

**Case No. D15/20**

**Profits tax** – whether the profits tax assessment and the additional profits tax assessment are excessive and incorrect – meaning of trading – whether the disposal of the properties should be considered as trading and thus be chargeable to profits tax – sections 66, 68(4) and 68(9) of the Inland Revenue Ordinance

Panel: Chui Pak Ming Norman (chairman), Hew Yang Wahn and Leung Ho Yin Alexander.

Dates of hearing: 17 June, 28 August and 7 September 2020.

Date of decision: 19 January 2021.

The Appellant was incorporated in Hong Kong in 2007 by Ms G. Ms G is the Appellant’s sole director and shareholder. The Appellant described its principal activity as property investment for rental purpose.

During the relevant period, the Appellant purchased and sold Property A, Property B and Property C. They were all held for less than 3 years. The Appellant filed its Profits Tax Returns for the year of assessment 2010/11 to 2012/13. The Assessor considered that the Properties were the trading assets of the Appellant and the gains on disposal of Property B and Property C as well as the deposit forfeited from cancellation of the sale of Property C should be chargeable to Profits Tax. Further, no commercial building allowance should be granted in respect of Property B and Property C.

The Appellant brought the appeal under section 66 of the Inland Revenue Ordinance (Chapter 112) (‘the Ordinance’) against the determination of the Deputy Commissioner of Inland Revenue.

The issues in this appeal are (a) whether the profits derived by the Appellant from the sale of Property A, Property B and/or Property C (collectively ‘Properties’) are trading profits and chargeable to profits tax; and (b) whether the Appellant is entitled to commercial building allowance in respect of Property B and Property C in the relevant years of assessment.

**Held:**

1. ‘Trading’ requires an intention to trade (Simmons v IRD [1980] 1 WLR 1196 applied). In determining whether an activity amounts to trading, the fact-finding tribunal must consider all the circumstances involved in the activity (Church Body of the Hong Kong Sheng Kung Hui & Another v CIR (2016) 19 HKCFAR 54. followed). The Taxpayer’s own declaration of intention is inconclusive and has to be tested against all objective facts and

circumstances (All Best Wishes Ltd v CIR (1992) 3 HKTC 750). 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 (Real Estate Investments (NT) Ltd v Commissioner for Inland Revenue (2008) 11 HKCFAR 433 applied).

2. Applying the badges of trade to the Properties referred by McHugh NPJ in Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6, there were 9 issues for the Board to consider: (1) Whether the Appellant has frequently engaged in similar transactions; (2) Whether the Appellant has held the asset or commodity for a lengthy period; (3) Whether the Appellant has acquired an asset or commodity that is normally the subject of trading rather than investment; (4) Whether the Appellant has bought large quantities or numbers of the commodity or asset; (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; (6) Whether the Appellant has sought to add re-sale value to the asset by additions or repair; (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; (8) Whether the Appellant has conceded an actual intention to resell at a profit when the asset or commodity was acquired; and (9) Whether the Appellant has purchased the asset or commodity for personal use or pleasure or for income.
3. Applying the badges of trade to the Properties, Board came to the following findings: (1) The Appellant intended to sell the Properties soon after its respective acquisitions; (2) Properties were acquired by the Appellant as a trading stock for trading purpose; (3) At the time of disposal of the Properties, there was no change of its nature of being a trading stock; (4) The profits derived by the Appellant from the sale of the Properties are trading profits and chargeable to profits tax; (5) The Appellant was not entitled to the grant of commercial building allowances in respect of Property B and Property C (which are held as trading stock); and (6) Since the Properties were trading stocks, each disposal was an independent trading activity. Any property acquired from the proceeds of sale as a replacement property (if any) would not alter the fact that profit tax is chargeable on the profits realized.
4. Taking into account the documentary evidence, and Ms G's oral testimony and her witness statements, the Board considered that the evidence given by Ms G is not credible and reliable. The principal reason is that there were a lot of inconsistencies and contradictions between Ms G's oral testimony and the documentary evidence.
5. The Appellant failed to discharge its onus under section 68(4) of the Ordinance to prove that the assessment being assessed is excessive or incorrect. The appeal should be dismissed with costs in the total sum of

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\$25,000, which is the maximum amount that the Board can order under section 68(9) of the Ordinance.

**Appeal dismissed and costs order in the amount of \$25,000 imposed.**

Cases referred to:

Simmons (As Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioner [1980] 1 WLR 1196  
Commissioner of Inland Revenue v Church Body of The Hong Kong Sheng Kung Hui (2016) 19 HKCFAR 54  
Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6  
Brand Dragon Limited v Commissioner of Inland Revenue [2002] HKRC 90-115 D35/11, (2011-12) IRBRD, vol 26, 602  
Beautiland Company Limited v The Commissioner of Inland Revenue [1991] 2 HKLR 511  
D76/94, IRBRD, vol 9, 394  
D11/14, (2014-15) IRBRD, vol 29, 602  
Pickford v Quirke (1927) 13 TC 251  
Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioner for Inland Revenue (1980) 53 TC 461  
Marson (Inspector of Taxes) v Morton and related appeals [1986] 1 STC 463  
All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750  
Real Estate Investments (NT) Ltd v Commissioner for Inland Revenue (2008) 11 HKCFAR 433  
Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6  
Shui On Credit Company Limited v Commissioner of Inland Revenue (2009) 12 HKCFAR 392  
D21/07, (2007-08) IRBRD, vol 22, 541  
D23/16, (2016-17) IRBRD, vol 31, 543  
Lee Fu Wing v Yan Po Ting Paul [2009] 5 HKLRD 513  
Hui Cheung Fai and Anor v Daiwa Development Ltd and Others, HCA 1734 of 2009 (8 April 2014)  
Chan Sze Yuen v Tin Wo Engineering Co Ltd and Others, CACV 71 of 2011 (25 July 2012)  
British Railway Board v Herrington [1972] AC 877  
Tam Po Kei v Tam Bo Kin and Others [2011] 1 HKLRD 537  
Ip Man Shan Henry v Ching Hing Construction Co Ltd [2003] 1 HKC 256

Audrey Eu SC and Prisca Cheung, Counsel, instructed by Messrs Kok & Ha, for the Appellant.

Kay Seto, Counsel, instructed by Department of Justice, for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. This is an appeal brought by the Appellant under section 66 of the Inland Revenue Ordinance (Chapter 112) ('Ordinance') against the determination of the Deputy Commissioner of Inland Revenue dated 30 December 2019 ('Determination') whereby:

- (i) Second Additional Profits Tax Assessment for the year of assessment 2010/11 under Charge Number X-XXXXXXXX-XX-X, dated 23 March 2017, showing Additional Assessable Profits of \$133,875 with Additional Tax Payable thereon of \$22,089 is increased to Additional Assessable Profits of \$24,497,102 with Additional Tax Payable thereon of \$4,042,022;
- (ii) Profits Tax Assessment for the year of assessment 2011/12 under Charge Number X-XXXXXXXX-XX-X, dated 15 August 2014, showing Assessable Profits of \$2,087,116 is increased to Assessable Profits of \$14,403,804 with Tax Payable thereon of \$2,364,627; and
- (iii) Second Additional Profits Tax Assessment for the year of assessment 2012/13 under Charge Number X-XXXXXXXX-XX-X, dated 23 March 2017, showing Additional Assessable Profits of \$8,546,245 with Additional Tax Payable thereon of \$1,410,130 is increased to Additional Assessable Profits of \$9,994,359 with Additional Tax Payable thereon of \$1,649,069;

are confirmed.

2. By the letter of Wellex Consultancy Limited dated 24 January 2020, the Appellant's tax representative, which was received by the Board of Review (Inland Revenue) ('Board') on the same date, the Appellant lodged an appeal against the Respondent's dismissing the Appellant's objection to the Additional Profits Tax Assessments for the years of assessment 2010/11 and 2012/13 and the Profits Tax Assessments for the year of assessment 2011/12.

3. The grounds of the appeal raised by the Appellant in the Notice of Appeal could be summarized as follows:

- (a) The Commissioner had not taken into account of all the relevant factors and had erred in taking the incorrect information from the real estate agent to take the view that the Appellant acquired Property A, Property B and Property C as trading assets of the Appellant and assessed the gain on disposal of Property A, Property B and Property C as trading profits [the first, second and fourth ground of appeal]. Property A,

Property B and Property C have the meaning defined in the Statement of Agreed Facts<sup>1</sup>;

- (b) The Commissioner had not taken into account of all the relevant factors and had erred in taking the view that the Appellant acquired Property C as trading assets and assessed the deposit forfeited from cancellation of sale of Property C as trading profits [the third ground of appeal]; and
- (c) The Commissioner had erred in taking the view that the Appellant acquired Property B & Property C as trading assets and disallow the commercial building allowance claimed for Property B & Property C in respect of the years of assessment 2010/11 & 2011/12 [the fifth ground of appeal].

4. The Appellant in the said letter further elaborated the five grounds of appeal relied on by it.

#### **Issues**

5. The Issues for the Board's consideration are therefore (a) whether the profits derived by the Appellant from the sale of Property A, Property B and/or Property C (collectively 'Properties') are trading profits and chargeable to profits tax; and (b) whether the Appellant is entitled to commercial building allowance in respect of Property B and Property C in the relevant years of assessment.

#### **Agreed Statement of Facts**

6. The parties on 15 June 2020 signed and filed with the Board a Statement of Agreed Facts of the appeal ('Agreed Facts'), which is annexed to this Decision as Appendix A. The agreed facts therefor form part of the facts of the appeal. The Appellant called only one witness at the hearing, who is a director and sole shareholder of the Appellant, namely, Ms G. Both the Appellant and the Respondent submitted further documents to support their respective cases.

#### **Authorities submitted by the parties**

7. The Appellant's list of authorities, which was not disputed by the Respondent, reads as follows:

- (a) Simmons (As Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioner [1980] 1 WLR 1196
- (b) CIR v Church Body of The Hong Kong Sheng Kung Hui (2016) 19 HKCFAR 54

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<sup>1</sup> Referred to in paragraph 6 hereof.

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- (c) Lee Yee Shing v CIR (2008) 11 HKCFAR 6
- (d) Brand Dragon Limited v Commissioner of Inland Revenue [2002] HKRC 90-115
- (e) D35/11, (2011-12) IRBRD, vol 26, 602
- (f) Beautiland Company Limited v The Commissioner of Inland Revenue [1991] 2 HKLR 511
- (g) D76/94, IRBRD, vol 9, 934
- (h) D11/14, (2014-15) IRBRD, vol 29, 602
- (i) Inland Revenue Ordinance (Chapter 112) sections 2, 14 and 68

8. The Respondent's list of authorities, which was not disputed by the Appellant, reads as follows:

- (a) Inland Revenue Ordinance (Chapter 112) sections 2(1), 14, 66, 68 and Schedule 5
- (b) Pickford v Quirke (1927) 13 TC 251
- (c) Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioner for Inland Revenue (1980) 53 TC 461
- (d) Marson (Inspector of Taxes) v Morton and related appeals [1986] 1 STC 463
- (e) All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750
- (f) Real Estate Investments (NT) Ltd v Commissioner for Inland Revenue (2008) 11 HKCFAR 433
- (g) Lee Yee Shing v Commissioner of Inland Revenue (2008) 11 HKCFAR 6
- (h) Shui On Credit Company Limited v Commissioner of Inland Revenue (2009) 12 HKCFAR 392
- (i) D21/07, [(2007-08)] IRBRD, vol 22, 541

9. In addition to the above authorities, the Respondent also submitted the following authorities on Fact Finding and Assessing Credibility:

- (a) Inland Revenue Ordinance (Chapter 112) sections 51 and 64

- (b) D23/16, (2016-17) IRBRD, vol 31, 543
- (c) Lee Fu Wing v Yan Po Ting Paul [2009] 5 HKLRD 513
- (d) Hui Cheung Fai and Anor v Daiwa Development Ltd and Others, HCA 1734 of 2009 (8 April 2014)
- (e) Chan Sze Yuen v Tin Wo Engineering Co Ltd and Others, CACV 71 of 2011 (25 July 2012)
- (f) British Railway Board v Herrington [1972] AC 877
- (g) Tam Po Kei v Tam Bo Kin and Others [2011] 1 HKLRD 537
- (h) Ip Man Shan Henry v Ching Hing Construction Co Ltd [2003] 1 HKC 256

### **Relevant Provisions of the Inland Revenue Ordinance**

10. The following provisions of the Ordinance are relevant and apply in this appeal:

#### ***Meaning of Trade***

- (a) Section 2(1) defines ‘*trade*’ to include ‘*every trade and manufacture, and every adventure and concern in the nature of trade*’.

#### ***Charging Provision***

- (b) Section 14(1) provides:

*‘Subject to the provisions of the Ordinance, profit 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.’*

#### ***Onus of Proof***

- (c) Section 68(4) provides that ‘*the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant*’.

### **Costs**

(d) Section 68(9) provides that:

*‘Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5, which shall be added to the tax charged and recovered therewith.’*

The amount specified in Part 1 of Schedule 5 is \$25,000.

### **Relevant Authorities on Trade, Intention and Manner to ascertain the Intention**

11. From the authorities submitted by the parties, it is quite clear that the relevant legal principles on ‘trade’, ‘Intention’ and ‘Manner to ascertain the Intention’ which the Board will need to apply are not in dispute.

12. ‘Trading’ requires an intention to trade. Lord Wilberforce stated in Simmons<sup>2</sup> that *‘normally the question to be asked is whether the intention existed at the time of acquisition of the asset’*. In Simmons, his Lordship set out the principle at page 1199 as follows:

*‘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)*

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<sup>2</sup> Simmons v IRC [1980] 1 WLR 1196

13. In Church Body of The Hong Kong Sheng Kung Hui<sup>3</sup>, Tang PJ said ‘*in determining whether an activity amounts to trading, the fact-finding tribunal must consider all the circumstances involved in the activity. It will have to make a “value judgment” as to whether this constitutes trading and whether the requisite intention to trade can be inferred. Regardless of what is claimed to be the intention subjectively, the question falls to be determined objectively having regard to all the surrounding circumstances (at paragraph 50).*’

14. In Lee Yee Shing<sup>4</sup>, Bokhary and Chan PJJ emphasized in 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 said in paragraph 56 that *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.* His Lordship also pointed out in paragraph 59 that ‘*the intention to trade to which Lord Wilberforce referred is not subjective but objective*’. It is inferred from all the circumstances of the case to see whether the ‘badges of trade’ that indicate an intention to trade, or perhaps more correctly, the carrying on of a trade are present. Specifically, they are whether the taxpayer:

- (a) has frequently engaged in similar transactions;
- (b) has held the asset or commodity for a lengthy period;
- (c) has acquired an asset or commodity that is normally the subject of trading rather than investment;
- (d) has bought large quantities or numbers of the commodity or asset;
- (e) 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;
- (f) has sought to add re-sale value to the asset by additions or repair
- (g) 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 and asset of that class;
- (h) has conceded an actual intention to resell at a profit when the asset or commodity was acquired; and
- (i) has purchased the asset or commodity for personal use or pleasure or for income.

15. The Taxpayer’s own declaration of intention is inconclusive and has to be

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<sup>3</sup> Church Body of the Hong Kong Sheng Kung Hui & Another v CIR (2016) 19 HKCFAR 54.

<sup>4</sup> Lee Yee Shing v CIR (2008) 11 HKCFAR 6.

tested against all objective facts and circumstances. In All Best Wishes<sup>5</sup> Mortimer J (as he then was) said at page 771

*‘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.’*

16. In Marson<sup>6</sup>, Sir Nicolas Browne-Wilkinson V-C said at H, page 1347 that ‘a single, one-off transaction can be an adventure in the nature of trade’ and continued at B, page 1348 that ‘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.’ Nonetheless, the list of factors was in no sense comprehensive, nor was any one of those decisive in all cases. They would provide common sense guidance to an appropriate conclusion. The matters which are apparently treated as a badge of trade referred to by Sir Nicolas Browne- Wilkinson V-C are summarized as follows:

- (a) That the transaction was a one-off transaction although a one-off transaction is in law capable of being an adventure in the nature of trade.
- (b) Is the transaction in some way related to the trade which the taxpayer otherwise carries on?

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<sup>5</sup> All Best Wishes Ltd v CIR (1992) 3 HKTC 750.

<sup>6</sup> Marson (Inspector of Taxes) v Morton and related appeal [1986] STC 463.

- (c) 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 realization?
- (d) Was the transaction carried through in a way typical of the trade in a commodity of that nature?
- (e) What was the source of finance of the transaction?
- (f) 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?
- (g) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots?
- (h) What were the purchasers' intentions as to resale at the time of purchase?
- (i) Did the item purchased either provide enjoyment for the purchaser or pride of possession or produce income pending resale?

