Case No. D1/19

Appeal out of time – notice of appeal – on what basis a letter from the Appellant may constitute a Notice of Appeal – whether time limit for appeal ought to be extended for being absent from Hong Kong – joint tenants of landed properties would need time to discuss and agreed on joint approach – Inland Revenue Ordinance ('the Ordinance') section 66

Profits tax – whether sale of landed properties amounted to trade – whether the Appellants had an intention to trade when acquiring the landed properties – section 14 of the Ordinance

Panel: Chow Wai Shun (chairman), Chan Wan Po Paul and Phillis L P Loh.

Date of hearing: 4 December 2018.
Date of decision: 9 April 2019.

The Appellants bought and sold as joint tenants two landed properties quickly in session: for the first property (Property J), the sale and purchase agreement for buying it was signed in April 2007 and the assignment to the Appellants occurred in October 2007, and the sale and purchase agreement to sell the property was entered into in November 2007; for the second property (property K), the sale and purchase agreement for buying it was signed in November 2008 and the assignment to the Appellants occurred in January 2010, and the sale and purchase agreement to sell the property was entered into in January 2010. Upon enquiries, the Assessor was informed that the Appellants engaged estate agents to sell Property J by May 2007, and to sell Property K by June 2009. Profits Tax Assessments for the 2007/08 year of assessment and the 2009/10 year of assessment for the profits the Appellants earned from the transactions involving Property J and Property K were raised against the Appellants. On the objection by the Appellants, the Deputy Commissioner confirmed the assessments subject to minor variation to the figures.

The Determination by the Deputy Commissioner was sent by registered post to the Appellants, and it was delivered on 11 July 2018. The Appellants first wrote to the Board on 23 July 2018 to request an extension of time to appeal, because they were busy and would have to leave Hong Kong on 2 long-haul overseas trips ('the First Letter'). But the First Letter was returned on 25 July 2018 due to insufficient postage. The Appellants posted the First Letter again on 10 August 2018, and the same was received by the Board on 13 August 2018. On 15 August 2018, the Appellants sent a second letter to the Board by email ('the Second Letter'). They stated that they would object to the Determination because they acquired Properties J and K as capital assets. They also requested an extension of time to file the notice of appeal because they found some of the information in the Determination not correct, and would need time to present the correct information. The Appellants then left Hong Kong as planned. On 8 October 2018, the Appellants sent a third letter to the Board by email ('the Third Letter'), stating the grounds of their appeal and explained the delay.

Held:

1. The Second Letter should be considered as the Appellant's notice of appeal. Section 66 of the Ordinance did not prescribe any form for the notice of appeal, as long as the intention of the aggrieved taxpayer to appeal, as well as the reason(s) thereof, have been made sufficiently clear and comprehensible. There is no requirement for an appellant to substantiate the ground(s) relied on. On a holistic and contextualized construction of the Second Letter, the Appellants stated their intention to 'object' to the Determination, and provided the reasons for doing so, i.e. they held the subject properties as capital assets, and the Commissioner's evidence was inaccurate and incomplete.

2. (By majority) The time for filing the notice of appeal should be extended because the Appellants were prevented from doing so within time because of their absence from Hong Kong. The Board accepted that the Appellants' evidence that they were overwhelmed by their respective busy schedules and preparation for their planned trips to the extent that they were not able to file the notice of appeal within time. Also, since they held the subject properties as joint tenants, and hence liable to the assessments to tax jointly, they needed the time to discuss and come to an agreed approach with mutually agreeable ground(s) of appeal, unlike previous cases involving single taxpayers (<u>Chow Kwong Fai v Commissioner of Inland Revenue</u> [2005] 4 HKLRD 687 applied; <u>D9/79</u>, IRBRD, vol 1, 354; <u>D3/91</u>, IRBRD, vol 5, 537; <u>D19/01</u>, IRBRD, vol 16, 183; <u>D14/06</u>, (2006-07) IRBRD, vol 21, 371 distinguished).

3. (By majority) Considering all circumstances holistically, the Board accepted the Appellants' evidence that their intention at the respective time of acquiring Properties J and K was to acquire a flat as their home, because:

   (i) It was accepted that the Appellants did not know the prohibition of keeping pets for Property J until after they took possession.

   (ii) It was also accepted that the Appellants only discovered that the layout of Property K was unsatisfactory after they took possession.

   (iii) It was accepted that the Appellants were prompted by their trusted estate agents to add the subject properties in the agents' portfolio for market information.

   (iv) The other investment properties that the Appellants held were of a much smaller size than Properties J and K.

