Case No. D10/14

Stated case – section 69(1) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Fong Sui Yi Andrea and Wong Ho Ming Horace.

Date of hearing: Stated case, no hearing.
Date of decision: 8 July 2014.

By letter dated 8 May 2014, the Taxpayer's representative applied to the Board to state a case in respect of its Decision dated 9 April 2014 ('the Decision') pursuant to section 69(1) of the IRO. The said letter contained merely a bare application without framing or identifying any question of law for the Board to state a case for the opinion of the Court of First Instance.

Held:

1. It is incumbent on an applicant for a case stated to identify a question of law which is proper for the Court of First Instance to consider. It is not for the Board to frame questions for an applicant. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal. A satisfactory question has to be identified so as to trigger the preparation of the case. (Commissioner of Inland Revenue v Inland Revenue Board of Review and another [1989] 2 HKLR 40 applied)

2. In cases where questions have been framed or identified, the Board is required to apply a *qualitative* assessment to the proposed questions and is *duty bound to decline* to state a case if the question proposed to be stated is not a proper one. (Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321; Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378; Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456)

3. No question had been framed or identified by the Taxpayer. The time limit under the proviso to section 69(1) had expired. There is no provision for extension of time.

Application dismissed.

Cases referred to:

Commissioner of Inland Revenue v Inland Revenue Board of Review and another, [1989] 2 HKLR 40

Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223

Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409

Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321

Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378

Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456

Decision:

Introduction

1. All references to sections and subsections are to those of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

2. The Assessor raised on the Appellant the 2005/06 Profits Tax Assessment.

3. By the Determination dated 14 December 2010, the Deputy Commissioner of Inland Revenue confirmed the Profits Tax Assessment for the year of assessment 2005/06 dated 18 August 2009, showing assessable profits of $9,741,714 with tax payable thereon of $1,704,799.

4. The Taxpayer appealed to the Board of Review ('the Board').

Board's decision on the Taxpayer's appeal to the Board

5. By its Decision, D1/14, dated 9 April 2014 ('the Decision'), the Board confirmed the assessment appealed against and dismissed the appeal. A copy of the Decision is annexed and marked 'Annexure A' which the Board incorporates by reference.

The Taxpayer's application for a case stated

6. By letter dated 8 May 2014, Castra CPA Limited applied on behalf of the Taxpayer to the Board for a case stated. The letter reads as follows (*written exactly as it stands in the original*):

> ' Dear Sirs

APPEAL TO THE BOARD OF REVIEW
(COMPANY B)
PROFITS TAX ASSESSMENT 2005/06

We act for (Company B).

We refer to the Board's Decision on our client's appeal dated 9 April 2014 and now make pursuant to section 69(1) of the Inland Revenue Ordinance (Cap. 112), this application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance.

We now enclose a cheque [cheque number omitted here] in the sum of $770 being the fee payable for application requiring the Board of Review to state a case.

Yours faithfully'

Relevant authorities on stating a case

7. Section 69(1) provides that the Board's decision shall be final:

> ' *The decision of the Board shall be final*'.

The finality of the Board's decision is subject to the proviso on appeals by way of case stated on a question or questions of law. The proviso reads as follows:

> ' *Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part 2 of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.*'

8. There is **no** provision for extension of the one-month time limit laid down by the proviso.

9. It is trite law that:

(1) an applicant for a case stated must identify a question of law which is proper for the then High Court, now Court of First Instance, to consider;

(2) the Board is under a statutory duty to state a case in respect of that question of law;

(3) the Board has a power to scrutinise the question of law to ensure that it is one which is proper for the court to consider; and

(4) if the Board is of the view that the point of law is not proper, it may decline to state a case;

per Barnett J in Commissioner of Inland Revenue v Inland Revenue Board of Review and another, [1989] 2 HKLR 40 at page 57 H to J ('the Aspiration Case'). See also subsequent development of the case in the Court of Appeal in Commissioner of Inland Revenue v Inland Revenue Board of Review and Aspiration Land Investment Ltd (1989) 3 HKTC 223 and before Kaplan J in Commissioner of Inland Revenue v Aspiration Land Investment Ltd [1991] 1 HKLR 409 at page 417I.

10. It is clear from the Aspiration case that it is incumbent on an applicant for a case stated to identify a question of law which is proper for the Court of First Instance to consider. It is not for the Board to frame questions for an applicant. The reason is obvious: the parties know better than anyone else what points they wish to take on the appeal (see the Aspiration case at page 48J). A satisfactory question has to be identified so as to trigger the preparation of the case (at page 47I).

11. The letter dated 8 May 2014 contains **no** question whatsoever. **No** question has been framed or identified.

12. In cases where questions have been framed or identified, the Board is required to apply a *qualitative* assessment to the proposed questions and is *duty bound to decline* to state a case if the question proposed to be stated is not a proper one.

(1) In Same Fast Limited v Inland Revenue Board of Review, (2007-08) IRBRD, vol 22, 321 at paragraphs 6 and 9, Reyes J considered the questions in that case prolix, argumentative, not easy to understand and embarrassing as a whole. Simply on account of their wordiness and opacity, those questions did not appear to the learned judge at all appropriate for a case stated and the learned judge upheld the decision of the Board refusing to state a case.

(2) In Honorcan Ltd v The Inland Revenue Board of Review [2010] 5 HKLRD 378, Fok J (as he then was) held that the Board is required to apply a *qualitative* assessment to the proposed questions of law and is *duty bound to decline* to state a case if the question of law proposed to be stated is not a proper one, such as a question which is plainly and obviously unarguable:

(a) The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the proposed questions of law were not proper ones for the opinion of the Court. (paragraph 34)

(b) In my judgment, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable. (paragraph 50)

(c) If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position. (paragraph 53)

(3) In Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456, Barma J (as he then was) in a judgment handed down on 26 August 2011 applied Honorcan and held at paragraph 31 that if the Board is satisfied that the argument has no prospect of success, it is not bound to include it amongst the questions that it poses for the consideration of the court.

Conclusion and disposition

13. **No** question has been framed or identified. The time limit under the proviso to section 69(1) has expired. There is no provision for extension of time.