17. His Lordship at C, page 1349 emphasized that the matter he has mentioned are not a comprehensive list and no single item is in any way decisive. In his words, *'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?'*

**Witness Statement dated 1 June 2020 ('WS') and Supplemental Witness Statement dated 15 June 2020 ('SWS') of Ms G**

18. The sole witness called by the Appellant to give evidence at the hearing is Ms G, the Appellant's sole director and shareholder.

19. Ms G signed and filed a witness statement and a supplemental witness statement respectively dated 1 June 2020 and 12 June 2020, to which she made statements of truth that the witness statements were true and (if applicable) the opinion expressed in them were honestly held by her.

20. Before she testified, she also confirmed under oath that the contents of the two witness statements were true and correct. Accordingly, the two witness statements made by her stood as evidence-in-chief of Ms G.

21. At the commencement of the cross-examination, Ms G confirmed that the Appellant engaged Wellex Consultancy Limited ('Wellex') as its tax representative who

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made a submission by way of a letter dated 24 January 2020 to the Board, the contents of which were approved and confirmed by her. Ms G also confirmed that the contents of the letters sent by the Appellant to the Inland Revenue Department ('IRD') to deal with the requisitions raised were of her approval and confirmation.

22. In addition to the undisputed facts, Ms G's two witness statements covered *inter alia* the following:

- (a) At all material times, Ms G has been and is the Appellant's sole shareholder and director, as well as the Appellant's sole controlling mind. She is now 64 and has a career spanning for 41 years in Company H. She started off as an insurance agent and has been promoted several times until now being a Position J (mainly responsible for recruitment, training and management with around 300-400 staff in her team).
- (b) Ms G's income for the period from year ended 31 March 2007 to year ended 31 March 2013 ranged from \$5.3 million to \$9.18 million, which allowed her to become financially independent as a married woman.
- (c) Ms G is an inherently conservative person who is very risk averse. Her personality traits have defined the investments that she made in life. She has never been an investor in the stock market (save the 4,000 bonus share of Company H allotted to her) or financial products of any sort, as she has always been very conservative, and simply did not enjoy the 'gamble' or the volatility. Her investment strategy has therefore been to make fewer decisions and therefore be exposed to fewer risks. Her choice of investment has therefore always been in commercial real estate.
- (d) Her choice of investment has always been in commercial (as opposed to residential) properties, since they would usually give her a higher rental yield with the least amount of administrative management and work required. As such commercial property investment was very attractive to her because she was (and remain) very busy with her work and simply did not have the time to be bothered with small administrative details. She did not need to constantly monitor prices and make instantaneous decision either.
- (e) In 2007, the sudden and bitter divorce of her good friend prompted her to realize that she needed an 'insurance' for her future as she was facing retirement and needed to know to know that she would at least be financially secure if something happened to her marriage or her family in the future.
- (f) Against this background, Ms G incorporated the Appellant in 2007

with the professed aim of building up a portfolio of properties as long term investment for rental income. It had never been her intention to flip or trade properties for short-term gain. Otherwise, she would pay heed to the advice from those around her that it would be easier for ‘tax purpose’ to simply buy one property with a different company each time.

- (g) Since the incorporation of the Appellant, Ms G is the Appellant’s sole director and shareholder, and is its sole controlling mind. The Appellant is the means by which she enjoys her independence and gives her the freedom to decide what she wants to buy with her hard-earned money. Her husband, Mr K (an active investor in properties), unlike her, is a bit more aggressive and has two separate portfolios: one for long-term investments and another for short-term/riskier investments. Despite their common interest in properties, her husband and she have different personalities and risk appetite. While Mr K sometimes cannot help but give unsolicited advice on what she should or should not buy (as most spouses probably do), the Appellant is separate from Mr K’s companies and Ms G makes all the decisions alone. It may also be appropriate for her to mention that her husband and she have always completely separate finances. They have never had a joint bank account. They have always paid the mortgage instalments for their family home (jointly held by them) equally.
- (h) For the sake of completeness, Ms G added that apart from the Appellant, she is the sole shareholder and director of one more company named Company L, which is incorporated in 2010 and has held a property at Address M since November 2010 until now.

***Property A***

- (i) Both Property A1 (which is immediately next to Property A) and Property A were of a good size and came with existing tenancies that had a rental yield of 4.8%, which to Ms G was a very attractive investment. She was also able to obtain a bank loan from Bank N to finance approximately 70% of the acquisition price for a term of 15 years. She was able to finance the remainder with a shareholder’s loan from her annual earnings and accumulated saving.
- (j) The subsequent disposal of Property A1 was entirely due to the November 2008 financial crisis. Bank N decided that in view of the drop in property price, the Appellant should repay the loan principle in the amount of \$4.0 million to restore the loan-to-valuation ratio to 70%. In the meantime, the tenants of Property A1 and Property A started to delay in paying their monthly rent. They also started asking the Appellant to reduce their rent amount as their line of business was very hard hit from the financial crisis. Ms G found it very troublesome

to continuously ‘chasing rent’ from those tenants many times every month.

- (k) At that time, she supposed that she was fortunate to have an agent approach her, asking her to let Company P try to help her sell Property A1. Sick and tired of dealing with Bank N, ‘chasing rent’, and the uncertainty in the economic situation, she agreed to let Company P take a shot at selling Property A1 (together with two other properties belonging to her husband’s companies). She felt that Property A1 and Property A were becoming a burden to the Appellant as she did not have any prospect of finding replacement tenants for both shops who were not in the hard-hit building materials business. She therefore decided to sell Property A1 at a loss because she needed to cut her loss and took opportunity to restructure the Appellant’s property portfolio before it became too late.
- (l) Ms G emphasized that not once did the Appellant appoint any agent to sell Property A.
- (m) The disposal of Property A in 2010 was entirely unexpected. In September 2010, Ms G received a ‘cold call’ from an agent of Company Q with a buyer offering to purchase Property A at HK\$50,400,000.00. She thought it was quite a good offer. She therefore decided to take up the offer and sell Property A for HK\$50,400,000.00.
- (n) For the sake of completeness, Ms G added that after the Appellant sold Property A, on 18 September 2010 the Appellant signed a provisional sale and purchase agreement for Property E<sup>7</sup> with completion taken place on 15 November 2010.

***Property B***

- (o) The reasons underlying the Appellant’s purchase of Property B have been explained in much detail in the Appellant’s January Submissions made through Wellex<sup>8</sup>. Ms G only highlighted some main reasons for the Appellant acquisition of Property B in the witness statements.
- (p) On 22 July 2009 (the day before the provisional sale and purchase agreement for Property B was signed), Ms G was contacted by an estate agent from Company Q who told Ms G that Property B (located at Address R) was for sale. She was immediately quite interested, as she instinctively knew that District S not only was a good district, but Address R has always been the busiest and most popular street in the

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<sup>7</sup> As defined in paragraph 5 of the Statement of Agreed Facts.

<sup>8</sup> The letter dated 24 January 2020 from Wellex to the IRD.

neighbourhood.

- (q) Property B came with an existing tenancy with a monthly rental yield of 3.62% for 3 years which would be increased by 15% for the following 2 years. The tenant ran a very well-known Japanese restaurant, Restaurant T, in which Ms G dined many times before. She knew that it only opened in the evenings and was a cozy and restaurant which had been in business for a long time and had a very loyal clientele. To err on the side of caution, she dined at Restaurant T for dinner before she decided to purchase Property B.
- (r) In the meantime, the estate agent kept calling to say that Ms G had to act quickly if she really was interested, as Property B was the subject of hot interest for a lot of other investors and competition to secure it was very fierce. As she was busy with back-to-back client meetings on the day the provisional agreement was signed, Ms G asked her husband to help her sign it and nominate it to the Appellant thereafter. Thus the provisional sale and purchase agreement for acquiring Property B was signed by Company U, a company owned by her husband. On 5<sup>th</sup> November 2009, Company U entered into a nomination agreement with the Appellant in respect of Property B.
- (s) Contrary to the Respondent's assertions, Ms G had never put Property B on sale.
- (t) The disposal of Property B was not due to any change of intention of the Appellant and not by reason of any advertisement for sale. The genesis of Property B's disposal came from an offer to purchase it from Ms G's husband's business associates, who were the senior management of Group V and were quite fond of Restaurant T to the extent that they had nicknamed it their 'private clubhouse'. They offered to purchase Property B from her for HK\$34 million.
- (u) Ms G was not convinced to sell Property B at first and did not find that the offer price of HK\$34 million attractive enough to convince her to give up her long-term investment. However, due to her husband's nagging her to sell and a sale which would indeed help her husband's business, she was therefore persuaded to sell Property B by the following reasons, (i) the scope for a further increase in rent is limited by the business of Restaurant T and its business hours; (ii) there was a possibility of Restaurant T not renewing the tenancy. If that happened it might be difficult to find a replacement tenant as there was a newspaper stand right in front of Property B that operated during daytime; and (iii) an extra of HK\$280,000.00 was offered by Group V.
- (v) After the sale of Property B, the Appellant paid 0.5% commission to

her husband (through one of his companies, Company W), as the unsolicited offer was obtained by him, and the Appellant was strictly separate from her husband's dealings. The Appellant also paid 0.5% commission to Company X for preparing and following up with the necessary paperwork.

*Property C*

- (w) The acquisition of Property C stemmed from her desire to diversify the Appellant's investment portfolio and own something other than retail premises. She noted that her husband's company, Company Z, had signed a provisional agreement on 17 November 2009 and a formal sale and purchase agreement on 3 December 2009 for the acquisition Property C. Given the rental return of 3.26% (with existing tenancy due to expire on 8 March 2012, after 2 years), its location at Address AA, the relatively low purchase price of HK\$15 million, as well as her strong desire to diversify the Appellant's portfolio, Company Z and the Appellant signed a Nomination Agreement on 19 April 2010 to nominate the Appellant to complete the purchase of Property C.
- (x) If Ms G had intended to hold Property C for short-term or 'flip', she would not have bothered asking Company Z to nominate the property to the Appellant. The sole reason for having Company Z nominate the Appellant to complete the sale and purchase was so that the property could become 'her' property, held by the Appellant, for long-term investment.
- (y) The acquisition of Property C was financed by a 3-year loan from Bank AB as well as advances from herself. She would strongly disagree with any adverse inferences drawn from the mere fact that the Appellant had taken out a short-term loan. In any event, her plan was always to refinance the Appellant, if necessary after the maturity of the short-term loan.
- (z) After the acquisition, in June 2010, the tenant informed the Appellant that the tenant would not renew its tenancy in 2012 as it found Property C too small for its operation. The Appellant therefore began a 2-year process of searching for replacement tenants but unfortunately, without much avail.
- (aa) On 2 June 2011, the Appellant received an unsolicited offer from a real estate agent for acquisition of Property C at a consideration of HK\$23.1 million. This offer came as surprise to Ms G as the Appellant had never put Property C up for sale.
- (bb) The offer was accepted but the purchaser decided at the last minute

not to complete the transaction. As a result, the Appellant exercised its right to forfeit the deposit of HK\$2.31 million.

- (cc) In around March 2012, the Appellant received news that someone was interested in buying Property C. Given the fact that the offer represented a gain of 19.98 years of rental income, the Appellant decided to take up the offer and sell Property C. The Appellant saw this as an opportunity to ‘upgrade’ its portfolio by acquiring a first-tier office premises in an even better location and eventually, acquiring Property F.
- (dd) Supplemental Witness Statement of Ms G dated 15 June 2020.
- (ee) Ms G filed the SWS to supplement information relating to Property D, E and F and the setting up of the Appellant. Ms G said it is abundantly clear that her professed intention (as the sole controlling mind of the Appellant) is to gradually acquire a portfolio of commercial properties under the Appellant for long term investment purposes if one views the Appellant’s property portfolio in its entirety, viz Properties A to F as a whole.
- (ff) She was 51 years old in 2007 and had planned to retire in around 10 to 15 years. Her aim at that time was therefore for the Appellant to build up a sizeable portfolio of properties in the first few years. It was therefore her aim to repay all bank loans/mortgages as soon as possible, and where possible, she was more inclined to speed up the Appellant’s mortgage repayments by repaying a larger sum to the bank every month. Her other aim was to have a strong and healthy property portfolio when she retires.
- (gg) She had a few guiding principles overarching her decision on which properties to add to the Appellant’s portfolio: (a) Choice of investment – on commercial properties; (b) Budget – within her financial reach; (c) Rental yield – properties subject to tenancy, the tenants of which are usually indicative of the potential and values of the properties; (d) Tenant’s business – potential for rental increase in the future; and (e) location – in popular districts with which she is familiar.
- (hh) At the time of entering into the provisional agreement to purchase Properties A and A1, Ms G asked her husband’s personal assistant to acquire a shelf company (namely, the Appellant). Due to her mistake, Ms G’s husband was added as a director and shareholder of the Appellant. After she told her husband about her intention in setting up the Appellant to acquire properties for long term investment on her own, her husband resigned as director and transferred the share back to her in early February 2008.

- (ii) After the sale of A1, she managed to repay her entire mortgage for Property A to Bank N and re-finance Property A with Bank AC. Using the money obtained from the re-financing of Property A from Bank AC, the Appellant bought Property D in 2009, which was located at another part of Road AD.
- (jj) The Appellant acquired Property E on 15<sup>th</sup> November 2010, after having sold Property A. Due to different completion dates of Property E and Property A, in addition to using mortgage loan, she had to use her savings to complete the purchase of Property F first. Property E was situated in an extremely busy and diverse part of Road AE and came with a highly reputable tenant with a high rental yield of 3.15% p.a.. Shortly after the Appellant signed the provisional sale and purchase agreement for Property E on 18 September 2010, the Appellant also signed a provisional sale and purchase agreement for Property E1 on 6 October 2010. Property E1 consisted of 2 flats immediately above Property E, which could be used as an annex to support and enhance the usability of Property E1.
- (kk) After the Appellant obtained vacant possession of Property E and Property E1 upon expiry of the tenancies, the Appellant in 2011 spent HK\$1,133,400 to renovate the properties and it took over one year to complete, meaning that the Appellant has lost one-year's rental income and that she was paying Property E's mortgage to Bank AC out of her own pocket.
- (ll) The above could make the points that (a) Ms G's investment policy has always been very consistent and is for the purpose of long-term investment; and (b) Ms G was more than financially capable as the Appellant's shareholder – by paying renovation costs for Property E and Property E1 and withstanding the complete lack of any rental income for both properties for one whole year.
- (mm) As explained in paragraphs 56 to 57 of the WS, Property F was purchased after the Appellant had sold Property C. The Appellant acquired it on 6 December 2012 through the nomination of Company Z which originally entered into a sale and purchase agreement with the vendor on 25 March 2012. Property F was located in District AF and undoubtedly an upgrade from Property C. After holding it for 6 years, it was sold for a phenomenal HK\$101 million in 2018. To the Appellant, the offer was too good to refuse.

### **Oral Testimony of Ms G**

23. Ms G confirmed the contents of the WS and SWS and stood for cross-examination by counsel for the Respondent.

***Structures of different companies related to Ms G and her husband Mr K***

24. Upon cross-examination, Ms G admitted that:
- (a) she was a director of Company W but not a shareholder thereof for the period from 2007 to 2013. She said she had nothing to do with and did not participate in its daily operation. All she did was to sign an audited report once every year. She admitted that she did not make reference of Company W to the WS or SWS;
  - (b) Company W was a holding company which held other companies, through which properties were held. Company W was a shareholder and director of Company Z. Company W also held Company U.
  - (c) Everything related to Company W was managed by Mr K. Company Z was a company for short-term and riskier investment. Ms G never participated in the investments of Company Z. It was Mr K who made purchases and Mr K did not have to seek her approval.
  - (d) Company AG sold 2 properties as well as Shop A1 held by the Appellant. Ms G was a 25% shareholder of Company AG while Mr K was a 75% shareholder;
  - (e) Between March 2007 to March 2017 Company AH was 50% owned by Mr K and 50% owned by Ms G. Both of them were directors of Company AH.
25. Ms G told the Board that due to the mistake of Mr K's secretary; one share of the Appellant was transferred to Mr K on 28 December 2007. Upon discovery of the mistake, the said share was transferred back to Ms G on 5 February 2008 with the result that the Appellant was wholly owned by Ms G. Mr K became a reserve director of the Appellant on 13 November 2009 at the suggestion of its auditors.

***Acquisition and Disposal of different properties by the Appellant***

26. Ms G told the Board that:
- (a) Property C was acquired by Company Z on 3 December 2009 (the date of the agreement for sale and purchase. One day before the completion of the sale and purchase, the Appellant was nominated by Company Z to take up Property C on 20 April 2010.
  - (b) Property D was acquired by Company U on 26 June 2009. One date before the completion, the Appellant was nominated by Company U to take up the assignment of Property D on 20 October 2009.

