

**Case No. D19/17**

**Profits tax** – determination of profits tax assessment – buying and selling property with existing tenancy – intention of purchase for long-term investment or trade – sections 2(1), 14(1), 66(3) and 68(4) of the Inland Revenue Ordinance

Panel: Chow Wai Shun (chairman), Lee Tsung Wah Jonathan and Mo Lai Lan.

Date of hearing: 13 October 2017.

Date of decision: 4 December 2017.

The Appellant appealed against the determination of the Deputy Commissioner of Inland Revenue dated 6 June 2017 (the ‘Determination’). The Determination confirmed the revised Profits Tax Assessment (the ‘Assessment’) for the year of assessment 2011/12 raised on the Appellant in a letter by the Assessor on 7 October 2013. The Appellant objected to the Assessment. Before the Assessment, the Assessor ascertained information of Shop F from Company M, Company N and Company G.

The issue of this appeal was whether the profits derived by the Appellant from the sale of Shop F was chargeable to Profits Tax. Shop F was purchased and sold with existing tenancy. During the years ended 31 March 2011 and 2013, the Appellant sold other properties, i.e. Shop J and House K. The Appellant sold Shop F with existing tenancies through Company G to purchaser H. Information from Company M and Company N both showed that Shop F was offered for sale in December 2010, even before Shop F was assigned to the Appellant in January 2011.

**Held:**

1. The question whether something amounted to the carrying of a trade was objective and required an examination of all the circumstances. No appeal by a taxpayer could succeed unless the court was of the view that the true and only reasonable conclusion was that the position was what the taxpayer contended. Furthermore, the question for this Board was: ‘did the Commissioner get the correct answer’; not ‘did the Commissioner get the correct answer by the wrong method (Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue [1980] 53 TC 461; All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750; Brand Dragon Limited (in members' voluntary liquidation) and other v Commissioner of Inland Revenue (2001) 5 HKTC 502; Marson v Morton [1986] STC 463; Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51; Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008)

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11 HKCFAR 433; and Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Limited [1964] HKLR 224 followed).

2. Although the Appellant claimed that Shop F had been purchased for long-term investment and subsequently disposed of it due to changes in environment, a self-serving statement of intention was not sufficient to establish such a change and such change of intention must have been established with reference to all relevant circumstances (Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue [1980] 53 TC 461 followed).
3. The onus of proving that the Assessment was excessive or incorrect was on the Appellant. The actions taken by the Appellant, including its quick offer for sale before the assignment and active pursuit of a higher price afterwards contradicted the Appellant's alleged intention of acquiring Shop F for long-term investment.
4. The Appellant purchased Shop F and sold it afterwards with same existing tenant producing rental income was a neutral factor. Borrowing for acquisition was a neutral factor either (Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433; and Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51 followed).

**Appeal dismissed.**

Cases referred to:

Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue [1980] 53 TC 461;  
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750;  
Brand Dragon Limited (in members' voluntary liquidation) and other v Commissioner of Inland Revenue (2001) 5 HKTC 502;  
Marson v Morton [1986] STC 463;  
Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51;  
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433; and  
Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Limited [1964] HKLR 224.

Director of the Appellant, for the Appellant, accompanied by Cheung Yiu Hung of Messrs Y H Cheung & Company.  
Ong Wai Man Michelle and Chan Wai Lin, for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 6 June 2017 ('the Determination'). The Determination confirmed the revised Profits Tax Assessment for the year of assessment 2011/12 raised on the Appellant.

2. Ms A, a director of the Appellant, appeared for the Appellant. Mr Cheung Yiu-hung of Messrs Y H Cheung & Co. ('the Representatives') accompanied Ms A. Only Ms A herself gave the oral submission and responded to the submissions given by the Respondent. She did not give any oral evidence. Indeed, the Appellant did not call any witness. Apart from four radiological reports in respect of Ms A issued by Hospital B, on the following dates, the Appellant did not provide any other additional documentary evidence for the hearing:

Date	Examination
6 October 2011	MR of brain and spectroscopy
27 June 2012	MR of brain and abdomen
26 June 2013	MR of brain
7 April 2016	MR of brain

The Appellant submitted these reports three weeks before the hearing took place.