14. The Board declines to state a case and dismisses the Taxpayer's application for a case stated.

Annexure A
D1/14

BOARD OF REVIEW

Appeal by Company B

(Date of Hearing: 19 August 2011)

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DECISION

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Case No. D1/14

Profits tax – sale of property – no allegation on the intended user – onus of proof on the appellant – sections 2(1), 14 and 68 of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Fong Sui Yi Andrea and Wong Ho Ming Horace.

Date of hearing: 19 August 2011.
Date of decision: 9 April 2014.

The Appellant bought the House (notwithstanding 2 Orders to demolish certain unauthorised building works issued in 1986 and 1989 respectively by the Building Authority) in January 2004 and sold the same in May 2005 at a gain.

The Appellant contends that the profit on disposal of the House is capital in nature and should not be chargeable to Profits Tax for the year of assessment 2005/06.

Held:

1. The onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

2. In the grounds of appeal, there is no allegation on the intended user of the House. The allegation of intention to acquire the House and hold it on a long term basis is hollow.

3. The Appellant kept shifting from one user to another yet made no attempt to explain the shifting of grounds; and worst of all the Appellant declined to say which user it was asserting on appeal.

4. The Board is not impressed by the credibility of the Shareholder as a witness whose evidence is contradicted by contemporaneous documents and inherent probabilities.

5. There is no factual support for any case on capital asset.

6. All in all, the Appellant was doing a deal. It carried on an adventure in the nature of trade and acquired the House as a trading stock.

Appeal dismissed.

Cases referred to:

China Map Limited v CIR (2008) 11 HKCFAR 486
Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213
Wing Tai Development Co Ltd v CIR [1979] HKLR 642
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Shui On Credit Company Limited v Commissioner of Inland Revenue (2009) 12 HKCFAR 392
Simmons v CIR [1980] 1 WLR 1196
Marson v Morton [1986] 1 WLR 1343
All Best Wishes Limited v CIR (1992) 3 HKTC 750
Lee Yee Shing v The Commissioner of Inland Revenue (2008) 11 HKCFAR 6

Lo Wing Hung of Castra CPA Limited for the Appellant.
Chan Tsui Fung and Leung Wing Chi for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant bought and sold the House at a gain.

2. The Assessor raised on the Appellant the 2005/06 Profits Tax Assessment.

3. By the Determination dated 14 December 2010, the Deputy Commissioner of Inland Revenue confirmed the Profits Tax Assessment for the year of assessment 2005/06 dated 18 August 2009, showing assessable profits of $9,741,714 with tax payable thereon of $1,704,799.

4. Castra CPA Limited gave notice of appeal on behalf of the Appellant with a 'Statement of the Grounds of Appeal' (see paragraph 6 below) with a word count of over 1,220.

Acquisition and sale of the House

5. The salient facts are as follows:

	11 September 1986	Date of First Order issued by the Building Authority requiring owners of the House to

		demolish certain unauthorised building works at the property, which comprised the structures erected on the open yard areas, adjacent to the master bedroom and on the roof. Works should be commenced within 1 month and be completed in 2 months.
	10 November 1989	Date of Second Order which superseded the First Order. Works should be commenced forthwith and be completed in 1 month.
	October 2003	The Appellant was incorporated.
	5 December 2003	Date of the provisional acquisition agreement by which the Shareholder agreed to purchase the House at a consideration of $13,800,000. The agreement provided, among others, that: • The Shareholder could nominate a corporation to complete the purchase before noon on 8 December 2003. The purchaser acknowledged that there were certain unauthorised building works in the House.
	19 December 2003	Date of formal acquisition agreement. The agreement provided, among others, that: • The purchaser acknowledged that there were 2 Orders [1] affecting the House; • The House was sold on an 'as is' basis; • No requisition or objection whatsoever shall be raised in respect of the Orders; and • The purchaser shall complete the purchase of the House notwithstanding the Orders.
Q[2]	10 January 2004	Directors of the Appellant resolving in writing that the Shareholder be authorised to sign all acquisition documents and that the House:

1 i.e. the First Order and the Second Order.

2 Allegation of directors' quarters as intended user.

		• 'will be used as director quarter'.
	15 January 2004	Facility letter of a bank loan facility of HK$6,900,000 and an overdraft facility of HK$1,380,000. The Appellant accepted the facility.
	19 January 2004	Date of legal charge in favour of the bank.
L[3]	19 January 2004	Date of assignment of rentals in favour of the bank[4].
	19 January 2004	Drawdown of $6,900,000 bank mortgage loan maturing on 19 January 2014.
	19 January 2004	Date of acquisition assignment.
L[5]	14 February 2004	Date of registration in the land registry of assignment of rentals in favour of the bank.
L[6]	17 May 2004	Facility letter from the bank of a term loan facility of HK$1,380,000 to be repaid by 120 monthly instalments, and upon drawdown of this term loan, the overdraft facility of HK$1,380,000 would be cancelled simultaneously. The Appellant was required to: • 'Apply the loan drawdown … towards financing or refinancing the purchase of [the House] or financing the payment of the loan borrowed for the purchase of [the House]'. • Use the House 'for letting'. • The documents required by the bank included a 'rental assignment'.
	25 May 2004	$1,380,000 was credited by the bank to the Appellant's current account.
	13 December 2004	Letter from Building Authority to the Appellant stating that if they could still not

[3] Letting – user permitted by bank under restriction on user.
[4] Registered in the land registry on 14 February 2004.
[5] Letting-only restriction imposed by the bank.
[6] Letting – user permitted by bank under restriction on user.

		gain access to the House by 28 December 2004 or later, they may break into the House.
	2 February 2005	Date of Superseding Order by the Building Authority. It required the Appellant to demolish the following building works and reinstate in accordance with building plans: • structures erected on the open yard area; and • structures erected adjacent to the master bedroom. Works should be commenced within 30 days and completed within 60 days.
	6 April 2005	Date of provisional sale agreement at a consideration of $24,880,000.
	20 April 2005	Date of formal sale agreement.
	May 2005	The Shareholder's mother passed away.
	May 2005	Shareholder's elder brother 'leaving (sic) in elderly home' after mother passed away.
	20 May 2005	Date of sale assignment.
	30 June 2005	Balance sheet as at this date showed the Appellant's assets comprised: • a loan due from the Shareholder of $9,708,858.53; and • cash at bank of $60,455.84.
Q[7]	7 April 2006	Letter from Company A, the Appellant's then tax representative, to CIR stating: • Purchase of the House 'with the intention of long term investment and use as director quarter. The minute of the Directors' Meeting … shows the authorization and intention of the purchase'. • 'The acquisition of [the House] was financed by two Mortgage Loans from

[7] Allegation of directors' quarters as intended user.

