Case No. D58/09

Profits tax – trade – resumption of land acquired – sections 2(1), 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Kelly Wong Yuen Hang and David Yip Sai On.

Date of hearing: 26 November 2009.
Date of decision: 19 March 2010.

The appellant acquired certain pieces of agricultural land ('the Agricultural Land') in 1993. Over the years, it made various applications to the Town Planning Board for rezoning the land to accommodate proposed residential developments. In 1999, part of the Agricultural Land was resumed by the Government. Compensation was paid to the appellant for the resumption of the resumed portion of the Agricultural Land. The assessor assessed the appellant's gain from the acquisition and resumption of the resumed portion to profits tax.

The appellant objected to the assessment and claimed that it acquired the Agricultural Land with the intention to hold it as a long term investment and as land bank for capital gain. In its grounds of appeal, it argued that the reasons given by the Deputy Commissioner of the Inland Revenue in confirming the assessment were erroneous.

Held:

1. The appellant's approach as formulated in the grounds of appeal is misconceived. Whether the Commissioner gave correct reasons for his determination is a matter of historical interest. The Board considers the matter *de novo* to decide whether the assessment appealed against is shown by the taxpayer to be incorrect or excessive. (Section 68(4) of IRO; Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213; Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433; and Shui On Credit Company Limited v Commissioner of Inland Revenue (2009-10) IRBRD, vol 24, 589 applied).

2. The subject property in this case is the Agricultural Land. Apart from any town planning restrictions, it is clear that the lease conditions restricted the user to agricultural use. There is no allegation that the appellant acquired the Agricultural Land for farming.

3. The appellant's allegation is that it was hoped that the Agricultural Land would be rezoned and the price of the Agricultural Land would increase. In the event of the land being rezoned, the owner had an option of disposing of the land or developing it. In the event of a development, the owner had an option of long term holding for rental income or selling individual units in the development. Increase in price in the Agricultural Land would not be relevant unless the Agricultural Land was sold or unless the units in the development on it were sold. What is conspicuous in its absence in this case is any allegation about the appellant's intention to develop for rental income in the event of any rezoning. On the contrary, from the appellant's own assertions, the proposed residential developments did not represent what the appellant intended.

4. In the circumstances, the appellant has not discharged the burden of proving that the Agricultural Land was an investment asset. (Simmons v IRC [1980] 1 WLR 1196; Marson v Morton [1986] 1 WLR 1343; All Best Wishes Limited v CIR (1992) 3 HKTC 750; and Lee Yee Shing v The Commissioner of Inland Revenue (2008) 11 HKCFAR 6 applied).

5. The Board also considers the badges of trade summarised by McHugh NPJ in Lee Yee Shing. Upon a holistic consideration of the circumstances of this particular case, the Board concludes that the appellant was doing a deal in the hope of the Agricultural Land being rezoned, in other words, it carried on an adventure in the nature of trade and acquired the Agricultural Land as a trading stock.

Appeal dismissed.

Cases referred to:

Kim Eng Securities (Hong Kong) Ltd v CIR (2007) 10 HKCFAR 213
Wing Tai Development Co Ltd v CIR [1979] HKLR 642
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Shui On Credit Company Limited v Commissioner of Inland Revenue (2009-10) IRBRD, vol 24, 589
Simmons v IRC [1980] 1 WLR 1196
Marson v Morton [1986] 1 WLR 1343
All Best Wishes Limited v CIR (1992) 3 HKTC 750
Lee Yee Shing v The Commissioner of Inland Revenue (2008) 11 HKCFAR 6

Taxpayer represented by the director and general manager of its ultimate holding company.
Yip Chi Chuen and Chan Man On for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The appellant is a shelf company. By an agreement dated 29 September 1993, the appellant agreed to acquire certain pieces of agricultural land for $68,000,000. The acquisition was completed in March 1994.

2. 2 directors of the appellant were co-owners of some adjacent pieces of land.

3. In December 1998, the Chief Executive in Council decided that certain pieces of land which included part of the agricultural land should be resumed. In March 1999, the resumed portion reverted to the State.

4. In December 1999, the appellant indicated its acceptance of the Government's offer of $14,337,648 as compensation for the resumption of the resumed portion.

5. The assessor assessed the appellant's gain of $5,907,554 from the acquisition and resumption of the resumed portion to profits tax.

6. The appellant, having objected without success, appealed against the assessment and the determination.

The agreed facts

7. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 3 June 2009 whereby the profits tax assessment for the year of assessment 1999/2000 under charge number X-XXXXXXX-XX-X, dated 28 February 2006, showing assessable profits of $5,896,780 with tax payable thereon of $943,484 was confirmed.