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- (c) Property F was acquired by Company Z on 14 May 2012 (the date of the agreement for sale and purchase). Two days before the completion, the Appellant was nominated by Company Z to take up the assignment of Property F.

27. Regarding Property B, Ms G wanted to buy this property. She was busy on the signing date so she asked Mr K to sign the agreement. Mr K used Company U to sign the agreement for sale and purchase. One day before the completion, Company U executed a nomination in favor of the Appellant. Thereafter the Appellant took up the assignment on 5 December 2009.

28. In relation to the financing proposal made by Bank AB on the acquisition of Property B, Ms G confirmed that Mr K was named as guarantor for a loan of \$15.75 million and the proposal was sent for the attention of Mr K.

29. In relation to the proposal made by Bank AB on the acquisition of Property C, Ms G also confirmed that Mr K was named as guarantor, in this occasion, for a loan of \$10.5 million and the proposal was sent to the Appellant for the attention of Mr K.

30. Ms G offered the explanation that it was so because her husband had a very long-term and in-depth relationship with Bank AB spanning over two to three decades. She did not have any account with Bank AB and had no relationship with them. Since her husband had a good relationship with Bank AB, she agreed to engage Bank AB. She could act as guarantor as well, but it would take one or two weeks more to get the loans as they would ask her for more information in order to support the loans. She denied the suggestion that her finance was not independent from Mr K.

31. Ms G testified that she purchased the aforesaid properties not due to the advice given by Mr K. It was not the case that whenever she wanted to buy or sell certain things, she would seek advice from Mr K or Mr K would give advice to her. However, she admitted that like other spouses would do, they always talk amongst themselves. It was not the case that Mr K specifically directed comments on a certain property and told her whether or not Ms G should make that purchase.

32. On 14 September 2010, the Appellant signed an agreement for sale and purchase to sell Property A which was signed by Mr K for and on behalf of the Appellant. Ms G confirmed that she authorized Mr K to sign but due to her mistake, the said authorization was not mentioned in the board meeting held on the same date.

***Relevant Board Resolutions***

33. Ms G was referred to a number of board resolutions of the Appellant resolved by Ms G and Mr K in which the resolution(s) were purportedly passed with the unanimous consent of the persons attending to approve the sale and purchase of Property C. Apart from her, Mr K was the other attendee.

34. Counsel for the Respondent suggested that the word ‘unanimous’ referred to

in the board resolution for the sale of Property C implied that the decisions were made by Ms G and Mr K jointly. Ms G maintained that the decisions to purchase and to sell properties were only made by her alone despite the wordings of the resolutions.

35. The agreement for sale and purchase relating to the sale of Property A was signed by Mr K for the Appellant. Ms G was asked to comment on the reason why Mr K was not made in the board resolution as an authorized person to sign on behalf of the Appellant. Ms G admitted she had made a mistake.

36. Ms G confirmed that Mr K needed to sign the board resolutions for the sale and purchase of Property C because he was a reserve director of the Appellant. She was then referred to the board resolution relating to the sale of Property A and the board resolution relating to the sale of Property C which were signed by her as the sole director, without the involvement of Mr K. Ms G explained that she was a one-man band and she had missed something if she had made any mistakes but it was not relevant to the matter at hand.

#### ***Letters from Company Q and Company X***

37. Ms G was referred to two letters written by Company Q dated 12 December 2013 ('2013 Company Q Letter') and Company X dated 28 November 2014 ('2014 Company X Letter') to the IRD relating to the sale of Property A and Property B respectively. In the 2013 Company Q Letter, it confirmed *inter alia* that they would contact Mr K at XXXX XXXX and/or XXXX XXXX for Property A. In the 2014 Company X Letter, it confirmed *inter alia* that the contact person for Property B was Mr K and the telephone number was XXXX XXXX and XXXX XXXX. Ms G offered the explanation that she could not know how to reply because she did not know the properties agencies would contact her husband in relation to those properties. Probably, the agents felt Mr K was nicer, but ultimately, she was the person who made the decisions pertaining to buying and selling.

#### ***Computer Records of Company Q and Computer Record of Company X***

38. In relation to the computer record maintained by Company Q on Property A and in relation to the computer record maintained by Company X on Property B, Ms G confirmed that the Ms AJ referred to in the records should be counted as her because Ms AJ was her direct secretary who told the estate agents that the Appellant was not selling nor leasing the properties in question or those properties were not for sale or leasing.

39. The agents knew that Ms G was the wife of Mr K. If it did not work with Ms G, the agents wanted to try with Mr K and hoped to convince Mr K to sell and Mr K could convince his wife. She said the entries relating to Ms AJ were accurate. In relation to those entries purportedly made by Mr K, she could not know whether they were correct because Mr K would not report to her the contents of the calls from the agents. Mr K would not tell her what he thought in his own mind and what his position was on the matter.

40. For the purpose of this appeal, Ms G did not verify the computer records with Company X and Company Q. However, in order to prove her own innocence, she had done

a lot of work. She had contacted her lawyer, Lo & Lo to send letters to Company X and Company Q asking them to provide the correspondence with the IRD.

41. In response to the letters of Lo & Lo dated 20 and 26 January 2015, Company X's solicitors Tony Kan & Co sent a reply to Lo & Lo dated 5 March 2015 annexing a copy of their letter to IRD dated 28 November 2014, a handwritten statement dated 25 February 2015 by a Mr AK, Company X's staff and the computer records in question. Ms G confirmed that despite Lo & Lo demanding for an apology from Company X on the alleged wrong information being sent to the IRD, Company X refused to tender any apology.

42. Upon being confronted with several correspondences from the Appellant to the IRD on divers dates where the Appellant had used the words 'directors, we or in Chinese "我們"', Ms G denied the suggestion that Mr K was a controlling mind of the Appellant at the time of the transactions in relation to Properties A, B and C.

### ***The Appellant's Finances***

43. Ms G agreed with counsel for the Respondent that for the period from April 2009 to March 2013, the current assets of the Appellant fell short of meeting its liability according to the Appellant's financial statements. However, Ms G explained that it was so because of the reclassification of long-term loan of a company as its current liabilities consequent upon the change of accountancy laws. Before that, only the money due to banks repayable in the future 12 months would be classified as current liabilities.

44. Ms G stressed that in order to decide whether or not the Appellant was solvent, what we should look at was whether or not the revenue derived from 'collecting rent' was sufficient to pay the interest and to maintain the business. She was the boss of the Appellant. If anything went wrong with the Appellant, regardless of the amount of capital, she had to be responsible for that. It was therefore irrelevant to judge whether or not the Appellant had sufficient capital to operate.

### ***Ms G's income***

45. Ms G told the Board that her annual income in the relevant years was in the range of \$6 million to \$9 million.

46. Consequent to her claim, Ms G was asked to explain the discrepancies of her taxable income (taxable profit) stated in the Appellant's letters to the IRD respectively dated 17 December 2014 and 17 June 2015:

	Letter dated 17 December 2014	Letter dated 17 June 2015
Year of assessment	Taxable Profits	Taxable Profits
2007/08		\$4,683,116
2008/09	\$3.2 million	\$7,952,167
2009/10	\$3.4 million	\$2,745,072
2010/11	\$3.9 million	\$3,924,627

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	Letter dated 17 December 2014	Letter dated 17 June 2015
Year of assessment	Taxable Profits	Taxable Profits
2011/12	\$5.2 million	\$5,281,077
2012/13	\$4.7 million	
Total	\$20.4 million	
Yearly average	\$4.08 million	

47. Ms G offered no explanation why it was wrong because those were drafted by her accountant to whom she trusted, but she had nothing to hide. If there were some errors, the Respondent could verify and found out the correct amount and it would be ending up in that range.

48. In any event, she admitted that the average yearly income before tax for the period from 2008/09 to 2012/13 was \$4.08 million and after deduction of tax, her average annual net income for that period amounted to about \$3.4 million region.

***Finance for Acquisition of Property A, Property B and Property C***

49. The bank statements produced by Ms G showing her savings between April 2012 to March 2013 were in the region of \$8 to \$12 million.

50. Ms G agreed with the suggestion that in January 2011 she borrowed a loan of \$9.5 million from Company W for the purchase of Property E1, \$8 Million thereof being for the purchase price and \$1.5 million being for the Appellant's working capital.

51. In response to IRD's enquiry on the acquisition of Property B, by its letter dated 3 April 2013 to IRD, the Appellant in paragraph 9 thereof confirmed that the acquisition of Property B was financed by the shareholder and the directors and bank loan. However, Ms G disagreed that the Property B was financed by herself and Mr K. She maintained that the acquisition of Property B was financed by her alone.

52. In response to IRD's enquiry on the acquisition of Property C, by its letter dated 12 September 2014 to IRD, the Appellant in paragraph 9 thereof confirmed that the acquisition of Property C was financed by the shareholder and the directors and bank loan. However, she disagreed with the suggestion that Property C was financed by herself and Mr K. She also maintained that all the loan was provided by her solely.

53. In relation to the acquisition of Property B, it was financed by a loan of \$15,750,000 from Bank AB, to be repaid by 12 unequal quarterly instalments with the first 11 instalments at \$130,000 per quarter and the last instalment is \$14.32 million, which is more than 90% of the loan principal of \$15.75 million.

54. In relation to the acquisition of Property C, it was financed by a loan of \$10.5 million from Bank AB. The loan was repayable with 12 unequal quarterly instalment with the first 11 instalments at \$100,000 and the last instalment is \$9.4 million. Ms G agreed that repayment of 89.5% of the loan principal is deferred until the last instalment.

55. Upon being questioned why she chose to borrow short-term loans from Bank AB, she replied that the loans were structured by the bank. It would be a case whether or not she accepted the structure of the loan. If not, she had to borrow the loan from another bank. However, she wanted to establish a relationship with Bank AB, she accepted the structures of the loan. She had the implied consent from Bank AB that the loan would be renewed upon the expiry of the initial 3-year term. She felt she had a good chance of being able to extend the loans.

***Acquisition and Disposal of Property A***

56. Ms G agreed that no formal feasibility study had been conducted prior to its acquisition. However, she felt that 4.8% return on the purchase price was regarded as an active investment. The 4.8% return was one of the factors taken in consideration by her. She had some guidelines for herself when it came to investment. Her guidelines were (a) not to buy stocks; (b) investment on property which gave a stable return; (c) commercial properties (which required lowest administration); (d) the locations; (e) her own financial capability, in case that the property was not rented out, she needed to consider whether or not it would impose a serious burden on her; (f) yield; and (g) the tenants.

57. At that time, Property A gave her 4.8% yield yet the interest rate on the bank loan was one point something percent. In other words, the 4.8% yield not only paid back the interest to her, it also paid back part of the principle.

58. Ms G confirmed that she applied the guidelines when she purchased Property A and Property A1. Apart from applying the aforesaid guidelines, she had also walked around Road AD at that time to buy construction materials for decoration of her house which was acquired at that time. She found that that segment of Road AD was occupied by all tiles shops which were nicely decorated and of good refurbishment. That segment was also the busiest part of Road AD. There were a lot of customers around the 2007 period.

59. Ms G admitted that she did not consider the age of the building when she made the purchase but she opined that there was no need to consider this because all street-level shops were located in the old districts. The buildings in the old districts were all several decades old.

60. Ms G also admitted that before the purchase of Property A and Property A1, she did not consider or make any enquiries if the building was subject to any large-scale renovation. As a matter of fact, there was no such thing at the time when the Appellant bought Property A and Property A1. Even if it happened in future that the properties were subject to large-scale renovation, she could fund that kind of money.

61. Ms G testified that there was a lot of trouble in respect of receiving rent from the tenant of Shop A1 shortly after the acquisition. So, she decided to sell it and authorized Mr K to sign an engagement letter (together with Company AG) to appoint Company P as their agents to handle the sale of Property A1 and two other properties. Upon cross-examination, Ms G agreed that she was a director and 25% shareholder of Company AG.

62. Ms G also testified that she had never instructed any estate agents to sell Property A for her. In relation to the computer record of Company Q, Ms G did not know how they came up with the price. Company Q did not talk to her nor to Mr K. Further Mr K did not represent her. Ms G maintained that the 21 entries in Company Q computer records had nothing to do with her.

63. Ms G was referred to the second entry of 14 September 2010 computer record where it recorded '50.4 million have one per cent commission. Have 49.8 million offer already.' She said she had no recollection of the offer of 49.8 million.

64. Ms G was referred to paragraph 12 of the Appellant's letter dated 27 March 2013 (signed by Ms G) to the IRD where it wrote:

'Since the time (Early 2009) we realized that Shop B1 (referred to as Property A in this appeal) was not a sound investment, we have the intention to sell it out and replace it with other investments. We have made known to real estate agents that we have intention to sell Shop B1 (referred to as Property A in this appeal) since early 2009.

However, there was no reasonable offer until September 2010.

Our intention was to sell out Shop B1 (referred to as Property A in this appeal) first, get the proceeds and then buy other properties for long term investment. But for 1 whole year, we are unable to sell out Shop B1 (referred to as Property A in this appeal).'

65. When Ms G was asked to comment this reply to the IRD, Ms G clarified that Property A and Property A1 had the similar problems at similar time. She wrote this letter about 3 years after she (the Appellant) had sold Property A1 and two years after she (the Appellant) sold Property A. She was always very confused between Property A1 and Property A. The intention to dispose of the property in early 2009 was not about Property A. It was about Property A1. She asked Company P to help her do the sale. The intention applied to Property A1 and had nothing to do with Property A.

66. Ms G was referred to paragraph 11 of that letter where she gave a detailed account of why she disposed of Property A1. She was queried that she should make no confusion because the reasons for disposal of Property A1 and Property A were explained in details in two separate paragraphs (i.e. paragraph 11 and paragraph 12 of the same letter). Ms G maintained that some of the answers provided in the letter pertained to Property A1 and some pertained to Property A. She said for the difficulties in collecting rent, that had to do with Property A as well. For the selling part, that has to do with Property A1 only.

67. Ms G admitted that she did not correct the mistakes (of the confusion of Property A and Property A1 in the letter to the IRD) in the WS or SWS. Neither did she seek to correct it at the beginning of the hearing.

68. Ms G stressed that for Property A1, she did in fact ask the agent to sell it, but that was not the case for Property A. This was the correct answer. If what she had written previously in the letter of 27 March 2013 to the IRD had led to misunderstanding on the part of the IRD, she said she was sorry.

69. Regarding the sale of Property A1, she confirmed that she sold Property A1 and bought Property D as replacement. She sold Property A and bought Property E and Property E1 as replacement. For Property B and Property C, she just bought them to expand the portfolio.

70. Ms G was referred to paragraph 11 of the letter written by the Appellant and dated 27 March 2013 to the IRD where Ms G wrote that Property A and Property A1 were sold and replaced by the purchase of Property B, Property C and Property D. Ms G was asked why in this letter she did not suggest that Property A was to be replaced by E and E1. She offered the explanation that it was quite a generalization on her part because she was a layman. Right now, she could confirm that she sold Property A1 and she bought Property D. She sold Property A and bought Property E and E1 as replacement. She had held Property D and Property E ever since for over 10 years without change. For Property B and Property C, she just bought more stuff in order to expand the portfolio.

71. Ms G was further referred to paragraph 15 of Section B of SWS where it was written 'Properties E and E1 replacing Property A' and the table where Ms G suggested the Property E was a replacement of Property A and Property E1 was for something else. She offered again the explanation that she was too general.

72. Ms G was referred to another letter written by the Appellant to the IRD dated 12 April 2017, at paragraph 2(d) of which Ms G replied to the IRD that the Appellant bought Property C as replacement property for Road AD (sic). When she was queried that this was another version given by her, she repeated again that when she replied to the IRD she was too general. She stressed again that Property A1 was replaced by Property D and Property A was replaced by Properties E and E1.

### ***Acquisition and Disposal of Property B***

73. Ms G was referred to the first paragraph on page 4 of the letter to IRD dated 23 July 2013 where Ms G wrote 'this area ([Address R]) is not an area we always go for shopping or entertaining. Since [District S] is not a familiar place for us, you cannot expect us to get familiar with the environment....' In the course of giving evidence, Ms G said that one of her guidelines to buy a property was its location. Upon cross-examination on the contents of this letter provided by her to the IRD why she bought property at a not familiar place, Ms G admitted that she was familiar with Address R as she went to school at District S.

74. Ms G was also referred to paragraph 11 of the letter written by the Appellant to the IRD and dated 3 April 2013 where she wrote 'it was found out that this tenant does not start doing business until after 7:00 p.m. everyday...'. She was asked why in paragraph 35 of the WS she wrote '... I have dined in [Restaurant T] many times before, and knew

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that although it only opened in the evenings, it was a cozy and small restaurant.....'. Upon learning this discrepancy, Ms G admitted that in the moment when she bought Property B, she knew Restaurant T did not commence business until after 7:00 p.m. She knew it all along. It was not the case that she only found out about it after the Appellant bought Property B. What she did not know was that in the morning when the newsstand set up for business, it stood in front of that place. That was one thing she did not know.