		[the bank] of HK$6,900,000 … and HK$1,380,000 …'
Q[8]	7 May 2006	Letter from Company A to CIR giving notice of objection on behalf of the Appellant stating: • '[The Appellant] was set up by [the Shareholder and his wife] for the purpose of "house" investment for the directors' residence on 17th October 2003'.
Q[9]	10 June 2006	Letter from Company A to CIR stating: • The House 'is planned to be used as directors' quarter'.
	10 August 2006	Letter of Compliance.
M[10]	26 May 2010	Letter from Castra CPA Limited to CIR stating that: • The 'intended occupants were [the Shareholder's] mother, [the Shareholder's] elder brother … and their servants' in answer to the request to provide a list of all intended occupants in relation to the claim that the House was intended to be used as own residence of the Shareholder. • The House 'had 3 bedrooms which were intended to be occupied by [the Shareholder's mother and the Shareholder's brother]. Our client did not know its gross floor area'. • The Shareholder's mother and the Shareholder's brother had been residing at a first floor flat which 'was very old, lack of repairs and maintenance, without elevator' and the flat was about to be demolished for redevelopment. • The Shareholder's mother passed away

8 Allegation of directors' quarters as intended user.
9 Allegation of directors' quarters as intended user.
10 As residence for Shareholder's mother and his elder brother.

		in May 2005 and the Shareholder's brother 'leaving (sic) in elderly home' since then.

The statement of the grounds of appeal

6. By a letter dated 13 January 2011, Castra CPA Limited gave Notice of Appeal to the Board of Review against the Profits Tax Assessment. The Appellant's statement of the grounds of appeal reads as follows *(written exactly as it stands in the original)*:

> ' 1. This statement of the grounds of appeal is made on behalf of [the Appellant], the Appellant by Castra CPA Limited.
>
> 2. Save where otherwise indicated, references to paragraphs below are to paragraphs in the Written Determination of the Commissioner of Inland Revenue dated 14 December 2010 and abbreviations and nomenclature used therein are also adopted hereunder. The use of such abbreviations and nomenclature by the Appellant is not to be taken to constitute admission of any aspect of the Commissioner's case.
>
> 3. The facts are set out in paragraph 1 of the Commissioner's Written Determination and the Appellant says as follows:
>
> (1) Sub-paragraphs (1) to (7) are admitted.
>
> (2) Sub-paragraph (8) is denied.
>
> (3) Sub-paragraphs (9) to (11) are admitted.
>
> (4) Sub-paragraph 12(a) is admitted save that the information has no direct correlation to the Company's case.
>
> (5) Sub-paragraphs (12)(b) and (c) are admitted.
>
> 4. The Commissioner sets out his determination in paragraph 2 of his Written Determination and the Appellant now appeal against the said determination.
>
> 5. The reasons for the Commissioner's determination are set out in paragraph 3 of the Commissioner's Written Determination and the Appellant says as follows:
>
> (1) Sub-paragraphs (1) to (3) are not disagreed.

(2) Sub-paragraph (4) is denied. It is specifically denied that the Company had advanced three different assertions in respect of its intention to acquire [the House] because the three assertions had corresponded to the same objective, viz, [the House] was acquired as long term investment. Nevertheless, the Company's initial intention when acquiring [the House] for long term investment did not preclude its directors from using the asset as quarters after the acquisition. More importantly, no one assertion could lead to the suggestion that the Company had intended to acquire the [the House] for trading purpose.

(3) Sub-paragraph (5)(a) is denied. One of the Commissioner's bases for concluding that the Company was not intended to hold [the House] as an investment or for use by its directors was the relatively small amount of issued capital maintained by the Company. We find this conclusion unsustainable because the Company's directors and shareholders had committed to providing an unsecured and interest free continuous financial support to enable the Company to acquire [the House] on a long term basis. Furthermore, as [name of another company not disclosed here] was wholly owned by [the Shareholder and his wife], the financial support from [name of another company not disclosed here] was equivalent to the financial support of the couples. It is also a very common phenomenon for private companies in Hong Kong to have maintained only relatively small amounts of issued capital and heavily relied on the financial supports of theirs directors, shareholders, related companies and bankers for their working capital. In the present case, the acquisition of the long term Mortgage Loans by the Company could also indicate that the Company's intention to hold [the House] was as a long term investment rather than for short term trading.

(4) Sub-paragraph (5)(b) is admitted save that a trading venture typically has a short period of ownership but not vice versa.

(5) Sub-paragraph (5)(c) is denied. Paragraph 1(11)(a) of the Commissioner's Written Determination has clearly stated the reasons why [the House] was left vacant during the whole period of the Company's ownership. In particular, the frequent visits by officers of the Housing Department (as evidence by the enclosed notice of the joint meeting of the owners [of Blocks ABC&D of the development where the House was situated] after the Company's acquisition of [the House] had increased the Company's risk of breaching the tenancy contract in case the illegal structures were to be removed during the effective tenancy

period. Accordingly, the Company had to seriously reconsider how it should handle the decoration of [the House] and whether it would still be worthwhile to let the [the House] out after redecoration. Even though the residential property market in Hong Kong had recovered since July 2003 but Hong Kong was still shrouded in the darkness of SARS in the second half of 2003. This may be evidenced by the downward trend of the then Hong Kong property market yield.