8. Subject to some minor amendments which have been incorporated in this section, the appellant agreed the statement of facts in paragraph 1 of the Determination under the heading of 'Facts upon which the Determination was arrived at' and we find them as facts, see paragraphs 9 to 26 below.

9. The appellant has objected to the profits tax assessment for the year of assessment 1999/2000 raised on it. The appellant claims that the profits derived from the resumption of certain pieces of land by the Government of the Hong Kong Special Administrative Region ('HKSAR') were capital in nature and should not be chargeable to profits tax.

10. The appellant was incorporated in Hong Kong as a private company on 17 September 1992. At the relevant times, the directors and shareholders of the appellant were as follows:

	No. of shares held at $1 each	
Shareholder	7-9-1993 to 12-5-1994	Since 13-5-1994
Shareholder1	6	5,584
Shareholder2	4	3,723
Shareholder3	-	693
	10	10,000
Director	Appointment date	Resignation date
Director1	12-11-1992	-
Director5	31-8-1993	-
Director6	31-8-1993	-
Director2	31-8-1993	18-5-1998
Director3	31-8-1993	18-5-1998
Director4*	9-5-2000	-
Director7	9-5-2000	-

* Director4 passed away [in] February 2005

An unlisted company incorporated in Hong Kong was the ultimate holding company ('Ultimate Holding Company') of the appellant. The appellant made up its accounts to 31 March annually.

11. By an agreement for sale and purchase dated 29 September 1993, the appellant agreed to acquire certain pieces of agricultural land 'the Agricultural Land' at a consideration of $68,000,000. The purchase was completed on 29 March 1994.

12. At the relevant times, the late Director4 and Director1 were the co-owners of certain pieces of adjacent land known as 'the Adjacent Land'.

13. By a Gazette Notice [number omitted here] [in December] 1998, it was announced that the Chief Executive in Council had decided that certain pieces of land which included part of the Agricultural Land and part of the Adjacent Land, were required for a public purpose and that the Chief Executive of the HKSAR had ordered that such land should be resumed and revert to the Government of the HKSAR on the expiration of three months from the date of affixing of the notice to the land.

14. Particulars of the Agricultural Land to be resumed (collectively 'the Resumed Portion') were as follows:

Location	Area		
	Square metres	/	Square feet
[Lot No. omitted here]	1,254.6		13,504
[Lot No. omitted here]	242.8		2,614
[Lot No. omitted here]	1,092.6		11,761
[Lot No. omitted here]	1,431.7		15,411

15. (a) By a letter [in January] 1999, the Director of Lands gave notice to the appellant that the Resumed Portion would revert to the Government of the HKSAR [in March] 1999 and that the appellant had a right to compensation under section 6 of the Lands Resumption Ordinance. In order to expedite payment to the appellant, the Government offered to make compensation in the sum of $14,337,648 calculated at the rate of $331.20 per square foot in full and final settlement of all and any claims which the appellant might have in respect of the resumption of the Resumed Portion.

(b) By a joint letter dated 8 February 1999, the appellant together with Director1 and the late Director4 notified the District Lands Office, inter alia, that they had decided not to accept the compensation offer in respect of the resumption of their land in the Agricultural Land and the Adjacent Land and that the resumption would have a negative impact on the access to their other land contiguous thereto.

(c) [In March] 1999, the Resumed Portion reverted to the State for the use of the Government of the HKSAR. By a letter dated 8 April 1999, the Director of Lands offered the appellant again the compensation of $14,337,648 in full and final settlement of all claims, costs and demands which the appellant might have in connection with the land resumption.

(d) [In December] 1999, the appellant through its representative returned to the District Lands Office a letter of acceptance signifying its acceptance of the Government's offer and its agreement to the terms as stated in the previous offer letter.

16. Pursuant to the letter of acceptance referred to in paragraph 15(d), the Director of Lands and the appellant executed an Agreement as to Compensation and Indemnity in respect of Land or Section of the Land Resumed whereby the two parties had agreed to the payment of $14,337,648 as compensation in respect of the resumption of the Resumed Portion.

17. (a) On 8 February 2006, the appellant filed its Profits Tax Return for the year of assessment 1999/2000 together with the audited accounts and proposed tax computation. In the Return, the appellant described its principal business activity as property investment and declared an adjusted loss of $10,774. In arriving at the loss figure, the appellant excluded from assessment a disposal gain of $5,907,554 derived from the resumption of the Resumed Portion.

(b) The gain was computed as follows:

Compensation received (paragraph 16)	$14,337,648

Less: Allowable expenditure*		
Purchase consideration	$7,969,600	
Legal fee on acquisition	22,162	
Stamp duty	216,820	
Consultancy fee paid	221,512	8,430,094
Gain on disposal		$5,907,554

* Apportionment was made on the basis of site area.