75. Ms G confirmed that she did not carry out any feasibility study in relation to the acquisition of Property B. She only applied the guidelines when she made a decision to buy Property B. She was under pressure to make a decision then and only considered the matter overnight as the agent told her that she had to act quickly because the competition was fierce. She did not find out the building of which Property B formed part was subject to any large-scale renovation.

76. She missed the newsstand in the vicinity of Property B at the time of purchase. She did not like Property B because of the newsstand. That was like the thorn in her foot. When she replied to IRD as to the reason of sale of Property B, she emphasized this reason.

77. The preliminary agreement was signed in the name of Company U and by her husband Mr K. She did not sign the preliminary agreement because she was busy on that day. Their intention was that before the date of completion, Company U would nominate the Appellant to complete.

78. When the Board clarified with Ms G why the provisional agreement was not signed in the name of the Appellant and signed by Mr K as its authorized signatory which could spare with the nomination, she replied that it made no difference because there was no extra costs and no extra stamp payable on the nomination.

79. Ms G confirmed that paragraph 42 of WS was correct:

'The disposal of Property B was not due to any change of intention of the Appellant and not by reason of any advertisement for sale. As with Property A, the Appellant had never advertised or engaged any agents to sell Property B. The genesis of Property B's disposal came from an offer to purchase it from my husband's business associates, who were senior management of [Group V]. It transpired that they, too, were fond of [Restaurant T] to the extent that they had nicknamed it their "private clubhouse". They had therefore offered to purchase Property B from me for HKD34m.'

80. When it was pointed out by counsel for the Respondent that it was not mentioned in any of her letters to IRD, she replied that she forgot how she actually sold Property B. She had said it was sold through agent in her letters to the IRD. At the end and after checking the documents, that was not the case. She actually sold it through her husband to one of his contacts or friends.

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81. Ms G could remember the details of the sale stated in paragraph 42 of the WS only because her tax representative found a document which was a receipt of \$170,000.00 for commission payable to Company W, her husband's company. She forgot why it was \$170,000 and what it was for. She then wanted to find out. She asked her husband why she paid Company W the amount of \$170,000. Mr K then said it was the commission she paid to him. Mr K explained what happened was because at that time the people of Group V liked nightlife there and the only nighttime place available was Restaurant T. They really enjoyed going there for drinks and food. At one night, one of the senior staff found out that it was his wife who owned the property. Mr K then tried to persuade her to sell it to them because Ms G did not like the newsstand and she could buy another thing. Due to the newsstand, the weak potential growth of rental (due to the operation hour of the shop) as well as her wish to help her husband, and an additional sum of \$280,000 offered, she then agreed to sell it to Mr K's friend. Her husband said he did not want to deal with the documents and asked a real estate agent to act as the in-between person for her. It follows that Ms G offered 0.5% commission to the real estate agent to handle the documents for them. In the end, she offered 0.5 percent commission to both the agent and her husband. She stressed that Company W had declared that income on their tax returns.

82. Despite the relatively simple work involved in the documentation, Ms G still offered \$171,400 to the agent to complete the documentation for her because it helped maintain a good relationship with agent who was on good terms with her husband. Ms G explained that if they maintained a good relationship with the agents, the agents would refer them to any good properties available before the agents introduced the same to other customers.

83. Ms G was referred to 5 letters she wrote to the IRD in response to the acquisitions and disposals of Properties A, B and C. In paragraph 11 to 14 of the letter dated 3 April 2013, she wrote *inter alia*:

‘Paragraph 11: there is a 報紙檔 blocking the entrance of the shop all day. It will only close everyday at around 6:30 p.m. .... Since this was a problem of no cure, the Company decided to look for other property to replace this one. That was why, the Company wanted to dispose(d) (sic) this shop and buy another property with a better future.

Paragraph 12: The Company just made known to property agents that it wanted to sell out the shop.

Paragraph 13(a): The purchaser is solicited through property agent, [Company X].

Paragraph 16: The selling price was determined by reference to the market price.’

When Ms G was confronted with the contents of this letter and was asked why she did not mention the account of sale of Property B to her husband's friend or Group V at the price of HK\$34,280,000.00 in that letter, she offered

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the explanation that she forgot about the whole ordeal with her husband and she just answered with the reasons that there was a newspaper stand blocking the entrance.

84. The second letter referred to Ms G by counsel for the Respondent was the letter dated 23 July 2013. At the bottom of page 2 she wrote *inter alia*:

‘After holding the property for 2 years, we learnt the downside of this investment. Since we need to use our capital fund to invest, why can’t we change to hold a better property instead of holding to this shop? Realizing an investment mistake and trying to correct a purchase mistake is nothing wrong. Since we were approached by estate agent to dispose it, we decided to sell it and get the proceeds to buy another property with a more promising future.’

In the second paragraph of page 3 of the letter, Ms G wrote *inter alia*:

‘We take long time to realize the downside potential of the property. We want to sell out the property to other buyers when the property still looked attractive with the tenants still paying rent.’

In the second paragraph of page 4 of the letter, Ms G wrote *inter alia*:

‘It took time for us to realize all the downside factors of our investment..... We sold out this property to acquire a replacement property and was to correct our investment mistake.’

85. She was asked whether the contents of the second letter was inconsistent with paragraph 43 of the WS where she stated *inter alia*:

‘I was not convinced to sell Property B at first, given that I was quite happy with the tenant and did not find the offer price of HKD34m attractive enough to convince me to give up my long-term investment.’

Ms G offered the explanation that the WS was drafted after she obtained all the relevant information. Regarding the contents of the letters, she really could not recall the entire thing and could only remember parts and bits and bits of them. She sequenced those bits together into something reasonable in order to respond to the IRD’s letters and that was how she responded to the IRD’s letters.

86. The third letter referred to by counsel for the Respondent was letter dated 13 March 2014 written in Chinese. On the bottom of page 3 of the letter, Ms G wrote *inter alia*:

‘希望稅局可以.....明白我方賣出物價並非為獲利，而係想correct作錯的投資決定.....’

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When Ms G was asked to comment that it was inconsistent with paragraph 43 of the WS, she repeated the same explanation as she made on the second letter.

87. The fourth letter referred to Ms G by counsel for the Respondent was the letter dated 12 September 2014. At the bottom of page 3 of the letter Ms G wrote *inter alia*:

‘Around in August 2011, an opportunity came up. A property agent called us for a potential deal. The price offered by the buyer is \$34.28 million. There was a gain of about \$10 million, represented a sum of about 13 years’ rental, and a substantial gain on disposal of property is a temptation for all investors. We finally accepted the offer. Selling at a profit does not turn an investment into a trading property.’

Ms G was asked whether the property agent was Company X. She repeated that the transaction was not done by an estate agent. When she wrote the letter, she thought that was the case (the transaction being done by an estate agent) and that was why she responded it in this way.

88. The fifth letter Ms G referred to by counsel for the Respondent was the letter dated 12 April 2017. At paragraph 3 on page 5 of the letter Ms G wrote *inter alia*:

‘They only cared about the rental rate and they did not notice the existence of the newspaper stall. We are not the stupid one.’

Ms G was asked if this was inconsistent with paragraph 42 of the WS where she stated:

‘The senior management of [Group V] bought property B because they and their artists were so fond of [Restaurant T] that they regarded it as their private clubhouse.’

Ms G offered the explanation that at the time of writing that letter, she still thought she sold it through an agent.

89. Ms G was asked if all the 5 letters sent to the IRD made no mention of the involvement of her husband and his business associates with Group V and she kept saying in these letters that it was a bad investment and she made a bad mistake. Ms G confirmed that that was correct but all the letters were consistent with the fact that she forgot that she sold Property B through her husband and the reason given to the IRD was that she disliked the newspaper stall.

90. In response to Ms G’s claim that Company W had reported the commission income of \$171,400.00 to the IRD, the Board asked if there was any evidence to that effect.

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91. Ms G then told the Board that she was confident that Company W had reported this amount in its tax return. It was because she recalled that she received a phone call from the accountant for Company W who was preparing the audit of Company W's accounts enquiring the purpose of that cheque of \$171,000.00 and she did respond something along the line that this was a service fee payable to Company W.

92. Ms G was enquired by the Board whether she contacted the newspaper stall owner to find out what happened. Ms G replied that she took no action because she did not want to give the perception that she was very anxious about the matter. She said the matter in fact was not very urgent. She could wait for several years because the newspaper owner might quit and she had income from Restaurant T in the meantime. There was no strategical advantage in dealing with the problem then over dealing with it later down the road.

93. Upon further clarification by the Board, Ms G admitted that the newspaper stall factor was not one of the major factors for her to sell Property B. If it were only the newspaper stall issue, she would not sell Property B immediately because she was collecting rent.

***Entries in the Computer Record of Company X in respect of Property B ('Company X Entries')***

94. In relation to the entries relating to Property B made in the computer of Company X, Ms G complained that Company X only chose 4 entries to respond to the IRD. The 1<sup>st</sup> entry (made on 1 August 2009) and 2<sup>nd</sup> entries (made on 17 November 2009) indicated that Property B was not for sale. In relation to the entry made on 28 October 2010, it changed the price from \$26 million to \$42 million. She did not know who made the change to the price. Subsequently it was changed to \$45 million in April 2011. In relation to the entries that Property B was not for sale, it was either made by her secretary, Mr K or her.

95. Ms G understood that for the real estate agents, they had an incentive to start such a computer record entry, because what happens was if they started the first initial computer entry, then later on no matter which agent sold that particular property, he would get a cut of that. If the IRD relied on the computer record, it was only fair for the Commissioner to look at the entirety of the computer record. The entries dated 17 November 2009, 8 May 2010 or 17 June 2010 indicated that her husband had clearly stated that Property B was not for sale. Mr K could not represent her. Whatever he said about sale or not making a sale did not mean anything to her.

96. Ms G opined that the asking price of \$42 million and the amount of \$45 million indicated in the entries were ridiculously high and detached from reality. She thought the price of Property B at that time was around 30 million something. If she was to speculate property, she would not have done it like that. She would offer a more realistic price.

97. Ms G disagreed that the contact person for Property B was her husband. She had never told her husband to contact an agent on her behalf. But since Mr K was an experienced investor, and he had better relations with those agents than she did, so whatever

conversations that happened between Mr K and the agents, she would not know and Mr K would not bring it up to her. Ms G maintained that she had never authorized her husband to say anything to the estate agents but regardless of what Mr K said to the estate agents, Ms G made the final decision.

***Acquisition and Disposal of Property C***

98. Ms G agreed that the Provisional Agreement for Sale and Purchase of Property C dated 17 November 2009 was signed by Company Z as purchaser, which was Mr K's holding company for short-term or riskier investments. Company Z was a property trading company of Mr K.

99. Ms G denied that she asked for a longer completion period in order to facilitate a confirmor sale.

100. Ms G testified that the Appellant decided to buy Property C from Company Z (or Mr K) one day before signing the agreement because it fitted her investment guidelines. However, she did not feature this arrangement in the WS or SWS because she found it alright if she only stated that she intended to keep this for long-term investment. If she wanted to change her WS, she needed to contact her solicitors who in turn needed to contact the barrister. She thought this point was not so important.

101. Ms G paid back the deposits which Mr K paid to the vendor upon signing the provisional and formal agreement for sale and purchase of Property C.

102. Ms G confirmed that when she decided to purchase Property C, that was one night before Company Z entered into the provisional agreement for sale and purchase, she did not conduct any formal feasibility study in respect of Property C. However, this purchase fitted her five investment guidelines discussed previously. If all those five conditions were satisfied, then she felt good about buying it and would buy.

103. Ms G testified that Property C was with a good tenant, a Country AL business, a major company. There were about two more years of the lease before it expired so there was no trouble for her on the horizon. After two months after the Appellant became the owner, in or about June 2010 when her assistant went there to collect rent, the one who paid the rent to her assistant told her that after the lease was up, the tenant planned to move to a larger office and they would not renew the lease. He did not say that they were definitely going to leave. He told her assistant that the Appellant could try to find a new tenant and if the Appellant could find a new tenant, the new tenant could replace them. If the Appellant could not find a new tenant, they would leave at the end of the lease.

104. Ms G agreed that the above offer from the tenant was not reduced into writing. If she could find a replacement tenant, she would then call them to confirm if they were indeed leaving. In the positive, she would sign a new lease with the new tenant. If they were not, Ms G would not sign the new lease.

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105. Despite the production of the payment vouchers which stated the MTR expenses to Address AA for inspection of office by the Appellant, Ms G agreed that there was no contemporaneous written record on whether those inspections attended by her assistant were for leasing or for sale.

106. Ms G agreed that there was a sale and purchase agreement dated 2 June 2011 registered with the Land Registry which recorded that Property C was sold to Company AM at a consideration of \$23.1 million. It was less than 14 months after the Appellant acquired Property C but the sale and purchase were aborted.

107. There was an increase of liabilities of the Appellant to \$57.95 million for the period from 2010 to 2011. However, Ms G denied that she sold the Properties so as to relieve her financial pressure.

108. Ms G confirmed again that the sale of Property B had nothing to do with Property E1 and through her portfolio building, she swapped Properties A and A1 for Property E and Property C for Property F. So, the only property which she sold and had not acquired a replacement was Property B.

**Discussion and Analysis**

109. It is the Appellant's case that the Appellant is an investment company with the intention to acquire properties including Property A, Property B and Property C for long-term investment. However, such intention did not materialize because it is not disputed that each of the Properties was disposed of by the Appellant after holding them for less than 3 years:

	<u>Date of Acquisition</u> (a) Agreement Date (b) Completion Date	<u>Date of Sale</u>	<u>Holding Period from</u> <u>date of agreement</u>	<u>Holding Period from</u> <u>date of assignment</u>
Property A1	(a) 11 December 2007 (b) 8 May 2008	April 2009	1 year 4 months	Less than 12 months
Property A	(a) 11 December 2007 (b) 8 May 2008	14 September 2010	2 years 9 months	2 years 4 months
Property B	(a) 23 July 2009 (b) 6 November 2009	12 August 2011	2 years 1 month	1 year 9 months
Property C	(a) 17 November 2009 (b) 20 April 2010	2 June 2011 (aborted)	1 year 8 months	1 year 2 months
	(a) 17 November 2009 (b) 20 April 2010	25 March 2012	2 years 4 months	1 year 11 months

110. If we take Property A1 into consideration, the Appellant had 4 transactions of properties which were held by the Appellant for the periods ranging from 1 year 4 months to 2 years 9 months (counting from the dates of the contracts for the purchase) before they were sold. If we count from the respective effective acquisition dates (being the assignment dates and being the dates on which the Appellant became an owner), the Appellant held those 4 properties for the periods ranging from 1 year 2 months to 2 years 4 months before they were sold.

111. Ms G explained that she sold Property A1 for a number of reasons, one of which was the drop in price which necessitated the mortgagee bank Bank N asking for additional security of \$4.0 million. The other reason was that the Appellant experienced difficulty in collecting rent from the tenant. Both reasons appear to us that they were finance related. If Ms G intended to acquire Property A1 and Property A for long-term investment, we wonder why she needed to sell Property A1 on those 2 reasons. She should have assessed that she had the financial capability to hold them for long-term (including the payment of additional loan and payment for mortgage instalments if so required by the mortgagee bank or difficulty in collecting rent) before she acquired them.

112. On the face of the frequency of sale and purchase of several properties which were held by the Appellant for relatively short periods of time, an inference which could be drawn is that the sales and purchases in question amount to trading activity unless the Appellant could give a credible account of the reasons why it did not hold the Properties in accordance with Ms G's stated intention of holding them as long-term investment and why the Appellant sold each of them after holding them for a relatively short period.

113. The Appellant's own stated intention (of holding the properties for long-term investments) is inconclusive and has to be tested against all the objective facts and circumstances<sup>9</sup>. In order to discharge the burden or onus to prove that the Properties were not trading stock, the Appellant needed to discharge the burden on the basis of balance of probabilities only.

### ***Credibility of Ms G***

114. Ms G explained in details the reason why the Appellant was formed around 2007 and how the Appellant built up the portfolio of investment properties including the Properties (for long-term purpose) in the WS. In paragraph 19 of the WS, she stated that for the sake of completeness, she would add that apart from the Appellant, she is also the sole shareholder and director of one more company named Company L, which is incorporated in 2010 (holding a property at Address M). These allegations would give one to get the impression that Ms G had not been involved in sale and purchase of properties previously except through the Appellant or Company L. It appears that she portrayed herself as a novice in property investment in the WS and SWS.