**Facts**

3. With reference to the facts as agreed by the Appellant and other documents made available to us, we find the following facts relevant to this case:

- (a) The Appellant is a private limited company incorporated in Hong Kong in 1987. During the years ended 31 March 2011 and 2012, the Appellant's issued share capital was \$10,000, divided into 10,000 shares of \$1 each. Ms A held one share in the Appellant whereas a company incorporated in Territory C held the remaining 9,999 shares. Ms A was the sole shareholder of that company. Ms A and her daughter, Ms D, were directors of that company and the Appellant.
- (b) The Appellant made up accounts annually to 31 March. Its principal activity as stated in the report of its directors for the years ended 31 March 2011 and 2012 was properties letting.
- (c) By a provisional agreement for sale and purchase dated 3 November 2010, the Appellant, through Company E, agreed to purchase Shop F at a consideration of \$13,050,000. The Appellant completed the

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purchase on 11 January 2011.

- (d) By a provisional agreement for sale and purchase dated 16 April 2011, the Appellant, through Company G, agreed to sell Shop F at a consideration of \$18,000,000 to Purchaser H. The Appellant and Purchaser H executed the formal agreement for sale and purchase on 3 May 2011. The Appellant completed the sale on 8 August 2011.
- (e) Shop F was purchased and sold with existing tenancy:

Date of tenancy	12 March 2010
Term of tenancy	Two years from 15 March 2010 to 14 March 2012
Monthly rent	\$31,000 exclusive of rates, government rent and management fees

- (f) During the years ended 31 March 2011 and 2013, the Appellant sold other properties.

Location of property	Purchase	Sale
	(a) Provisional Agreement date (b) Agreement for Sale and Purchase date (c) Assignment date (d) Consideration	(a) Provisional Agreement date (b) Agreement for Sale and Purchase date (c) Assignment date (d) Consideration
Shop J	(a) 3 December 2007 (b) 12 December 2007 (c) 25 February 2008 (d) \$13,500,000	(a) 7 May 2010 (b) 20 May 2010 (c) 20 July 2010 (d) \$20,230,000
House K	(a) – (b) 4 February 2008 (c) 10 March 2008 (d) \$11,700,000	(a) 12 March 2012 (b) 22 March 2012 (c) 18 May 2012 (d) \$14,500,000

- (g) The Appellant sold Shop J with existing tenancies.
- (h) The Appellant failed to furnish Profits Tax Return for the year of assessment 2011/12 within time. The Assessor was of the opinion that the Appellant was chargeable with tax and made the following estimated Profits Tax Assessment for that year:

Assessable Profits	\$550,000
Tax Payable thereon	\$78,750

- (i) The Appellant, through the Representatives, objected to the estimated assessment, claiming that it was excessive.
- (j) To validate the objection, the Appellant furnished Profits Tax Return

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for the year of assessment 2011/12 together with its audited financial statements and the tax computation for the year ended 31 March 2012. In the return, the Appellant declared an adjusted loss of \$421,082 after excluding the profit on disposal of Shop F of \$4,135,765. The profit on disposal of Shop F was computed as follows:

	\$	\$
Sale proceeds		18,000,000
<u>Less: Commission to Company G</u>		<u>180,000</u>
		17,820,000
<u>Less: Purchase consideration</u>	13,050,000	
Legal fee and stamp duty	503,735	
Agency fee	<u>130,500</u>	<u>13,684,235</u>
		<u>4,135,765</u>

- (k) The balance sheet of the Appellant as at 31 March 2012 and 2013 disclosed the following:

