Case No. D15/19

Profits tax – sale of property – intention at time of acquisition – sections 2(1), 14(1) and 68(4) of the Inland Revenue Ordinance

Panel: Wong Kwai Huen Albert (chairman), Lee Wong Wai Ling Winnie and Patricia Joy Shih.

Date of hearing: 3 July 2019.
Date of decision: 14 October 2019.

The Appellant and Mr B are a married couple and were the shareholders and directors of Company C.

Company C was a private company incorporated in Hong Kong engaging in fire prevention and engineering works.

On 6 September 2010, the Appellant completed the acquisition of Unit H at a consideration of $1,259,000.

On 11 April 2012, the Appellant completed the disposal of Unit H at a consideration of $2,410,000.

The Appellant contends that she intended to acquire Unit H for use by Company C as its workshop/Dangerous Goods ('DG') workshop. Unit H was disposed of because a Dangerous Goods Licence ('DG Licence') could not be granted.

The Appellant claims that the gain derived from the sale of Unit H should not be chargeable to Profits Tax.

Held:

1. All the three witnesses in this appeal were honest and credible.

2. The business plan of using discarded distinguishers for CO_2 injection was a one-man business with Mr B running the show. That explained why there was no record of business discussion, formal business plan or feasibility study.

3. When Mr B realized that no DG workshop licence would in fact be issued to Unit H, he discarded the idea.

4. The Board cast no doubt on the Appellant's intention to hold Unit H for use as DG workshop.

5. The Appellant has discharged her burden of proving that she intended to hold Unit H as a capital asset at the time of its acquisition. It was later disposed of as a result of changes of circumstances.

Appeal allowed.

Cases referred to:

Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioners 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

Li Man Chung Eric of Messrs Eric M C Li & Co, CPA for the Appellant.
Chan Wun Fai and Yu Wai Lim, for the Commissioner of Inland Revenue.

Decision:

Background

1. Ms A ('the Appellant') has objected to the Profits Tax Assessment for the year of assessment 2012/13 raised on her. The Appellant claimed that the gain derived from the sale of a property should not be chargeable to Profits Tax.

2. The Appellant and Mr B are a married couple.

3. At all relevant times, the Appellant and Mr B were the shareholders and directors of Company C and Company D.

4. (a) Company C was a private company incorporated in Hong Kong in September 1996. It described its principal activity as engagement in fire prevention and engineering works ('Usual Business'). It closed its accounts on 31 December annually.

(b) Company D was a private company incorporated in Hong Kong in July 2010. It was dissolved by deregistration in November 2015. Prior to its dissolution, it described its principal activity as property investment. It closed its accounts on 31 March annually.

(c) The shareholders and directors of Company C and Company D (prior to its dissolution) were as follows:

	Shareholder (% of shareholding)	Director
Company C	The Appellant (27%) Mr B (68%) Mr E (5%)	The Appellant Mr B Mr F Mr G
Company D	The Appellant (90%) Mr E (10%)	The Appellant

(d) The Appellant received an annual employment income of $240,000 from Company C during the years of assessment 2010/11 to 2012/13.

5. (a) By a formal agreement for sale and purchase dated 20 July 2010, the Appellant agreed to purchase a property located at Unit H ('Unit H' or 'the Subject Property') at a consideration of $1,259,000. The acquisition was completed on 6 September 2010.

(b) Unit H, with gross floor area of 58 square metres, was purchased with an existing tenancy which would expire on 9 January 2012.

(c) On 6 September 2010, Company D pledged its assets and Unit H to Bank J to secure a loan of $840,000.

(d) By a preliminary sale and purchase agreement dated 11 February 2012, the Appellant agreed to sell Unit H at a consideration of $2,410,000.

(e) The sale transaction was completed on 11 April 2012.