115. Against this background, the Respondent was to cross-examine about Ms G's shareholding on other companies which involved sales and purchases of properties. Upon cross-examination, it was elicited that:

- (a) Ms G was a director of Company W;
- (b) Company W was the sole owner of Company U;
- (c) Company W was the sole owner of Company Z in relevant period. Company W was also a corporate director of Company Z.

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<sup>9</sup> All Best Wishes (paragraph 15 hereof).

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- (d) Ms G owned 25% shareholding of Company AG. Ms G was one of the directors of Company AG.
- (e) Ms G was a 50% shareholder of Company AH and she was also one of its directors.

116. Ms G confirmed that Company W, Company U, Company Z and Company AH had a number of property transactions in the relevant time. Company Z was engaged for short-term or riskier investments on property as confirmed by Ms G. Although Ms G said she was neither a shareholder nor a director of Company Z and had nothing to do with Company Z's investments, it remains the fact that one of the directors of Company Z was Company W, of which Ms G was a director.

117. Company AG was not mentioned in the Appellant's closing submission. We do not have much information about the business of Company AG. However, we know Company AG had at least two properties transactions<sup>10</sup>. Ms G held 25% shareholdings of Company AG and was one of its directors.

118. By reason of the aforesaid, we have little doubt that Ms G was an experienced property investor at the time the Appellant was incorporated. It was because Company W and Company AG at least had already had several property dealings before. She was not a novice in property investments at the time the Appellant acquired the Properties.

119. Counsel for the Appellant suggested that Company W, Company U, Company Z and Company AH are simply irrelevant to this appeal. The Appellant said relevance is the bar. We do not agree with this suggestion. Credibility is always in issue. So long as Ms G suggested that she was a novice in property investment, it is fair for the Respondent to cross-examine her regarding her involvement or shareholding in other companies which used to hold or trade properties.

120. The Appellant was surprised that Ms G's income and financial capabilities were being challenged by the Commissioner who was in possession of all of Ms G's Tax Return and Notices of Assessments for the years of assessment 2006/2007 – 2012/2013. Upon having examined the information provided by Ms G in the WS, SWS and the correspondences from the Appellant to the IRD, we do not feel that the comment is fair to the Respondent.

121. Paragraph 11 of the WS stated the amounts of pre-tax annual income for the relevant years. The total pre-tax income for the seven financial years was \$49,535,647 and average annual pre-tax income was about \$7,076,521.

122. Nowhere in the WS stated that the pre-tax incomes were subject to deduction of deductible expenses. 'Pre-tax income' is not defined in the WS. To an ordinary person, pre-tax income means the income before tax. If 'pre-tax income' means anything other than

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<sup>10</sup> The letter appointing Company P to sell two properties.

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its literal meaning, i.e. it includes deductible items, we feel Ms G is obliged to point it out in the WS and SWS that it is so. The WS provides no information relating to the deductible expenses. In other words, the pre-tax incomes provided by Ms G in the WS only gave incomplete information about her financial capability.

123. In paragraph 6(1) of the SWS, Ms G said ‘Indeed, as a career woman who was earning much more than HKD6m every year, my steady income meant.....’. We do not know whether the ‘steady income of more than HKD6m every year’ referred to by Ms G in this paragraph was pre-tax income, taxable income or after-tax income.

124. The Board is supposed to rely on the annual income of Ms G provided in the WS and SWS. The Board is not expected to find out the figures anywhere in the correspondences referred to by the Appellant, i.e. pages 310, 316, 317 and 320 to 321 of R1 Bundle (being the correspondences sent by the Appellant to the IRD) as referred to by counsel for the Appellant.

125. Even if the Board is to find out the relevant information from the correspondences, upon reading page 310<sup>11</sup> and page 316<sup>12</sup> of R1 Bundle, it is not difficult to find out that Ms G used the term ‘annual income’, not ‘pre-tax income’ she used in the WS. In both letters, she gave her *annual income* for only 3 financial years:

About HK\$3.4 million for the year of assessment 2009/10

About HK\$3.9 million for the year of assessment 2010/11

About HK\$5.2 million for the year of assessment 2011/12

126. In page 317<sup>13</sup> of R1 Bundle, Ms AJ gave another term ‘taxable profit’ to describe her income. She gave her taxable profit for 6 financial years. It was far from clear as to whether the meaning of ‘taxable profit’ is different from the meanings of ‘annual income’ or ‘pre-tax income’ as referred to by Ms G in the WS, SWS or correspondences with the IRD.

127. In page 317 of R1 Bundle, it gave ‘Taxable profit’ for 5 financial years. In page 320, it gave ‘Income’ and ‘Taxable profit’ for 5 financial years. In page 321, it gave ‘Income’ and ‘Taxable profit’ for 4 financial years. For easy reference, we summarize the ‘income’ and ‘taxable profit’ stated in different pages as follows:

Financial year	‘Taxable Profit’ stated in Page 317	‘Income’ stated in Page 320	‘Taxable Profit’ stated in Page 320	‘Income stated’ in Page 321	‘Taxable Profit’ stated in Page 321
2007/08		\$7,299,609	\$4,683,116		
2008/09	\$3.2 million	\$9,890,698	\$7,952,167		
2009/10	\$3.4 million	\$5,337,033	\$2,745,072	\$5,337,033	\$3,414,643
2010/11	\$3.9 million	\$6,043,462	\$3,924,627	\$6,043,462	\$3,924,627

<sup>11</sup> Letter dated 12 September 2014 from the Appellant to the IRD.

<sup>12</sup> Letter dated 17 December 2014 from the Appellant to the IRD.

<sup>13</sup> Letter dated 17 December 2014 from the Appellant to the IRD.

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Financial year	'Taxable Profit' stated in Page 317	'Income' stated in Page 320	'Taxable Profit' stated in Page 320	'Income stated' in Page 321	'Taxable Profit' stated in Page 321
2011/12	\$5.2 million	\$7,774,191	\$5,281,077	\$7,774,191	\$5,281,077
2012/13	\$4.7 million			\$7,283,694	\$4,784,453

128. It can be seen that the 'taxable profit' stated in page 320<sup>14</sup> of R1 Bundle for the financial years 2008/09 and 2009/10 are quite different from those stated in page 317 and page 321.

129. Only after substantive cross-examination, Ms G eventually agreed that her average annual after-tax income for the relevant financial years was about \$3.4 million. This is a big difference between her claimed average pre-tax annual income of \$7,076,251 in her WS and the average annual after-tax income of \$3.4 million (which was obtained as a result of cross-examination on Ms G). Much time and expense could be saved if Ms G was more forthcoming in her WS and SWS by stating her annual after-tax income, which meant her annual disposal income for investment or other use.

130. Apart from issues of Ms G's experience of property transactions and her annual income, for the reasons we will give in the later part of the decision, we do not feel that Ms G is a credible or reliable witness.

***Guidelines of acquiring properties and Feasibility Study***

131. Ms G confirmed that the Appellant conducted no feasibility study when it acquired the Properties. However, she would adopt the following guidelines on investments:

- (a) Not to buy stocks;
- (b) Investment on property which gave a stable return;
- (c) Commercial properties which required lowest administration;
- (d) The locations;
- (e) Her own financial capability, in case that the property was not rented out, she needed to consider whether or not it would impose a serious burden on her;
- (f) Yield; and
- (g) The tenants – she would take the nature of business of the tenant into account.

132. We note that the guidelines of 'location' and 'nature of the tenant's business' were not mentioned in Wellex's letter of 24 January 2020 to the Board. It was first brought up in the hearing.

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<sup>14</sup> Letter dated 17 June 2015 from the Appellant to the IRD.

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133. Although she listed the above guidelines, the guidelines adopted by her can be summarized as: (a) she only invested on commercial property because they involved the least administration work; (b) she would only invest in properties situated on good locations; (c) She would invest only if she could afford the purchase and the purchase. The investment should not impose a serious burden on her; (d) the good return on the investment; and (e) the tenants of the properties – good tenants and their good businesses could provide a stable income to her.

134. Such guidelines would not, in our view, assist the Board too much in differentiating whether the purchase by the Appellant was for long-term or for trading purpose. It is because such guidelines could be applicable on any acquisition no matter the acquisition was for long-term or for short-term.

135. Ms G should have known that her guidelines might not work for her sometimes, at least in cases of acquisitions of Property B and Property C. As per the Appellant's letter to IRD dated 25 July 2013, Ms G complained at paragraph (e) that during the ownership period of Property A (total 2 and half years), the tenant was late to pay rents for most of the time. She took great trouble to follow up the tenant in order to collect his rentals. For 7 months, the tenant even paid his rental by several instalments in each month. In the said paragraph (e), Ms G gave 'the rent due dates' and 'actual rent payment dates' in respect of Shop A in details.

136. In the Appellant's letter to the IRD dated 27 March 2013, in the middle part of page 4 of the letter, Ms G complained that:

'However, tenant of Shop A keep (sic) on telling us that their business was no good. Since the economy had not yet recovered, the tenant whose business strongly relied on the demand for interior decoration materials had no hope to increase. He kept on asking us to reduce his rental. We reduced his rental from HK\$116,000 to HK\$106,000 from 1 February 2009 to 31 July 2009, and from 1 September 2009 to 28 February 2010. So we have totally reduced 1 whole years' rental for the tenant of Property A.'

137. The bad experience with the tenants of Property A and Property A1 should have affected her confidence on some of the investment guidelines applied by her in her purported long-term investment (i.e. commercial property requires the lowest administration but in fact it was not; and the good business of the tenant might turn out to be bad and might affect the yield greatly).

138. For an investment involving several ten-million dollars or even one to two hundred-million dollars (as the case alleged by Ms G), one would expect that a prudent long-term investor would carry out a feasibility study on the proposed acquisition before the investor would finally make the decision to acquire. If Ms G was a serious long-term investor, we do not understand why Ms G saw fit not to carry out feasibility study before the Appellant invested \$58 million on Property A and Property A1, \$22.5 million on Property B and \$15 million on Property C.

139. For an investor who needed mortgage to finance an acquisition, she should know the interest rate would affect the return of acquisition. Accordingly, the trend of interest rate should be one of the factors to be taken into consideration.

140. Another factor which would affect a long-term investment is the age of the building itself. Ms G admitted that she had not taken the age of the Property A and Property B into consideration when she decided to buy the same. We are quite surprised to learn such remark made by a long-term investor. It is not only a matter whether Ms G could afford the renovation costs if the whole building was subject to a large-scale renovation due to the old age of the building, it is also a matter affecting the return (which is an important guideline for Ms G).

141. If there were a large-scale renovation to be carried out in the building, the building work would affect the building and the shops greatly. In the extreme case, the shops were to be closed for a long period for the renovation work. If that happened, no matter how attractive the rental income then was, Ms G might lose substantial amount of rental income during the renovation period. That would directly affect the yield or return of the investment.

142. The prospect of a renewal of the tenancy by the existing tenant and the prospect of getting a replacement tenant in the event that the existing tenant for whatever reason decides to quit upon expiry of the current tenancy should be another factor a long-term investor should take into consideration. If the property is left vacant (no matter how short the vacant period may be), it would affect the return. If the property is let to a replacement tenant, the return may be reduced by the 'rent-free period' which is customarily and generally offered to new tenant by the landlord. The payment of commission to estate agent to get a replacement tenant should be another factor which would affect the yield.

143. No matter how attractive the return might be to Ms G, such return was gross return. For example, Ms AJ claimed that the return was 4.8% in case of Property A and Property A1 (which were assigned in favor of the Appellant in May 2008). However, she needed to pay interest at the rate of 2.58% on the loan from Bank N in May 2008 as shown in Bank N's advice dated 9 May 2008. The return of 4.8% was still reduced by the fact that Ms G needed to pay stamp duty, agency fee and legal costs. Such costs and expenses might be in the region of 5% of the purchase price. That means the gross return of 4.8% will become  $4.8\% / 1.05 = 4.57\%$ . The gross return, taken at its highest is about 2%. No doubt, the subsequent reduction in rentals in Property A1 and Property A should have reduced the return further.

***Entries in the Computer Records of Company Q ('Company Q Entries') and Company X Entries***

144. For ease of discussion, we set out the relevant Company Q Entries and Company X Entries as follows:

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*Company Q Entries*

Date	Shop	Entry
16-04-2008	A	Company Q record of Property A stated '放賣 – 仍吉, 未租出'
18-04-2008	A	Company Q record Property A stated 'not sell or rent, sd by lady according to her boss's instruction'
19-11-2008	A	Company Q record Property A stated '[Mr K]話暫時未有打算放賣'.
26-02-2009	A1	Company Q record Property A1 stated '放賣 – Shop a意向價 30m'.
25-03-2009	A1	Company Q record Property A1 stated '放賣 – Shop a意向價 30m租期至2010年7月租金全不包'..
15-04-2009	A	Company Q record Property A stated '放賣 – Sale Price change to \$33m'.
23-05-2009	A	Company Q record Property A stated '放賣 – asking price \$35m'.
10-06-2009	A	Company Q record Property A stated '放賣 – [Ms AJ] said老闆回覆暫不放售'.
18-06-2009	A	Company Q record Property A stated '放賣 – [Company P]獨家出稿bot price \$3680萬'.
13-07-2009	A	Company Q record Property A stated '放賣 – now [Company P] giving over 33m now see over 35-36m'.
15-07-2009	A	Company Q record Property A stated '放賣 – now [Company P] giving over 33m now see over 35-36m'.
21-07-2009	A	Company Q record Property A stated 'still for sell bot px around 37M'.
17-08-2009	A	Company Q record Property A stated '放賣 – [Ms AJ] [said]Boss no instruction for sell.'
16-11-2009	A	Company Q record Property A stated '放賣 – [Mr K]話暫時未打算放售'.
08-01-2010	A	Company Q record Property A stated '放賣 – [K生]話呢間暫時唔想賣, 遲D先算'.
05-03-2010	A	Company Q record Property A stated '放賣 – [K生]話3厘多d就賣' with an asking price of \$36.8m.
29-03-2010	A	Company Q record Property A stated '放賣 – [K生]話現租客已續租\$126,000, 不再放售。'
02-06-2010	A	Company Q record Property A stated '放賣 – [Mr K] said not for sale now'.
28-06-2010	A	Company Q record Property A stated '放賣 – [Mr K] said not for sale now'.
03-09-2010	A	Company Q record Property A stated '放賣 – [Mr K] said even 3% yield still not for sale'.

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Date	Shop	Entry
08-09-2010	A	Company Q record Property A stated ‘放賣 – [K生]話現價改為5040萬’.
14-09-2010	A	Company Q record Property A stated ‘放賣 – [Mr K] said bot \$5040 hv 1% commission. hv 49.8m offer already’.
14-09-2010	A	Company Q record Property A stated ‘放賣 – [Mr K] said pending for sell now’.

*Company X Entries*

Date	Shop	Entries
01-08-2009	B	Company X record Property B stated ‘售價更改0.000->26.000’ *1
04-08-2009	B	Company X record Property B stated ‘[Mr K] prefer to keep unless you willing to pay up to this amount will then consider whether sell or not sound not firm to sell’
17-11-2009	B	Company X record Property B stated ‘暫時不賣住’.
08-05-2010	B	Company X record Property B stated ‘暫不放賣!’.
17-06-2010	B	Company X record Property B stated ‘[Mr K] said the shop not for sale’
28-10-2010	B	Company X record Property B stated ‘售價更改0.000->42.000’
02-03-2011	B	Company X record Property B stated ‘not for sale now’
08-04-2011	B	Company X record Property B stated ‘售價更改0.000->45.000’

145. Throughout the appeal, Ms G has disputed the accuracies of the Company Q Entries and the Company X Entries (collectively referred to as ‘Entries’). She told the Board that from her knowledge, estate agents were usually keen to cold call property owners hoping to secure a deal and eventually earn a commission if they successfully induced the owner to sell when they found a potential buyer. According to her knowledge, the estate agent was keen to make the first entry as he would have a cut of the commission no matter the transaction was later put through by him or not. However, she stressed that there was no proof on this.

146. In relation to the Entries purportedly made by Ms AJ, Ms G said they could be counted as made by her because Ms AJ was her direct secretary. As to other Entries, she could not know whether they were correct as Mr K would not report to her the contents of the calls from the agents and what his position was on the matter.

147. Regarding the Entries, we wish to ask ourselves whether there was any reason or incentive for Company Q and Company X’s staff to create the first entry. We are not sure, neither was Ms G. For discussion purpose, even if Ms G’s speculation was correct that the maker of the first entry would have a cut on commission, the next question we wish to ask is whether the contents of first entry and subsequent entries were correct or fairly reflected what happened or fabricated by the maker. Without concrete evidence, we tend to exclude the possibility of fabricating entries by the staff for the obvious reason. If the entries were fabricated, the acts of making false entries (by creating non-existing contents) might

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become criminal acts. The offenders might be subject to sever punishment as well as losing their jobs. We cannot image a plausible reason that Entries were fabricated by the staff of Company Q or Company X unless one argues that they did not know such serious consequences. In our view, it is more probable than not that the Entries were correct or the contents of the Entries fairly reflected what actually happened.

