR 6

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

Li Sau Keung v Maxcredit Engineering Ltd & Another CACV 16/2003 (unreported, 25 November 2003)

Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Others, CACV 90, 91, 93-96/2012 (unreported, 17 September 2013)

Tjang Siu Thu v Profield Construction Engineering Ltd & Another [2015] 5 HKC 22

Goldbay Fortis Ltd v Asia Allied Infrastructure Holdings Ltd, HCA 371/2014 & HCA 2449/2013 (unreported, 16 June 2021) [2021] HKCFI 1684

Lionel Simmons Properties Ltd. (in liquidation) and Others v Commissioners of Inland Revenue (1980) 53 TC 461

Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463

Cheng Kit Sun Wilson, instructed by Ernst & Young Tax Services Limited, for the appellant.
Ernest C Y Ng, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

A. Introduction

1. By way of the notice of appeal dated 30 December 2020, Company A ('the Taxpayer') appeals ('the Appeal') from the decision of the Acting Deputy Commissioner of Inland Revenue ('the Commissioner') in the Determination ('the Determination') dated 30 November 2020, which confirmed the Taxpayer's Additional Profits Tax Assessment for the year of assessment 2011/2012 and revised the Taxpayer's Profits Tax Assessments for the years of assessment 2010/2011 and 2013/2014 and the Additional Profits Tax Assessment for the year of assessment 2012/2013 (collectively, 'the Assessments'), to the Board of Review ('the Board').

2. After hearing the Appeal, the Board has decided to confirm the Assessments, subject to the Taxpayer's payment of stamp duty in the sum of HK$1,530,000 in the acquisition of Property 3 (defined below) to be taken into account per the Alternative Ground of Appeal ('the Alternative Ground'),[1] and dismiss the rest of the Appeal for the reasons set out below.

B. The Agreed Facts

3. For the purposes of the Appeal, the parties are largely in agreement of the facts stated in Part 1 of the Determination.[2] In summary, they are set out as follows.

4. The Taxpayer was a private company incorporated in Hong Kong on 24 August 2001. Its issued share capital was $2, divided into 2 shares of $1 each. At all relevant times, Mr B and Mr C were the Position D and Position E of the Taxpayer.

5. The Taxpayer's annual accounts closed on the 31st day of December each year. The Taxpayer's principal activities were described in the Position Ds' Report for the period of 31 December 2008 and 31 December 2013 as follows:

Year End		Principal Activities
31 December 2008		Investment holding
31 December 2009		Investment holding
31 December 2010		Investment holding
31 December 2011		Investment holding and property investment
31 December 2012		Property investment
31 December 2013		Property investment

[1] The Taxpayer was granted leave to amend the notice of appeal to incorporate the Alternative Ground of stamp duty in respect of Property 3 as set out in the Taxpayer's Further Submissions dated 20 October 2011.

[2] The Commissioner's last request dated 30 September 2020 for agreement with the Taxpayer on the draft Statement of Facts was unanswered; the Taxpayer only makes clear its position and confirms agreement with the Commissioner on Part 1 of the Determination through its representative, Mr Wilson Cheng of EY, at the hearing of the Appeal.

6. Relevant to the Appeal, the Taxpayer was involved as the sole owner in the transactions of (1)Address F1 ('Property F1'), Address F2 ('Property F2'); (2) Address F3 ('Property F3'); (3) Address F4 ('Property F4'); and (4) Address F5 ('Property F5') (collectively, 'the Subject Properties'), among others with details as follows:

Property	Purchase (by the Taxpayer) (1) Date of Provisional Agreement for Sale and Purchase ('Provisional Agreement') (2) Date of Agreement for Sale and Purchase ('Formal Agreement') (3) Date of Assignment (4) Consideration	Sale (by the Taxpayer) (1) Date of Provisional Agreement (2) Date of Formal Agreement (3) Date of Assignment (4) Consideration
Address F6 ('Property F6')	(1) 23 May 2007 (2) 12 June 2007 (3) 18 September 2007 (4) HK$16,500,000	(1) 6 April 2011 (2) 18 April 2011 (3) 15 July 2011 (4) HK$35,450,000
Property F1	(1) 2 April 2008 (2) 19 April 2008 (3) 8 May 2008 (4) HK$42,000,000	(1) 31 December 2009 (2) 12 January 2010 (3) 3 March 2010 (4) HK$53,000,000
Property F3[3]	(1) 2 January 2010 (2) 15 January 2010 (3) 15 March 2010 (4) HK$41,800,000	House F3 (1) 22 August 2012 (2) 5 September 2012 (3) 6 December 2012 (4) HK$53,000,000 The Carparks (1) 13 June 2016 (2) 24 June 2016 (3) 27 July 2016 (4) HK$1,000,000
Property F4	(1) 8 February 2010 (2) 25 February 2010 (3) 10 May 2010 (4) HK$36,000,000	(1) 28 May 2011 (2) 27 June 2011 (3) 7 October 2011 (4) HK$70,000,000
Property F5	(1) 28 April 2011 (2) Not applicable (3) 28 July 2011 (4) HK$26,000,000	(1) 10 October 2012 (2) 24 October 2012 (3) 18 February 2013 (4) HK$42,700,000

[3] Together with Car Parking Space Nos XX & XX, Property F1

Property	Purchase (by the Taxpayer) (1) Date of Provisional Agreement for Sale and Purchase ('Provisional Agreement') (2) Date of Agreement for Sale and Purchase ('Formal Agreement') (3) Date of Assignment (4) Consideration	Sale (by the Taxpayer) (1) Date of Provisional Agreement (2) Date of Formal Agreement (3) Date of Assignment (4) Consideration
Address F7 ('Property F7')	(1) 12 July 2011 (2) 26 July 2011 (3) 18 October 2011 (4) HK$30,380,000	Not applicable

7. The Taxpayer furnished the Profits Tax Returns for the years of assessment 2008/2009 to 2013/2014, together with the audited financial statements and profits tax computations for the respective years, on diverse dates. Among them, the gains derived by the Taxpayer from the sale of the Subject Properties were computed as follows:

(1) Year of Assessment 2010/2011

Property 1

	HK$	HK$
Sale Proceeds		53,000,000
Less: Purchase Cost	42,000,000	
Accumulated Depreciation	(1,916,924)	
		40,083,076
Decoration at Cost		951,628
Gain on Disposal		11,965,296

(2) Year of Assessment 2011/2012

Property 3

	HK$	HK$
Sale Proceeds		70,000,000
Less: Purchase Cost	36,000,000	
Accumulated Depreciation	(395,227)	
		35,604,773
Commission		700,000
Legal Fee		58,000
Gain on Disposal		33,637,227

(3) Year of Assessment 2012/2013

Property 2

	HK$	HK$
Sale Proceeds		53,000,000
Less: Purchase Cost	41,800,000	
Accumulated Depreciation	(1,936,000)	
		39,864,000
Commission		689,000
Legal Fee		48,620
Gain on Disposal		12,398,380

(4) Year of Assessment 2013/2014

Property 4

	HK$	HK$
Sale Proceeds		42,700,000
Less: Purchase Cost	27,256,360	
Accumulated Depreciation	(1,281,785)	
		25,974,575
Furniture & Fixtures	38,150	
Accumulated Depreciation	(12,717)	
		25,433
Gain on Disposal		16,699,992

8. The Taxpayer provided the following information about the Subject Properties:

Property 1

(1) The Taxpayer acquired Property 1 with vacant possession through Company G. The gross floor area of Property 1 was 3,193 ft^2.

(2) The Taxpayer sold Property 1 with vacant possession through Company H.

Property 2

(3) The Taxpayer acquired Property 2 subject to tenancy through Company J. The gross floor area of Property 2 was 3,193 ft^2.

(4) At the relevant time, the details of the two tenancies of Property 2 were as follows:

Name of Tenant	Date of Tenancy Agreement	Term	Monthly Rent (HK$)
Company K	30 November 2008	24 months (commencing on 1 February 2009)	120,000
Company K	31 December 2010	24 months (commencing on 1 February 2011)	138,000

(5) The Taxpayer sold Property 2 through Company L and Company M, with payment of commission of HK$424,000 and HK$265,000 to them respectively.