6. (i) Apart from the Subject Property, the Appellant, Mr B and Company D had also purchased and sold the following units located on the same floor ('Other Units'):

Property	Owner	Purchase (a) Date of provisional agreement (b) Date of assignment (c) Consideration	Sale (a) Date of provisional agreement (b) Date of assignment (c) Consideration	Gross floor area
Unit K	The Appellant	(a) 16-08-2010 (b) 12-10-2010 (c) $1,170,400	Not yet sold	50 m^2
Unit L	Mr B	(a) 07-07-2010 (b) 26-08-2010 (c) $1,266,000	(a) 13-02-2012 (b) 11-04-2012 (c) $2,400,000	56 m^2

Property	Owner	Purchase (a) Date of provisional agreement (b) Date of assignment (c) Consideration	Sale (a) Date of provisional agreement (b) Date of assignment (c) Consideration	Gross floor area
Unit M	Company D	(a) 12-07-2010 (b) 13-09-2010 (c) $1,382,000	(a) 06-03-2012 (b) 18-05-2012 (c) $2,700,000	63 m^2

(ii) Units M, L and K were acquired each with an existing tenancy.

7. The Appellant provided the following information:

(a) She intended to acquire Unit H for use by Company C as its workshop/Dangerous Goods ('DG') workshop.

(b) Unit H was disposed of because a Dangerous Goods Licence ('DG Licence') could not be granted in respect of the Subject Property.

(c) The gain on disposal of Unit H was calculated as follows:

	$	$
Sale proceeds		2,410,000
Less: Purchase cost		1,259,000
Gross profits		1,151,000
Less: Expenses –		
Legal fees	12,130	
Commissions to agents	36,690	
Bank interest	37,651	
Decoration fee	63,000	149,471
Gain on disposal		1,001,529

8. The Respondent did not accept the Appellant's claim and considered that the purchase and sale of the Subject Property amounted to an adventure in the nature of trade. The Respondent raised on the Appellant the following Profits Tax Assessment for the year of assessment 2012/13:

	$
Assessable Profits	1,001,529
Tax Payable thereon (after tax reduction)	140,229

9. (a) The Appellant, through Messrs Eric M C Li & Company ('the Representatives'), objected to the assessment in paragraph 8 above on the ground that the Subject Property was acquired for business use of Company C and the gain on its disposal was capital in nature and should not be taxable.

(b) The Representatives put forth the following contentions:

(i) The Appellant together with Mr B and Company D acquired the Subject Property and Other Units in pursuant with a business plan to use them as Company C's workshop for its Usual Business as well as DG workshop for charging of carbon dioxide (CO_2) gas and clean agent fire extinguishers.

(ii) Before acquiring the Subject Property, the Appellant and Mr B had searched the relevant rules which stated that DG workshops could not be situated more than 30 metres above the ground floor. They considered that the Subject Property and Other Units should meet the requirements as they were located on the fifth floor.

(iii) When the Appellant was ready to make the application for the relevant licence, she started her communications with Fire Services Department ('FSD') in around November 2011. She was told that in practice FSD would only issue licences for DG workshops located on the ground floor.

(iv) The Appellant only applied for a workshop licence for Unit K for her Usual Business. The application was then approved and Unit K was kept for Usual Business use. Units M, L and H became useless for Company C's business and were subsequently sold.

(v) The Appellant had never been active in property dealings.

10. In response to the Respondent's further enquiries, the Representatives made the following contentions:

Purchase

(a) Company C was a registered Class 1, 2 and 3 fire service installation contractor ('FSIC') and was engaged in the provision of anti-fire design, installation and repairs.

(b) Since 2006, the Appellant had intended to engage in the CO_2 gas and clean agent fire extinguishers business.

(c) The Subject Property Unit H together with Other Units were acquired by the Appellant as they were situated on the fifth floor of an industrial building not exceeding 30 metres above the ground floor with windows at outside wall. The property units should meet the requirements according to the 'Guide to Application for DG Licence

(Categories 2 to 10 Dangerous Goods excluding Liquefied Petroleum Gas) issued by FSD in June 2009 ("the 2009 Guide")'.

(d) Company C planned to use Unit M, Unit L and Unit H for DG workshops because a larger area was needed for storage of a large number of fire extinguishers to be refilled and other processing equipment.

(e) As it was difficult to find suitable premises, Unit H was acquired despite that there was a sitting tenant. The Appellant had no choice but had to wait for the expiry of the then existing tenancy. The Appellant did not renew the tenancy upon its expiry.

(f) In mid-2012, the workshop of Company C was moved to Unit K after obtaining the approval for continued registration as FSIC by FSD on 7 May 2012.

Source of finance

(g) The down payment for the Subject Property in the sum of $419,000 was paid out of the Appellant's own savings.

(h) The balance was met by a mortgage loan of $840,000 borrowed in name of Company D. The loan was repayable by 180 monthly instalments of $5,788 each. The monthly mortgage instalment was covered by the rental income.