As at 31 March	2011	2012	2013
	\$	\$	\$
<i>Non-current Assets</i>			
Investment properties	25,679,660	11,641,068	1,262,787
Motor vehicle	212,000	159,000	106,000
<i>Current Assets</i>			
Fixed deposit at bank	-	15,000,000	-
Cash at banks	<u>8,946,140</u>	<u>3,380,466</u>	<u>1,976,289</u>
	<u>34,837,800</u>	<u>30,180,534</u>	<u>3,345,076</u>
<i>Less: Current liabilities</i>			
Bank loan repayable (secured)	4,914,671	4,657,877	-
Rental deposits received	168,000	34,600	34,000
Others	<u>428,669</u>	<u>436,669</u>	<u>420,669</u>
	<u>5,511,340</u>	<u>5,129,146</u>	<u>454,669</u>
<i>Less: Non-current liabilities</i>			
Amount due to holding company	<u>28,454,235</u>	<u>20,136,763</u>	<u>121,369</u>
Net Assets	<u>872,225</u>	<u>4,914,625</u>	<u>2,769,038</u>
<i>Capital and Reserve</i>			
Share capital	10,000	10,000	10,000
Retained profits	<u>862,225</u>	<u>4,904,625</u>	<u>2,759,038</u>
	<u>872,225</u>	<u>4,914,625</u>	<u>2,769,038</u>

- (l) In the tax computation, the Appellant claimed that it carried on property letting for many years for earning rental income and Shop F was disposed of in the ordinary course of business as the directors required finance for a larger investment project.

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(m) According to the Representatives, in response to enquiries raised by the Assessor:

- i. The gross floor area of Shop F was about 300 square feet and its age was around 20 years old at the time of the acquisition by the Appellant.
- ii. The directors decided to purchase and sell Shop F after their oral discussion. The decisions were not documented in writing.
- iii. The original intention of acquisition of Shop F was for long-term letting. The objective of the Appellant was long-term investment in landed properties to earn steady income. It never intended to purchase Shop F for short-term sale. This was supported by its past activities.
- iv. The Appellant conducted a brief feasibility study. At the time of purchase, the Appellant had excessive cash at bank yielding insignificant interest income. Acquiring Shop F for letting was the proper strategy.
- v. The acquisition of Shop F was financed wholly from the cash held by the Appellant, which was generated upon disposal of Shop J. To increase the investment return, the Appellant only purchased those properties within its financial ability without the need of borrowing.
- vi. The payments for purchasing Shop F were:

	\$	Withdrawn from
Initial deposit	500,000	} Director's personal bank account The Appellant's current account held with Bank L
Further deposit	805,000	
Final payment	11,745,000	
Stamp duty and legal fees	503,735	

- vii. The Appellant acquired Shop F with existing tenancy to save the trouble of seeking tenants. The tenant of Shop F was unrelated to the Appellant. Purchasing a property with tenancy attached would cause delay or troubles on disposal. However, the Appellant preferred to do so as it should be beneficial for an investor who intended to acquire Shop F for letting purpose.
- viii. The Appellant later found the yield from Shop F lower than that from properties of larger size. The Appellant therefore decided to sell Shop F when market became robust in order to

have sufficient fund to exchange for a larger size property.

- ix. The Appellant sold Shop F through Company G. The ultimate buyer was found shortly after the appointment of Company G.
  - x. The sale proceeds of Shop F were placed at the bank to earn interest income and for investment later on. As it was a boom market and property prices were very high, the Appellant was unable to buy another ideal property. It decided to wait for the property market to go down.
  - xi. Part of the sale proceeds of \$15,000,000 placed in fixed deposit was subsequently uplifted and transferred back to the shareholder through Ms A. The remaining sale proceeds of \$3,000,000 was used to repay part of the loan due to the holding company.
- (n) The Representatives provided copies of bill and bank statements in support of the money movement outlined above.
- (o) The Assessor ascertained the following information from Company M, Company N and Company G:

Company M

- i. The computer records of Company M showed, among other things, the following contents in respect of the sale of Shop F:

Date	Contents
06-12-2010	Mrs P sd still for sell ask px 17m
17-01-2011	\$17.50M WILL CONSIDER TO SELL
26-01-2011	P 太話仍放賣\$17.5m
04-03-2011	Mrs P keep asking \$17.5M for sell
29-03-2011	still for sell
02-04-2011	Mrs P said still for sell \$17.5M
20-04-2011	Mrs P said sold out already

- ii. According to Company M's computer records, the contact persons of Shop F as at 30 November 2010 were 'Mrs P', Ms A and Ms D.