(6) Sub-paragraph (5)(d) is denied. Conversely, the Appellant is of the opinion that both [name of another property not disclosed here] and [the House] are luxury properties situated at different districts. In fact, the Commissioner has failed to consider the following facts:

(a) the environments surrounding the two properties are different. While the former is situated in the Island … facing an open sea, the latter is situated in … Kowloon surrounded by mountains and trees;

(b) although both [name of another property not disclosed here] was purchased three months before the acquisition of [the House], the former was only put to use by [the Shareholder] as his family dwelling in July 2005 which was after the disposal of the latter;

(c) although [the Shareholder] had returned to Hong Kong from [name of another place not disclosed here] in November 2003, he had only settled down in Hong Kong after the Chinese New Year in the following year. Further, [the wife of the Shareholder] had only returned to Hong Kong from [name of another place not disclosed here] and settled down in Hong Kong in June 2006. As such, [the Shareholder and his wife] did not have urgent need to move into either one property during the relevant period;

(d) the acquisitions of the two properties and their usages were not mutually exclusive;

(e) as stated in paragraph 1(10)(f) of the Commissioner's Written Determination, the Company has obtained the quotation for redecorating [the House] in early 2004 and demolished the unapproved structures before [name of property agent not disclosed here] had approached the Company. Should the Company intended to acquire [the

House] for trading purpose, it would have maintained the asset on an "as is" basis rather than demolishing the unapproved structure without fixing it;

(f) as stated in paragraphs 1(6)(a) and (b) of the Commissioner's Written Determination, environmental factors such as fresh air and comfortable environment are crucial factors for [the Shareholder and his wife] when choosing their residence; and

(g) the Company has never put up either asset on the open market for sale which does not resemble a speculator's behaviour.

(7) Sub-paragraph (5)(e) is denied. In fact, the Company had already commenced to redecorate [the House] in early 2004. The Appellant was also unable to reconcile the Commissioner's logic as to how a two-storey house with owned gardens and garages, wide open spaces with fresh air, surrounded by mountains and quiet environment could be comparable to a multi-storey old building which was about to be demolished, lacked of repairs and maintenance, without elevator to facilitate the movements of elderly persons, surrounded by busy roads, noisy environment and misty air.

(8) Sub-paragraph (5)(f) is denied. The Appellant maintains that all facts provided to the Commissioner are consistent with each other.

(9) Sub-paragraph (5)(g) is admitted save that the Company can always dispose of its long term investment when a favourable and attractive offer is made by an unsolicited buyer, especially when the offer price has almost doubled the acquisition cost. This should be distinguished with investments originally acquired for trading or speculation in which cases sellers would be actively looking for potential buyers.

6. The Appellant considers that the Commissioner when determining the present case, has erroneously overweighed facts not favourable to the Company, undermined or misinterpreted relevant facts favourable to the Company and taken into irrelevant facts into account. The Appellant reiterates that the profit on disposal of [the House] is capital in nature and should not be chargeable to Profits Tax. For these reasons, the Appellant appeals against the Commissioner's determination.'

Respondent's list of authorities

7. The Appellant did not furnish any list of authorities and no authority was cited on its behalf.

8. The Respondent's list of authorities reads as follows:

'

Item	Authorities
	Inland Revenue Ordinance (Chapter 112)
1.	Section 2(1)
2.	Section 14
3.	Section 68
4.	Schedule 5
	Court Cases
5.	Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioners of Inland Revenue (1980) 53 TC 461
6.	All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750
7.	Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463
8.	Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51
9.	Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
10.	Shui On Credit Co Ltd v Commissioner of Inland Revenue [2010] 1 HKLRD 237
11.	Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224
	Board of Review Decisions
12.	D58/09, (2010-11) IRBRD, vol 25, 54

The importance of the grounds of appeal

9. The grounds of appeal govern the scope of the admissible evidence and they define the issues on appeal, sections 68(7) and 66(3) of Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

10. The Court of Final Appeal made it clear in China Map Limited v CIR (2008) 11 HKCFAR 486 at paragraphs 9 and 10 that unless permitted by the Board under section 66(3), an appeal is confined to the original grounds of appeal and applications for the Board's consent to amend the grounds of appeal 'should be sought fairly, squarely and unambiguously'[11].

> ' *9. By its representative, each of the Taxpayers put forward the grounds of appeal that the profits in question "were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive". None of the Taxpayers pursued its alternative ground that the assessments were excessive. That left only one question raised by the grounds of appeal given in accordance with s.66(1). Did the profits in question arise from the sale of capital assets? But at the hearing before us, Mr Patrick Fung SC for the Taxpayers contended that there was an antecedent question. Were the profits in question from the carrying on of a trade, profession or business?*
>
> *10. No such question is raised by the Taxpayers' grounds of appeal given in accordance with s.66(1). But Mr Fung contended that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised such a question. For this contention, Mr Fung relied on an exchange between the Board's chairman and the Taxpayers' counsel (not Mr Fung or his junior Ms Catrina Lam). That exchange took place after the close of the evidence and during final speech. By its nature, such a question is fact-sensitive and its answer inherently dependent on evidence. For a tribunal of fact to entertain such a question after the close of the evidence would be unusual and plainly inappropriate if done without offering the party against whom the question is raised an opportunity to call further evidence. No such opportunity was offered to the Revenue. We do not think that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised the antecedent question for which Mr Fung now contends. If and whenever s.66(3) consent is sought, it should be sought fairly, squarely and unambiguously. Nothing of that kind occurred in this case.*'

[11] See China Map Limited v CIR (2008) 11 HKCFAR 486 at paragraphs 9 and 10.

Reasons given by CIR and burden of proof

11. Whether the Commissioner gave correct reasons for his determination is a matter of historical interest. The Board considers the matter *de novo* to decide whether the assessment appealed against is shown by the taxpayer to be incorrect or excessive:

(1) Section 68(4) of the Ordinance provides that:

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

(2) In Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213, Bokhary PJ referred in paragraph 5 to counsel for the taxpayer’s citation of Wing Tai Development Co Ltd v CIR [1979] HKLR 642 on section 68(4) and his Lordship stated at paragraph 50 that a taxpayer is not entitled to benefit from sparsity in evidence as it bears the burden of showing that the assessments are wrong:

‘ *In relation to dealings on the other foreign stock exchanges, the evidence is sparse. The Taxpayer is not in the position to benefit from such sparsity. After all, it bears the burden of showing that the assessments are wrong.*’

(3) In Real Estate Investments (NT) Limited v Commissioner of Inland Revenue, (2008) 11 HKCFAR 433, Bokhary and Chan PJJ said at paragraphs 32 - 35 that the notion of a shifting onus, is seldom if ever helpful and certainly it cannot shift the onus of proof from where section 68(4) places it:

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

33. As noted above, the Property had been described in the Taxpayer’s accounts from 1980 to 1995 as a fixed asset. It is argued on the Taxpayer’s behalf as follows. Such accounting treatment gave rise to a prima facie case that the profits in question arose from the sale of a capital asset. Consequently, the onus of proof shifted so that the Revenue had to show by evidence that the assessments were correct.