(c) The balance sheet of the appellant as at 31 March 2000 showed, inter alia, the following particulars which included the comparative figures for the preceding year:

	2000	1999
NON-CURRENT ASSETS	$	$
Fixed assets	63,680,345	71,929,123
CURRENT LIABILITIES (extract)		
Amount due to ultimate holding company	40,228,724	40,150,243
Amounts due to shareholders companies	31,883,351	31,803,282

(d) Notes on the appellant's 1999/2000 financial statements contained, inter alia, the following:

(i) Fixed assets – Land held for development

Cost	$
As at 31/03/1999	71,929,123
Consultancy fee capitalised	181,315
Disposals	(8,430,093)
As at 31/03/2000	63,680,345
Accumulated depreciation	
As at 31/3/1999 and 31/3/2000	-
Net book value	
As at 31/03/2000	63,680,345
As at 31/03/1999	71,929,123

(ii) The amount due to ultimate holding company was unsecured, interest free and had no fixed terms of repayment.

(iii) The amounts due to shareholders companies were unsecured, interest free and had no fixed terms of repayment.

18. On 28 February 2006, the assessor raised on the appellant the following 1999/2000 profits tax assessment to assess the gain on disposal of the Resumed Portion to tax:

Loss per Return [paragraph 17(a)]	($10,774)
Add: Gain on disposal of land [paragraph 17(b)]	5,907,554
Assessable profits	$5,896,780
Tax payable thereon	$943,484

In his notes to the assessment, the assessor explained that the above assessment was issued due to the 6-year statutory time limit. The appellant was invited to lodge an objection should it feel aggrieved by the assessment.

19. The appellant objected against the 1999/2000 profits tax assessment on the ground that the assessment had erroneously included a capital gain of $5,907,554. In amplification of its ground of objection, the appellant stated the following (written exactly as in the original):

(a) '[The appellant] acquired [the Agricultural Land] situate at ... in or about year 1993 as a long term investment and as land bank. [The Agricultural Land] is for agricultural use and currently zoned for village type development and open space. [The Agricultural Land] can be used for property development purpose only if the same is rezoned by the Town Planning Board. It is not sure whether [the Agricultural Land] will be rezoned. It is also not sure that, even if [the Agricultural Land] will be rezoned, whether the new zoning will allow for property development and when the rezoning will be made.'

(b) 'Part of [the Agricultural Land] was compulsorily resumed by the Government in or about year 2000. This resumption gave arise the capital gain of 5,907,554 shown in the appellant 1999/2000 profits tax computation.'

20. In response to the assessor's enquiries, the appellant replied as follows (written exactly as it stands in the original):

(a) 'The land was compulsorily resumed by the Government in spite of our objection, there was no sale and purchse;'

(b) 'The land was not subject to any tenancy when the same was compulsorily resumed by the Government;'

(c) 'The land was acquired for long term holding as land bank;'

(d) 'There was no development on the land and therefore no redevelopment thereon was possible. As stated in our [notice of objection], the land could not be used for development purposes until and unless the same was rezoned for residential development by the Town Planning Board;'

(e) 'The land was acquired with the hope that [it] would be rezoned for residential development by the Town Planning Board;'

(f) 'The acquisition of the land was financed 100% by shareholders;'

(g) 'The land was vacant during the entire period of ownership because it was held as land bank with the hope that the same would be rezoned for residential development by the Town Planning Board;'

(h) 'The amount of the Statutory Compensation was determined unilaterally by the Government;'

(i) 'The compensation money was used to repay shareholders' loans;'

(j) 'There was no previous history of property transaction (other than the acquisition of the land compulsorily resumed by the Government and the land being held for long term as land bank in one transaction in or about 1993) on the part of the Company;'

21. The assessor was of the view that the gain was chargeable to tax. By the letter dated 2 February 2007, the assessor explained to the appellant that its objection could not be accepted having regard to the following matters:

(a) The acquisition of the Agricultural Land was financed by borrowing obtained from the shareholders. There was no information in relation to the financial position of the shareholders as well as his/her ability to provide the finance to the appellant on a long-term basis. More importantly, the borrowing from the shareholders companies and the ultimate holding company were classified under current liabilities in the appellant's accounts.

(b) Notwithstanding the claim that the Agricultural Land was acquired for long term holding as land bank, no detailed building plan or feasibility study had ever been done.