Property 3

(6) The Taxpayer acquired Property 3 subject to tenancies through Company N. The total gross floor area of Property 3 was 12,900 ft^2 (i.e. G/F: 3,000 ft^2; 1/F-3F/: 3,300 ft^2 each).

(7) The details of the tenancies of Property 3 were as follows:

Property 3	Name of Tenant	Date of Tenancy Agreement	Term	Monthly Rent (HK$)
Shop A on G/F and 1/F-3/F	Company P	24 April 2008	5 years (commencing on 1 February 2008)	163,000
Portion of Space at Shop B on G/F	Company Q	19 November 2009	3 years (commencing on 1 December 2008)	6,650
Main Roof and Portion of External Wall	Company Q	19 November 2009	3 years (commencing on 1 December 2008)	9,500

(8) The Taxpayer sold Property 3 subject to tenancies through Company R.

Property 4

(9) The Taxpayer acquired Property 4 subject to tenancies through Company H. The gross floor area of Property 4 was 29,600 ft^2. At the time of acquisition, the building age of Property 4 was about 37

years old.

(10) After Property 4 was assigned to the Taxpayer on 28 July 2011, the Taxpayer pledged it to Bank S on 4 October 2011 for a loan of HK$13,000,000, which was repayable by 180 monthly instalments of around HK$91,365 each.

(11) The Taxpayer sold Property 4 subject to tenancies through Company T.

9. The Taxpayer provided further account of the transactions of the Subject Properties as follows:

Property 1

(1) The Taxpayer's principal activities were investment holding and property investment. Property 1 was a good investment with a low asking price. The Taxpayer expected that there would be a great demand for residential properties of quality after the economic recovery.

(2) The Taxpayer financed the acquisition of Property 1 partly with a mortgage loan of HK$29,400,000 from Bank S, which was repayable by 240 monthly instalments of around HK$166,404 each.

(3) After Property 1 was assigned to the Taxpayer on 8 May 2008, the Taxpayer obtained another loan of HK$4,200,000 from Bank S on 6 June 2008, which was repayable by 60 monthly instalments of around HK$75,766 each.

(4) The Taxpayer also received advances of HK$6,200,000 and HK$2,200,000 respectively from two related companies, Company U and Company V. Another related company, Company W, had also provided financial support to the Taxpayer in the acquisition of Property 1. After Company V sold House F8 in August 2008, Company V transferred the sale proceeds to the Taxpayer.

(5) The Taxpayer had appointed Company G to lease out Property 1, with an asking monthly rent of HK$120,000, with effect from 1 June 2008 to 30 May 2009. Property 1 was left vacant throughout the period of the Taxpayer's ownership as no tenant could be successfully found by the Taxpayer.

(6) The Taxpayer had engaged a decoration company before August 2009 to refurbish Property 1 to attract tenants.

(7) When Property 1 was under refurbishment, the Taxpayer was

approached by the owner of the neighbouring House F9 who would like to acquire Property 1 (i.e. House F1) with the plan of redeveloping the two houses into one. The Taxpayer eventually sold Property 1 to the owner of House F9.

(8) The Taxpayer considered the gain obtained from the sale of Property 1 to be capital in nature, as the Taxpayer had intended to hold Property 1 as long-term investment. The Taxpayer only sold Property 1 because the price offered by the owner of House F9 was attractive. The Taxpayer then acquired Property 2 as a replacement and for long-term investment. According to the Taxpayer, had it intended to sell Property 1, it would not have carried out the renovation work in the first place.

Property 2

(9) After the Taxpayer sold Property 1 to the owner of House F9, it was looking for a property in replacement. The Taxpayer came across Property 2 when it was negotiating for the sale of Property 1. The Taxpayer then acquired Property 2 as replacement of Property 1 and for long-term investment.

(10) The Taxpayer financed the acquisition of Property 2 partly with a mortgage loan of HK$25,080,000 from Bank S, which was repayable by 240 monthly instalments of around HK$116,405 each.

(11) The Taxpayer paid for the rest by applying the cash at bank (i.e. HK$2,180,000), the sale proceeds of Property 1 (i.e. HK$12,540,000) and a Position D's loan (i.e. HK$2,000,000), which was repaid on 8 January 2010. The Taxpayer expected that the monthly rental income of Property 2 would be more than sufficient to cover the monthly mortgage repayment.

(12) On 8 October 2012, Company K served upon the Taxpayer a two-month notice to terminate the lease, which came to an end on 7 December 2012. As a result of the loss of rental income from Company K, the Taxpayer experienced a net cash outflow.

(13) Furthermore, the Taxpayer had changed its capital investment plan from holding residential properties to industrial properties. The Taxpayer was looking for industrial properties and a potential buyer of Property 2 at the same time. The Taxpayer eventually sold Property 2 and acquired two industrial properties (i.e. Property 4 and Property F7). The Taxpayer believed that industrial properties would command a better yield than residential properties.

Property 3

(14) The Taxpayer expected that there would be influx of funds into Hong Kong in November 2010 under the Second Quantitative Easing. The Taxpayer considered property investment to be an effective hedge against inflation and cash depreciation.

(15) The Taxpayer financed the acquisition of Property 3 partly with a mortgage loan of HK$25,200,000 from Bank S, which was repayable by 216 monthly instalments of around HK$128,565 each. The Taxpayer paid off the rest (i.e. HK$10,800,000) with advances from Company U.

(16) After considering a lot of expert opinions and recommendations, the Taxpayer had changed its investment plan from holding residential properties to industrial properties. The Taxpayer considered the then price level of industrial properties to be low.

(17) After the Taxpayer sold Property 3, it applied the sale proceeds to acquire Property 4 and Property F7.

(18) The Taxpayer's case was that the gain derived from the sale of Property 3 was capital in nature, as it was an investment asset.

Property 4

(19) The Taxpayer acquired Property 4 as a capital asset providing high rental yield. Assuming that all units in Property 4 were successfully leased out, the Taxpayer could obtain a rental yield of 6% per year, which was well above the prevailing bank deposit rate.

(20) The Taxpayer 4 acquired Property 4 with the sale proceeds of Property F6 deposited at bank.

(21) After some tenants moved out from Property 4 at the end of their tenancies, the Taxpayer was not able to find any new tenants. The monthly rental income of Property 4 dropped from HK$85,600 to HK$29,400 in one year's time. The Taxpayer then decided to hold only one industrial property as investment.

(22) The Taxpayer received a call from Company T regarding a potential buyer of Property 4. Due to the unexpected low occupation rate of Property 4, the Taxpayer decided to sell it and only hold Property F7 as investment.

(23) The Taxpayer applied the sale proceeds of Property 4 to repay the mortgage loans of Property 4 and Property F7. The Taxpayer also

transferred HK$11,500,000 to Company U.

(24) The Taxpayer has maintained the same investment plan since then and continued to keep Property F7 in its investment portfolio.

10. The Assessor had obtained the following information from various estate agents:

Company H

(1) The Taxpayer signed an estate agency agreement to appoint Company H to sell Property 1 for the listed price of HK$58,000,000 with effect from 31 December 2009, which expired on the same day.

(2) The Taxpayer did not sign any estate agency agreement to appoint Company H to lease out Property 1.

Company R

(3) Company R was a wholly-owned subsidiary of Bank X.

(4) The Taxpayer had no intention to sell Property 3 at the very beginning. In November 2010, Company R approached and managed to convince the Taxpayer to grant Company R a sole agency contract to sell Property 3.

(5) The Taxpayer did not tell Company R the concrete selling price of Property 3 at the outset. In the email dated 23 December 2010, Company R recommended the Taxpayer to set the asking price of Property 3 to be somewhere between HK$72,000,000 and HK$75,000,000. The Taxpayer then received an offer from a buyer to purchase Property 3 for HK$70,000,000. The Taxpayer accepted the offer and sold Property 3.

11. The Assessor was of the view that the transactions of Property 1, Property 2 and Property 3 by the Taxpayer were in the nature of trade and the profits obtained by the Taxpayer therefrom should be chargeable to profits tax. By letter dated 2 February 2017, the Assessor explained his view to the Taxpayer and requested the Taxpayer to provide further information about Property 4 for consideration.

12. The Assessor equally did not accept that the gain obtained by the Taxpayer from the sale of Property 4 was not chargeable to profits tax.