34. That argument is misconceived. Consistency between a taxpayer's audited accounts and its stance does not go so far as to set up a prima facie case of that stance's correctness in law. Where a taxpayer's audited accounts are consistent with its stance, such consistency is some evidence in support of that stance. Even where accounting treatment amounts to strong evidence, it still falls to be considered together with the rest of the evidence adduced in the case.

35. As for the notion of a shifting onus, such a notion is seldom if ever helpful. Certainly it cannot shift the onus of proof from where s.68(4) of the Inland Revenue Ordinance places it, namely on a taxpayer who appeals against an assessment to show that it is excessive or incorrect.'

(4) In Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009) 12 HKCFAR 392, Lord Walker NPJ said at paragraphs 29 and 30 that the Board's function is to consider the matter de novo and the appeal is an appeal against an assessment:

' *29. As the Board correctly observed, by reference to the decisions in Mok Tsze Fung v. CIR [1962] HKLR 258 and (after the amendment of s.64 of the IRO) CIR v. The Hong Kong Bottlers Ltd [1970] HKLR 581, the Commissioner's function, once objections had been made by the taxpayer, was to make a general review of the correctness of the assessment. In Mok Mills-Owens J said at pp 274-275 :*

> *"His duty is to review and revise the assessment and this, in my view, requires him to perform an original and administrative, not an appellate and judicial, function of considering what the proper assessment should be. He acts de novo, putting himself in the place of the assessor, and forms, as it were, a second opinion in substitution for the opinion of the assessor."*

30. Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: CIR v. Board of Review ex parte Herald International Limited [1964] HKLR 224, 237. The taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and (4)). The taxpayer's counsel drew attention to the fact that when Part XI was amended in 1965, the wording of s.68(4) was altered to refer to the onus of proving that the assessment was "excessive or incorrect" (rather than

> *simply "excessive"). This, it was argued, showed that the amount of an assessment was no longer always the essential issue. Counsel for the Commissioner could not suggest any particular reason for the alteration, other than a general tidying-up of the language. Whatever the explanation, I am satisfied that the alteration was not intended, by what is sometimes called a side-wind, to make a major change in the scheme and effect of Part XI of the IRO.'*

Decision makers

12. On an appeal to the Board, the Board, not the tax representative, and not the taxpayer, is the fact finding body and the decision maker. Contentions similar to those below made in this case show a lack of understanding of an appeal process, are misconceived and are unhelpful to the Appellant:

- 'We find this conclusion unsustainable'.
- 'The Appellant was also unable to reconcile …'
- 'The Appellant considers that the Commissioner when determining the present case, has erroneously overweighed facts not favourable to the Company …'

Capital or trading/business issue

13. Section 2 of the Ordinance defines:

- '*business*' as including '*agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government*' and
- '*trade*' as including '*every trade and manufacture, and every adventure and concern in the nature of trade*'.

14. Section 14 is the charging provision on profits tax. Sub-section (1) provides that:

> *' Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment ... on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business*

(excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'

Simmons

15. Lord Wilberforce stated in Simmons v IRC [1980] 1 WLR 1196 at page 1199 that the relevant question is whether the stated 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? His Lordship recognised that intention may be changed (at page 1199) and that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention (at page 1202):

> ' *One must ask, first, what the commissioners were required or entitled to find. 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.*' (at page 1196)

> ' *Finally as to the decision of the Court of Appeal, the judgment, delivered by Orr L.J., contains a clear account of the facts, and, in my respectful opinion, a generally correct statement of the law. In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention.*' (at page 1202)

In the Court of Appeal, Orr L J accepted that it was clearly established that on appeal to the Commissioners[12] the burden is on the taxpayer to displace the assessment and in the circumstances the burden was clearly on the taxpayers to establish that the sales in question gave rise to a surplus on capital account and not to a trading profit. His Lordship stated the general principles in these terms:

[12] In Hong Kong, the appeal is to the Board.

> '*It is also clearly established that on appeal to the Commissioners the burden is on the taxpayer to displace the assessment, and in these circumstances the burden in the present case was clearly on the taxpayers to establish that the sales in question gave rise to a surplus on capital account and not to a trading profit (Norman v Golder 26 TC 293, at page 297, and Shadford v H Fairweather & Co Ltd 43 TC 291, at page 300). On the other hand it is also clear that if an asset is acquired in the first instance as an investment the fact that it is later sold does not take it out of the category of investment or render its disposal a sale in the course of trade unless there has been a change of intention on the part of the owner between the dates of acquisition and disposal (Eames v Stevnell Prouerties Ltd 43 TC 678). The question, moreover, whether an item is held as capital or as stock-in-trade is not concluded by the way in which it has been treated in the owner's books of account (CIR v Scottish Automobile and General Insurance Co Ltd 16 TC 381, at page 390) or by the Revenue in past years (Rellim Ltd v Vise 32 TC 254).*' [l980] 53 TC 461 at pages 488 and 489.

Marson v Morton

16. In Marson v Morton [1986] 1 WLR 1343 at pages 1347 - 1349, Sir Nicholas Browne-Wilkinson VC thought that the only point which was as a matter of law clear was that a single, one-off transaction can be an adventure in the nature of trade and the question is whether the taxpayer was investing the money or was he doing a deal. His Lordship stated that:

- Only one point is as a matter of law clear, namely that a single, one-off transaction can be an adventure in the nature of trade.

- The purpose of authority is to find principle, not to seek analogies on the facts.

- The question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case.