Disposal

(i) The Appellant was aware that a DG licence was required for operating a DG workshop. However, no formal application for a DG licence was ever made after learning that FSD would not issue such a licence if the workshop was not situated on the ground floor. Neither the Appellant nor Company C had any written communications with FSD on matters relating to the application and requirements for a DG licence.

(j) The Appellant decided to sell the Subject Property through property agents in January 2012. No formal appointment letter was signed and the agent for the sale was Company N. Company N was not the agent for the Appellant in the original purchase.

(k) The sale proceeds from the disposal of the Subject Property were used to repay its own mortgage loan and the mortgage loan of Unit K.

(l) No replacement property was purchased since those qualified property units with similar size were too expensive. It was too costly and risky to carry out the original business plan.

The gain on disposal of the Subject Property was not taxable

(m) The Subject Property and Other Units were adjacent to each other. They were acquired for the purpose of the business expansion plan of Company C.

(n) The Subject Property was acquired in 2010 i.e. one year after the Guide was issued in June 2009 with a view to meeting the latest requirements prescribed by FSD.

(o) The Appellant's understanding was that the Subject Property and Other Units located in a factory building should meet the requirements of the relevant authorities.

(p) Unit M, Unit L and the Subject Property were only sold after the expiry of the tenancies.

(q) The application for a licence for Unit K for Usual Business was made on 7 March 2012. The business expansion plan was abandoned and Unit M, Unit L and the Subject Property were no longer suitable or useful for the originally planned DG workshop. All those units were sold.

(r) The Appellant had no history of property speculation.

11. The Respondent maintained the view that the acquisition and disposal of the Subject Property amounted to an adventure in the nature of trade and therefore the gain on its disposal should be chargeable to Profits Tax. The Respondent wrote to the Appellant to explain its views and invited the Appellant to withdraw the objection.

12. The Appellant, through the Representatives, declined to withdraw the objection and put forth, among other things, the following contentions:

(a) The Appellant had held the Subject Property for nineteen months. She argued that property unit would normally be sold within a year if it was intended for trading.

(b) The Appellant did not file any application to the Buildings Department ('BD') for siting approval as she considered that it was not necessary provided that there was no change in the original structure of the building.

(c) The Appellant did not file any formal application for a DG licence with FSD after being verbally informed that DG workshops could only be located on ground floors.

(d) The Appellant considered that it was unrealistic and impracticable to seek any approval from relevant authorities prior to the purchase of the Subject Property and Other Units. She saw it as a good opportunity to acquire all units which were adjacent to each other and would meet the requirements of FSD as she understood at that time. The cost of the purchase also met her budget.

(e) The Appellant was eager to develop the CO_2 fire extinguisher business and took actions including checking the relevant rules with FSD, finding suppliers and recognised testing companies, checking prices and designing its own label since 2006. In 2013, after the sale of Unit M, Unit L and the Subject Property, the Appellant had approached FSD to explore the possibility of operating such business in a less costly way.

(f) The Appellant did not acquire the Subject Property in the first instance. Mr E, a minor shareholder of Company C and a would-be partner in the CO_2 fire extinguisher business, signed the provisional sales and purchase agreement for acquisition of the Subject Property. Due to his financial situation, Mr E did not take up the agreement for purchase but transferred the Subject Property to the Appellant instead.

(g) The Appellant received the sale proceeds from the disposal of the Subject Property on 11 April 2012. Thereafter, she searched around for other premises of similar size in appropriate areas. Her original business plan was eventually shelved when she came to realise that premises of similar size on ground levels would cost too much. She then used the proceeds to repay the mortgage loan of Unit K.

13. Upon the Respondent's enquiries on Units M, L and H, FSD advised the following:

(a) There was no record of licence or approval of DG storage found at Unit M, Unit L and Unit H.

(b) Referring to the enquiry raised by Mr E on 3 February 2015, FSD could only provide information on the general siting requirements as Mr E did not give any specific details, such as the type of building where the 'workshop for manufacture of DG' was located. However, the Appellant disputed this fact and averred that Mr E did ask FSD whether all workshops for DG work must be located on the ground level and that Mr B did make enquiries with FSD officers, Mr P and Mr Q in early 2010 and that Mr E gave them the full addresses of the

relevant units. Again, the Appellant disputed this fact and challenged if any DG licence had ever been granted to premises above ground level. The Appellant denied that it had ever authorised or appointed any property agent to sell the units at the material time. It should be noted that the Board did not consider this fact to be relevant in this appeal.