13. The Assessor came to the following Profits Tax Assessments for the years of assessment 2010/2011 and 2013/2014 and Additional Profits Tax Assessments for the years of assessment 2011/2012 and 2012/2013:

(1) Year of Assessment 2010/2011

(a) Net Assessable Profits - HK$8,178,025

(b) Tax Payable thereon - HK$1,349,374

(2) Year of Assessment 2011/2012

(a) Additional Assessable Profits - HK$35,191,747

(b) Additional Tax Payable thereon - HK$5,806,638

(3) Year of Assessment 2012/2013

(a) Additional Assessable Profits - HK$9,712,580

(b) Additional Tax Payable thereon - HK$1,602,575

(4) Year of Assessment 2013/2014

(a) Assessable Profits - HK$15,424,979

(b) Tax Payable thereon - HK$2,535,121

14. The Taxpayer objected to all the assessments above, contending that the gains derived from the sale of the Subject Properties were capital in nature and not subject to profits tax. In support, the Taxpayer relied on the following matters:

Property 1

(1) The Taxpayer did not appoint any estate agent to sell Property 1. The Taxpayer only appointed Company G on 1 June 2008 to lease out Property 1, with an asking rent of HK$120,000 per month.

(2) It was Company H which approached and convinced the Taxpayer to sell Property 1 to the owner of House F9.

(3) The Taxpayer had incurred substantial costs in altering the structure of Property 1. The Taxpayer would not have done so had it intended to sell Property 1.

Property 2

(4) In October 2012, Company K informed the Taxpayer that it would

terminate the tenancy early. Property 2 was refurbished.[4]

Property 3

(5) The Taxpayer agreed to appoint Company R to sell Property 3 as a result of the repeated requests made by Company R. The Taxpayer did not have any intention to sell Property 3. The Taxpayer only made the appointment to 'entertain' Company R. According to the Taxpayer, it would have appointed an estate agent with more extensive network had it really intended to sell Property 3; Company R was only a small and newly established company.

(6) Company P was one of the tenants of Property 3 operating an elderly home at Shop A on G/F and 1/F to 3/F. In late 2010, Company P complained that there was serious water leakage on 3/F. Company P also paid rent to the Taxpayer late. The Taxpayer felt annoyed about all these.

(7) Company Q, the other tenant of Property 3, requested the Taxpayer for rental reduction owing to the economic recession.

(8) The Taxpayer finally decided to sell Property 3 and acquired Property F7 as replacement.

Property 4

(9) The Taxpayer appointed Company H in July 2011 to lease out Property 4, but not to sell it. The Taxpayer had also posted advertisements to look for tenants.

(10) Mr C discovered that the Building Authority had imposed a building order against the illegal structure on 9/F of Building F5, which was a few floors above Property 4. The Taxpayer worried that the Building Authority would similarly issue building order against the illegally sub-divided units in Property 4.

(11) According to the Land Registry Records, the Building Authority issued a building order on XX October 2006 against the unauthorized building works inside the staircase at the premise of Property 4.

(12) The Taxpayer received a call from Company T regarding a potential buyer of Property 4. The Taxpayer then decided to sell Property 4 to get rid of the potential litigation.

[4] The Taxpayer disputes part of paragraph 1(12)(b) in the Determination as follow: 'The Company worried that it could not find another tenant for [Property 2] to produce rental income. Therefore, the Company sold [Property 2].'

15. The Taxpayer also provided additional documents in support of its contention.

16. The Assessor maintained the view that the profits derived by the Taxpayer from the sale of the Subject Properties should be subject to profits tax.

17. For the reasons set out in the Determination, the Commissioner did not accept the Taxpayer's objections to the assessments; the Additional Profits Tax Assessment for the year of assessment 2011/2012 was confirmed and the Profits Tax Assessments for the years of assessment 2010/2011 and 2013/2014 and the Additional Profits Tax Assessment for the year of assessment 2012/2013 were revised, including as follows:

(1) Year of Assessment 2010/2011

(a) Revised Net Assessable Profits: HK$7,372,450 (from HK$8,178,025)

(b) Tax Payable thereon: HK$1,216,454 (from HK$1,349,374)

(2) Year of Assessment 2012/2013

(a) Revised Additional Assessable Profits: HK$10,212,580 (from HK$9,712,580)

(b) Additional Tax Payable thereon: HK$1,685,075 (from HK$1,602,575)

(3) Year of Assessment 2013/2014

(a) Revised Assessable Profits: HK$15,174,039 (from HK$15,424,979)

(b) Tax Payable thereon: HK$2,493,716 (from HK$2,535,121)

C. Questions for Determination in the Appeal

18. By letter dated 30 November 2020, the Commissioner informed the Taxpayer that it was unable to agree with the Taxpayer's objections to the Assessments and enclosed the Determination which set out the reasons for the Commissioner's decision and the statement of facts. In gist, the Commissioner was of the view that the transactions of the Subject Properties amounted to an adventure in the nature of trade by the Taxpayer and hence the profits arising therefrom should be chargeable to profits tax.

19. On 30 December 2020, the Taxpayer brought the Appeal against the Assessments in respect of the gains obtained from the sale of the Subject Properties, namely, HK$11,965,296 (Property 1), HK$12,398,380 (Property 2), HK$33,637,227 (Property 3)

and HK$16,699,992 (Property 4), in the years of assessment 2010/11, 2012/13, 2011/12 and 2013/14. According to the Taxpayer, it has engaged in investment holding and/or property investment since the year of assessment 2005/2006. The Taxpayer contends that the Subject Properties were acquired with the intention of holding them as long-term investment and the gains obtained from the sale of them should be 'capital' in nature and not subject to profits tax under section 14 of the Inland Revenue Ordinance (Chapter 112 of the Laws of Hong Kong) ('IRO').

20. It follows that the questions to be determined in the Appeal are whether the Subject Properties were 'capital assets' as contended by the Taxpayer and hence the profits obtained from the sale of them should be excluded and not chargeable to profits tax under section 14 of the IRO.

D. Applicable Legal Principles

21. The function of the Board of Review, on hearing an appeal under section 68 of the IRO, is to consider the matter *de novo*. A taxpayer appeals from a determination but the appeal is made against an assessment: see Shui On Credit Co Ltd v Commissioner of Inland Revenue (2009) 12 HKCFAR 392 at paragraphs 29-30 per Lord Walker of Gestingthorpe NPJ.

22. Section 68(4) of the IRO provides for the burden of proof in an appeal to the Board of Review:

> '*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.*'

23. According to section 66(3) of the IRO:

> '*Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).*'

24. Section 14(1) of the IRO provides:

> '*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*' (emphasis added).

25. Section 2(1) of the IRO defines '*trade*' to include '*every trade and manufacture, and every adventure and concern in the nature of trade*'.

26. In considering the material question of whether a transaction in question is

an adventure in the nature of trade or merely a realization of capital assets, the Board seeks guidance from the Court of Final Appeal's decision in Commissioner of Inland Revenue v Church Body of the Hong Kong Sheng Kung Hui & Another (2016) 19 HKCFAR 54. Fok PJ held:

> '*43. Profits tax is chargeable only on profits arising in or derived from the carrying on by a taxpayer of "a trade, profession or business" in Hong Kong and* ***profits arising from the sale of capital assets are excluded*** *from such charge: Inland Revenue Ordinance (Cap. 112), section 14(1).*
>
> *44. It clearly follows from this statutory charging provision that* ***a landowner may sell his land at an enhanced price above his acquisition cost but not be subject to tax on the profits thereby generated unless in doing so he is embarking on a trade or business of selling land****. So the material issue of fact in the present case was whether the taxpayers were carrying on a trade or business when they made the profits sought to be taxed, or whether those profits arose from the sale of a capital asset.*
>
> *45. The question of* ***whether an activity amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the relevant fact-finding body on a consideration of all the circumstances****: see Lee Yee Shing v Commissioner of Inland Revenue and Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue.*
>
> *46.* ***An intention to trade is essential****. As Lord Wilberforce said in Simmons v IRC:*
>
> *"****Trading requires an intention to trade****: normally the question to be asked is* ***whether this intention existed at the time of the acquisition of the asset****.* ***Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?*** *Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss.* ***Intentions may be changed.*** ***What was first an investment may be put into the trading stock – and, I suppose, vice versa****.* ***If findings of this kind are to be made precision is required****, since a shift of an asset from one category to another will involve changes in the company's accounts, and possibly, a liability to tax: see Sharkey v Wernher [1956] A.C. 58. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate*

*and intelligible, **the company, in whatever character it acquires the asset, may reserve an intention to change its character**. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that **situations are open to review**."*

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

...