Company N

- iii. The computer records of Company N showed, among other things, the following contents in respect of the sale of Shop F:

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Date	Status	Asking Price (M)	Contents
11-12-2010	放賣	17.00	開新聯絡及放售, 11-01-2011 成交
16-12-2010	放賣	17.00	Mrs P sd keep price, t/n until 3/12
27-01-2011	放賣	17.00	Mrs P sd the price still sell \$17M with t/n
01-02-2011	放賣	17.00	Mrs P sd still sell \$17M
30-03-2011	放賣	17.50	P 太話現 1750 萬

- iv. According to Company N's computer records, the contact persons were the same 'Mrs P', Ms A and Ms D.

Company G

- v. Company G sent a letter inviting the Appellant to put up Shop F for sale around 11 April 2011. On 13 April 2011, Ms D contacted Company G by phone and put up Shop F for sale at an initial asking price of \$17,500,000.
- vi. During 13 to 15 April 2011, Company G contacted potential purchasers for Shop F. On 15 April 2011, Mr Q, a director and shareholder of Purchaser H, offered to purchase Shop F at \$16,800,000. Ms D rejected the offer and indicated that the asking price was \$17,500,000 without payment of commission or \$17,700,000 with payment of commission.
- vii. On 16 April 2011, Mr Q went to Company G's office for signing the provisional agreement to purchase Shop F at \$17,700,000. However, Ms D changed the asking price to \$18,000,000. Mr Q eventually signed the provisional agreement to purchase Shop F at \$18,000,000 on the same day.
- (p) The Assessor opined that the profit on the disposal of Shop F should be chargeable to Profits Tax. By a letter dated 7 October 2013, the Assessor explained to the Representatives her views and proposed the Profits Tax Assessment for the year of assessment 2011/12 be revised as follows:

	\$
Adjusted loss per return	(421,082)
Add: Profit on disposal of Shop F	<u>4,135,765</u>
Assessable Profits	<u>3,714,683</u>
Tax Payable thereon	<u>600,922</u>

- (q) The Appellant, via the Representatives, declined the proposed revised Profits Tax Assessment and eventually objected to it. The Deputy Commissioner of Inland Revenue rejected the objection as



per the Determination.

**The issue of this appeal**

4. The issue of this appeal is whether the profits derived by the Appellant from the sale of Shop F is chargeable to Profits Tax.

**The law**

5. We agree with the Respondent's submission and find that the following provisions of the Inland Revenue Ordinance apply to this appeal.

(a) Section 14 provides:

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

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

(c) Section 68(4) provides

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

6. We also agree with the Respondent and find the following cases and the legal principles arisen therefrom apply to this appeal.

(a) Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue [1980] 53 TC 461;

(b) All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750;

(c) Brand Dragon Limited (in members' voluntary liquidation) and other v Commissioner of Inland Revenue (2001) 5 HKTC 502;

(d) Marson v Morton [1986] STC 463;

(e) Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51;

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- (f) Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433; and
- (g) Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Limited [1964] HKLR 224.

7. According to Simmons, trading ‘requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock – and, I suppose, vice versa... What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It must be one or other...’ (per Lord Wilberforce at page 491).

8. In Brand Dragon, Chu J held at pages 528 and 529:

‘18. It is common ground that the relevant intention is that of the appellants. But given that the appellants are not natural persons, their intention can only be inferred and defined from the acts and intention of their controlling minds...’

19. In my view, it must be permissible for the Board to look at the intentions and acts of its controlling minds in ascertaining the purpose and intention of a corporation...’