   (<u>Lionel Simmons Properties Ltd (in liquidation) and others v Commissioner</u>

of Inland Revenue (1980) 53 TC 461; All Best Wishes Ltd v CIR (1992) 3 HKTC 750; Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463; Lee Yee Shing v CIR [2008] 3 HKLRD 51; Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433; D15/13, (2013-14) IRBRD, vol 28, 419 considered)

Appeal allowed.

Cases referred to:

Chow Kwong Fai, Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D9/79, IRBRD, vol 1, 354
D3/91, IRBRD, vol 5, 537
D19/01, IRBRD, vol 16, 183
D14/06, (2006-07) IRBRD, vol 21, 371
Lionel Simmons Properties Ltd (In Liquidation) and others v Commissioner of Inland Revenue (1980) 53 TC 461;
All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750;
Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463;
Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51;
Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
D15/13, (2013-14) IRBRD, vol 28, 419

Appellant in person.
Cheng Po Fung, Lau Wai Sum and Cheung Ka Yung, for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 9 July 2018 which revised the Profits Tax Assessments for the years of assessment 2007/08 and 2009/10 raised on the Appellants ('the Determination').

The preliminary issue

2. It is common ground that the Appellants' notice of appeal is out of time. The preliminary issue for this appeal is, therefore, whether the Appellants' late appeal could and should be entertained. This depends on whether the statutory period for lodging an appeal against the Determination should be extended. The Appellants gave oral evidence at the hearing.

Facts

3. On the documents made available to us and after considering the evidence given by the Appellants, we find the following facts relevant to the preliminary issue of this case:

(a) The Determination was sent under cover of a letter of 9 July 2018 from the Deputy Commissioner to the Appellants by registered post. The letter, together with the Determination, was delivered to the last known address of the Appellants on 11 July 2018.

(b) The letter, enclosing the full text of the relevant provision of the Inland Revenue Ordinance ('the IRO'), sets out in detail the procedure and the time limit of lodging an appeal to this Board.

(c) The Appellants sent a letter dated 23 July 2018 to this Board ('the First Letter') on 24 July 2018. The First Letter, however, did not reach this Board and was returned on 25 July 2018 due to insufficient postage. It is unclear when the First Letter was delivered back to the Appellants. On the documentary evidence provided by the Respondent, it appears that the First Letter was not posted again by the Appellants until 10 August 2018. This Board finally received the First Letter on 13 August 2018.

(d) In the First Letter, the Appellants requested an extension of time to file their notice of appeal for the reason that they were 'extremely busy' during that period with two long-haul overseas trips, one from 28 July to 12 August and another from 28 August to 6 September 2018. In the First Letter, they also indicated that they would need extra time to review the Determination before they could prepare their statement of appeal. They did leave Hong Kong on 28 July 2018. Ms A and Mr B returned to Hong Kong on 9 and 12 August 2018 respectively.

(e) On receipt of the First Letter on 13 August 2018, this Board reminded the Appellants of the relevant statutory time limit of and requirements for lodging an appeal, informed them that their application for extension of time would be considered at the hearing and urged them to ensure compliance with the statutory provision should they intend to proceed.

(f) On 15 August 2018, Mr B sent to this Board, via email, another letter dated 14 August 2018 ('the Second Letter') reiterating the Appellants' decision to appeal and their request for an extension of time to file the notice of appeal. In the Second Letter, they stated, *inter alia*:

'We object to the assessment made by the IRD for the following

reasons:

- We acquired these properties as capital assets. The interpretation based on evidence collected by IRD is inaccurate and incomplete. We would like to provide further details for a more comprehensive assessment of the facts surrounding the case. The Taxpayers' intention towards the properties at the time of our acquisition is an important consideration, and we will provide more evidence in this area for thorough review.

- The communication obtained from real estate Agent was not known to us and may just be communication between Property Agents. The mobile phone number quoted was not our number. The tenancy period of the rental property was not updated. As some of the information may influence the result of the decision, we will need to correct some of the information presented in the IRD letter.'

(g) The Appellants left Hong Kong on 28 August and arrived back on 5 September 2018. Ms A left again on 25 September for an unexpected overseas trip and was back on 2 October 2018.

(h) On 8 October 2018, Mr B sent, via email, to this Board a letter dated 7 October 2018 ('the Third Letter') which they described as their Notice of Appeal and explained the further delay. The Third Letter was elaborative, consisting of 21 paragraphs in 5 pages, with what the Appellants considered their Statement of the Grounds of Appeal.

The statutory provisions

4. Section 66 of the IRO is the relevant statutory provision to the preliminary issue:

'*(1) Any person (hereinafter referred to as the appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may within –*

(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts; or

(b) such further period as the Board may allow under subsection (1A),

either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by a

copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal.