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

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

...

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

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

identified the following "badges" at [60], namely:

"...whether the taxpayer:

(1) has frequently engaged in similar transactions?

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

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

(4) has bought large quantities or numbers of the commodity or asset?

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

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

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

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

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

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

52. *It is important to note that Sir Nicolas Browne-Wilkinson V-C stated that it was clear the question of whether or not there was an adventure in the nature of trade depended on (a) "all the facts and circumstances of each particular case" and (b) "**the interaction between the various factors that are present in any given case**". He was also at pains to emphasise that "**the factors…are in no sense a comprehensive list of all relevant matters, nor is any one of them…decisive in all cases**". As Lord Bridge has observed, "the law has never succeeded in establishing precise rules which can be applied to all situations to distinguish between trading stock and capital assets". Indeed, it is perhaps unfortunate that the various*

> *factors are referred to as "badges of trade", since that phrase tends to suggest that the mere presence of one or more of those badges may mean that an activity is in the nature of a trade.* ***This is not the intent of the list of factors, the purpose of which is to identify the facts and matters to which a fact-finding tribunal will look holistically in order to determine if the inference of an intention to trade is or is not to be drawn****...****(emphasis added)****.*'
>
> (See also Perfekta Enterprises Ltd v Commissioner of Inland Revenue (2019) 22 HKCFAR 203 at paragraphs 24-27 per Fok PJ)

27. With respect to the question of whether there was an intention to trade, the Court of Final Appeal in Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6 held:

> '*59.* ***The intention to trade to which Lord Wilberforce referred is not subjective but objective****: Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663 at p.668.* ***It is inferred from all the circumstances of the case****, as Mortimer J pointed out in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 at p.771.* ***A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit when the asset or commodity was acquired and the case where the taxpayer asserts that no such intention existed****. If the taxpayer concedes the intention in a case where the taxing authority claims that a profit is assessable to tax, the concession is generally but not always decisive of intention: Inland Revenue Commissioners v Reinhold (1953) 34 TC 389. However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit* ***or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition****,* ***the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case****. It examines the circumstances to see whether the "badges of trade" are or are not present.* ***In substance, it is "the badges of trade" that are criteria for determining what Lord Wilberforce called "an operation of trade"****.*
>
> ...
>
> *61.* ***In some cases, the source of finance for the purchase may also be a badge of trade, particularly where the asset or commodity is sold shortly after purchase. But borrowing to acquire an asset or commodity is usually a neutral factor (emphasis added)****.*'

28. The other fundamental question is what a taxpayer is required to prove before he can succeed in his appeal to the Board of Review. It was analysed in Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433 as

follows:

> '*47. Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y.* ***The taxpayer will have to prove his contention. So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y. Either way, no appeal by the taxpayer against the Board's decision could succeed on the "true and only reasonable conclusion" basis unless the court is of the view that the true and only reasonable conclusion is that the position is Y.***
>
> *48. For "the position is X" read "the Property was trading stock", and for "the position is Y" read "the Property was a capital asset". That gives you the situation in the present case. In other words,* ***the Taxpayer fails unless the true and only reasonable conclusion is that the Property was a capital asset****.*
>
> *...*
>
> *51. Those answers to the Taxpayer's points rest essentially on common-sense and obvious commercial realities. It is nevertheless worthwhile mentioning two authorities relevant to those answers. One of those authorities is Chinachem Investment Co Ltd v CIR (1987) 2 HKTC 261. It is relevant to the answers to points (i), (ii) and (iv). The properties there in question had been held for substantial periods, in some instances for as long as 15 years. And they had generally been let throughout. Profits tax was charged on the profits derived from their disposal, it being the Revenue's case that they were trading stock. The taxpayer challenged that charge to profits tax, its case being that the properties were capital assets.*
>
> *52.* ***Sir Alan Huggins VP, having accepted that the facts were consistent with that taxpayer's case, then turned to the question of whether they were inconsistent with the Revenue's case, and gave this answer*** *(at p. 311):*
>
> *"****They are not – particularly having regard to the economic climate of Hong Kong during the relevant periods****:* ***[the taxpayer] may have been waiting for a favourable opportunity to sell and merely have been turning the properties to good account in the meantime****. Equally, the fact that the properties were let at full economic rents is consistent with the case of both sides, although if the lettings had been at rents below the economic rents that would clearly have supported [the Revenue's] contention. Again, the renewal of the leases was*

> *equivocal and it is immaterial that the initiative was taken by [the taxpayer]: these facts may indicate nothing more than that the 'favourable opportunity to sell' had not arrived and that it was expected that lettings would be more beneficial than sales within the period of the new leases."*
>
> *The other members of the Court of Appeal agreed* ***(emphasis added)****.'*

E. Taxpayer's Witnesses

29. In the Appeal, the Taxpayer has called the following witnesses to give oral evidence for and on its behalf:

(1) Mr C, one of the Position D and Position E of the Taxpayer;

(2) Mr Y, Position D of Company Z;

(3) Ms AA, Position AB of Company R; and

(4) Mr AC, Position AD of Company U.

30. The Commissioner submits that the Board should draw adverse inferences against the Taxpayer for failing to call Ms AE, an account clerk of Company U, as witness. According to the Commissioner, Ms AE was one of the contact persons between the Taxpayer and the estate agents and had also signed tenancy agreements for and on behalf of the Taxpayer, and it is therefore reasonable to infer that she should have material knowledge of the Taxpayer's interactions with the estate agents; notwithstanding that, the Taxpayer has not called Ms AE as a witness to give evidence in the Appeal.

31. To begin with, the adverse inferences that could be drawn against a person failing to call as witness a person whom he might reasonably be expected to call were explained by the Court of Appeal in Li Sau Keung v Maxcredit Engineering Ltd & Another, CACV 16/2003 (unreported, 25 November 2003):

> '*28. But the plaintiff's evidence was unequivocal: he maintained that he had told So about the fall. Not only was it not put to the plaintiff that he never told So about it, So, who was an employee of the 2nd defendant, was not called to give evidence. Mr Chan SC rightly submitted that this was a matter that may properly be taken into account. In* ***Cavendish Funding Ltd v Henry Spencer & Sons Ltd*** *[1998] 6 EG 146 at 148-149, Aldous LJ cited the following passage from the judgment of Newton and Norris JJ in* ***O'Donnell v Reichard*** *[1975] VR 916 at 929:*
>
> *"It is sufficient to say that in our opinion for the purposes of the present case* ***the law may be stated to be that where a person without explanation fails to call as a witness a person who he might***

> ***reasonably be expected to call, if that person's evidence would be favourable to him**, then, although the jury may not treat as evidence what they may as a matter of speculation think that that person would have said if he had been called as a witness, nevertheless **it is open to the jury to infer that that person's evidence would not have helped that party's case; if the jury draw that inference then they may properly take it into account against the party in question for two purposes**, namely:*
>
> ***(a) in deciding whether to accept any particular evidence**, **which has in fact been given, either for or against that party**, **and which relates to a matter with respect to which the person not called as a witness could have spoken**…" **(emphasis added)**.*'

32. It is pertinent to note that if the reason for the witness's absence or silence satisfies the Court, no adverse inference may be drawn. If there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his or her absence or silence may be reduced or nullified: see Pacific Electric Wire & Cable Co Ltd v Texan Management Ltd & Others, CACV 90, 91, 93-96/2012 (unreported, 17 September 2013) at paragraph 106 (CA); Tjang Siu Thu v Profield Construction Engineering Ltd & Another [2015] 5 HKC 22 at paragraph 33 (CA).

33. In the present case, Mr C explains in his oral evidence that Ms AE has been diagnosed of breast cancer and she therefore would not want to undergo the stress of testifying for the Taxpayer in the Appeal. Mr C also mentions that Ms AE might agree to attend the hearing had he insisted. It is true, as submitted by the Commissioner, that the Taxpayer has not provided the Board with any medical evidence of Ms AE's physical condition. Nor was the same raised in the letter to the Board dated 7 September 2021. That said, there is no reason or basis for the Board to doubt the veracity of the Taxpayer's explanation provided by Mr C for not calling Ms AE as a witness in the Appeal.