22. In response to the assessor's letter at paragraph 21, the appellant claimed as follows (written exactly as it stands in the original):

(a) 'The Company has been holding the Agricultural Land for almost 14 years, yet you come to view that there is no evidence the Company **was** financially capable of holding the same on a long-term basis. If a period of 14 years is [not] taken as long term, what period will be so taken?'

(b) 'Amounts due to shareholders, like share capital, are amounts invested in the Company by its shareholders. The same are quasi capital but not commercial debts. We have never seen any commercial debts which,

like the shareholders loans, are unsecured, interest free, have no fixed terms of repayment, having been outstanding for almost 14 years and will continue to be outstanding for an indefinite period.'

(c) 'The amounts due to shareholders have been outstanding for almost 14 years and yet you come to the view that you are not sure that the shareholders have the ability to provide finance to the Company on a long term basis.'

(d) 'We are puzzled by your comment that no detailed building plan or feasibility study has ever been done for the land bank. By definition, land bank is raw land held as raw land on a long term basis. If you are minded to make enquiry with your colleagues in the Town Planning Department, they will confirm to you that the Agricultural Land cannot be used for development purposes under its current zoning. In the circumstances, what feasibility should be done? Why detailed building plan have to be done?'

(e) 'The Company has not made any attempt to market or sell the Agricultural Land during the entire ownership period.'

(f) 'The Company lodged an objection against the proposed resumption.'

(g) 'In spite of the Company's objection, the land concerned was reverted to the State for the use of the Government of the HKSAR [in March], 1999.'

(h) 'In the circumstances, the Company had no alternative but to accept the compensation money offered by the Lands Department.'

(i) 'Although the Chief Executive in Council decided in 1998 that the land concerned was required for a public purpose, the same has remained vacant for 8 years since the resumption.'

(j) 'We expect that [the Agricultural Land] would be rezoned for residential development by the Town Planning Department because, in our view, the small house policy cannot sustain and the existing "open space" zoning is inappropriate.'

23. The assessor had since ascertained the following information regarding the appellant's shareholders and directors:

(a) Shareholder1 was incorporated in Hong Kong as a private company on 18 May 1982. At the relevant times, it was a wholly owned subsidiary of the Ultimate Holding Company. The principal activity of Shareholder1 was nominee services.

(b) Shareholder2 was incorporated in Hong Kong as a private company on 15 April 1993. At the relevant times, its shareholders and directors were as follows:

	No. of shares held at $1 each		
Shareholder	27-8-1993 to 14-12-1993	15-12-1993 to 25-6-1997	Since 26-6-1997
Offshore Company1	1	-	-
Offshore Company2	1	1	-
Offshore Company3	-	1	-
Offshore Company4	-	-	1
Offshore Company5	-	-	1
	2	2	2
Director			
Director2	First director appointed on 27 August 1993 and resigned on 10-6-1997		
Director3	First director appointed on 27 August 1993 and resigned on 10-6-1997		
Director8	Appointed on 10-6-1997		
Director9	Appointed on 10-6-1997		

Since 10 June 1997, the registered office of Shareholder2 had been situated at [address omitted here].

(c) Shareholder3 was incorporated in Hong Kong as a private company on 15 October 1991. At the relevant times, the late Director4 held 99 out of the 100 shares of $1 each issued by Shareholder3. The remaining 1 share was held by a shareholder of Shareholder3. The late Director4 and the other shareholder of Shareholder3 were the only two directors of Shareholder3.

(d) The late Director4 was the chairman of 3 listed companies (ListCo1, ListCo2 and ListCo3) whose shares are listed on The Stock Exchange of Hong Kong Limited.

(e) Director1 is the chairman of the Ultimate Holding Company and another company, a listed company ('ListCo4'). The shares of ListCo4 are listed on The Stock Exchange of Hong Kong Limited.

24. In response to the assessor's further enquiries and invitation for its comment on a draft Statement of Facts, the appellant stated the following (written exactly as in the original):

(a) 'Each of the late [name omitted here], the late Director4 and 2 of their friends acquired 1/4 interest in [the Adjacent Land] in or about 1960s. Subsequent to such acquisition, the late Director4 acquired the interests of the 2 friends in the Adjacent Land and the late [name omitted here] transferred his interest in the Adjacent Land to his son, Director1. As a result thereof, Director1 and the late Director4 are interested in 25% and 75% of the Adjacent Land respectively.'

(b) 'The Adjacent Land is adjacent to, of the same user (i.e. agricultural use) of and subject to similar zoning (i.e. village type development and open space) to, the Agricultural Land. As the Adjacent Land cannot be used for property development purpose, the same was held as land bank for decades.'