148. Since we accept that the Entries were correct or the contents fairly reflected what happened, the next question we wish to ask ourselves is whether Ms G or the Appellant authorized Ms AJ or Mr K to contact the property agent and/or to give instructions or remarks to them regarding the sales of Property A and Property B.

149. Ms G in her WS admitted that while Mr K sometimes could not help but gave unsolicited advice on what she should or should not buy (as most spouses probably do), and while she may benefit from Mr K's estate agent contacts when purchasing properties, she emphasized that she made all the decisions alone. Ms G denied that she had authorized Mr K to make any offer for sale and his decision did not represent her.

150. There is no evidence that Mr K had never discussed with Ms G about any unsolicited offers in relation to the sale of Property A and Property B respectively from the estate agents of Company Q and Company X or any offer made by him.

151. As said by Ms G, Mr K, like most spouses probably did, sometimes gave advice on what should or should not buy. It is reasonable and logical for one to expect that Mr K would discuss with Ms G about any unsolicited offers he received or any offer he made to the estate agents for the sale of Property A or Property B in their daily conversations. If Ms G had no intention to sell, we do not understand why Ms G did not stop Mr K from making any offer on behalf of the Appellant to the estate agents.

152. In order to prove Ms G's innocence that the Appellant did not authorize Company Q and Company X to list Property A and Property B for sale, Ms G relied on a letter from Company Q dated 15 January 2020 ('2020 Letter') to the Appellant and a letter from Mr AK dated 25 February 2015 to Company X ('AK Letter').

153. In the 2020 Letter, it wrote: 'during 2008 to 2010, they had in response to their clients' terms and necessity made enquiries with the Appellant concerning the marketing for sale of Property A1 and Property A'. The letter stated *inter alia* that 'the properties originally were not for sale, but their company colleagues had all along been acting on behalf of clients to offer price to the Appellant hoping to persuade the Appellant to sell the said properties, for mutual winning'.

154. In our view, the evidential value of the 2020 Letter is not too high because the contents of this letter contradicted the entry of the Company Q Entries made on 12 December 2007 where it recorded: '[Mr K] sd. 第一太平做 \$58m bought in, add \$10M may consider.' and the entry made on 5 March 2010 that '[K生]話3厘多d就賣'. There was no explanation whatsoever offered in the 2020 Letter on the contradiction.

155. Regarding the AK Letter, Mr AK wrote:

‘... but [the Appellant] was not too firm in selling the above property (Property B), and did not have any formal written appointment to appoint [Company X] to formally sell for and on its behalf.’

156. The choice of the word ‘too firm’, ‘formal’ and ‘formally’ appears to us that the Appellant was not too firm (but still interested) in selling Property B and the Appellant did not have any formal written appointment to appoint Company X to formally sell for and on behalf the Appellant (but the Appellant did informally appoint Company X to sell Property B on its behalf).

157. In the end of the AK Letter, it wrote ‘the sale price of HK\$26,000,000 shown on the computer in August 2009 is my estimated price of Property B which I made after dialogue and price negotiation but was not the formal intended price of [the Appellant]’.

158. Again, there were a lot of reservations in this sentence. It appears to us that the price of HK\$26,000,000 was estimated by Mr AK as a result of his discussion with the Appellant after the Appellant commissioned him for the sale although it was not the Appellant’s formal intended price.

159. If the Appellant did not authorize, appoint or discuss with Mr AK on the sale of Property B, Mr AK could simply state in the letter that the Appellant had not appointed Company X or him as their agent in selling Property B and the price of HK\$26,000,000.00 was only made by him based on his estimation which estimation had nothing to do with the Appellant.

160. Given the ambiguity of the contents of the 2020 Letter and the AK Letter, we do not feel that these two letters can vindicate the Appellant and/or Mr K that they had not commissioned Company Q and Company X respectively for the sale of Property A and Property B.

161. Ms G’s allegation that she did not authorize Mr K and she was the one to make the decision could not prevent a person of reasonable mind from drawing the inference that the Entries reflected the matter as described therein.

### ***The role of Mr K***

162. It is the Appellant’s case that Mr K took no role in the sale and purchase of the Properties. Ms G admitted that sometimes Mr K did give some advice on properties, like other spouses would do, but such exchange of view did not amount to specific advice whether or not to purchase a particular property. In the end, the decision of the Appellant was made by Ms G and by her alone. It is the Appellant’s submission that her answer was entirely consistent with the realities of a working couple who were independently minded but at the same time supported each other by giving advice when necessary.

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163. If we simply look at the advices given by Mr K without in the meantime looking at the following matters as referred to by counsel for the Respondent, the submission made by the Appellant might probably be correct. The matters referred to by counsel for the Respondent include the following facts or matters which Mr K had done or purportedly done in relation to the acquisitions and sales of the Properties:

- (a) Mr K has been the sole reserve director of the Appellant since November 2009;
- (b) Mr K signed an appointment letter on behalf of the Appellant to appoint Company P as agent to sell Property A1. The sale of Property A1 was arranged by Mr K, together with the sale of 2 other properties of Company AG;
- (c) Mr K was allowed to sign the preliminary sale and purchase agreement to sell Property A on behalf of the Appellant without any board authorization;
- (d) Mr K was the Appellant's contact person with Company Q in respect of the sale of Property A;
- (e) Mr K was the Appellant's contact person with Company X in respect of the sale of Property B;
- (f) Mr K was the Appellant's contact person with Bank AB in respect of the mortgage loans for the purchase of Property B and Property C.
- (g) Mr K was the personal guarantor in respect of the Bank AB mortgage loans for Property B and Property C, bearing a personal liability of \$26m plus interest for the Appellant;
- (h) Mr K attended the Appellant's board meeting on 17 November 2009 as director, during which it was 'unanimously resolved' to purchase Property C. He also signed the board minutes;
- (i) Mr K attended another board meeting of the Appellant on 25 March 2012 as director, during which it was 'unanimously resolved' to sell Property C. He also signed the board minutes; and
- (j) Properties B, C, D and F were initially acquired by Mr K through Company Z or Company U, before they were nominated to the Appellant as purchaser either 1 or 2 days before assignment. In particular, according to the Appellant's own case, when it decided to purchase Property B, Mr K was asked to sign the Provisional Sale and Purchase Agreement (via Company U) on behalf of the Appellant, and to nominate the Appellant as purchaser subsequently.

164. Although Ms G had offered detailed explanations on the aforesaid acts taken by Mr K in the cross-examination, we are not impressed with such explanations. Such explanations could not lead us to believe that Mr K took no role in the property transactions in question. Having carefully considered the evidence provided by the Appellant, the explanations offered by Ms G and the evidence of the case, we are of the view that Mr K actively and substantially participated in the Appellant's investments in the properties, and at the very least Mr K was authorized by Ms G or the Appellant as the Appellant's agent to deal with the estate agents in relation to the transactions of Property A and Property B and matters incidental to the sale and purchase of Property A, Property B and Property C.

165. The Appellant criticized that there was no substance whatsoever in the Respondent's complaint that the Appellant did not call Mr K as a witness.

166. Although Mr K was not called as a witness (which decision was a matter entirely within the Appellant's discretion) the Board will not criticize, or draw any adverse inference against, the Appellant for not calling Mr K as a witness. However, as Mr K was not called to give evidence, the Board did not have the benefit of hearing his evidence on his role in different matters raised by the Respondent.

### ***The Appellant's liabilities***

167. In support of the Appellant's claim that the Appellant was financially sound to make the long-term investments, counsel for the Appellant submitted that the actual liabilities of the Appellant (excluding the shareholder's advance) are around 64% - 68% of the total costs of the investment properties for the years ended 31 March 2009 and 31 March 2010 respectively. She also set out the gearing ratio (defined as financial ratio to measure the proportion of the assets (investment properties) that are financed by borrowing) has continuously been decreasing from 64% as at 31 March 2009 to 26% as at 31 March 2017.

168. We have two observations on the liabilities and the gearing ratio submitted by counsel for the Appellant.

169. First, regarding the liabilities of the Appellant, the shareholder's advance was not taken into account. If shareholder's advance is taken into account, we need to assess the financial capability of Ms G at the material time to see if she could fund a long-term investment in the region between \$100 million and \$150 million. On record, Ms G was the sole shareholder at the material time.

170. Assuming that Ms G could obtain 70% mortgage on each acquisition, she still needed to pay deposits or down payments of 30%, i.e. between \$30 million and \$45 million. This amount was net of expenses. The stamp duty payable at the material time was 3.75%. The Appellant needed to pay stamp duty in the aggregate amount between \$3.75 million to \$5.625 million if the Appellant acquired properties in the region of \$100 million to \$150 million as planned. The agents' commission payable would be in the region of 1% (i.e. between \$1 million to \$1.5 million). In short, Ms G needed to fund \$34.75 million<sup>15</sup>

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<sup>15</sup> \$30 million (for down payment), \$3.75 million (for stamp duty) and \$1 million (for agency fee).

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to \$52.125 million<sup>16</sup> if she planned to make investments of an aggregate amount of \$100 million to \$150 million as planned by her.

171. As discussed in the above, the average annual after-tax income of Ms G was about HK\$3.4 million for the relevant periods. Her savings at the material time were in the region of HK\$8 to HK\$12 million. Based on her income and her savings at the material time, we have doubt that Ms G had the financial capability to fund investments of an aggregate amount of \$100 to \$150 million as planned by her.

172. Secondly, if we are to look at the gearing ratio, it is more relevant to look at the gearing ratio when the Appellant acquired the Properties. The gearing ratio in the subsequent years might not fairly reflect whether or not the Appellant had the financial capability to fund a long-term investment because the gearing ratio might be reduced by the profits out of the trading of properties, not by funding from Ms G. Although the gearing ratio of the Appellant reduced steadily from 64% to 26%, we feel it was consequent upon disposal of the Properties and other properties and the proceeds of sale (including the substantial amount of profits) were used to reduce the bank loans.

173. The following information was extracted from the Appendix B of the WS:

	31-03-2009	31-03-2010	31-03-2011	31-03-2012
	(\$ million)	(\$ million)	(\$ million)	(\$ million)
Total value of Investment Properties portfolio	58	70.9	150.68	128.18
Liabilities				
Bank Loan- Current portion	1.8	3.25	4.91	69.58
Bank Loan- Non-Current portion	35.25	44.89	84.19	
Total Bank loan	37.05	48.14	89.10	69.58
Loan from Related Company			9.5	
Shareholder' loan- Non current	22.16	26.06	33.55	33.55

174. We can see that as at 31 March 2011 Ms G could advance \$33.55 million to the Appellant to acquire properties. It is not disputed that on the date of completion of Property E1, the Appellant needed to borrow a sum of \$9.5 million from Mr K, as to \$8.0 million of which for settlement of the acquisition price and as to the balance of \$1.5 million for the Appellant's working capital. Fairly speaking, Ms G did not make and probably could not afford to make further investment beyond her advancement of \$33.55 million of shareholder's loan to the Appellant by the financial year ended 31 March 2011. Based on the evidence before us, it appears to us that she would not be able to acquire further properties without Mr K's financing (which she denied) or without realizing the profits from selling *inter alia* the Properties.

175. It is the Appellant's contention that Ms G had no obligation to provide a detailed account of her entire finances. Whether or not to provide further evidence as to Ms

<sup>16</sup> \$45 million (for down payment), \$5.625 million (for stamp duty) and \$1.5 million (for agency fee).

G's finance is entirely a matter for the Appellant. However, in the absence of further evidence as to her finance and for the reason of the aforesaid, we have doubt on whether Ms G or the Appellant had the financial capability to hold the Properties as long-term investment.

***Replacement properties for Property A, Property B and Property C***

176. As discussed in paragraph 69 to paragraph 72 hereof, Ms G gave several versions of replacement properties for Property A, Property B and Property C in the letters to IRD or in her WS or SWS or at the hearing. After a lot of clarifications in the course of cross-examination, Ms G eventually confirmed that she swapped Properties A and A1 for Property E and Property C for Property F. The only property which she sold and had not acquired a replacement was Property B<sup>17</sup>.

177. If an investment property was sold and replaced by another investment property or trading property, the sale of the first investment property would not attract tax on any gain on profit for the obvious reason that it is a capital gain and does not attract profit tax.

178. Likewise, if a trading property was sold and replaced by another investment property or trading property, the sale of the first trading property might not attract profit tax on any gain on price if before its sale, it had changed its nature from a trading property to an investment property.

179. If a trading property was sold and at the time of disposal it remained a trading property, the acquisition of a replacement property (for trading or for investment) should be irrelevant when we decide whether the disposal of the trading property should attract profit tax on any gain in price. The sale of the first trading property should be treated as an independent trading activity.

180. By reason of the aforesaid, we will take the alleged replacements made by the Appellant into consideration when we are to decide whether the Properties were trading properties or investment properties. Only if we found that the Properties were trading stock, then it became irrelevant whether the Appellant acquired replacement properties or not.

***Disposal of Property A***

181. From the Company Q Entries, we notice that Property A was listed with Company Q for sale by Mr K as the Appellant's agent in September 2010 where the entry of 8 September 2010 stated '放賣 - [K生]話現價改為5040萬' and the entry of 14 September 2010 stated '放賣 - [Mr K] said bot \$5040 hv 1% commission. hv 49.8m offer already'.

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<sup>17</sup> Paragraph 108 above.

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182. We note that Company Q wrote to the IRD on 12 December 2013 ('2013 Company Q Letter') in response to their investigation of the disposal of Property A. Amongst others, the letter states:

'According to our record, [the Appellant] sold Property A through our company at HK\$50,400,000.00 on September 14, 2010 but [the Appellant] did not sign any Appointment Letter to appoint us as an agent to sell the Property..... We would contact [Mr K] at [XXXX XXXX] and/or [XXXX XXXX] for the Property.

Our staff inputted price information of the Property in computer record and the schedule is set out as follows:

April 15, 2009	HK\$33,000,000.00
May 23, 3009	HK\$35,000,000.00
July 21, 2009	Bottom price around HK\$37,000,000.00
September 8, 2010	HK\$50,400,000

We do not have any schedule showing the dates on which the potential purchasers were taken to view the Property.'

183. We feel the probative value of the 2013 Company Q Letter is higher than the probative value of the 2020 Letter. It is because the 2013 Company Q Letter was written some 6 years earlier than the 2020 Letter. The matters happened should be fresher in the writer's mind when he wrote the letter some 3 years after the happening of the event, than one's mind when he wrote the letter some 10 years after. Further the 2013 Company Q Letter was written in response to a government department's investigation while the 2020 Letter was addressed to the Appellant. The writer should be more serious if he was to deal with the investigation of a government department than the one who was to give a reply to the Appellant.

184. The Company Q Entries and the 2013 Company Q Letter apparently contradict Ms G's allegation that the disposal of Property A in 2010 was entirely unexpected and she received a 'cold call' from an agent in Company Q Property Agency with a buyer offering to purchase Property A at HKD50,400,000.00. Solely based on the Company Q Entries and the 2013 Company Q Letter, we have no doubt that the Appellant commissioned Company Q to sell Property A not long after its acquisition.

185. And by reason of the aforesaid, we have doubts as to whether Ms G had provided the different versions of events as to the circumstances of the disposal of Property A to the IRD.

186. In the Appellant's letter to IRD dated 27 March 2013, the Appellant claimed at paragraph 12 thereof that:

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- (a) Since the time (Early 2009) we realized that Property A was not a sound investment, we have intention to sell it out and replace it with other investments.
- (b) However, there was no reasonable offer until September 2010.
- (c) Our intention was to sell out Property A first, get the proceeds and then buy other properties for long term investment. But for 1 whole year, we are unable to sell out Property A.

187. In paragraph 11 of the same letter, Ms G gave the reason<sup>18</sup> to dispose Property A where she stated:

‘Apart from reducing the rent, the tenant was not punctual to pay his rent and this caused us to conclude that that building material retail business largely affected by the economy.

We also noticed that there were several vacant shops nearby our shop. This was the sign of no good business for all those retailers of building materials. Hence we realized that building material retail business is highly volatile, and it highly relates with the property market.’

188. The aforesaid replies apparently also contradict Ms G’s claim that the disposal of Property A in 2010 was entirely unexpected and she received a ‘cold call’ from an agent in Company Q Property Agency with a buyer offering to purchase Property A at HKD50,400,000.00.

189. Upon confrontation with this letter, Ms G explained that she made a mistake as to Property A1 and Property A in this letter. She said what she meant in that paragraph should mean Property A1. We do not accept this explanation that she had a mistake. Contrary to her claim, she did not make any mistake as to Property A and Property A1.