34. In these circumstances, the Board is not persuaded that it is appropriate to draw adverse inferences against the Taxpayer for not calling Ms AE as a witness in the Appeal; whether or not the Taxpayer is able to discharge its burden of proof in the Appeal without Ms AE's evidence is a separate matter.

35. Turning now to Mr B, the other Position D and Position E of the Taxpayer, he made a witness statement on 7 September 2021 for the Appeal. But as Mr B has not turned up in the Appeal,[5] no weight should be given to any of the matters set out in his witness statement.

36. With respect to Ms AH and Ms AL, both being the estate agents of Company H, the Commissioner submits that it is reasonable to infer that they should have material knowledge of the Taxpayer's interactions with Company H insofar as Property 1 and Property 4 were concerned. As Ms AH and Ms AL are not called as witnesses by the

[5] For medical reason; in support, the Taxpayer has submitted the medical certificate of Dr AF of Clinic AG.

Taxpayer in the Appeal, no weight should be given by the Board to their two letters dated 8 May 2017 and 30 May 2017.

37. In considering the evidence of the Taxpayer's witnesses, namely, Mr C, Mr Y, Ms AA and Mr AC, in the Appeal, the Board bears in mind the legal principles relevant to the assessment of a witness' credibility as summarized by Yeung J in Goldbay Fortis Ltd v Asia Allied Infrastructure Holdings Ltd, HCA 371/2014 & HCA 2449/2013 (unreported, 16 June 2021) [2021] HKCFI 1684:

> '*73. The approach for assessing credibility is not in dispute. I have been cited a number of authorities, which include Hui Cheung Fai v Another v Daiwa Development Ltd & Others, unrep., HCA 1734/2009, 8 April 2014, §§77-79 per DHCJ Eugene Fung SC and Hua Tyan Development Ltd v Zurich Insurance Co Ltd [2012] 4 HKLRD 827 §27 per Andrew Chung J, Hung Fung Enterprises Holdings Ltd and Other v The Agricultural Bank of China, unrep., HCA 16459/1998, 4 October 2010, §47 per To J.* ***I remind myself when considering a witness' credibility the importance of considering the inherent likelihood or unlikelihood of the witness' evidence, the consistency of the witness' evidence with undisputed or indisputable evidence, with contemporaneous conduct and documents, and the internal consistency of the witness' evidence. I need to consider the totality of the evidence.*** *I warn myself against attaching undue weight on demeanour, though demeanour is obviously relevant when considering credibility. I also bear in mind Re H (Minors) [1996] AC 563, which Mr. Li has reminded me of, that the more serious the allegation sought to be proved is, the more cogent the evidence relied upon to support it must be* ***(emphasis added)***.'

F. Consideration of Badges of Trade in respect of all the Subject Properties

38. Profits tax is only chargeable on profits arising in or derived from the carrying on by the Taxpayer of a trade but profits arising from the sale of capital assets are excluded under section 14 of the IRO. The Taxpayer may sell the Subject Properties at an enhanced price above its costs of acquisition without being subject to profits tax, unless the Taxpayer was embarking on a trade of selling the Subject Properties.

39. The Commissioner's case is that the Subject Properties were the trading stocks of the Taxpayer and profits tax was therefore charged of the Taxpayer on the profits derived from the sale of them. The taxpayer on the other hand challenges such charge to profits tax, its case being that the Subject Properties were its capital assets.

40. As identified in Section C above, the material issue for determination was whether the Taxpayer was carrying on a trade of selling the Subject Properties and made profits therefrom, or whether those profits were generated by the Taxpayer from the sale of the Subject Properties as capital assets which were excluded under section 14 of the IRO.

41. The Taxpayer bears the burden of proof in the Appeal. The Taxpayer would fail the Appeal unless it satisfies the Board that the true and only reasonable conclusion is that the Subject Properties were capital assets: see Real Estate (*supra*).

42. The question of whether the sale of the Subject Properties by the Taxpayer amount to the carrying on of a trade is a question of fact and degree. In answering it, the Board has considered all the circumstances of the present case as required: see Lee Yee Shing (*supra*), Real Estate (*supra*) & Church Body (*supra*).

43. As trading requires an intention to trade, the Board has focused on the question of whether the Subject Properties were acquired by the Taxpayer with the intention of disposing of them at a profit or as permanent investment. It has been borne in mind by the Board that the Taxpayer's intentions may change; if the Board takes the view that there was such change on the Taxpayer's part, it is necessary for the Board to identify it with precision: see Church Body (*supra*), referring to Simmons v IRC per Lord Wilberforce.

44. In making the value judgment as to whether there was trading by the Taxpayer and whether the requisite intention to trade can be inferred, the Board disregards what is claimed by the Taxpayer to be its subjective intention and determines the question objectively: see Church Body (s*upra*).

45. In the present case, the Taxpayer has made profits out of the sale of the Subject Properties but asserts that it had no intention to resell them for profits when they were acquired. The Board therefore has to determine the intention of the Taxpayer objectively, by examining all the circumstances, including whether or not the 'badges of trade' were present. But these badges of trade do not provide any comprehensive or exhaustive list; nor is any one single factor decisive. The Board has examined all the facts and matters holistically and further taken into account their interaction in order to determine whether or not the inference of an intention to trade by the Taxpayer is to be drawn: see Lee Yee Shing (*supra*) (referring to Marson (Inspector of Taxes) v Morton per Sir Nicholas Browne-Wilkinson V-C (as he then was); Church Body (*supra*).

46. All the factors identified below are criteria for an operation of trade by the Taxpayer. After viewing them together with the matters to be further set out in the next few sections in respect of the individual Subject Properties as a whole, the Board is of the view that the Taxpayer acquired the Subject Properties with the intention of disposing of them at a profit and not as permanent investment.

47. On the facts, it can be clearly seen that the Taxpayer had acquired various properties including the Subject Properties, one after the other, starting from 2007 (Property F6), 2008 (Property 1), 2010 (Property 2 & Property 3) to 2011 (Property 4 and Property F7). The Taxpayer then disposed of all of them – save and except Property F7 – in 2009 (Property 1), 2011 (Property F6 & Property 3) and 2012 (Property 2 & Property 4).

48. The level and intensity of transactions entered into by the Taxpayer during those few years were obviously not infrequent. It would not be incorrect to describe that

the Taxpayer was frequently engaging in similar conveyances or transactions over that period of time.

49. By objective standard, the Taxpayer can hardly be considered to have held the Subject Properties for a lengthy period.

50. At the material times, real properties were common subject of trading by investors in Hong Kong.

51. The number of real properties – six in total – acquired by the Taxpayer over a period of four years is not scanty or few. As observed above, after the Taxpayer acquired them, they were disposed of shortly afterwards at different times.

52. The Taxpayer has derived substantial gains from the sale of all of the Subject Properties within a short period of time.

53. The fact that the Taxpayer had acquired the Subject Properties with finance from banks so as to enable it to dispose of them shortly afterwards is a relevant badge of trade or factor supporting that there was an intention to trade or the carrying on of a trade by the Taxpayer in the present case.

G. Property 1

54. In addition to the aforesaid, the Board is satisfied that Property 1 was a trading stock of the Taxpayer and the sale of it was in the nature of the trade by the Taxpayer for the following reasons.

55. First of all, the Minutes of the Position Ds' Meeting held on 2 April 2008 contained the self-serving statements of the Taxpayer which represented only the Taxpayer's subjective intention. The question of whether there was any intention to trade by the Taxpayer has to be determined objectively by the Board, having regard to all the surrounding circumstances regardless of what was claimed by the Taxpayer.

56. Second, the Taxpayer only held Property 1 for a short period of time as summarized below:

Date	Agreement
For Purchase	
2 April 2008	Provisional Agreement
19 April 2008	Formal Agreement
8 May 2008	Assignment
For Sale	
31 December 2009	Provisional Agreement
12 January 2010	Formal Agreement
3 March 2010	Assignment

57. When the above is considered together with the steps taken by the Taxpayer

to sell Property 1 as analysed below, it becomes even more tolerably clear that there was an intention to trade or the carrying on of a trade by the Taxpayer.