(c) A DG store should normally be located on ground floor of a building. If the building was an industrial building, the proposed DG store could be located on upper floor not higher than 30 metres above the ground floor level with an approaching lobby having a window opening on the external wall and being accessible by aerial ladders or platforms of fire appliances.

(d) An applicant should decide on the siting and construction of the DG store and associated facilities at the planning stage. Since the construction of DG store may involve alternation works to an existing building or affect the safety of the remaining parts of the building, the applicant is strongly advised to submit the general building plans including the location of the proposed DG store to the BD for siting approval prior to the submission of a formal DG licence application to the DG Division.

(e) An approval must be obtained from the Building Authority through General Building Plan submissions by an authorised person.

14. In response to the Respondent's enquiries, Company N replied that the Appellant put up the Subject Property for sale at an asking price of $2,800,000 with sitting tenancy on 16 September 2011.

15. On 7 January 2019, the Respondent confirmed the Profits Tax Assessment for the year of assessment 2012/13 under Charge Number X-XXXXXXX-XX-X, dated 29 September 2014, showing Assessable Profits of $1,001,529 with Tax Payable thereon of $140,229 after tax reduction. The Appellant lodged an appeal to this Board.

The Issue

16. The issue for the Board to decide is whether the profits derived by the Appellant from the disposal of the Subject Property should be chargeable to Profits Tax.

The Relevant Legislation

17. The Respondent referred the Board to the following relevant statutory provisions:

(i) Section 14(1) of the Inland Revenue Ordinance ('the Ordinance') is the charging provision on Profits Tax:

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

(ii) Section 2(1) of the Ordinance defines 'trade' as follows:

'*"trade" (行業, 生意) includes every trade and manufacture, and every adventure and concern in the nature of trade*'

(iii) Section 68(4) of the Ordinance places the burden of proof on the appellant:

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

The Relevant Case Law

18. The Respondent also referred the Board to the following authorities:

(i) Intention at the time of acquisition

In determining whether a property is a capital asset or a trading stock, the intention of the taxpayer at the time of acquisition of the property is crucial. In Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioners of Inland Revenue (1980) 53 TC 461 ('Simmons'), Lord Wilberforce set out the principle at pages 491G to 492A:

'*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 … 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 …*'

(ii) Subjective intention to be tested against objective facts and circumstances

The taxpayer's stated intention is not decisive and has to be tested against the objective facts and circumstances. In All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 ('All Best Wishes'), Mortimer, J stated the approach on how to test the taxpayer's intention at page 771:

'*... The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the 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 ...*'

(iii) Badges of trade

In Marson (Inspector of Taxes) v Morton and related appeals [1986] STC 463, Sir Nicolas Browne-Wikinson V-C usefully set out the following approach:

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

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

(iv) In Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51, Bokhary and Chan PJJ emphasized that the question whether something amounts to the carrying on of a trade or business was a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. On the question of trade, McHugh NPJ stated the following:

(a) No principle of law defines trade. Its application requires the

tribunal of fact to make a value judgement after examining all the circumstances involved in the activities claimed to be a trade.

(b) The intention to trade referred to by Lord Wilberforce in *Simmons* is not subjective, but objective and it requires examination of all the circumstances of the case.

The Appellant's Grounds of Appeal

19. The Appellant claimed that the Subject Property was primarily acquired to be used as a DG workshop. However, if the plan for the DG workshop failed, the Subject Property would be used for other purposes including business expansion, investment or generating rental income. The subsequent disposal of the Subject Property was due to the plan to conduct the DG workshop having failed.

The Respondent's Submission

20. (i) It is the Respondent's position that the Appellant should be assessed Profits Tax on the profits derived from disposal of the Subject Property for the year of assessment 2012/13.

(ii) The Respondent submitted that in order to succeed in the appeal the Appellant must show to the Board's satisfaction that the Subject Property was a capital asset. If the Board, having considered all the evidence in the present appeal, either:

(a) positively finds that the Appellant acquired the Subject Property as a trading asset; or

(b) cannot draw a conclusion that the Subject Property was a capital asset,

then the appeal must be dismissed as the Appellant would have failed to discharge the burden of proving her case.