(c) 'In or about 1993, Director2 told Director1 that the Agricultural Land might be available for sale. Director1 and Director2 shared the same view that the open space zoning of the Adjacent Land and the Agricultural Land was inappropriate and should be changed. They also held the view that the small house policy is not sustainable in the long run because there will not be sufficient land in Hong Kong to meet the unending small house requirements of male descendants of the indigenous villagers and, if the small house policy is not abolished, the Government may have to give the female descendants of indigenous villagers the right same as their male counterparts. If the small house policy is abolished, the Adjacent Land and the Agricultural Land will be rezoned.'

(d) 'It was not sure when the small house policy would be abolished and when the Adjacent Land and the Agricultural Land would be rezoned. Nonetheless, it was expected that it would take years, if not decades, for the Government to abolish the small house policy and the rezoning. It was also not sure whether the Adjacent Land and the Agricultural Land, if rezoned, would be rezoned for residential development purposes. However, if the Adjacent Land and the Agricultural Land are rezoned for residential development purposes, the value of thereof will increase substantially. Furthermore, the Adjacent Land and the Agricultural Land together can create a critical mass which will further enhance the value thereof. Director1 and Director2 agreed to form a joint venture to acquire the Agricultural Land as a long term investment and as land bank for capital gain. The Company is the vehicle of such joint venture. As the intention towards the Agricultural Land was formed before the use of the Company as the joint venture vehicle, there are no written minutes of the directors' meeting recording such intention.'

(e) 'The Company had, in conjunction with, inter alios, Director1 and the late Director4, applied to the Town Planning Board for rezoning, inter

alia, the Adjacent Land and the Agricultural land for residential development purposes.'

(f) 'There were four rezoning applications made to the Town Planning Board. The first rezoning application was made on 30 December 1993. By the letter of the Town Planning Board dated 5 May 1994, the first rezoning application was rejected. The second rezoning application was made on 10 August 1998. This application was subsequently withdrawn on 20 March 2002. The third rezoning application was made on 4 June 2002. By the letter of the Town Planning Board dated 25 July 2003, the third rezoning application was rejected. The fourth rezoning application was made in March 2004. By the letter of the Town Planning Board dated 18 February 2005, the fourth rezoning application was rejected.'

(g) 'To [the appellant's] best information and knowledge, Director2 and Director3 were business partners and [Shareholder2] was controlled by them when the Company acquired the Agricultural Land.'

25. In response to the assessor's request, the Town Planning Board provided the following information:

(a) The letter of request dated 30 December 1993 made by [the then representative] for rezoning of various lots in Demarcation District No. … from 'Village Type Development' to 'Residential (Group B)' and the Planning Statement ('the 1993 Planning Statement') which accompanied the application.

(b) The letter of request dated 10 August 1998 made by the then representative for rezoning of various lots in Demarcation District No. ... from 'Village Type Development', 'Open Space' and 'Green Belt' to 'Comprehensive Development Area' and the Planning Statement ('the 1998 Planning Statement') which accompanied the application.

26. (a) According to the 1993 Planning Statement, the rezoning request was to facilitate the implementation of a private residential development in Demarcation District No. ... The private land consolidated for the proposed development included, inter alia, the Agricultural Land and the Adjacent Land, as follows:

Lot No.	Area (square feet)	Status of land use
Part of Adjacent Land^	11,761.20	Agricultural
Part of Adjacent Land^	6,969.60	Agricultural
Part of Adjacent Land^	1,742.40	Agricultural
Part of Agricultural Land*	13,503.60	Agricultural
Part of Agricultural Land*	2,613.60	Agricultural

Part of Agricultural Land*	11,761.20	Agricultural
Other land	1,196.00 16,830.00	House Agricultural
Part of Adjacent Land^	27,442.80	Agricultural
Other land	56,897.00	Agricultural
Other land	5,060.00	Agricultural
Part of Adjacent Land^	2,000.00	Agricultural
Part of Adjacent Land^	871.20 75,794.40	House Agricultural
Part of Adjacent Land^	144,619.20	Agricultural
Part of Agricultural Land*	341,510.40	Agricultural
Part of Adjacent Land^	8,712.00 871.20	Agricultural House
Part of Adjacent Land^	11,325.60	Garden
Total area	741,481.40	

* The Agricultural Land owned by the appellant (paragraph 11)

^ The Adjacent Land commonly owned by Director1 and the late Director4 (paragraph 12)

The proposed private residential development consisted of 18 residential blocks each with 12 storeys with the following details:

No. of units	:	1,680
No. of car parking spaces	:	1,680 (1 for each unit)
Average flat size	:	Type A (93 m^2) and Type B (81 m^2)
Open space provisions		
Active recreational and club house facilities	:	8,000 m^2
Ground level open space	:	10,000
Podium level open space	:	5,000
Sky garden	:	1,000
Public open space	:	16,000 40,000 m^2