58. The Commissioner highlights the following entries in Company H's computer record of Property 1:[6]

Client Information	
Owner	COMPANY A
Contact Person	MR AM

Name	COMPANY A
Contact	XXXXXXXX
13 May 2008 17:58:46	(MS AH, PROPERTY F10) OPEN FOR SALE, FV CALL MR

19 November 2008 14:52:53	(MS AH, PROPERTY F10) FOR LEASE TOO

59. The Commissioner submits that the said computer record provides objective evidence that Property 1 was open for sale immediately or shortly after Property 1 was assigned to the Taxpayer. According to the Commissioner, the reference to 'MR AM' could only be realistically referring to Mr C. The Commissioner points out that Mr C was listed as the contact person and his mobile phone was also included; Property 1 was marked 'OPEN FOR SALE' by Ms AH on 13 May 2008, which was only 5 days after the assignment of Property 1 to the Taxpayer. The Commissioner relies on these matters to show that the Taxpayer had the intention to trade Property 1.

60. On the other hand, the Taxpayer denies that it had given Company H and other estate agents any instruction to sell Property 1. The Taxpayer disputes the accuracy of Company H's computer record. Mr C testifies that the only Estate Agency Agreement for Sale of Residential Properties in Hong Kong (Form 3) concluded by the Taxpayer with Company H in respect of Property 1 was the one dated 31 December 2009, and not 6 March 2009 as shown on Company H's computer record.

61. In response to this, the Commissioner submits that Mr C has admitted that generally speaking, estate agents would commence work even before the formal execution of Form 3; the form was just an official document to make sure that the estate agents could get paid for their commission.

62. As the Board understands it, this is however a different point and does not provide a complete answer to the Taxpayer's challenge of the inaccuracy of Company H's computer record.

63. In light of the incorrect entry of 6 March 2009 as the date of Form 3, the

[6] The said computer record was produced by Company H to the Commissioner on 27 October 2017 upon the Commissioner's request.

Board has difficulty accepting the said Company H's computer record to be an accurate record that the Taxpayer had listed Property 1 for sale on 13 May 2008 as submitted by the Commissioner. The Board also adds that even Company H has expressly qualified in their reply to the Commissioner dated 27 October 2017 that the truth or accuracy of the content of the computer record in question was not guaranteed or warranted.

64. Separately, the Commissioner also relies on Company AN's computer record of Property 1[7] and highlights the following entries:

Client Information	
Name	COMPANY A
Contact	XXXXXXXX
Remarks	AM生 (COMPANY U)

6 July 2008 PM 02:53:27	(MR AP, DISTRICT F11) NEW OWNER IS AM生 (COMPANY U)

8 July 2008 PM 03:13:34	(MR AP, DISTRICT F11) MR AM SAID CAN TRY TO OFFER HIM, INDICATIVE PRICE $52M

28 July 2008 PM 01:19:57	(MS AQ, DISTRICT F11) MR AM SD STILL AVA & SAME PX

65. It was stated in Company AN's reply to the Commissioner dated 27 July 2016 that the Taxpayer's first appointment to sell Property 1, with the asking price of HK$52,000,000, was made on 8 July 2008, which was just 2 months after the assignment of Property 1 to the Taxpayer (on 8 May 2008).

66. The Taxpayer denies that it had appointed Company AN to sell Property 1 with an asking price of HK$52,000,000 on 8 July 2008, or to let it. The Taxpayer also denies that it had instructed Company AN to reduce the asking price of Property 1 from HK$52,000,000 to HK$45,000,000 on 28 February 2009 and HK$46,800,000 on 12 June 2009. It is Mr C's evidence that he did not know any estate agent in Company AN; he also did not recall speaking to them in 2008.

67. The Taxpayer further submits that even if there were any discussion with Company AN, Mr C did not take the initiative to sell Property 1, nor set a sale price. In the Taxpayer's expression, Mr C was merely 'open to options' and 'passively' reacting to offers and was not acting inconsistently with the Taxpayer's intention to hold Property 1 as long-term investment. According to the Taxpayer, Company AN's computer record does not show that the 'indicative price $52M' was set by Mr C, and in any event such price was

[7] The said computer record was produced by Company AN to the Commissioner on 27 July 2016 upon the Commissioner's request.

marked up[8] to put off the estate agents and was not serious.

68. The Board does not accept, on evidence, that there was no exchange of communications between Mr C and Company AN in respect of Property 1 as alleged by the Taxpayer. It is true, as submitted by the Taxpayer, that Company AN did not expressly set out in the computer record that the price of HK$52,000,000 was provided by the Taxpayer. But it is simply incredible that Company AN would have plucked HK$52,000,000 out of the air and adopted it as the 'indicative price' of Property 1, and further adjusted it over time to HK$45,000,000 (on 28 February 2009) and HK$46,800,000 (on 12 June 2009), without first communicating with the Taxpayer.

69. It should also be noted that the term 'indicative price' – in contradistinction to 'price' (as shown in entries of 28 February 2009 and 12 June 2009) – was used after 'Mr AM said can try to offer him'.

70. In view of the Taxpayer's case, *viz.* Company AN was not appointed to sell Property 1 for HK$52,000,000 on 8 July 2008 or instructed to reduce the asking price of Property 1 in 2009, and having considered Mr C's evidence, which goes as far as to suggest that he did not know or speak to any estate agent in Company AN, it would be reasonable to expect the Taxpayer to call the estate agents referred to in Company AN's computer record to give evidence in the Appeal. But the Taxpayer has called none of them as witness, be it 'Mr AP, District F11', 'Ms AQ, District F11', 'Mr AR, Road F12' or 'Mr AS, Road F12'.

71. The Board does not accept Mr C's explanation that enquiry had been made with Company AN about the computer record in question right after the Taxpayer received the hearing bundles but Company AN was unable to respond timely before the Appeal. As submitted by the Commissioner, the Taxpayer should (and could) have made the enquiry with Company AN in 2017, or at least after the Taxpayer's filing of the notice of appeal in December 2020, bearing in mind that the burden of proof falls squarely on the Taxpayer in the Appeal.

72. Third, the fact that the Taxpayer concluded the Estate Agency Agreement for Leasing of Residential Properties in Hong Kong (Form 5) on 1 June 2008, pursuant to which Company G was appointed to lease out Property 1 for HK$120,000 (with effect from 1 June 2008 to 30 May 2009), does not advance the Taxpayer's case any further. It might well just show that the Taxpayer was putting Property 1 to good account whilst waiting for a favourable opportunity to sell it, as shown by the Taxpayer's engagement of Company AN in July 2008: see Real Estate (*supra*) at paragraph 52 per Bokhary PJ & Chan PJ.

73. Fourth, the fact that the rental income to be obtained by the Taxpayer from leasing out Property 1 was likely to be a negative yield would also support that the Taxpayer was waiting for a favourable opportunity to sell Property 1 instead of treating it as a long-term investment. The Taxpayer had financed the acquisition of Property 1 with a mortgage

[8] As represented by a sharp increase of 23.8% over the Taxpayer's own purchase price of Property 1 (HK$42,000,000) in 3 months' time.

loan of HK$29,400,000 from Bank S (repayable by 240 monthly instalments of around HK$166,404 each) and subsequently another loan of HK$4,200,000 from Bank S (repayable by 60 monthly instalments of around HK$75,766 each), leaving aside the funds advanced by Company U (HK$6,200,000) and Company V (HK$2,200,000). Assuming that Property 1 was successfully let by the Taxpayer for HK$120,000 per month, the rental income alone would not be sufficient to cover the monthly mortgage repayments to Bank S, not to mention payment of outlays like management fees and rates.

74. The consideration here is not so much whether the Taxpayer was able to make the monthly mortgage repayments (whether by itself or with the financial support of the related companies) as submitted by the Taxpayer. The material question to be considered is whether the Taxpayer had the intention of holding Property 1 as long-term investment when the rental income to be obtained was not sufficient to cover the expenses and liabilities at all material times. There is authority to suggest that if money was borrowed, that is 'some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade'. The source of finance as a single item may not be decisive, but when being considered with the other circumstances in the present case as a whole, it supports that the resale of Property 1 by the Taxpayer was in the nature of trade: see Real Estate (*supra*) at paragraph 54 per Bokhary PJ & Chan PJ. [9]

75. Fifth, it is true that a company may reserve an intention to change the character of an asset: see Church Body (*supra*) at paragraphs 46-47 per Fok PJ.[10] But the Board is not satisfied that the Taxpayer had any intention to change the character of Property 1 from a trading stock to a capital investment in August 2009 and afterwards.