9. Mortimer J in All Best Wishes at page 771 stated:

‘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 realizable, 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.’

10. The Court of Final Appeal decision in Lee Yee Shing echoed this. Bokhary

and Chan PJJ ruled at paragraph 38 that the question whether something amounts to the carrying of a trade *'is a question of fact and degree to be determined by the fact-finding body upon a consideration of all the circumstances.'* In the words of McHugh NPJ in paragraph 56 to 60, the intention to trade to which Lord Wilberforce referred in Simmons is not subjective, but objective and it requires an examination of all the circumstances to see whether the *'badges of 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 an asset of that class?
- (h) has conceded an actual intention to resell at a profit when the asset or commodity was acquired?
- (i) has purchased the asset or commodity for personal use or pleasure or for income?

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

11. This list coincides much with the one in Marson v Morton [1986] STC 463:

- (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?
- (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?

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- (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 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?

Apart from repeatedly stressing that the list was not comprehensive and no single item was in any way decisive, Sir Nicolas Brown-Wilkinson V-C said, at page 471, that *'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... was this an adventure in the nature of trade?'* Alternatively, one may ask, *'was the taxpayer investing the money or was he doing a deal?'*

12. In Real Estate Investments (NT) Limited, Bokhary and Chan PJJ opined that the list offered in Marson v Morton is no less helpful in Hong Kong than it is in the United Kingdom. The judges held, at page 452, that the question of whether property is trading stock or capital asset is always answered upon a holistic consideration of the circumstances of each particular case.

13. On the taxpayer's burden of proof, Bokhary and Chan PJJ first said, at page 445, that it *'is natural and appropriate to strive to decide on something more satisfying than the onus of proof'*. However, they also acknowledged that tax appeals do begin on the basis of section 68(4) and so *'it is possible although rare for such an appeal to end – and be disposed of – on that basis'*. The judges further held, at page 450, that the *'taxpayer will have to prove his contention'* and so *'his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X [which is the footing on which the tax assessment is made]. And it would likewise fail if the Board merely determines that he has not proved his contention'* that the property was capital asset. This means that no appeal by the taxpayer could succeed unless the court is of the view that the true and only reasonable conclusion is that the position is what the taxpayer contends.

14. In ex parte Herald International Limited, Blair Kerr J summarized, at page 237, what this Board needs to do:

*‘The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive.’*

In other words, the question is: ‘Did the Commissioner get the correct answer’; not ‘did the Commissioner get the correct answer by the wrong method’.

### **The Appellant’s Grounds of Appeal**

15. In the statement of the grounds of appeal, the Appellant claimed that:
- (a) It had not carried on a trade and the intention to purchase Shop F was for long-term investment. Shop F was subsequently disposed of due to changes in environment.
  - (b) The Commissioner of Inland Revenue had not provided concrete evidence to support that the Appellant purchased Shop F with an intention for sale. In contrast, the Appellant’s history revealed that it had never purchased property for sale.
  - (c) The Commissioner relied on the short interval between purchase and sale to support his conclusion. However, many factors would affect the decision for sale. The history and the subsequent events confirmed that the Appellant had never carried on trading business.

### **The Appellant’s submission at the hearing**

16. The Appellant provided a bi-lingual written skeleton. Ms A made the oral submission, not following closely the skeleton.

17. First, Ms A claimed that she often had headaches and suspected a possible reoccurrence of cysts in her brain around 2009 but said that there was no contemporary medical proof available in support. She had provided, instead, the four radiological reports mentioned in paragraph 2 above.

18. Second, Ms A said that after disposing of Shop J, she had cash and would prefer to have a more ‘front-lined’ property. Moreover, she did exercise at Park R and so considered Shop F that was nearby fitting the bill well. However, according to Ms A, soon after she signed the agreement for purchase of Shop F, she realized that Shop F was too small and the existing tenant did not open Shop F for business until early afternoon. She had in mind to change hands and looked for a replacement for better yield to maintain a continuing stream of income for her living but she also said that when estate agents first approached her, in December 2010, she just casually offered an asking price in order to avoid further calls.