(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1).'

The Respondent's submission

5. On this preliminary issue, the Respondent submitted that the Appellants' failure to file its appeal in time was not prevented by absence from Hong Kong, illness or other reasonable cause and so no extension of time should be granted to the Appellant. In this regard, the Respondent referred to and relied upon the following cases:

(a) Chow Kwong Fai, Edward v Commissioner of Inland Revenue [2005] 4 HKLRD 687;

(b) D9/79, IRBRD, vol 1, 354;

(c) D3/91, IRBRD, vol 5, 537;

(d) D19/01, IRBRD, vol 16, 183; and

(e) D14/06, (2006-07) IRBRD, vol 21, 371;

Oral evidence of the Appellants

6. Mr B explained that the Appellants had been working full time and they had a lot of work to finish off and sort out before their planned trips. He also indicated that they suffered from jet lag on return to Hong Kong while they had to catch up with all matters again. Mr B told us that they had tried their best to make time and prepare for their submissions. However, because of certain materials provided in the Determination, particularly those with regard to estate agents other than the one they had known and computer records of telephone conversation showing phone numbers which were not theirs, it took them extra time to carefully and thoroughly consider such information before they could actually write up their responses.

7. On cross-examination, Mr B told us that he was by profession an accountant, qualified in Country C, and had been working as Position D at University E ('the University'). In response to a question from the panel, Mr B confirmed that the University has its annual fiscal year ending on 30 June and so July is often the busiest month of a year. Mr B also told us that he had about 80 staff to manage. Because of the planned trips, Mr B said that he had to squeeze time for some of his tasks both before and after each trip. While he might delegate his work, it would still be his duty to supervise and ensure that

matters were being given prompt and proper attention. Moreover, he considered it proper to have taken up his fair share of the work before handing over to his deputy to follow up while he was away.

8. In her evidence, Ms A told us that she was working as Position F at the Hong Kong subsidiary of a multinational group with its fiscal year also ending in June. In addition to a number of audit meetings which Ms A had to attend, the CEO came to visit the Hong Kong company in July 2018. Ms A further said that she had around 12 direct performance review reports to complete before she left for the planned trips.

9. On cross-examination, Ms A said that she did not have the same full details of those transactions as Mr B did because Mr B handled and kept most of the information of those transactions. Since she was also one of the taxpayers concerned, Ms A told the panel that she had to sit together with Mr B and take some time to resolve on what grounds they would pursue their appeal and how they would substantiate it. Despite the fact that July has been the usual hectic month of a year for both the Appellants, Ms A said that the planned trips were for family reasons and had been a family tradition since their respective mothers were residing overseas and, more recently, their son was studying in Country G. The Determination, rather unexpectedly, arrived at their busiest time of the year.

Our Analysis

10. The representatives of the Respondent raised the issue of whether the Second Letter constituted a notice of appeal. It is their submission that the Second Letter was not meant to be so because the Appellants requested for an extension of time under the Second Letter and they only filed their notice of appeal by way of the Third Letter on 8 October 2018. Even if the Second Letter was considered a notice of appeal, it is the Respondent's position that it was not valid because the Appellants failed to give any statement of grounds of appeal until 8 October 2018 in the Third Letter. Furthermore, even if the Second Letter was considered a valid notice of appeal with a statement of grounds of appeal, it was still late for four days.

11. We agree that in any event the Appellants' notice of appeal is out of time. However, we consider it still relevant when a valid notice of appeal was filed and hence whether the time for filing the notice of appeal should be extended to that time.

12. We hold the view that the Appellants filed the required valid notice of appeal with the necessary statement of grounds of appeal by the Second Letter. The intention of the Appellants to appeal against the Determination has been at all relevant times clear. The question is whether the Second Letter contained a statement of grounds of appeal. On this matter, we consider it more appropriate to take a holistic and contextualised approach in construing the Second Letter.

13. First, we see nothing inappropriate for the Appellants to ask for an extension of time to file a notice of appeal in the Second Letter because in any event they were indeed late.

14. Second, we note that the statutory provision requires, *inter alia*, a notice of appeal in writing accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal. The provision does not, however, prescribe any form of such notice or of such statement so long as the intention of the aggrieved taxpayer to appeal against the determination of the Commissioner as well as the reason(s) for such appeal have been made sufficiently clear and comprehensible.

15. In this regard, we refer to the extracts cited in paragraph 3(f) above. Although the Appellants referred the matter as an objection 'to the assessment made by the IRD', the context is clear that they were referring to the Determination, not the original assessments. The Appellants used the present tense of the verb 'object' and they referred to such matters and information presented in the Determination under the cover of a letter from the IRD in the second paragraph of the extract.