76. It is not in dispute that Company G had not managed to locate any tenant for the Taxpayer for Property 1. The Taxpayer then decided to engage a decoration company to renovate Property 1 before August 2009. The Taxpayer submits that the purpose of Property 1 was changed, as the Taxpayer would no longer want to let Property 1 for rental income but to use it as a Position D's quarter.

77. As can be seen from the quotation issued by Company Z on 17 July 2009, the decoration works intended to be carried out included the building of a mahjog room and a massage room. Mr Y testifies that he had spent a great deal of time discussing with Mr B, the Taxpayer's other Position D, about the design of the house and to understand his personal needs etc.

78. Furthermore, Mr C gives evidence that he and Mr B had plan to acquire House F9 (which was adjacent to Property 1) so that they could live close by as they did before.[11] For that purpose, they had requested Ms AH to approach the owner of House F9. It turned out that the owner of House F9 would like to acquire Property 1 for HK$53,000,000 so that he could put the two houses together. Ms AH therefore persuaded the Taxpayer to sell Property 1 to the owner of House F9, which the Taxpayer eventually

[9] Quoting Marson v Morton at page 1348F-G per Vice Chancellor
[10] Quoting Simmons v IRC per Lord Wilberforce
[11] As they did in House F13 and House F14

did.

79. The Taxpayer submits that the sale price (HK$53,000,000) offered by the owner of House F9 was 'exceptionally high' and the 'unexpected attractive offer' to purchase Property 1 from the owner of House F9 was not there when the Taxpayer acquired Property 1 in 2008.

80. The Board is not satisfied that the Taxpayer had any intention to change the character of Property 1 from a trading stock to a capital investment at any time. On the facts, what happened was that the Taxpayer could not manage to sell Property 1 since 2008. The Taxpayer was also not able to secure any tenancy for Property 1. In these circumstances, the Taxpayer had decided to renovate Property 1 and use it as Mr B's quarter, pending a favourable opportunity to sell it. There was no change of the intention of the Taxpayer at that point of time. The favourable opportunity to sell Property 1 came along when the owner of House F9 offered to purchase it from the Taxpayer for HK$53,000,000. The owner of House F9 was willing to pay a premium in exchange for the location of Property 1 which would make his plan of combining two houses into one feasible.

81. Alternatively, the Taxpayer's use of Property 1 as a Position D's quarter, when properly considered with all other relevant facts and circumstances of the present case as a whole, is not inconsistent with the Commissioner's case that Property 1 was held as a trading stock. The Taxpayer was merely making good use of Property 1 pending sale. In other words, the Taxpayer's case that Property 1 was a capital asset was not the true and only reasonable conclusion in any event: see Real Estate (*supra*) at paragraphs 47-48 & 52 per Bokhary PJ & Chan PJ.

82. For the above reasons, the gain obtained by the Taxpayer from the sale of Property 1 should be subject to profits tax.

H. Property 2

83. Turning to Property 2, the Board is also satisfied that it was a trading stock of the Taxpayer and the sale of it is an adventure in the nature of trade.

84. It is necessary for the Board to examine all the relevant circumstances objectively, regardless of what was claimed to be the subjective intention of the Taxpayer in acquiring Property 2 in the Minutes of the Position Ds' Meeting held on 31 December 2009.

85. First of all, as highlighted by the Commissioner, the fact that the Taxpayer sold Property 2 not long after it was acquired does not support the Taxpayer's case that Property 2 was acquired as long-term investment:

Date	Agreement
For Purchase	
2 January 2010	Provisional Agreement
15 January 2010	Formal Agreement

Date	Agreement
15 March 2010	Assignment
For Sale (House F3)	
22 August 2012	Provisional Agreement
5 September 2012	Formal Agreement
6 December 2012	Assignment

86. Second, the Taxpayer's case that the intention at the time of acquisition of Property 2 was to hold it as long-term investment is not credible, taking into account the fact that Property 2 was not generating much, if not nil, net gain to the Taxpayer. It is accepted that the Taxpayer's acquisition of Property 2 was financed partly by a mortgage loan of HK$25,080,000 from Bank S (which was repayable by 240 monthly instalments of around HK$116,405 each). On the other hand, the monthly rental income of HK$120,000 received from Company K under the first tenancy (until 31 January 2011) would barely cover the monthly mortgage repayment to Bank S, leaving aside other outlays like the management fees and rates. The financial position only slightly improved after the coming into effect of the second tenancy (from 31 December 2010) with an increased rent of HK$138,000.

87. Third, as can be seen from the correspondence exchanged between the Taxpayer and the Commissioner, the Taxpayer had appointed 'many different estate agents' to look for a buyer of Property 2 prior to the appointment of Company M[12] and Company L[13] in August 2012. This contradicts the Taxpayer's case that Property 2 was sold because the Taxpayer's investment plan was 'frustrated' by Company K's early termination of the tenancy. According to Mr C, Company K verbally informed him about the early termination in July 2012, even though Company AT only served written notice of termination on behalf of Company K to the Taxpayer on 8 October 2012.

88. The Commissioner first requested the Taxpayer on 17 January 2014 to provide the following information with respect to Property 2, namely, (1) copies of minutes of Position Ds' meeting to authorize the sale and purchase of Property 2; (2) the original intention with regard to the acquisition of Property 2 together with documentary in support; (3) any feasibility study as to the viability of the investment of Property 2 in terms of return on capital and servicing of the loan, and if so, a copy of the feasibility for reference; (4) the reasons for and the circumstances leading to the disposal of Property 2 together with documentary evidence in support; (5) the date when the Taxpayer resolved to sell Property 2 and the date when it commenced to offer Property 2 for sale, e.g. appointment of estate agent and advertisement in newspaper; (6) the basis on which the selling price of Property 2 was determined; and (7) the Taxpayer's reasons for considering that the gain on disposal of Property 2 was not subject to profits tax in Hong Kong.

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[12] On 1 August 2012, the Taxpayer concluded the Estate Agency Agreement for Sale of Residential Properties in Hong Kong (Form 3) with Company M to sell Property 2 as exclusive agent for HK$65 million with effect from 1 August 2012 to 31 October 2012.

[13] On 21 August 2012, the Taxpayer concluded the Estate Agency Agreement for Sale of Residential Properties in Hong Kong (Form 3) with Company L to sell Property 2 for HK$60 million with effect from 21 August 2012 to 31 October 2012.

89. The Taxpayer did not supply the information sought by the Commissioner in its replies dated 2 July 2014, 10 December 2014, 27 February 2015 and 14 April 2015. The Commissioner therefore repeated its requests to the Taxpayer on 6 November 2014, 30 January 2015, 12 March 2015 and 6 November 2015.

90. The Taxpayer only gave more substantive replies on 1 March 2016. In response to the Commissioner's request for item (5) – the date when the Taxpayer resolved to sell Property 2 and the date when it commenced to offer Property 2 for sale, e.g. appointment of estate agent and advertisement in newspaper – the Taxpayer replied that 'we cannot remember the dates'. The Taxpayer continued to say that 'we had asked **many property agents to find buyer for a long time**. However, there were with no result. In August 2012, we have appointed [Company M] as the exclusive agent **(emphasis added)**'.

91. Even though the Taxpayer said that it could not recall the date when it started offering Property 2 for sale, it was explained in the said reply dated 1 March 2016 that the Taxpayer came to the view that investment in industrial properties was better than residential properties in early 2011. As a result, the Taxpayer had shifted its investment from residential properties to industrial properties. It can also be seen that the Taxpayer was looking for industrial properties and a buyer for Property 2 'simultaneously'. It was also stated by the Taxpayer that it acquired Property 4 and Property F7 in April 2011 and July 2011 respectively.

92. It follows that the Taxpayer had already appointed many different agents to sell Property 2 in early 2011; by that time, the Taxpayer did not know about Company K's early termination yet. On the Taxpayer's own case, Mr C only received the oral notice from Company K in July 2012.

93. In addition, contrary to the Taxpayer's case that it was holding Property 2 to generate rental income, the Taxpayer has adduced no single shred of evidence to show that steps were taken to look for new tenant after Company K. Mr C's evidence is simply that the rent paid by Company K was relatively high and the Taxpayer considered that 'it was hard to maintain such high return from new tenant'.