190. In the section ‘The reason to dispose Shop A’ of the letter, Ms G wrote in clear term that “we reduced his rental from . . . . . and from 1 September 2009 to 28 February 2010”. So we have totally reduced 1 whole years’ rental for the tenant of Property A.’. The period for reduction in rent was from 1 September 2009 to 28 February 2010. When she replied that she made a mistake, she probably forgot that Property A1 had already been disposed of in April 2009. There should not be any mistake made by Ms G as alleged. In our view, Ms G did honestly give the reason of disposal of Property A in the Appellant’s letter dated 27 March 2013 to the IRD that ‘Since the time (Early 2009) we realized that Property A was not a sound investment, we have intention to sell it out and replace it with other investments.’

191. Even if we are wrong in drawing an inference from the Company Q Entries and the 2013 Company Q Letter, we do not have any doubt that the Appellant intended to

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<sup>18</sup> In addition to those set out in paragraph 12 of the letter.

sell the Property A in early 2009 and through estate agents on the basis what she wrote to the IRD not long after the sale of Property A when everything was still fresh in her mind. Ms G's allegation that the Appellant's sale of Property A was unexpected and from a cold call from Company Q is not credible.

***Disposal of Property B***

192. Despite Ms G was confronted with different versions relating to the disposal of Property B given by her to the IRD<sup>19</sup>, Ms G maintained that the disposal of Property B was not due to any change of intention of the Appellant and not by reason of any advertisement for sale. She maintained that the genesis of Property B's disposal came from an offer to purchase it from her husband's business associates, who were the senior management of Group V. They were too fond of Restaurant T that they offered to purchase Property B from her for HKD34 million.

193. The reply from Company X to the IRD and dated 28 November 2014 ('2014 Company X Letter') where it stated:

'The Vendor ([the Appellant]) appointed our company to sell Property B on 1 August 2009. The original asking price was HK\$26,000,000. The contact person was [Mr K] and the telephone number is [XXXX-XXXX] and [XXXX-XXXX]. We regret to inform you that there is no appointment letter.

The asking price of the Property had been changed from the original one. The details of the subsequent revision of price is shown as follows:

<u>Date</u>	<u>HK\$</u>
17 November 2009	Not for sale
28 October 2010	\$42,000,000
2 March 2011	Not for sale
8 April 2011	\$45,000,000

194. We have no reason to believe that this letter was not correct. It matches some of the Company X's Entries. Based on the 2014 Company X Letter and the Company X Entries only, an inference could be drawn that the Appellant had commissioned Company X as its agent to sell Property B on 1 August 2009.

195. In support of Ms G's claim that she forgot the incidents when she gave different versions of replies to the IRD, she produced a cheque dated 31 October 2011 drawn from the Appellant's account with Bank AB in favor of Company W for the amount of \$171,000.00. Ms G said it was the commission payable to Mr K after he put through the sale of Property B to Group V's people.

196. Ms G said she did not make known the correct account of the sale to Property B to Group V's people to the IRD previously because she only discovered this cheque upon

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<sup>19</sup> Paragraph 83 to Paragraph 89 hereof.

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checking her stuff recently. When she discovered that she had issued a cheque in the sum of \$171,000 in favor of Company W for the purpose she could not recall, she then asked Mr K why the Appellant paid Company W. Upon her enquiry, Mr K prompted her that it was the commission payable to him consequent upon his introduction of Group V's people to acquire Property B from the Appellant. She said that explained why she could give a correct account of the sale of Property B in her WS, but not in her letters to the IRD.

197. Ms G stressed that the income of \$171,000.00 had been reported for tax by Company W. Upon being enquired by the Board how we could find out whether Company W had reported it for tax, Ms G said she was sure because she was a director of Company W and the auditor of Company W had enquired with her about the purpose of payment from the Appellant to Company W. She gave him an account of the issue of this cheque to Company W along the line of payment of commission by the Appellant to Company W after Mr K put through the sale of Property B to Group V's people, though she could not recall when she told the auditor.

198. The sale of Property B was completed on 28 October 2011. If commission was payable to Mr K as alleged, it should be around October 2011. In fact, the date of the cheque was 31 October 2011. If this income was reported for taxation, it should have been included in the account for the year ended latest by 31 October 2012. In other words, the auditor should have made the enquiry with Ms G and she should give the full account of payment of commission to Company W by the Appellant, latest by 31 October 2012.

199. The 5 letters to the IRD given by Ms G to explain the details of acquisition and sale of Property B were respectively dated 3 April 2013, 23 July 2013, 13 March 2014, 12 September 2014 and 12 April 2017. The earliest one was 3 April 2013. If what Ms G told in her WS was true, she could give the same account of incidents relating to the sale of Property B to the Group V's people in any of her five letters to the IRD. If she could relay the account of incidents to the auditor of Company W in or around October 2012, at the latest, we could not imagine that she could not recall the same in April 2013 or in 2014 when she replied to the IRD.

200. Ms G said since it was a private deal between the Appellant and the Group V's people and Mr K did not want to handle the documentation for the transaction between the Appellant and the buyer, she engaged the estate agent to complete the procedure and paid him commission of \$171,400.00.

201. The explanation of payment of \$171,400 to an estate agent to maintain a good relationship in our view is unsustainable. The sum of \$171,400 is not a small sum. The work to be performed was only to fill in certain particulars in a standard form of a provisional agreement for sale and purchase. It could be done by Ms G herself or by someone easily.

202. If Ms G did not want to do so, she could give a telephone call to any of her acquainted solicitors firm asking them to handle it for the Appellant. We feel any such firm would have been willing to provide this service – preparing a standard preliminary agreement for sale and purchase of 3 to 4 pages for free, or for a relatively nominal amount of money. We do not understand why Ms G did not engage a solicitors firm to handle the

preliminary agreement for sale and purchase for her if she needed someone to handle the provisional agreement for sale and purchase. Since it was a private deal, there was no time pressure on the parties to complete the preliminary agreement within a relatively short period of time.

203. The return on an investment was one of the factors to be taken by Ms G. The payment of \$171,400 which could be avoided if she chose to do so would affect her return. This sum was equivalent to about rentals for 5 months payable by Restaurant T. Ms G claimed that in order to maintain a good relationship, she needed to engage an agent. However, the sum went to Company X, not to the agent direct (although he might have a cut on the sum). Last but not least, the explanation is not credible when viewed in the context of the Appellant's 5 prior letters to the IRD regarding Property B<sup>20</sup>. The contents thereof contradict or are at least materially inconsistent with the explanation, and it is inherently improbable that Ms G would have by April 2013 entirely forgotten about the convoluted manner/process (including the alleged rationale for paying Company X a commission of \$171,400) pursuant to which Ms G now says the Appellant disposed of Property B.

204. By reason of the aforesaid, we do not accept the sale of Property B being put through by Mr K as alleged by Ms G. Having considered the evidences of the case, it is our view that Property B was listed with Company X for sale soon after its acquisition. The sale was put through by the estate agent of Company X, not by Mr K as alleged. We are of the view that the contents of the 5 letters to the IRD reflected what happened as written by Ms G. When she wrote the letters, what happened was still fresh in her mind.

### *Disposal of Property C*

205. Ms G said in the WS that consequent upon the tenant's informal notification given to her staff Ms AN in or about June 2010 (2 months after the acquisition) that the tenant would not renew the tenancy at the end of tenancy (in 2012), the Appellant then began a 2-year process of searching for replacement tenants but unfortunately without much avail. The search process was supported by the traveling expenses claimed by Ms AN against the Appellant for going to Property C for 14 office inspections during the period of July 2010 to May 2011.

206. Although these invoices recorded that the traveling expenses were incurred for inspection of office at Address AA, they did not specify the purpose of inspection. On the face of those invoices, they could be for inspection for the purpose of leasing or for the purpose of sale. They are neutral documents.

207. We find it quite odd that the Appellant would commence to locate replacement tenants two years ahead of vacant possession being available. In reality, we do not think that a potential tenant would commit a tenancy which necessitated them to wait for 2 years before the commencement of the tenancy.

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<sup>20</sup> 'Paragraphs 83 to 88 above. In particular the letters dated 3 April 2013, 12 September 2014, and 12 April 2017 which directly contradict (or are at best inconsistent with) her oral evidence on this topic.'

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208. In the course of giving evidence, Ms G said that the existing tenant could move out early if the Appellant could find a replacement tenant anytime. Again, on balance we find this claim unlikely. Even if the existing tenant could accommodate the Appellant in the event that it could find a replacement tenant, it remained the fact the existing tenant needed time to find an alternate place and time to do the renovation work. It would take several months before the existing tenant could deliver vacant possession of the office to the replacement tenant if there was one. In reality, it would on balance be difficult, if not impossible, to find a tenant (for a small office of size about 1,000 sq. ft.) who is willing to wait for several months before vacant possession could be delivered. In reality, the potential tenants would need vacant possession as soon as possible after they commit to tenancies.

209. There was no evidence of a rise of rental at the time. If there was a rise in rental, Ms G might be benefitted by leasing the office to a replacement tenant at a higher rental. However, even if the Appellant could successfully find a replacement tenant at a higher rent, the higher rent might not compensate the loss in the commission payable to the estate agent and the rent-free period customarily given to the replacement tenant. If there was no rise in rental, Ms G would suffer even if she could find a replacement tenant.

210. Even if the Appellant could find a replacement tenant who was willing to wait for several months before vacant possession could be delivered, there was no guarantee that the existing tenant would move out. If there was a rise in rent, the existing tenant might not move out because they needed to pay the rent at a higher rate for about 2 years.

211. As admitted by Ms G in the WS, she had always been happy with Property C and the existing tenant who was the representative office of the Country AL business and was a good tenant. Even if the Appellant could find a replacement tenant, the replacement tenant might not be as good as Country AL business. The Appellant might suffer loss if the tenant was not good as far as payment of rental was concerned. By reasons of the aforesaid, Ms G's account of finding a replacement tenant 2 months after it acquired Property C was hard to believe.

212. In the circumstances, the logical deduction is that the vouchers for claiming traveling expense for inspection should be more likely for sale purpose than for lease. The vouchers were to cover inspection of office for the period from July 2010 to May 2011. It coincided with the fact that Property C was sold in June 2011 though it aborted subsequently.

213. We are of the firm view that the Appellant put Property C for sale shortly after its acquisition and the Appellant actively arranged the potential buyers to inspect Property C in the relevant period. The sale was intended out of the Appellant's own decision, not as alleged that the Appellant sold it due to an unsolicited offer from a real estate agent for its acquisition.

***Badges of Trade***

214. One of the ways to ascertain whether the Properties acquired were for trading or investment purpose is to test different aspects of the Properties against the Badges of

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Trade referred to by McHugh NPJ in Lee Yee Shing. We have to bear in mind that there are no mechanical calculation scores of the badges of trade so that a certain score would indicate whether there is an intention to trade or an intention to hold for long-term investments. As per Bokhary and Chan PJJ said in Real Estate Investment (NT) Limited, ‘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.....’.

215. Applying the badges of trade to the Properties, we have the following results (‘Test Results’):

	Property A	Property B	Property C
Whether the Appellant has frequently engaged in similar transactions	The Appellant had 4 transactions in the material times, namely Property A1, Property A, Property B and Property C.		
Whether the Appellant has held the asset or commodity for a lengthy period	About 2 years 9 months	About 2 years 1 month	About 1 year 6.5 months (in case of the aborted sale) About 2 years and 4.5 month
Whether the Appellant has acquired an asset or commodity that is normally the subject of trading rather than investment	Each of Property A, Property B and Property C can be either for trading or for investment.		
Whether the Appellant has bought large quantities or numbers of the commodity or asset	8 properties (Property A1, Property A, Property B, Property C, Property D, Property E, Property E1 and Property F) at the material time, 5 properties were sold, each of which was held for less than 3 years.		
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 <sup>21</sup>	Yes, unexpected offer from a cold call of an agent	Yes, offer from the friend of Mr K.	Yes, unsolicited offer
Whether the Appellant has sought to add re-sale value to the asset by additions or repair	No.	No.	No.

<sup>21</sup> This is being approached on the assumption/basis that the Appellant’s factual case is accepted.

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	Property A	Property B	Property C
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.	No.	No.
Whether the Appellant has conceded an actual intention to resell at a profit when the asset or commodity was acquired	Yes, each of the Properties was listed for sale shortly after its acquisition.		
Whether the Appellant has purchased the asset or commodity for personal use or pleasure or for income	Not for personal use or pleasure. The Appellant claimed that they were acquired for long-term investment, which were considered and discussed above.		

216. Solely from the Test Results, we feel the Test Results tend to suggest that the Properties are trading stock.

***Finding of facts***

217. We have carefully considered the evidence of the case (which include the contents of the WS and SWS, Ms G's oral testimony and the documentary evidence), the Test Results, the Agreed Facts and the submissions made by the parties. Overall, we do not find the evidence given by Ms G is credible and reliable. There were a lot of inconsistencies and contradictions between her oral testimony and the documentary evidence. The reasons given by Ms G in respect of the sale of each of the Properties are not believable.

218. On a holistic consideration of the circumstances, the Agreed Facts, the WS and SWS, Ms G's oral testimony, the documentary evidence and the submissions made by the parties, we come to the conclusion that:

- (a) The Appellant intended to sell the Properties soon after its respective acquisitions;
- (b) Each of Property A, Property B and Property C was acquired by the Appellant as a trading stock for trading purpose;
- (c) At the time of disposal of Property A, Property B or the Property C, there was no change of its nature of being a trading stock;

- (d) The profits derived by the Appellant from the sale of Property A, Property B and/or Property C are trading profits and chargeable to profits tax;
- (e) The Appellant was not entitled to the grant of commercial building allowances in respect of Property B and Property C (which are held as trading stock).
- (f) Since Property A, Property B and Property C were trading stocks, each disposal was an independent trading activity. Any property acquired from the proceeds of sale as a replacement property (if any) would not alter the fact that profit tax is chargeable on the profits realized as a result of disposal of Property A, Property B and/or Property C.

### **Conclusion and Disposition**

219. For the reasons and analysis set out above and the facts we found, the Appellant has failed to discharge its onus under section 68(4) of the Ordinance to prove that the assessment being assessed is excessive or incorrect. In our conclusion, the appeal should be dismissed. We confirm the three assessments appealed against as confirmed by the Deputy Commissioner and set out in paragraph 1 hereof.

### **Costs**

220. If the Appellant fails in its appeal, under section 68(9) of the Ordinance the Board may order the Appellant to pay as costs of the Board as a sum not exceeding the amount of \$25,000.00.

221. The Appellant sold each of the Properties within a relatively short period of time after it was acquired. On the face of the case, the Appellant needs a lot of convincing and compelling evidence to support its claim that the Properties were acquired for long-term investment purposes.

222. As discussed in the above, the evidence adduced by Ms G to support the reasons that the Properties were acquired for long-term purposes and the reason for their disposals within a relatively short period of time after their acquisitions was flimsy, contradictory, vague and hard to believe. From the outset, there is no reasonable prospect of success in the appeal.

223. In our view, the appeal is frivolous and vexatious. The tax involved in this appeal amounts to about several millions of dollars. The maximum costs which the Board might impose is only \$25,000.00. It follows that there was a great temptation for the Appellant to lodge an appeal even though the appeal was hopeless.

224. In the circumstances, it is right that we order the Appellant to pay a sum of \$25,000.00 as costs of the Board which shall be added to the tax charged and recovered therewith pursuant to section 68(9) of the Ordinance.

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225. Lastly, we wish to record herein our thanks to counsel for the Appellant and counsel for the Respondent for their submissions and kind assistance to the Board on this appeal.

**Appendix A**

B/R XX/XX

Appeal to the Board of Review

By [the Appellant]

Second Additional Profits Tax Assessments 2010/11 and 2012/13

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**STATEMENT OF AGREED FACTS**

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1. The Appellant ('the Company') has objected to the Profits Tax Assessment for the year of assessment 2011/12 and the second Additional Profits Tax Assessments for the years of assessment 2010/11 and 2012/13 raised on it. The Company claims that :

- (a) The gains on disposal of certain properties and deposit forfeited from cancellation of the sale of a property are capital in nature and should not be chargeable to Profits Tax.
- (b) It should be entitled to commercial building allowances ('CBA') respect of the properties disposed for the relevant years of assessments.
- (c) 20% of the purchase price of its properties should be taken as the residue of expenditure for computation of CBA.

2. (a) The Company was incorporated in Hong Kong as private company in November 2007.

(b) At all relevant times, the paid-up share capital of the Company was \$2.

(c) In the Profits Tax Returns for the years of assessment 2010/11 to 2012/13, the Company described its principal activity as property investment for rental purposes. It closed its accounts on 31 March annually.