16. Further, the Appellants provided their 'reasons' for doing so in the Second Letter. Unequivocally they stated that they acquired the Subject Properties (as defined in paragraph 26(a) below) 'as capital assets'. They also put forth in the Second Letter that the evidence collected and based on by the Respondent was 'inaccurate and incomplete'. Furthermore, they also stated that the communication records obtained from the estate agents were 'not known' to them. All these, in our view, are sufficiently comprehensible as to what and how the Appellants would be arguing their case.

17. The statutory provision requires a statement of the grounds of appeal which an aggrieved taxpayer will rely upon. It does not require a statement of such grounds with any substantiation. Stating the grounds of appeal is one thing; substantiating the grounds is another.

18. Based on our analysis set out above, therefore, we hold that the Second Letter is sufficient to constitute a notice of appeal with grounds of appeal stated. Should the Appellants then be allowed to extend the time for filing their appeal to that date?

19. Section 66(1A) of the IRO provides that the Board may extend the time if it is satisfied that an appellant was prevented by illness, absence from Hong Kong or other reasonable cause from giving notice of appeal in time.

20. In Chow Kwong Fai v Commissioner of Inland Revenue, the Court of Appeal held that in order for an extension of time, an appellant must show that there is a reasonable cause and because of that reason the appellant does not file the notice of appeal within time. The Court also held that the word 'prevented' is best understood to bear the meaning of the term in the Chinese language version of the subsection which means 'unable to' and although providing a less stringent test than the word 'prevent' imposes a higher threshold than a mere excuse.

21. The Appellants did not raise the ground of illness. They were absent from Hong Kong during part of the one-month time limit. Could they have filed their notice during their presence in Hong Kong? Were they unable to file the notice of appeal within

time due to their absence from Hong Kong or other reasonable cause?

22. The majority view (Mr Chow and Ms Loh) is as follows:

(1) The majority of us find the Appellants credible witnesses. In fact, their evidence was left undisturbed by the rather unsuccessful challenges posed by the representatives for the Respondents. As a result, the majority of us are convinced that the Appellants were overwhelmed by their respective busy schedules and preparation for their planned trips to the extent that they were not able to file their notice of appeal for the Determination which was delivered at a rather unexpected and their busiest time of the year before their first departure. Their position of holding the Subject Properties as joint tenants, and hence liable to the assessment to tax jointly, distinguishes themselves from the other authorities cited by the representatives for the Respondents, all of which involved a single taxpayer or entity where no joint decision was required. The Appellants needed the time to discuss and come to an agreed approach with mutually agreeable ground(s) of appeal.

(2) It was also in such context and against such background that, in the view of the majority of us, the Appellants wrote the First Letter when the date of their first departure was fast approaching and they had yet to do anything about the Determination. We prefer not to second guess what would have happened if the First Letter had been received by the Board. The fact is that the First Letter was returned due to insufficient postage and finally reached this Board after the one-month time limit.

(3) It is shown to us that the First Letter was returned on 25 July 2018 but it has not made clear to us when the First Letter was returned and reached the Appellants' address. According to the Appellants' evidence, they were not aware, nor made aware, of the return of the First Letter until they received the hearing bundle. Such evidence was not challenged. On such basis, in the view of the majority of us, the Appellants probably thought that they had done what they could have done.

(4) After their return to Hong Kong on 9 and 12 August 2018 respectively, the Appellants received this Board's acknowledgement of receipt of the First Letter. The Appellants were also reminded of the necessary compliance of the requirements under the statutory provision, namely the filing of a written notice of appeal, together with a copy of the Determination and a statement of grounds of appeal, while any application for an extension of time for such filing which would only be considered by this Board at the hearing. As a result, the Appellants drew up the Second Letter which we have found

above to have amounted to a notice of appeal with a statement of grounds of appeal. The Second Letter was sent to this Board, together with a copy of the Determination, first by email on 15 August 2018.

23. The dissenting view (Mr Chan) is as follows:

(1) The provisions of section 66(1A) are very clear and restrictive. All taxpayers must respect and be in full compliance in order to keep our tax system effective and efficient.

(2) Both the Appellants were healthy, and present in Hong Kong during most of the one-month period before the lapse of the prescribed time for appeal. They are highly educated, and one of them is by profession an accountant and currently works as Position D at University E. I find it difficult for this Board to extend the period for lodging the notice of appeal.

(3) Should the Board reject the Appellants' application for an extension of time under section 66(1A), the Appellants would be liable to the revised tax assessments pursuant to the Determination. There is no need for this Board to proceed with the substantive issue.