94. In considering the claim that there was a change in the investment plan of the Taxpayer from holding residential properties to industrial properties in 2011, the Board is not concerned with the Taxpayer's subjective intention. It is important to note that the Taxpayer has not provided the Board with the details of its investment plan with proper support of evidence. It is highly questionable whether there was such investment plan, and if so, what it precisely was. To the extent that the Taxpayer was relying on the acquisition of Property 4 and Property F7 in 2011 to show that there was such investment plan, it is worth pointing out that Property F6 was sold in 2011, followed by Property 4 in October 2012, by the Taxpayer.

95. In any event, the change in the Taxpayer's preference for industrial properties, if any, simply does not shed light on the question of whether Property 2 was a trading stock or a capital asset of the Taxpayer. The Taxpayer's sale of Property 2 for a new industrial property might just mean that the Taxpayer has since then been involved in

the trading of industrial properties and not residential properties. This is also consistent with the Commissioner's case that the sale of Property 2 by the Taxpayer was in the nature of trade. The Taxpayer fails to show that the true and only reasonable conclusion is that the Property 2 was a capital asset.

96. All the above matters viewed as a whole would support that the Taxpayer had the intention of trade when acquiring Property 2 and it was not a capital asset and the gain obtained by the Taxpayer from the sale of it was subject to profits tax.

I. Property 3

97. After the Board examines all the relevant circumstances of the present case objectively, regardless of what was claimed by the Taxpayer to be its subjective intention in acquiring Property 3, the Board is of the view that Property 3 was a trading stock of the Taxpayer and the sale of it was an adventure in the nature of trade.

98. First of all, the Taxpayer sold Property 3 not long after it was acquired in 2010 as follows:

Date	Agreement
For Purchase	
8 February 2010	Provisional Agreement
25 February 2010	Formal Agreement
10 May 2010	Assignment
For Sale	
28 May 2011	Provisional Agreement
27 June 2011	Formal Agreement
7 October 2011	Assignment

99. Second, the Taxpayer entered into the Sole Agent Licence Agreement with Company R for the sale of Property 3 on 29 November 2010, which was slightly over 6 months after Property 3 was assigned to the Taxpayer (on 10 May 2010). Had the Taxpayer intended to treat Property 3 as a long-term investment to generate rental income as alleged, the Taxpayer would not have granted the sole agent licence to Company R to sell it in the first place.

100. In this relation, it is relevant to take into account that there was a subsisting tenancy of Property 3. Company P operated an elderly home at Shop A of G/F and 1/F to 3/F. Even though the Taxpayer found Company P's complaint in the late 2010 about the water leakage on 3/F and the late payment of rent from time to time 'annoying', Mr C has confirmed that these were not the reasons for the Taxpayer to sell Property 3.

101. Third, it is simply unrealistic for the Taxpayer to suggest that it did not have any intention to sell Property 3 and had only decided to do so after the 'repeated solicitation' of Company R. Ms AA gives evidence that she had known the Position Ds of the Taxpayer for a long period of time. After Ms AA joined Company R, she approached them for business opportunities. Ms AA had persuaded them to allow her to sell Property 3. The

Taxpayer did not specify a sale price of Property 3. Ms AA analysed the benefits of holding and selling Property 3 for the Taxpayer. On the other hand, Ms AA recommended a selling price of Property 3 to the Taxpayer. The Taxpayer was passive in the whole process; the Taxpayer did not follow up with her regarding the sale of Property 3. These might all well be the case, but it still did not mean that the Taxpayer had not acquired Property 3 with the intention of reselling it for profits. The fact that the Taxpayer engaged Company R was itself the best evidence of such intention.

102. In further support, the Board notes from the computer record kept by Company H of Property 3 that both Mr C and Mr B were listed as contact persons. [14] Both the Taxpayer's office number and Mr C's own personal mobile number were included there. The Taxpayer does not seem to be disputing their accuracy. Such computer record at least shows that there were communications between the Taxpayer and Company H in respect of Property 3. It is Ms AA's evidence that the Taxpayer did not offer Property 3 for sale before their solicitation, but Ms AA did not know whether the Taxpayer had engaged other agents before Company R became the exclusive estate agent.

103. Fourth, with respect to the Taxpayer's point that it had no intention to sell Property 3 until it received the 'too-good-to-refuse offer', the Board would like to point out as follows. In the present case, Company R did not approach the Taxpayer with a ready offer at hand. The Taxpayer did not expect Company R to be able to dispose of Property 3 in a short period of time. On the facts, Ms AA took time to look for a buyer of Property 3. The Taxpayer had been facilitating the work of Company R. The Sole Agent Licence Agreement was originally for the period of 29 November 2010 and 31 March 2011. The Taxpayer agreed to extend it to 30 June 2011 by way of a supplemental agreement signed on 24 March 2011. This shows or supports that the Taxpayer had intention to resell Property 3 for profits throughout.

104. For the above reasons, the sale of Property 3 was an adventure in the nature of trade and the profits derived therefrom should be subject to profits tax.

J. Property 4

105. The Board is satisfied that the Taxpayer acquired Property 4 with the intention of reselling it for profits.

106. The matters set out in the Minutes of the Position Ds' Meeting held on 28 April 2011 contained only the Taxpayer's self-serving statements of its subjective intention of the acquisition of Property 4. It is necessary for the Board to consider all the relevant circumstances of the present case objectively as follows.

[14] The computer record was provided by Company E to the Commissioner on 27 October 2017 upon the Commissioner's request.

107. First, as pointed out by the Commissioner, the time span between the Taxpayer's acquisition of Property 4 and its eventual sale was short, which was indicative of Property 4 being intended as a trading stock:

Date	Agreement
For Purchase	
28 April 2011	Provisional Agreement
28 July 2011	Assignment
For Sale	
10 October 2012	Provisional Agreement
24 October 2012	Formal Agreement
18 February 2013	Assignment

108. In this relation, as pointed out by the Commissioner, a 'AU小姐' was included in Company H's computer record of Property 4 as a contact person. There were multiple entries in July 2011, indicating that Property 4 was listed for sale, with a unit price ('@1,250') per the instruction of 'AU小姐'. The Taxpayer does not seem to dispute that 'AU小姐' was referring to Ms AE at the material times. Without going into details, Company H's computer record shows that there were at least communications between the Taxpayer and Company H regarding the sale of Property 4 in July 2011, i.e. one year after the assignment of Property 4 to the Taxpayer. The Taxpayer has not called Ms AE as a witness to explain all these in the Appeal, which would otherwise support that Property 4 was a trading stock.

109. Second, the Board accepts the Commissioner's submission that the Taxpayer derived not much gain from holding Property 4 as long-term investment. On the Taxpayer's own case, the best rental to be obtained from Property 4 was HK$85,000, whereas the monthly mortgage repayment to Bank S was around HK$91,365, leaving aside other outlays.

110. Third, the fact that Property 4 was leased by the Taxpayer at the material time might simply mean that the Taxpayer was putting it to good use pending sale. This was not inconsistent with the Commissioner's case that the Taxpayer had intention of trading it.

111. Fourth, Mr C admits that he had knowledge of the sub-divided state of Property 4 before the acquisition. The Taxpayer's alleged concern about the risk of issue of a building order against Property 4 could not be genuine. In any event, it was not the cause of the sale of Property 4 by the Taxpayer. Had the Taxpayer been concerned about the illegality of the sub-division of Property 4, it simply would have not have acquired it in the first place.

112. In the further alternative, the Taxpayer's intention to get rid of the risk of litigation was not inconsistent with its intention of acquiring Property 4 as a trading stock. The Taxpayer might well be waiting for an opportunity to resell Property 4 and the risk of litigation just expedited it.

113. In the premises, the gain obtained by the Taxpayer from the sale of Property 4 was not capital in nature and should be subject to profits tax.

K. Conclusion

114. For the reasons above, subject to the deduction of the stamp duty of $1,530,000 paid by the Taxpayer in the acquisition of Property 3 being made in the calculation of the Taxpayer's Profits Tax Assessment for the year of assessment 2010/2011, the Assessments are confirmed and the Appeal (other than the Alternative Ground) is dismissed with no order as to costs of the Board.