19. The written skeleton referred to the historical background of the Appellant,

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first by stating its purpose being property letting for earning income, followed by its record of never been considered trading in properties by the Inland Revenue Department except in this case. The skeleton also revealed the property transactions of the Appellant in chronological order.

20. The written skeleton then referred to the death of one of the directors of the Appellant in 2007. That director was Ms A's deceased husband. While Ms A, as the surviving director, attempted to maintain the Appellant's business, she decided to downsize it as from 2011/12. In other words, the written skeleton suggests that the reason for selling Shop F was part and parcel of the downsizing strategy. It also included the health of the management as another reason. The skeleton added that because of these reasons, the Appellant changed its intention from holding Shop F to selling it. Since the value at the time of the change of intention was approximately the same as the actual sale proceeds, the Appellant made no profit.

21. The Appellant also accused the Respondent of:

- (a) having picked up only the present case to rule that it changed its activities to trading in property;
- (b) not having provided any similar information and record obtained from the estate agent in connection with the Appellant's purchase of Shop F;
- (c) not having provided any concrete evidence to prove that the Appellant had an intention to trade at the time of its purchase of Shop F.

### **Analysis**

22. Its statement of the grounds of appeal referred to 'change of environment' with no specific detail nor elaboration. The downsizing strategy of the Appellant and the health of the management mentioned in the written skeleton and the claims made in Ms A's oral submission that Shop F (and the sitting tenant) were not as satisfactory as expected might (or might not) fall within this phrase. However, the phrase is by no means wide enough to embrace 'change of intention' of the Appellant. The representatives of the Respondent challenged this as a new ground. The Appellant did not make any application under section 66(3) of the IRO at any relevant time. In any event, a self-serving statement of intention by the taxpayer is not sufficient to establish such a change. On the same token of Simmons, such change of intention must be established with reference to all relevant circumstances.

23. It is clear from section 68(4) of the IRO that the onus of proving that the revised 2011/12 Profits Tax Assessment on the Appellant is excessive or incorrect is on the Appellant. The Respondent does not bear the burden of proof on anything. Several decisions of this Board have held that by not calling any witness to give evidence, albeit self-serving, and subject to cross-examination at the hearing may prompt the hearing panel

to draw adverse inferences against the taxpayer in appropriate circumstances, particularly where the taxpayer is in the best position to provide relevant information and chooses not to do so. The Representative wrote in for and on behalf of the Appellant before the hearing, clearly indicated that the Appellant would not call any witness; and indeed the Appellant did not call any. Accompanied by Mr Cheung, Ms A only gave oral submissions but did not go to the witness box to swear and give evidence.

24. The four radiological reports (paragraph 2 above) served little, if any, purposes. These reports, all dated after the provisional agreement for sale of Shop F by the Appellant, did not convey any serious and worrying concerns. In the first one, the doctor doubted if there was any significance to act in the diagnosis and did not think to be able to offer any definitive diagnosis. He proposed another simple scan. In the second one, the doctor observed no change. In both the third and the fourth reports, the doctor opined that the situation was stable and found nothing abnormal.

25. As to Ms A's claim that the decision to purchase Shop F turned out to be a wrong one, we have considered and accept the Respondent's submissions. The Appellant decided to purchase Shop F after conducting a brief feasibility study. The Appellant has acknowledged the fact that Shop F came with an existing tenancy would save them from the trouble of seeking new tenants. It was also clear to the Appellant that it was within its financial capability without the need of borrowing to purchase Shop F. As the Respondent submitted, the Appellant apparently had considered the rental yield of Shop F before its commitment to purchase. It had also taken into account its financial position before purchasing Shop F, the size of which should have been known by the Appellant. We agree with the Respondent's submission that it is inconceivable that Shop F's size as well as the rental yield then became the reasons for its sale of Shop F in December 2010, just about a month after the signing of the provisional agreement for purchase. The Appellant did not provide how, when and by whom it found the yield of Shop F was lower than that from properties of a large size and the details of those properties that it had considered before it decided to sell Shop F. Neither could the Appellant provide details of its efforts in seeking such a replacement property at the relevant time.