Conclusion

24. The majority of us hold from the above analysis that the Appellants were unable to file the requisite notice within time due to a combination of reasons with compound effect in the circumstances of this case. By majority, this Board rules in favour of the Appellants and agrees to abridge the time for filing the notice of appeal to 15 August 2018. If the Appellants had, however, received the return of the First Letter before their first departure (which we do not find as such above from the evidence made available to us), they might not have had any reasonable cause for not able to file the notice in time even though they were not in Hong Kong during part of such period.

The substantive issue

25. The substantive issue in this appeal is whether the profits derived by the Appellants from selling the Subject Properties should be chargeable to profits tax. The Appellants appealed against the Determination on the ground that they acquired the Subject Properties as capital assets.

Facts

26. On the documents provided to us, we find the following facts relevant to the substantive issue of this case:

(a) As per the records of the Land Registry, the Appellants had the following property transactions:

	Property	Gross floor area	Purchase (1) Date of provisional agreement (2) Date of agreement for sale and purchase (3) Date of assignment (4) Consideration	Sale (1) Date of provisional agreement (2) Date of agreement for sale and purchase (3) Date of assignment (4) Consideration
(i)	Property H[1]	1,300 sq ft (3 bedrooms)	(1) – (2) 02-03-1998 (3) 15-02-1999 (4) $8,480,500	(1) – (2) 28-04-2006 (3) 01-06.2006 (4) $6,138,000
(ii)	Flat J1[1]	1,843 sq ft (4 bedrooms)	(1) 11-04-2007 (2) 14-04-2007 (3) 12-10-2007 (4) $13,000,000	(1) 12-11-2007 (2) 26-11-2007 (3) 14-03-2008 (4) $16,150,000
(iii)	Car Park J2[1]	-	(1) 11-04-2007 (2) 14-04-2007 (3) 12-10-2007 (4) $800,000	
(iv)	Flat K1[1]	1,865 sq ft (4 bedrooms)	(1) 30-11-2008 [3] (2) 02-12-2008 [3] (3) 15-01-2010 (4) $11,037,700 [3]	(1) 26-01-2010 (2) 08-02-2010 (3) 08-03-2010 (4) $14,500,000
(v)	Car Park K2[1]	-	(1) 17-12-2008 (2) 22-12-2008 (3) 15-01-2010 (4) $570,000	
(vi)	Property L[2]	1,812 sq ft (4 bedrooms)	(1) – (2) 05-04-2013 (3) 23-05-2013 (4) $19,207,000	(Not sold)

Notes:

[1] Held by the Appellants as joint tenants.

[2] Held by Ms A as sole owner.

[3] The original consideration of $11,379,100 was reduced under a supplemental agreement made on 29 January 2009 to $11,037,700.

Flat J1 and Car Park J2 are described together as ‘Property J’ while Flat K1 and Car Park K2 are described together as ‘Property K’. Property J and Property K are collectively referred to as ‘the Subject Properties’.

(b) The Appellants obtained the following loans to finance the acquisition of the Subject Properties:

			Property J	Property K
(i)	Name of bank	:	Bank M (Subject to a 3-year early redemption charge)	
(ii)	Loan drawn down date	:	12-10-2007	03-03-2009
(iii)	Mortgage loan	:	$9,660,000	(1) $7,726,390 (Flat K1) (2) $399,000 (Car Park K2)
(iv)	Total number of instalment	:	360	300
(v)	Amount of monthly instalment	:	$50,975	$30,336

(c) The Appellants entered into two tenancy agreements, which contained the following details:

		Tenancy 1	Tenancy 2
Property	:	'Leased Residence N'	'Leased Residence P'
Tenant	:	Ms A	Mr B
Monthly rent	:	$55,000	$53,000
Tenancy period	:	01-06-2006 – 31-05-2008	01-01-2009 – 31-12-2011

The Appellants clarified that the expiration dates of the two tenancy agreements were in December 2008 and September 2013 respectively.

(d) In the questionnaires concerning the purchase and sale of the Subject Properties, the Appellants gave the following answers and details:

		Property J	Property K
(i)	Usage	For residence	For residence
(ii)	Reason for sale	Change of residence	Change of residence
	Reasons for change	Their dog could not be kept in the housing estate	The flat size was much smaller than expected
	Rent of the new residence	$56,000/month	$53,000/month
(iii)	Computation of the gains	$	$
	Sale price	16,150,000	14,500,000
	Less: Purchase price	13,800,000	11,949,000
	Gross Profits	2,350,000	2,551,000
	Less: Expenses		
	Legal fees	18,000	28,844
	Stamp duty	487,500	413,914
	Bank interest	79,000	90,000
	Commission to agent upon sale	250,000	145,000
	Bank charges	-	107,264
	Net Profits	1,515,500	1,765,978

(e) In their Profits Tax returns for the years of assessment 2007/08 and 2009/10, the Appellants declared that they neither carried on any business nor had any assessable profits.