- The most that his Lordship had been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another and that the factors are in no sense a comprehensive list of all relevant matters, nor is any one of them decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate. The matters which are apparently treated as a badge of trading are as follows:

‘ *(i) The transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else.*

(ii) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel.

(iii) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman of the commissioners quoted from Inland Revenue Commissioners v. Reinhold, 1953 S.C. 49. For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment.

(iv) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature?

(v) What was the source of finance of the transaction? If the 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.

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

(vii) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought.

(viii) What were the purchasers’ intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a

trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

(ix) Did the item purchased either provide enjoyment for the purchaser, for example a picture, or pride of possession or produce income pending resale? If it did, then that may indicate an intention to buy either for personal satisfaction or to invest for income yield, rather than do a deal purely for the purpose of making a profit on the turn. I will consider in a moment the question whether, if there is no income produced or pride of purchase pending resale, that is a strong pointer in favour of it being a trade rather than an investment.'

- In order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad thing to go back to the words of the statute – was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?

All Best Wishes

17. Mortimer J (as he then was) pointed out in All Best Wishes Limited v CIR (1992) 3 HKTC 750 at page 770 and page 771 that – 'was this an adventure and concern in the nature of trade' is a decision of fact and the fact to be decided is defined by the Statute.

' *Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.*' (at page 770)

' *The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of the acquisition of the land that it was for development is conclusive.*

I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute - was this an adventure and concern in the nature of trade? The

> *intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the 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. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.*' (at page 771)

Lee Yee Shing

18. Lee Yee Shing v The Commissioner of Inland Revenue (2008) 11 HKCFAR 6 is a case on share dealing activities.

19. Bokhary PJ and Chan PJ emphasised at paragraph 38 that the question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. McHugh NPJ thought that ultimately, the issue is one of fact and degree[13].

20. On the question of 'trade', McHugh NPJ pointed out that the intention to trade referred to by Lord Wilberforce in Simmons was not subjective, but objective, to be inferred from all the circumstances of the case. His Lordship stated that:

> (a) No principle of law defines trade. Its application requires the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade. (at paragraph 56)
>
> (b) The intention to trade to which Lord Wilberforce referred in Simmons is not subjective but objective: Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663 at 668. It is inferred from all the circumstances of the case, as Mortimer J pointed out in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 at 771. A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit when the asset or commodity was acquired and the case where the taxpayer asserts that no such intention existed. If the taxpayer concedes the intention in a case where the taxing

[13] See paragraph 21(c) below.

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 the criteria for determining what Lord Wilberforce called 'an operation of trade'. (at paragraph 59)

(c) What then are the 'badges of trade' that indicate an intention to trade or, perhaps more correctly, the carrying on of a trade? An examination of the many cases on the subject indicates that, for most cases, they are 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? (at paragraph 60)

(d) 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. (at paragraph 61)

21. On the question of 'business', it has long been recognised that business is a wider concept than trade, per Bokhary PJ and Chan PJ at paragraph 17. McHugh NPJ is of the same view, stating in paragraph 68 that business is a wider term than trade. McHugh NPJ went on to state that:

(a) What then is the definition or ordinary meaning of 'business'? The answer is that there is no definition or ordinary meaning that can be universally applied. Nevertheless, ever since Smith v Anderson (1880) 15 Ch D 247, common law courts have never doubted that the expression 'carrying on' implies a repetition of acts and that, in the expression 'carrying on a business', the series of acts must be such that they constitute a business: Smith v Anderson (1880) 15 Ch D 247 at 277 – 278 per Brett LJ. Much assistance in this context is also gained from the statement of Richardson J in Calkin v Commissioner of Inland Revenue [1984] 1 NZLR 440 at 446 where he said 'that underlying … the term "business" itself when used in the context of a taxation statute, is the fundamental notion of the exercise of an activity in an organised and coherent way and one which is directed to an end result'. In Rangatira Ltd v Commissioner of Inland Revenue [1997] STC 47, the Judicial Committee said that it found these words of Richardson J 'of assistance'. (at paragraph 69).

(b) Ordinarily, a series of acts will not constitute a business unless they are continuous and repetitive and done for the purpose of making a gain or profit: Hope v Bathurst City Council (1980) 144 CLR 1 at 8 – 9 per Mason J; Ferguson v Federal Commissioner of Taxation (1979) 79 ATC 4261 at 4264. However, as Lord Diplock pointed out in American Leaf Blending Co Sdn Bhd v Director-General of Inland Revenue (Malaysia) [1979] AC 676 at 684 'depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between'. Exceptionally, a business may exist although the shareholders or members cannot obtain any gain or profit from the activities of the business: Inland Revenue Commissioners v Incorporated Council of Law Reporting (1888) 22 QBD 279 (law reporting body prohibited by its constitution from dividing profits among members). It may exist even though the object of the activities is to make a loss: c.f. Griffiths v JP Harrison (Watford) Ltd [1963] AC 1 (dividend stripping operation). And a corporation, firm or business may carry on business in a particular country even though its profits are earned in another country: South India Shipping Corp Ltd v Export-Import Bank of Korea [1985] 2 All ER 219. (at paragraph 70)

(c) While engaging in activities with a view to profit making is an important indicator, and in some cases an essential characteristic, of a business, a

> profit making purpose does not conclude the question whether the activities constitute a business. Whether or not they do depends on a careful analysis of all the circumstances surrounding the activities. Some may indicate the existence of a business; some may indicate that no business exists. Ultimately, the issue is one of fact and degree. But, as Edwards v Bairstow [1956] AC 14, Hope v Bathurst City Council (1980) 144 CLR 1 and Lewis Emanuel & Son Ltd v White (1965) 42 TC 369 show, the issue becomes one of law and not fact where the only reasonable conclusion to be drawn from the facts found or admitted is that the activities in question did or did not constitute the carrying on of a business. In such a case, an appellate court, although debarred from finding facts, may reverse the finding of the tribunal of fact and hold that a business was or was not being carried on. (at paragraph 71)

Real Estate Investments

22. In Real Estate Investments (NT) Limited v The Commissioner of Inland Revenue (2008) 11 HKCFAR 433, Bokhary PJ and Chan PJ stated that, given section 68(4), it is possible although rare for such an appeal to end - and be disposed of - on the basis of burden of proof and that the onus cannot be shifted:

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

> ' *As for the notion of a shifting onus, such a notion is seldom if ever helpful. Certainly it cannot shift the onus of proof from where s.68(4) of the Inland Revenue Ordinance places it, namely on a taxpayer who appeals against an assessment to show that it is excessive or incorrect)*', at paragraph 35.