(b) According to the 1998 Planning Statement, the rezoning request was to facilitate the implementation of a comprehensive development comprising private residential blocks and village type housing as well as a large public garden. The proposal was a revised one incorporating changes and improvement to address concerns raised on the previous rezoning request in December 1993. The private land consolidated for the proposed comprehensive development area was as follows:

Lot No.	Area (square feet)	Status of land use

Part of Adjacent Land	11,761.20	Agricultural
Part of Adjacent Land	6,969.60	Agricultural
Part of Adjacent Land	1,742.40	Agricultural
Part of Agricultural Land	13,503.60	Agricultural
Part of Agricultural Land	2,613.60	Agricultural
Part of Agricultural Land	11,761.20	Agricultural
Other land	1,196.00 16,830.00	House Agricultural
Part of Adjacent Land	27,442.80	Agricultural
Other land	56,897.00	Agricultural
Additional Land#	9,453.00	Agricultural
Other land	5,060.00	Agricultural
Additional Land#	5,067.00	Agricultural
Part of Adjacent Land	2,000.00	Agricultural
Part of Adjacent Land	871.20 75,794.40	House Agricultural
Part of Adjacent Land	144,619.20	Agricultural
Part of Agricultural Land	341,510.40	Agricultural
Part of Adjacent Land	8,712.00 871.20	Agricultural House
Part of Adjacent Land	11,325.60	Garden
Additional Land#	700.00	House
Additional Land#	700.00	House
Additional Land#	700.00	House
Total area	758,101.40	

Additional land included since the last rezoning request in 1993.

The proposed private residential development consisted of 5 blocks each with 13 storeys with details as below:

No. of units	:	442
No. of private car parking spaces	:	688 (including 25 visitors' parking spaces)
No. of parking spaces for motorcycles	:	37
Average flat size	:	107.8 m^2
Recreation facilities	:	Club house with outdoor swimming pool, sitting area, fitness room, aerobic/dancing room, children games room and outdoor children play area
Open space within development area	:	27,515 m^2 (including 7,481 m^2 to be open for public use)

The grounds of appeal

27. The notice of appeal signed by the director and general manager ('Barrister-CPA') of the Ultimate Holding Company who is qualified as a barrister and certified public accountant reads as follows (written exactly as it stands in the original):

> 'TAKE NOTICE THAT the undersigned [the "Taxpayer"] does hereby respectfully lodge an appeal against the written Determination of the Deputy Commissioner of the Inland Revenue [the "DCIR"] dated June 3, 2009 [the "Determination"] in respect of the Profits Tax Assessment for the Year of Assessment 1999/2000 on the Taxpayer [the "Assessment"] whereby it was determined that the Assessment (which charged a capital gain in the amount of $5,905,554.00 as a result of compulsory resumption of the Resumed Portion [the "Capital Gain"] to Profits Tax) was confirmed.
>
> FOR AN ORDER that the Assessment be annulled.
>
> TAKE FURTHER NOTICE THAT the grounds of appeal are as follows:
>
> (1) The Assessment erroneously charged the Capital Gain to Profits Tax contrary to the provisions of Section 14(1) of the Inland Revenue Ordinance, Cap 112.
>
> (2) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that the Taxpayer has not adduced any concrete evidence or contemporaneous documents to show that the proposed residential development on the Agricultural Land was intended to be held for long-term investment purposes instead of for sale. The proposed residential developments are proposals made solely for the purpose of rezoning requests and are irrelevant to the Taxpayer's intention behind the acquisition of the Agricultural Land. For the purpose of rezoning requests, there is no requirement for the applicants to state in the planning statements whether the proposed developments will be held for long-term investment purposes or for sale.
>
> (3) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that there is a lack of evidence to show that the Taxpayer and the other land owners shared a common intention of developing the proposed residential project for long-term investment purposes. The proposed residential developments are proposals made solely for the purpose of rezoning requests and are irrelevant to the Taxpayer's intention behind the acquisition of the Agricultural Land. The Taxpayer and the other land owners were de facto controlled by [Director4 and Director1] at the material times. [Director4 and Director1] had held the Adjacent Land for decades.

(4) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that taking into account the natural of the proposed development as a joint venture of various parties and having regard to the parties involved, it would seem likely that the residential development on the land concerned was intended for sale at a profit than for long-term rental prospects. It is inappropriate and/or unlawful for the DCIR to base the Determination on conjectures. The proposed residential developments are proposals made solely for the purpose of rezoning requests and are irrelevant to the Taxpayer's intention behind the acquisition of the Agricultural Land. The various parties who made the rezoning requests jointly were de facto controlled by [Director4 and Director1]. [Director4 and Director1] had held the Adjacent Land for decades.