(iii) The Respondent further submits that in deciding whether the Subject Property was a capital asset or a trading stock, the Appellant's intention towards the Subject Property at the time of acquisition was crucial as stated in the Simmons case. However, the Appellant's stated intention is not conclusive. Her stated intention has to be tested in the light of objective facts and the whole of the surrounding circumstances, including things said and things done, before and after. Further, the intention must be genuinely held, realistic and realizable as stated in the All Best Wishes case.

The Evidence

DG workshop and CO_2 gas injection business

21. The Appellant claimed that in 2010 Company C was planning to set up a DG workshop to process CO_2 gas injection into used fire extinguishers. The witnesses gave evidence that the business plan was the brainchild of Mr B. The business would involve little technical complication and would also be in line with the spirit of environmental protection. The only major capital investment would be suitable premises for being used as a DG workshop. Allegedly, no one else had ever embarked upon that business in Hong Kong before.

22. The Respondent questioned whether that business plan actually existed at the relevant time. There were no contemporaneous documents containing any such business proposals, no minutes of meeting recording any such business discussions or feasibility study report. The Appellant could not produce any plan, prototype or flow chart in relation with the proposed business model.

23. The Appellant contended that the business plan only required simple technical procedure which was all in the head of Mr B's. There was no need to prepare any formal feasibility study report. Considering that other than the Appellant, who was the wife of Mr B and in charge of the finance and accounting works of Company C and Mr E, the subordinate of Mr E, there was no one else for Mr B to discuss the business plan with. Hence, any discussions held between the three of them would be done orally and casually and there was no record in writing whatsoever.

Attempt to implement the business plan

24. The three witnesses i.e. the Appellant, Mr B and Mr E gave evidence that Company C had taken action to attempt to put in place the business plan. There was correspondence between Company C and FSD as well as certain suppliers in Mainland China in the years 2005 to 2013. The Appellant contended that the correspondence indicated strong interest to carry out the business plan.

25. The Respondent pointed out that the correspondence concerned with nothing more than general enquiries about the on-going FSIC business of Company C. It was not related to CO_2 gas injection business or application for a DG workshop licence.

26. It was the Appellant's case that as soon as Mr B had decided to implement the business plan, Company C would need to purchase suitable premises for setting up a DG workshop. For this purpose, Company C made enquiries about relevant government requirements for premises to be used as DG workshop and was referred to the 2009 Guide.

27. As already mentioned above, clause 8.1 of the 2009 Guide stated that DG workshops were not allowed to be situated more than 30 metres above ground floor. With this requirement in mind, the Appellant proceeded to purchase the Subject Property and the

Other Units which were located on the 5th floor of the building i.e. less than 30 metres above ground level.

28. The Appellant further submitted that it was not until the purchase of all relevant properties had been completed did they discover that DG workshop licences would in fact only be granted to premises situated at ground floor of any building.

29. The Respondent contended that the 2009 Guide was only a reference for any applicant to apply for a DG workshop licence. The Appellant should have made sure that any premises should satisfy all the requirements in the 2009 Guide, not just clause 8.1 but also other conditions such as siting requirements and submission of plans and drawings to the BD. Before the relevant purchase, the Appellant should have made full enquiries either oral or written to the FSD and other authorities rather than just relying on a search on the website for the 2009 Guide.

30. Regarding the discovery of the requisite location on the ground level of any DG workshops, the Respondent questioned why the Appellant had not written to the FSD to make formal applications but chose to make oral enquiries instead. As it turned out, when the Appellant finally made similar enquiries in writing on 27 August 2013, a reply was received from the FSD on 9 September 2013. It should be noted that at that time the Subject Property and Other Units accept Unit K had already been disposed of.

31. The Appellant submitted that she and Mr B were not highly educated. At the material time, they believed that any enquiries to the FSD would not be treated seriously and no formal confirmation would be given unless and until they had purchased the properties. Since it was difficult to find suitable premises like the Subject Property and Other Units which were adjacent to each other, they were willing to take the risk. Further, they had other ideas in mind in case a DG licence was not forthcoming. They would use the units as workshop and office either for their existing business or for long term investment by letting them out. They reckoned that the rental income would be sufficient to cover most of the mortgage repayment.