(f) The Appellants provided, among other things, copies of the following documents:

(i) Provisional agreement dated 12 November 2007 to sell Property J in which it was stated that the Appellants as vendor agreed to pay a commission of $80,500 to Company Q.

(ii) Estate agency agreement dated 20 January 2010 signed by Mr B under which the Appellants appointed Company Q, as non-exclusive agent, to sell Property K within the period from 20 January to 30 December 2010.

(iii) Reminder issued by the estate management stating that pets were not permitted to be kept at any unit in Estate R.

(g) On diver dates, the Assessor raised on the Appellants the following Profits Tax Assessments for the years of assessment 2007/08 and 2009/10:

	2007/08	2009/10
Assessable Profits [Paragraph 26(d)(iii)] –		
Property J	1,515,500	
Property K		1,765,978
Tax Payable thereon	217,480	264,896

(h) The Appellants objected to the assessments.

(i) The records of Company S in respect of Flat J1 and Flat K1 revealed the following electricity consumption:

		Flat J1		Flat K1	
Account owner	:	Mr B		Mr B	
Registered period	:	14-10-2007 – 19-03-2008		17-01-2010 – 03-03-2010	
Consumption	:	Date	Units consumed	Date	Units consumed
		29-10-2007	73	03-03-2010	8
		28-12-2007	148		
		28-02-2008	1459		
		19-03-2008	146		

(j) In response to the Assessor's enquiries, Company Q provided –

(i) an estate agency agreement dated 1 June 2007 signed by Ms A on behalf of the Appellants for sale of Flat J1 at $16,500,000

through Company Q, effective during the period from 1 June to 31 December 2007.

(ii) the computer record showing the conversations purportedly between Mr B and its staff regarding the sale of Property K. According to the record, the earliest offer of sale was made on 11 June 2009 at an asking price of $14,000,000

(k) In reply to the Assessor's enquiries, Company T –

(i) disclosed that the Appellants appointed it to sell Flat J1 on 14 May 2007 with an asking price of $16,500,000.

(ii) provided the computer record showing the conversations between a Mr U representing the Appellants and its staff regarding the sale of Property J.

(l) The Assessor invited the Appellants to consider withdrawing the objections but the Appellants refused, made further contentions and provided additional documents.

(m) The Assessor had since then ascertained, among others, the following:

(i) The Appellants paid a total interest of $67,577 to Bank M on the mortgage loan in respect of Flat K1 from 3 March 2009 to 9 March 2010.

(ii) Some deductions claimed in the tax computation [Paragraph 26(d)(iii)] were not correct.

(iii) The purchase price of Property K was overstated and should be $11,607,700 instead.

(iv) The interest paid to Bank M in respect of Property J from 12 February to 17 March 2008 (one month) was $23,898. The interest paid in respect of Property J from 12 October 2007 to 17 March 2008 (five months) was $119,490, i.e. $23,898 x 5 months.

(v) The interest paid to Bank M in respect of Flat K1 was $67,577. In the absence of detailed records, the Assessor had computed the interest paid in respect of Car Park K2 to be $3,490, i.e. $67,577 x $399,000 (loan – Car Park K2) / $7,726,390 (loan – Flat K1) [Paragraph 26(b)(iii)(1)]. Total interest paid in respect of Property K was $71,067, i.e. $67,577 + $3,490.

(vi) The agent commission paid upon the sale of Property J was

$80,500 [Paragraph 26(f)(i)].

(vii) Bank charges paid to Bank M in respect of Property J and Property K were $146,200 and $108,264 respectively.

(n) The Assessor took the review that the Profits Tax Assessments for the years of assessment 2007/08 and 2009/10 should be revised as follows:

	2007/08 Property J $	2009/10 Property K $
Sale price	16,150,000	14,500,000
Less: Purchase price	13,800,000	11,607,700
Gross Profits	2,350,000	2,892,300
Less: Expenses		
Legal fees	18,000	28,844
Stamp duty	487,500	413,914
Bank interest	119,490	71,067
Commission to agent upon sale	80,500	145,000
Bank charges	146,200	108,264
Net Profits	1,498,310	2,125,211
Tax Payable thereon	214,729	318,781

(o) The Determination made the revisions accordingly and the Appellants appealed.

The statutory provisions

27. We agree with the Respondent that the following provisions of the IRO are relevant to the substantive issue of this appeal.