(5) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that the protracted period over which the advances from the ultimate holding company and the shareholder companies were provided can presumably be attributed to the numerous rejections by the Town Planning Board of the rezoning and development application. It is inappropriate and/or unlawful for the DCIR to base the Determination on conjectures. The advances from the ultimate holding company and the shareholder companies, like share capital, are amounts invested in the Taxpayer. Such advances are unsecured, are interest free and have no fixed terms of repayment. The same are in the nature of quasi capital. Quasi capital, vis-à-vis equity, provides shareholders with flexibility and easy management. Quasi capital is a popular alternative to equity in the business sector. The Taxpayer acquired the Agricultural Land because its shareholders took the view that the open space zoning of the Adjacent Land the Agricultural Land was inappropriate and should be changed and that the small house policy in Hong Kong was not sustainable in the long run. However, the shareholders of the Taxpayer was not sure when the small house policy would be abolished and when the Adjacent Land and the Agricultural Land would be rezoned. Nonetheless, the shareholders of the Taxpayer expected that it would take years, if not decades, for the Government to abolish the small house policy and rezoned the Agricultural Land. The shareholders of the Taxpayer were also not sure whether the Adjacent Land and the Agricultural Land anb, if rezoned, would be rezoned for residential development purposes. The shareholders of the Taxpayer were prepared to finance the holding of the Agricultural Land on a long-term basis.

(6) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that the Taxpayer has not produced any feasibility study, cash flow projection or other material which demonstrates that it would be worthwhile for the Taxpayer to hold the Agricultural Land and the subsequent proposed residential development thereon as a long-term investment. The Taxpayer acquired the Agricultural Land as a long term

investment and as land bank for capital gain (a) with the view that, if the Adjacent Land and the Agricultural Land are rezoned for residential development purposes, the value thereof will increase substantially, and (b) with the hope that the Agricultural Land would be rezoned for residential development by the Town Planning Board. It was not considered that any feasibility study or cash flow projection therefor would be needed. The proposed residential developments are proposals made solely for the purpose of rezoning requests. The Taxpayer did not know whether the rezoning requests would be approved and what development schemes would be allowed. The Taxpayer does not have a crystal ball to ascertain (a) on which date in the indefinite the Agricultural Land will be approved. (b) how much land modification premium will then be charged by the Government for changing the user of the Agricultural Land, (c) how much the construction costs will then be, and (d) how the property market will then look like. In the circumstances, it was considered that no meaningful feasibility study and cash flow projection could be made.

(7) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that the Taxpayer relied on the circumstances for the disposal of the Resumed Portion to support its case. The Taxpayer's case is that it acquired the Agricultural Land with the intention to hold it as a long term investment and as land bank for capital gain but not as a trading asset. The circumstances in which the Resumed Portion compulsorily was resumed corroborate such intention.

(8) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that the Taxpayer's claim that it had no previous history of property transactions would not make the profits concerned not chargeable to Profits Tax as a on-off transaction is equally capable of being regarded as "an adventure in the nature of trade". The statement that the Taxpayer had no previous history of property transaction is a statement of fact made by the Taxpayer in response to enquiries raised by the Assessor concerned. The compulsory resumption of the Resumed Portion by the Government does not constitute an adventure (not to mention an adventure in the nature of trade) of the Taxpayer.

(9) The DCIR erroneously confirmed the Assessment, inter alia, for the reason that he is not satisfied that the Taxpayer has established that the Agricultural Land was acquired as its capital assets. The DCIR should make the Determination on the basis of facts proved by evidence. All available evidence shows and/or corroborates the fact that the Taxpayer acquired the Agricultural Land with the intention to hold it as a long term investment and as land bank for capital gain. There is no evidence whatever rebutting the same.'

The parties' lists of authorities

28. The appellant's list of authorities reads as follows (written exactly as it stands in the original):

> '3 Inland Revenue Board of Review Decision – Case No. D92/01
>
> 4 Stanwell Investments Limited v. Commissioner of Inland Revenue (Case No. HCIA 4/2003) – High Court Judgment
>
> 5 Section 14 of Inland Revenue Ordinance
>
> 6 Section 68 of the Inland Revenue Ordinance
>
> 7 Law of Contract, Tenth Edition, by Cheshire and Fifoot (page 238)
>
> 8 Hong Kong Taxation, 2009-10 Edition, by Ayesha MacPherson and Garry Laird (page 199 to page 208)
>
> 9 Advanced Taxation in Hong Kong, 12th Edition, by Dora Lee (page 204 to page 210 and page 255 to page 256)'