32. The Appellant further submitted that although they did not make any written application to the FSD, they did consult two FSD officials, Mr P and Mr Q. Both of them confirmed to the Appellant that a DG workshop licence would only be issued to premises which were located on ground levels. In view of this confirmation, although the Appellant was preparing a 'floor renovation plan' with a view to being submitted to the BD, they decided to abandon the submission.

33. As for the communications between the Appellant and the FSD subsequent to the disposal of the Subject Property, the Appellant admitted that they were made merely to support their case that DG workshop licences would only be issued to ground floor premises in anticipation of her tax disputes with the Respondent.

Capital Commitment

34. The Respondent submitted that the purchase of the Subject Property and Other Units was a substantial investment for Company C. The total consideration of the purchase exceeded the total asset value of Company C at the material time. As such, any reasonable man should have taken a more cautions approach before effecting the purchase. Since the business plan was completely new to the Appellant, she should not have just relied on a search on the website for the 2009 Guide.

35. The Appellant contended that she and Mr B had started the business of Company C since 1996. They had withdrawn substantial profit as their directors' fees over the years. Hence, the retained profit in the company did not reflect the wealth of the two people with each drawing an annual fee of $240,000 totaling $480,000. Taking into consideration of the fact that the monthly instalment of the Subject Property at the relevant time was $5,788 against the monthly rental income of $4,890, the Appellant contended that the investment was low risk and was within their affordability. Company D was set up merely for tax efficiency purposes. Hence, it was subsequently dissolved after the disposals of the relevant properties.

Retention of Unit K

36. The Respondent submitted that the retention of Unit K to be a workshop for the Appellant was unrelated to the purpose of the purchase of the Subject Property since there was not any external wall to satisfy the requirements stated in the 2009 Guide. Unit K was merely to replace the Appellant's existing workshop in District R.

37. The Appellant argued that the Subject Property or any of the Other Units could have been used as Company C's office but for the fact that Company C's staff indicated their reluctance to move to the new location. Unit K happened to be the one which was not taken up by any purchaser at the time.

38. The Appellant further pointed out that Unit M had also been disposed of in 2012. So far, the Respondent had not considered that transaction to be trading.

History of the Appellant and Length of Holding the Subject Property

39. The Respondent averred that even though there was no history of property trading on the part of the Appellant and the Subject Property had been held for 20 months before its disposal, any one-off transaction can still be viewed as an adventure in the nature of trade. The length of holding a property was only one of the relevant factors to be considered in deciding whether a property was held as a capital asset or a trading stock.

Finding

40. The Board finds that the three witnesses in this appeal were honest and credible. With the benefit of hindsight, they could have done the whole adventure in a more cautious and professional manner. They could have made formal and written enquiries with

the authorities relating to the suitability of the Subject Property and Other Units for DG workshop before rushing into the purchase. Equally, it would have been more appropriate if they had obtained formal and written confirmation of the requirement of DG workshop being situated on ground level before abandoning the Appellant's business plan.

41. However, there is no reason not to believe that the Appellant did set off to make the purchase of the Subject Property and Other Units with the intention to put into place Mr B's business plan of using discarded distinguishers for CO_2 injection. In fact, the whole adventure appeared to be designed and managed by Mr B alone. The evidence demonstrated that it was a one-man business with Mr B running the show. That explained why there was no record of business discussion, formal business plan or feasibility study. When Mr B realized that contrary to what was stated in the 2009 Guide, no DG workshop licence would in fact be issued to premises not located on ground level, he discarded the idea.

42. The Board also accepts that for reasons including their staff's reluctance to move and the experience of facing difficulties in collecting rent, upon abandoning their business plan, the Appellant and Mr B decided to dispose of the Subject Property and Other Units retaining only Unit K. In short, the Board finds that the Appellant's rather unsophisticated and haphazard manner in devising, implementing and abandoning the business plan was not serious enough for the Board to cast doubt on the Appellant's intention to hold the Subject Property for use as DG workshop.

43. Taking into consideration of the totality of the evidence adduced, including all the objective facts and circumstances as well as the badges of trade, or rather the lack of them, the Board is satisfied that the Appellant has discharged her burden of proving that she intended to hold the Subject Property as a capital asset at the time of its acquisition. It was later disposed of as a result of changes of circumstances.

Conclusion

44. The appeal is allowed.