(a) Section 14(1) (as it then was):

'*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, professional 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.*'

(b) Section 2(1):

' *"trade" includes every trade and manufacture, and every adventure*

and concern in the nature of trade.'

(c) Section 68(4):

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

The Appellants' submission and evidence

28. To facilitate his presentation of the Appellants' case, Mr B prepared and submitted a chart setting out the events in chronological order and information of various properties in parallel with each other including the Subject Properties, Leased Residence N, Leased Residence P, as well as their other investment properties. Mr B also submitted six color photographs taken on 17 January 2010 from inside and outside Flat K2. Representatives of the Respondent raised no objection to the admission of the chart and those photos.

29. It is Mr B's evidence that they had been renting their residences in Hong Kong until they bought Property H when their son was one year old. The family then lived there until the son got to about 9 years old who by then required more space and at that time Mr B's mother was also living with the family and started getting aged.

30. It is the submission of the Appellants that at all relevant times it had been their intention to acquire a flat as their home of around 1,800 square feet in size and both Flat J1 and Flat K1 matched what they wanted. This is corroborated with the facts found in paragraph 26(a)(ii), (iv) and (vi) above. There were other reasons offered by Mr B for the two requisitions, none relating to any trading motive. In both occasions, the Appellants made the decisions to acquire on their own on the spot.

31. As to the agency agreement referred to in paragraph 26(j) above, the Appellants could not recall but did not dispute the evidence which shows that they did sign it. It is their evidence that they probably signed that because their entrusted agent asked them to and the purpose was to get hold of relevant market information.

32. Regarding the mortgage relating to Property J, it is the Appellants' submission that they would not have chosen one with a three-year lock-up period with penalty on early redemption should they intend to dispose of Property J so soon.

33. The Appellants submitted that the main reason for the quick disposal of Property J was that they only realized that their pet dog, which they had raised since around 2006, was not allowed in and to live with them in Flat J1 when they took possession of Property J. Nevertheless, Mr B admitted in cross-examination when he was shown a copy of the sale brochure of Estate R which stated the restriction that he could have found that out from the brochure or by asking the agent if the issue prompted to his mind. It did not happen so because they did not think about it given that living together with the dog in Property H, which was constructed under the same property developer, did not cause any issue.

34. The Appellants relied on the photos admitted to show that they found the layout, particularly with regard to the space between the door entrance to Flat K1 and the kitchen, unexpectedly unsatisfactory such that one would end up with a dining table right between the kitchen and the entrance door with just switches on the wall left to the latter. Ms A was also complaining the size of the rooms in Flat K1 when they took possession of Property K.

35. With regard to the computer record referred to in paragraph 26(j)(ii), it was Mr B's evidence that the two contact phone numbers as shown were not his nor Ms A's, one of which however he recognized was their entrusted agent's. Mr B added that it was not unusual for real estate agents to add to the listings portfolio their clients' properties with which they have been dealing for marketing purposes and in hopes of initiative enquiries from prospective clients on other listed properties – in this case it was likely that their entrusted agent had put Property K in the listings portfolio without the Appellants' instructions. Mr B said he could ask their entrusted agent to come forward to give evidence on this matter if necessary.

The Respondent's submission

36. On this substantive issue, the Respondent referred to and relied upon the following cases:

(a) Lionel Simmons Properties Ltd (In Liquidation) and others v Commissioner of Inland Revenue (1980) 53 TC 461;

(b) All Best Wishes Ltd v CIR (1992) 3 HKTC 750;

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

(d) Lee Yee Shing v CIR [2008] 3 HKLRD 51;

(e) Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433; and

(f) D15/13, (2013-14) IRBRD, vol 28, 419.

37. It is the Respondent's case that the Appellants did not intend to buy the Subject Properties as capital assets at the time of their acquisition based upon an overall view of various factors including the asserted intention of the Appellants, their offer for sale shortly after purchase, the reasons offered for selling both properties, as well as their choices of mortgage loan with penalty on early redemption. In sum, the Respondent argued that the Appellants, who had all along lived at a sizeable residence, have not adduced sufficient evidence to prove their stated intention of purchasing Flat J1 and Flat K1 as their residence. It is the Respondent's submission that the sales of the Subject Properties were realization of their original intention to sell them for profits. Specifically, the reasons offered by the

Appellants, the Respondent argued, were unconvincing and should have been known to the Appellant before they acquired the properties. As such, it is the Respondent's submission that the Appellants have not discharged the burden of proof and their appeal should therefore be dismissed.