3. During the relevant period, the Company purchased and sold the following properties:

<u>Location</u>	<u>Saleable area</u>	<u>Purchase</u>	<u>Sale</u>	<u>Tenancy</u>
		(a) Date of provisional agreement (b) Date of assignment (c) Consideration	(a) Date of provisional agreement (b) Date of assignment (c) Consideration	(a) Date of tenancy agreement (b) Period of tenancy (c) Monthly rental
(a) Property A	417 sq. ft.	(a) 11-12-2007 (b) 08-05-2008 (c) \$25,220,021 <sup>[1]</sup>	(a) 14-09-2010 (b) 15-12-2010 (c) \$50,400,000	(a) 01-08-2007 (b) 01-08-2007 - 31-07-2010 (c) \$116,000

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<u>Location</u>	<u>Saleable area</u>	<u>Purchase</u>	<u>Sale</u>	<u>Tenancy</u>
		(a) Date of provisional agreement (b) Date of assignment (c) Consideration	(a) Date of provisional agreement (b) Date of assignment (c) Consideration	(a) Date of tenancy agreement (b) Period of tenancy (c) Monthly rental
(b) Property B	1,000 sq. ft.	(a) 23-07-2009 (b) 06-11-2009 (c) \$22,500,000	(a) 12-08-2011 (b) 28-10-2011 (c) \$34,280,000	<u>Existing tenancy</u> (a) 09-08-2004 (b) 12-08-2004 - 11-02-2010 (c) 1 <sup>st</sup> & 2 <sup>nd</sup> years - \$31,500 3 <sup>rd</sup> & 4 <sup>th</sup> years - \$37,000 5 <sup>th</sup> & 6 <sup>th</sup> years - \$40,000  <u>Renewal tenancy</u> (a) 23-07-2009 (b) 12-02-2010 - 11-02-2013 (c) \$68,000 - Renewable for a further term of 2 years at monthly rent of not more than \$78,200
(c) Property C	1,100 sq. ft.	(a) 17-11-2009 (b) 20-04-2010 (c) \$15,000,000	(a) 02-06-2011 (b) <sup>[2]</sup> (c) 23,100,000 <hr/> (a) 25-03-2012 (b) 29-06-2012 (c) 24,780,000	(a) 09-03-2009 (b) 09-03-2009 - 08-03-2012 (c) \$40,600

Note 1: Property A was purchased together with Property A1 at a total consideration of \$58,000,000. The purchase price was apportioned based on relative saleable area, i.e.  $\$58,000,000 \times 417 / (417+542)$

Note 2: The Potential purchaser failed to complete the transaction.

Properties A, B and C are collectively referred to as ‘the Subject Properties’.

4. The Company obtained the following loans to finance the acquisition of the Subject Properties:

	<u>Property A &amp; Property A1</u>	<u>Property B</u>	<u>Property C</u>
Bank loan	\$40,600,000	\$15,750,000	\$10,500,000
(i) Name of lender	Bank N	Bank AB	Bank AB
(ii) Date loan granted	18 March 2008	6 November 2009	14 April 2010
(iii) Term of repayment	15 years	3 years	3 years

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	<u>Property A &amp; Property A1</u>	<u>Property B</u>	<u>Property C</u>
(iv) Quarterly payment	1 <sup>st</sup> to 8 <sup>th</sup> instalments - \$300,000 each	1 <sup>st</sup> to 11 <sup>th</sup> instalments - \$130,000 each	1 <sup>st</sup> to 11 <sup>th</sup> instalments - \$100,000 each
	9 <sup>th</sup> to 16 <sup>th</sup> instalments - \$500,000 each	12 <sup>th</sup> (last) instalment - \$14,320,000	12 <sup>th</sup> (last) instalment - \$9,400,000
	17 <sup>st</sup> to 59 <sup>th</sup> instalments - \$780,000 each		
	60 <sup>th</sup> (last) instalment - \$660,000		
(v) Interest rate	1.1% p.a. over 1, 2 or 3 months' HIBOR	1.05% p.a. over 1, 2 or 3 months' HIBOR	0.95% p.a. over 1, 2 or 3 months' HIBOR
Shareholder's loan	\$17,400,000	\$6,750,000	\$4,500,000

5. Apart from the Subject Properties, the Company also acquired the following properties during the relevant years assessment :

	<u>Property address</u>	<u>Date of assignment</u>	<u>Consideration</u> \$
(a)	Property D	21 October 2009	23,180,000
(b)	Property E	15 November 2010	82,000,000
(c)	Property E1	17 January 2011	8,000,000
(d)	Property F	6 December 2012	43,500,000

6. The Company filed its Profits Tax Returns for the years of assessment 2010/11 to 2012/13 together with the audited financial statements and tax computations.

(a) The Company reported in the Profits Tax Returns the following assessable profits :

<u>Year of assessment</u>	<u>2010/11</u>	<u>2011/12</u>	<u>2012/13</u>
	\$	\$	\$
Assessable Profits	<u>3,238,349</u>	<u>123,874</u>	<u>1,283,723</u>

(b) In arriving at the assessable profits for the relevant years of assessment, the Company made, among other things, the following adjustments:

<u>Year of assessment</u>	<u>2011</u>	<u>2012</u>	<u>2013</u>
	\$	\$	\$
<u>Deduct :</u>			
Gain on disposal of Property A	24,521,529 <sup>[1]</sup>	-	-
Gain on disposal of Property B	-	11,122,625 <sup>[1]</sup>	-
Forfeiture of deposit of Property C	-	2,288,179 <sup>[2]</sup>	-
Gain on disposal of Property C	-	-	9,239,659 <sup>[1]</sup>
CBA			
-Property B	13,875	-	-
-Property C	120,000	120,000	-
-Property D	278,160	278,160	278,160

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Year of assessment	<u>2011</u>	<u>2012</u>	<u>2013</u>
	\$	\$	\$
-Property E	656,000	656,000	656,000
-Property F	-	-	348,000
<u>Add:</u>			
Balancing charge			
-Property A	807,040	-	-
-Property B	-	27,750	-
-Property C	-	-	240,000

Note 1: Computation of gain on disposal of property

	<u>Property A</u>	<u>Property B</u>	<u>Property C</u>
	\$	\$	\$
Selling price [Fact (3)]	50,400,000	32,280,000	24,780,000
<u>Less: Purchase price [Fact (3)]</u>	<u>25,220,021</u>	<u>22,500,000</u>	<u>15,000,000</u>
Commission	504,000	342,400	247,800
Legal & other expenses	<u>1,220,457</u>	<u>1,127,735</u>	<u>745,955</u>
	23,455,522	10,309,865	8,786,245
<u>Add : Accumulated depreciation</u>	<u>1,066,007</u>	<u>812,760</u>	<u>453,414</u>
Gain on disposal	<u>24,521,529</u>	<u>11,122,625</u>	<u>9,239,659</u>

Note 2:

	\$
Deposit forfeited from cancellation of the sale (10% x \$23,100,000 [Fact (3)])	2,310,000
<u>Less : Legal fee</u>	<u>21,821</u>
Net deposit received	<u>2,288,179</u>

- (c) The Company's detailed income statements showed the following breakdown of income:

Year ended 31 March	<u>2011</u>	<u>2012</u>	<u>2013</u>
	\$	\$	\$
Turnover	4,549,697	2,922,576	4,392,043
Gain on disposal of property, plant and equipment	24,521,529	11,122,625	9,239,659
Forfeiture of deposit	-	2,288,179	-
Interest Income	<u>244</u>	<u>33,299</u>	<u>54,138</u>
Total	<u>29,071,470</u>	<u>16,366,679</u>	<u>13,685,840</u>

7. (a) The Assessor raised on the Company the following Profits Tax

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Assessments and Additional Profits Tax Assessments for the Years of assessment 2010/11 and 2012/13.

Year of assessment	<u>2010/11</u>	<u>2010/11</u> (1st Additional)	<u>2012/13</u>	<u>2012/13</u> (1st Additional)
	\$	\$	\$	\$
Assessable Profits per return [Fact (6)(a)]	<u>3,238,349</u>		<u>1,283,723</u>	
Additional Assessable Profits		<u>128,138<sup>[1]</sup></u>		<u>128,138<sup>[1]</sup></u>
Tax Payable thereon	<u>534,327</u>		<u>201,814</u>	
Additional Tax Payable thereon		<u>21,143</u>		<u>21,143</u>

Note 1: The amount represented an adjustment of CBA claimed in respect of Property D (i.e.\$278,160 - \$150,022).

(b) The Company did not object to the Profits Tax Assessments and Additional Profits Tax Assessments in Fact (7)(a).

8. [The Appellant indicated that Fact (8) in the Determination was not agreed.]

9. [The Appellant indicated that Fact (9) in the Determination was not agreed.]

10. [The Appellant indicated that Fact (10) in the Determination was not agreed.]

11. The Assessor considered that the Subject Properties were the trading assets of the Company and the gains on disposal of Property B and Property C as well as the deposit forfeited from cancellation of the sale of Property C should be chargeable to Profits Tax. Further, no CBA should be granted in respect of Property B and Property C. Accordingly, she raised on the Company the following Profits Tax Assessment and second Additional Profits Tax Assessments:

Year of assessment	<u>2010/11</u> (2nd Additional)	<u>2011/12</u>	<u>2012/13</u>
	\$	\$	\$
Assessable Profits per return[Fact (6)(a)]	3,238,349	123,874	1,283,723
<u>Add :</u> Gain on disposal [Fact (6)(b), Note 1]			
- Property B	-	10,309,865	-
- Property C	-	-	8,786,245
Deposit forfeited from cancellation of the sale of Property C [Fact (6)(b), Note 2]	-	2,288,179	-
CBA previously claimed [Fact (6)(b)]	-	-	-
- Property B	13,875	-	-
- Property C	120,000	-	-
Adjustment on CBA – Property D [Fact (7)(a), Note 1]	128,138	-	128,138
<u>Less :</u> Balancing charge – Property C	-	-	<u>240,000</u>
Assessable Profits	<u>3,500,362</u>	<u>12,721,918</u>	9,958,106
<u>Less :</u> Profits previously assessed			
(\$3,238,349+\$128,138[Fact (7)(a)])	<u>3,366,487</u>		
(\$1,283,723 + \$128,138[Fact (7)(a)])			<u>1,411,861</u>
Additional Assessable Profits	<u>133,875</u>		<u>8,546,245</u>
Tax Payable thereon		<u>2,087,116</u>	

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Year of assessment	<u>2010/11</u> (2nd Additional)	<u>2011/12</u>	<u>2012/13</u>
Additional Tax Payable thereon	\$ <u>22,089</u>	\$	\$ <u>1,410,130</u>

12. The Company objected to the Profits Tax Assessment and Additional Profits Tax Assessment in Fact (11). It further contended that :

- (a) Property B and Property C were purchased for long term investment purpose and held as capital assets of the Company.
- (b) The gains on disposal of Property B and Property C and the deposit forfeited from cancellation of the sale Property C were capital in nature and should not be taxable.
- (c) Having a capital of \$2 was common for many Hong Kong companies. It did not mean that the Company was not financially viable to own the Subject Properties for long term investment purpose. The Company or its shareholder had the financial ability to hold the properties for long term investment purpose.
- (d) [The Appellant indicated that Fact (12)(d) in the Determination was not agreed.]

13. The Assessor did not accede to the Company's view that the gains on disposal of Property B and Property C as well as the deposit forfeited from cancellation of the sale of Property C were capital in nature. She invited the Company to accept the following proposed revised assessment for the year of assessment 2011/12:

Year of assessment	<u>2011/12</u>
	\$
Profits per return [Fact (6)(a)]	123,874
<u>Add:</u> Gain on disposal of Property B [Fact (6)(b), Note 1]	10,309,865
Deposit forfeited from cancellation of the sale of Property C [Fact (6)(b), Note 2]	2,288,179
CBA previously claimed for Property C [Fact (6)(b)]	<u>120,000</u>
	12,841,918
<u>Less:</u> Balancing charge for Property B	<u>27,750</u>
Assessable Profits	<u>12,814,168</u>
Tax Payable thereon	<u>2,102,337</u>

14. The Company declined to accept the proposed revised assessment in Fact (13).

15. Records maintained by the Land Registry revealed the following information in relation to Property E and Property F:

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<u>Property</u>	<u>Year built</u>	<u>Date of first assignment</u>	<u>Price for first assignment</u>
E	Around 1965	1 June 1977	\$471,600 <sup>[1]</sup>
F	Around 1959	12 August 1959	\$160,494 <sup>[2]</sup>

Note 1: Property E was acquired together with other properties at a total price of \$1,886,400. The first assignment price was estimated based on its share of the lot, i.e. as \$1,886,400 x 4/19=\$471,600.

Note 2: Property F was acquired together with other properties at a total price of \$2,600,000. The first assignment price was estimated based on its share of the lot, i.e. as \$2,600,000 x 5/81=\$160,494.

16. The Assessor considers that one half of the first assignment price of Property E and Property F could be deemed as the costs of construction of the properties. She opined that the CBA in respect E and Property F should be recomputed as follows:

<u>Property</u>	<u>Deemed cost of construction<sup>[1]</sup></u> \$ (x)	<u>Notional rebuilding allowance up to 1997/98</u> \$ (y)	<u>Residue of expenditure</u> \$ (x-y)	<u>CBA</u> \$ (x-y) x 4%
E	235,800	54,234 <sup>[2]</sup>	181,566	7,262
F	80,247	29,290 <sup>[3]</sup>	50,957	2,038

Note:

(1) ½ x first assignment price in Fact (15)

(2) (\$235,800 x 0.75% x 12 years) + (235,800 x 2% x 7 years)

(3) (\$80,247 x 0.75% x 30 years) + (\$80,247 x 2% x 7 years)

17. The Assessor maintains the view that the Subject Properties were trading assets of the Company. Therefore, the gains on disposal of these properties should be chargeable to Profits Tax and no CBA should be granted for these properties. Further, the CBA granted in respect of Property E and Property F should be adjusted per Fact (16). She proposes to revise the Profits Tax Assessment for the year of assessment 2011/12 and the second Additional Profits Tax Assessments for the years of assessment 2010/11 and 2012/13 as follows:

<u>Year of assessment</u>	<u>2010/11</u> (2 <sup>nd</sup> Additional)	<u>2011/12</u>	<u>2012/13</u> (2 <sup>nd</sup> Additional)
	\$	\$	\$
Assessable Profits per return [Fact (6)(a)]	3,238,349	123,874	1,283,723
<u>Add:</u> Gain on disposal [Fact (6)(b)]			
- Property A	23,455,522	-	-
- Property B	-	10,309,865	-

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Year of assessment	<u>2010/11</u> (2 <sup>nd</sup> Additional) \$	<u>2011/12</u> \$	<u>2012/13</u> (2 <sup>nd</sup> Additional) \$
- Property C	-	-	8,786,245
Deposit forfeited from cancellation of the sale of Property C [Fact (6)(b)]	-	2,288,179	-
CBA previously claimed [Fact (6)(b)]			
- Property B	13,875	-	-
- Property C	120,000	120,000	-
- Property D	278,160	278,160	278,160
- Property E	656,000	656,000	656,000
- Property F	-	-	348,000
<u>Less:</u> Balancing charge [Fact(6)(b)]			
- Property A	807,040	-	-
- Property B	-	27,750	-
- Property C	-	-	240,000
CBA			
- Property D [Fact (7)(a), Note 1]	150,022	150,022	150,022
- Property E [Fact (16)]	7,262	7,262	7,262
- Property F [Fact (16)]	-	-	2,038
Assessable Profits	<u>26,797,582</u>	<u>13,591,044</u>	10,952,806
<u>Less:</u> - Profits Previously assessed [Fact (11)]	<u>3,366,487</u>		<u>1,411,861</u>
Additional Assessable Profits	<u>23,431,095</u>		<u>9,540,945</u>
Tax Payable thereon (after tax rebate)		<u>2,230,522</u>	
Additional Tax Payable thereon	<u>3,866,131</u>		<u>1,574,255</u>
<u>Tax Payment Position</u>			
Total Tax Payable (i.e. Assessable Profits @ tax rate 16.5%)	4,421,601	2,242,522	1,807,212
<u>Less:</u> Tax rebate	-	12,000	10,000
<u>Less:</u> Tax reserve certificate purchased	22,089	1,552,789	1,410,130
<u>Less:</u> Tax previously paid	<u>555,470</u>	<u>534,327</u>	<u>222,957</u>
Tax further payable	<u>3,844,042</u>	<u>143,406</u>	<u>164,125</u>

Dated the 15<sup>th</sup> day of June 2020

(signed.) \_\_\_\_\_  
Messrs. Kok & Ha  
Solicitors for the Appellant

(signed.) \_\_\_\_\_  
Jesse Yu, Government Counsel  
for the Respondent