23. Their Lordships went on to state that:

- the badges of trade are no less helpful here than in the United Kingdom;
- they do not fall to be considered separately from the issue of intention or any assertion made by Taxpayer or on its behalf as to intention; and
- the question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case.

‘ *It is clear that question (ii)(b) uses the expression “badges of trade” to mean the circumstances that shed light on the issue of intention. Those circumstances simply do not fall to be considered separately from the issue of intention or any assertion made by Taxpayer or on its behalf as to intention*’, at paragraph 40.

‘ *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*’, at paragraph 47.

‘ *... the list offered in Marson v. Morton is no less helpful in Hong Kong than it is in the United Kingdom. As the Privy Council observed in Beautiland Co. Ltd v. CIR [1991] 2 HKLR 511 at p.515G, there is no material difference between the Hong Kong and United Kingdom definitions of trade for tax purposes. Both include every adventure in the nature of trade*’ at paragraph 53.

‘ *In regard to one of the badges of trade which he listed in Marson v. Morton, the Vice-Chancellor said this (at p.1348 F-G):*

> *“What was the source of finance of the transaction? 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.”*

That is as far as it goes, which is not very far when taken on its own. At p.1349 C-D the Vice-Chancellor emphasised that his list is not comprehensive, that no single item is in any way decisive and that it is always necessary to look at the whole picture.

The question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case’ at paragraphs 54 - 55.

No allegation in the grounds of appeal on the intended user

24. Despite the length and wordiness of the grounds of appeal, there is **no** allegation on the intended user of the House. The allegation of intention to acquire the House and hold it on a long term basis is hollow without any intended user which is one of

the crucial issues in a taxpayer's case on capital asset. 'What for' is conspicuous in its absence.

25. The absence of any allegation on 'what for' is important for two reasons.

(1) The Appellant faces immense difficulties in satisfying us on the facts in support of a capital asset case.

(2) It is barred by section 66(3) to put forward any case on intended user.

This point is by itself fatal against the Appellant.

Materially different versions

26. There are other formidable objections against a capital asset case.

27. In the China Map cases, the taxpayers 'had put forward materially different versions of the facts on which they sought to rely'[14]. The Board said that it was a question of fact whether the Taxpayers' stated intention of acquiring the properties concerned with view to redevelopment by the erection of a building to be held as a long-term investment generating rental income was their actual intention and the Board said that it decided against the Taxpayers on that factual issue[15]. The Court of Final Appeal affirmed the Board's decision and said at paragraph 23 that:

> '*A distinction is to be drawn between finding the facts and determining whether a case is proved on the facts found. The Taxpayers' essential assertion was that their intention was to acquire the properties concerned with a view to redevelopment by the erection of a building to be held as a long-term investment generating rental income. That was disputed by the Revenue, and thus put in issue. The Board made a finding on this issue, resolving it against the Taxpayers. It was upon this finding that the Board determined that the Taxpayers had failed to discharge their s.68(4) onus of proving that the assessments appealed against were excessive or incorrect.*'

28. In this case, the Appellant:

- shifted from one user to another;
- made no attempt to explain the shifting of grounds; and
- made matters worse by declining to say which user it was asserting on appeal.

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[14] See paragraph 15 of the CFA judgment.
[15] See paragraph 22 of the CFA judgment.

We note that:

- Directors' quarters was put forward by Company A on behalf of the Appellant.
- For-letting was a restriction imposed by the bank as part of its bank loan terms.
- Residence for Shareholder's mother and elder brother was put forward by Castra CPA Limited on behalf of the Appellant.

Directors' quarters

29. Chronologically, the first user alleged is as directors' quarters:

Q	10 January 2004	Directors of the Appellant resolving in writing that the Shareholder be authorised to sign all acquisition documents that the House: 'will be used as director quarter'.
Q	7 April 2006	Letter from Company A, the Appellant's then tax representative, to CIR stating: • Purchase of the House 'with the intention of long term investment and use as director quarter. The minute of the Directors' Meeting … shows the authorization and intention of the purchase'.
Q	7 May 2006	Letter from Company A to CIR giving notice of objection on behalf of the Appellant stating: • '[The Appellant] was set up by [the Shareholder and his wife] for the purpose of 'house' investment for the directors' residence on 17th October 2003'.
Q	10 June 2006	Letter from Company A to CIR stating: • The House 'is planned to be used as directors' quarter'.

For letting

30. The contemporaneous documents show that the bank imposed the for-letting restriction as part of its mortgage loan terms. Neither the Appellant nor its 2 tax representatives drew attention to this restriction.

	19 January 2004	Date of legal charge in favour of the bank.
L	19 January 2004	Date of assignment of rentals in favour of the bank, which assignment was registered in the land registry on 14 February 2004.
	19 January 2004	Drawdown of $6,900,000 bank mortgage loan maturing on 19 January 2014.
	19 January 2004	Date of acquisition assignment.
L	14 February 2004	Date of registration in the land registry of assignment of rentals in favour of the bank.
L	17 May 2004	Facility letter from the bank of a term loan facility of HK$1,380,000 to be repaid by 120 monthly instalments, and upon drawdown of this term loan, the overdraft facility of HK$1,380,000 would be cancelled simultaneously. The Appellant was required to: • 'Apply the loan drawdown … towards financing or refinancing the purchase of [the House] or financing the payment of the loan borrowed for the purchase of [the House]'. • Use the House 'for letting'. • The documents required by the bank included a 'rental assignment'.
	25 May 2004	$1,380,000 was credited by the bank to the Appellant's current account.

Shareholder's mother and elder brother as intended occupants

31. The next version, this time by Castra CPA on behalf of the Appellant, was that the intended occupants of the House were the Shareholder's mother and his elder brother.