26. The Appellant also sought to argue that the sale of Shop F was part of its downsizing strategy as from 2011/12. However, we do not see how this can assist the Appellant's case. In correspondence with the Assessor in March 2017 (which the Determination also made reference to and a copy of the letter was among the hearing bundle), the Appellant, via the Representative, agreed that the real purpose of the disposal of Shop J in 2010 was to reduce the management burden on Ms A. The purchase of Shop F about three months later in November 2010 at the very first place as another long-term investment did not seem to be consistent with that strategy.

27. The Appellant is right to say that in quite many sale and purchase of property transactions that it involved, profits of none except those for this case have been chargeable to Profits Tax. However, we agree with the Respondent that the Appellant's intention of acquiring those other properties cannot be attributed to Shop F. After all, only the Appellant's intention of acquiring Shop F as objectively assessed is relevant for this case. Even if those other transactions did not amount to trading, a single one-off

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transaction can be ‘an adventure in the nature of trade’.

28. The length of the period during which a taxpayer has held an asset before disposal is always a relevant factor. The Appellant had held Shop F for less than 7 months if we count from the date of the assignment of the purchase to that of the subsequent sale. We find the holding period short and such a short holding period is a strong indicator towards trading.

29. The fact that the Appellant made Shop F available for sale indeed before the execution of the assignment of the purchase has further weakened the Appellant’s case. Information from Company M and Company N both showed that Shop F was offered for sale in December 2010, even before Shop F was assigned to the Appellant in January 2011. Ms A said that she offered an asking price in order to stop the estate agents from further calling. We find, however, that it would have been more consistent with the alleged intention of the Appellant if the Appellant had not responded or told the estate agents categorically and unequivocally that Shop F was not for sale.

30. Furthermore, the information provided by Company M showed that the Appellant revised the asking price upward, from initially \$17 million to subsequently \$17.5 million as early as in January 2011. The same asking price appears from the record of Company N by the end of March 2011, before Company G came into play in April 2011.

31. When Company G managed to engage a willing purchaser, the Appellant further revised the asking price to \$17.5 million without payment of commission or \$17.7 million with payment of commission. On the edge of signing the provisional agreement to sell Shop F at \$17.7 million, the Appellant adjusted the asking price again to \$18 million and eventually agreed to sell Shop F at that consideration.

32. We agree with the Respondent’s submission that these actions taken by the Appellant, including its quick offer for sale even before the assignment and active pursuit of a higher price afterwards contradict the Appellant’s alleged intention of acquiring Shop F for long-term investment.

33. The fact that the Appellant purchased Shop F and sold it afterwards with the same existing tenant producing rental income is at best only a neutral factor. According to Real Estate Investments, this, even together with a long holding period, will shed little, if any, light on whether the property concerned is trading stock or capital asset.

34. According to Lee Yee Shing, borrowing for acquisition is usually a neutral factor either. In a worse case, it may even backfire in the sense that no borrowing for acquisition means no liability for any penalty interest for a quick disposal.

35. We also agree with the Respondent’s submission that whether the Appellant had subsequently succeeded in purchasing a replacement property, how it dealt with the proceeds of sale of Shop F and whether the Appellant subsequently sold its other properties have no bearing to this case.



**Conclusion**

36. Upon a holistic consideration of the circumstances of the case, and particularly in light of the commonly known badges of trade, we find that the Appellant acquired Shop F for trading purposes. Further or alternatively, we find that the Appellant has failed to discharge its burden of proof under section 68(4) of the IRO so as to convince us to draw a conclusion that Shop F was acquired as a capital asset.

37. Accordingly, we dismiss this appeal and confirm the revised Profits Tax Assessment as set out in paragraph 3(p) above.