Our analysis

38. It is trite that trading requires an intention to trade and in determining whether a property is a capital asset or trading, it is necessary to ascertain the intention of the taxpayer at the time of acquisition of the property: Lionel Simmons Properties Ltd (In Liquidation) and others v Commissioner of Inland Revenue (1980) 53 TC 461. We do not think, however, there is any issue of change of intention.

39. It is also clear that the subjective intention asserted by the taxpayer has to be tested against objective facts and circumstances including things said and things done at the time, before and after, noting that often actions speak louder than words: All Best Wishes Ltd v CIR (1992) 3 HKTC 750 and Real Estate Investments (NT) Ltd v CIR (2008) 11 HKCFAR 433, typically with reference to matters which are set out in Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463, pages 470-471 and treated as badges of trade. Those matters are not, as we well understand from Marson v Morton above, a comprehensive list and no single item is in any way decisive; it requires a holistic consideration of the circumstances of each particular case: Real Estate Investments (NT) Ltd above. In Lee Yee Shing v CIR [2008] 3 HKLRD 51, McHugh NPJ stated:

> '*60. 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 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?*

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.*'

40. The point made in paragraph 61 of Lee Yee Shing above was reiterated, for example, by this Board in D15/13, (2013-14) IRBRD, vol 28, 419. We also reckon the onus of proof on the Appellants.

41. The majority view (Mr Chow and Ms Loh) is as follows:

(1) The Appellants' stated intention is not conclusive but it is corroborated by the fact that Flat J1 and Flat K1 are of a size that matches their intention of having a flat in a size of about 1,800 square feet as home for the family, including Mr B's mother. It is also noteworthy that over the past 10 years during 2006 and until now, they have owned investment properties (one at a time), which they did not reside in, of much smaller sizes of about 700 square feet.

(2) A couple of the other badges of trade are neutral: landed property as the subject matter and the choice of payment options and terms of mortgage in financing the acquisition. While the Appellants have not frequently engaged in similar transactions nor have they bought large number of landed properties but they have had two and in fact a single adventure in trade is also trade.

(3) The Appellants have not sought to add re-sale value to the asset by additions or repair. While they did engage their entrusted agent who might, without the knowledge of the Appellants, also got in touch with others, we incline to accept the Appellant's evidence that they have probably just acted as prompted by their entrusted agent for market information and as a usual way how estate agents work.

(4) The facts that they have not held the Subject Properties for long and not actually used them, except for, in the case of Flat J1, what the Appellants described as 'soft' move in and for occupation of their relatives from overseas for about a month in February 2008, are both against them.

(5) This leaves us to how we consider the respective reasons for the quick disposals of the Subject Properties. Mr B and Ms A are well educated and occupy high-ranking positions in their respective employments. Both appeared sincere, forthcoming and truthful in giving evidence, both in chief and in response to the cross examination. Given the long lapse of time between the hearing and the transactions, we see that unreasonable to expect and require perfect recollection of each and every detail of the events but overall we find them credible witnesses. Moreover, from how they spoke, their background and status, we hold the view that they are of a personality to act, and react, rather impromptu and make a decision on the spot, particularly if they come across something that match their expectation such as Flat J1 and Flat K1 without caring too much about the costs and other minute details.

(6) We are, therefore, not disturbed by their missing of the pet restriction in small print on the sale brochure of Estate R. According to their evidence, they picked the point up when they acquired Flat K1.

(7) We are also not surprised by their lack of, or insufficient, attention to the floor plan of Flat K1. For the disposal of Property K, we find the photos admitted corroborative and supporting the reason put forward by the Appellants.

42. The dissenting view (Mr Chan) is as follows:

(1) To decide whether the profits derived by the Appellants from property sales should be chargeable to Profits Tax, it is necessary to ascertain the intention of the taxpayer at the time of property acquisition.

(2) The Appellants, who had all along lived at a sizable residence, have not provided sufficient evidence to prove their stated intention of purchasing Property J and Property K as their permanent home. Instead, there is clear evidence that the Appellants listed the two properties for sale shortly after their purchase.

(3) Buying a property as own residence is an important life decision, especially in Hong Kong. I find it difficult for this Board to accept that careless or imprudent property buying decisions were made twice by the Appellants, within a short period of time. The only reasonable explanation is that the sale of the Subject Properties were a mere realization of the Appellants' original intention to sell the properties for profits.

Conclusion

43. Following the approach of Sir Nicholas Browne-Wilkinson VC in Marson

v Morton, we stand back, having looked at those badges of trade, and look at the whole picture. The majority of us accept the reasons for the quick disposal of the Subject Properties such that neither of the two transactions was an adventure in the nature of trade. Therefore, by majority, this Board also allows this appeal in substance and annuls the assessments as revised and raised on the Appellants pursuant to the Determination.