	6 April 2005	Date of provisional sale agreement at a consideration of $24,880,000.
	20 April 2005	Date of formal sale agreement.
M	May 2005	The Shareholder's mother passed away and his elder brother 'leaving *(sic)* in an elderly home since then'.
	20 May 2005	Date of sale assignment.
M	26 May 2010	Letter from Castra CPA Limited to CIR stating that: • The 'intended occupants were [the Shareholder's] mother, [the Shareholder's] elder brother … and their servants' in answer to the request to provide a list of all intended occupants in relation to the claim that the House was intended to be used as own residence of the Shareholder. • The House 'had 3 bedrooms which were intended to be occupied by [the Shareholder's mother and the Shareholder's brother]. Our client did not know its gross floor area'. • The Shareholder's mother and the Shareholder's brother had been residing at a first floor flat which 'was very old, lack of repairs and maintenance, without elevator' and the flat was about to be demolished for redevelopment. • The Shareholder's mother passed away in May 2005 and the Shareholder's brother 'leaving *(sic)* in elderly home' since then.

Board's consideration of the versions

Letting for rental income

32. In our decision, the starting point for consideration is the for-letting restriction imposed by the bank as part of its mortgage loan terms.

33. A rental assignment is relevant to the bank's consideration and assessment of the loan repayment ability. Inclusion as a loan documentation shows the bank's concern about the Appellant's repayment ability.

34. The for-letting restriction appeared in the mortgage loan documentation. Its existence contradicts any case of 'owner residence', whether by the Shareholder; his mother or his elder brother.

35. As noted in paragraph 30 above, neither the Appellant nor its 2 tax representatives drew attention to this restriction.

36. The only reference to letting, in contrast with 'for letting' as a restriction, is what is stated in paragraph 5(5)[16] of the grounds of appeal. The Deputy Commissioner stated in paragraph 1(5)(c) of the Determination that:

> ' … [the Appellant] did not derive any rental income at all before selling it.'

Paragraph 5(5) of the grounds of appeal is difficult to understand in the absence of any assertion by the Appellant that it was its intention to acquire the House to be held as a long-term investment generating rental income.

37. There is no allegation of letting-for-rental-income as the Appellant's intention. It is not open to the Appellant to rely on letting-for-rental-income as a ground of appeal.

38. In any event, the Appellant has not leased out the House during the whole period of its ownership.

39. On the facts, we find that 'for-letting' was a restriction imposed by the bank. The Appellant was not bound to lease out but it could not use it for any other purpose.

40. The only reference to letting is what is stated in paragraph 5(5) of the grounds of appeal. The Deputy Commissioner stated in paragraph 1(5)(c) of the Determination that:

> ' … [the Appellant] did not derive any rental income at all before selling it.'

Paragraph 5(5) of the grounds of appeal is difficult to understand, in the absence of any assertion by the Appellant that it was its intention to acquire the House to be held as a long-term investment generating rental income.

Directors quarters

41. The written resolution dated 10 January 2004 asserted intended use as directors' quarter. Needless to say, it was a self-serving document.

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[16] See paragraph 4 above.

42. This intended user was contradicted by contemporaneous loan documentation.

43. Within 9 days and on the date of completion on 19 January 2004, the Appellant executed an assignment of rentals to the bank. The Appellant would not have executed an assignment to the bank had the intended user been for directors' residence. The 17 May 2004 facility letter expressly required the Appellant to use the House for letting and using it for 'owner residence' would be a breach of the loan terms.

44. We reject the allegation of directors' quarter as intended user and decide against the Appellant on this factual issue.

Residence for the Shareholder's mother and his brother

45. The assertion was contained in the 26 May 2010 letter from Castra CPA Limited to CIR. We have no hesitation in rejecting and do reject this assertion.

- The Shareholder's mother had been living in the first floor flat for many years, including the whole decade from the mid-90's to 2003, when the Shareholder lived abroad. We find this sudden unexplained concern for the Shareholder's mother perplexing.

- The Shareholder had the means to provide his elder brother with decent accommodation. According to the Shareholder, his elder brother ended up in an elders home.

- It would have made no material difference in terms of difficulty for the old lady and the old man to get to and from the second storey of the house, compared with to get to and from the first floor flat. Rooms in houses are usually on the first or upper floors. Information obtained by the Assessor shows that all the rooms in the House are on the first floor. The argument that it is difficult for old persons to climb stairs is calculated to confuse.

- It would have been difficult for the mother to travel from and to the House.

Credibility of Shareholder

46. For reasons given above, there is no factual support for any case on capital asset and the appeal must fail.

47. We are not impressed by the credibility of the Shareholder as a witness. He is not forthcoming. His evidence is inconsistent by contemporaneous documents and inherent

probabilities and is calculated to confuse or even mislead. We attach no weight to his evidence.

Badges of trade

48. For the reasons given above, this appeal fails and must be dismissed.

49. For completeness, we turn to the badges of trade summarised by McHugh NPJ in Lee Yee Shing:

(1) Whether the appellant has frequently engaged in similar transactions: No.

(2) Whether the appellant has held the asset or commodity for a lengthy period: It held the House from 19 January 2004 to 20 May 2005.

(3) Whether the appellant has acquired an asset or commodity that is normally the subject of trading rather than investment: The House can be the subject of trading or investment.

(4) Whether the appellant has bought large quantities or numbers of the commodity or asset: No.

(5) Whether the appellant 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.

(6) Whether the appellant has sought to add re-sale value to the asset by additions or repair: No.

(7) Whether the Appellant has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell an asset of that class: No.

(8) Whether the appellant has conceded an actual intention to resell at a profit when the asset or commodity was acquired: No.

(9) Whether the appellant has purchased the asset or commodity for personal use or pleasure or for income: The claim of purchase for residence has been considered and analysed above.

(10) Source of finance: 60% from 2 mortgage loans. The balance from funds borrowed from other sources.

50. Upon a holistic consideration of the circumstances of this particular case, we conclude that the Appellant was doing a deal. In other words, it carried on an adventure in the nature of trade and acquired the House as a trading stock.

51. The appeal fails and falls to be dismissed.

Disposition

52. We confirm the assessment appealed against and dismiss the appeal.