29. The respondent's list of authorities reads as follows (written exactly as it stands in the original):

> '1. Extracts from the Inland Revenue Ordinance, Chapter 112:
> (a) Section 2
> (b) Section 14
> (c) Section 68
> (d) Part I of Schedule 5
>
> 2. Lionel Simmons Properties Ltd (in liquidation) and Others v Commissioners of Inland Revenue, 53 TC 461
>
> 3. Marson (H.M. Inspector of Taxes) v Morton and Others, 59 TC 381
>
> 4. All Best Wishes Ltd v Commissioner of Inland Revenue, 3 HKTC 750
>
> 5. Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51
>
> 6. Board of Review Decision D8/88, 3 IRBRD 161
>
> 7. Board of Review Decision D44/96, 11 IRBRD 534

8. Winfat Enterprise (H.K.) Co. Ltd. v Commissioner of Inland Revenue, 3 HKTC 595

I. Board of Review Decision D92/01, 16 IRBRD 773 *(the Appellant's version at A1, 182-193)*

II. Stanwell Investments Ltd v Commissioner of Inland Revenue [2004] 2 HKLRD 227 *(the Appellant's version at A1, 194-214)*'

The hearing

30. The appellant was represented at the hearing by the Barrister-CPA. The respondent was represented by Mr Yip Chi Chuen, senior assessor.

31. The Barrister-CPA was the only witness called by himself. Mr Yip did not call any.

32. The Barrister-CPA often pronounced 'rezone' as 'resume' but we had clarified what he had intended to say.

33. Mr Yip told us categorically that he was not suggesting that the appellant did not have the financial means to hold the property on a long term basis.

Assessment of the oral evidence

34. The appellant's intention at the time of acquisition of the Agricultural Land is a question of fact and it is not subjective but objective. The acquisition agreement was made in September 1993. Director1 is the person who can give direct evidence on his own state of mind. No explanation has been offered why he was not called to give oral evidence. The Barrister-CPA claimed that he joined the Ultimate Holding Company in 1993. Plainly, he had no personal knowledge. Moreover, his willingness and eagerness to allege what he thought was helpful to the appellant's case and to come up with new assertions of fact in the course of his submission did his credibility as a witness no good. We attach no weight to his oral testimony.

Onus of proof and the Board's function

35. The Barrister-CPA's approach as formulated in the grounds of appeal is misconceived. Whether the Commissioner gave correct reasons for his determination is a matter of historical interest. The Board considers the matter *de novo* to decide whether the assessment appealed against is shown by the taxpayer to be incorrect or excessive:

(1) Section 68(4) of the Inland Revenue Ordinance, Chapter 112, provides that:

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

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

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

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

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

Accounting treatment only some evidence. Onus of proof not shifted

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

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

evidence, it still falls to be considered together with the rest of the evidence adduced in the case.

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

(4) In Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009-10) IRBRD, vol 24, 589, Lord Walker NPJ said at paragraphs 29 and 30 that the Board's function is to consider the matter *de novo* and the appeal is an appeal *against* an assessment:

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

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

30. Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: CIR v. Board of Review ex parte Herald International Limited [1964] HKLR 224, 237. The taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and (4)). The taxpayer's counsel drew attention to the fact that when Part XI was amended in 1965, the wording of s.68(4) was altered to refer to the onus of proving that the assessment was "excessive or incorrect" (rather than simply "excessive"). This, it was argued, showed that the amount of an assessment was no longer always the essential issue. Counsel for the Commissioner could not suggest any particular reason for the alteration, other than a general tidying-up of the language. Whatever the explanation, I am satisfied that the alteration was not intended, by what is sometimes called a side-wind, to make a major change in the scheme and effect of Part XI of the IRO.'

Authorities on capital or trading/business issue

36. Section 2 defines 'business' as including 'agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government' and 'trade' as including 'every trade and manufacture, and every adventure and concern in the nature of trade'.

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

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

Simmons

38. Lord Wilberforce stated in Simmons v IRC [1980] 1 WLR 1196 at page 1199 that the relevant question is whether the stated intention existed at the time of the acquisition of the asset – was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? His Lordship thought it was not possible 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. His Lordship recognised that intention may be changed (at page 1199) and that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention (at page 1202):

> *'One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock - and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax: see Sharkey v. Wernher [1956] A.C. 58. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status - neither trading stock nor permanent asset. It*

> *must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.' (at page 1196)*
>
> *'Finally as to the decision of the Court of Appeal, the judgment, delivered by Orr L.J., contains a clear account of the facts, and, in my respectful opinion, a generally correct statement of the law. In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention.' (at page 1202)*

In the Court of Appeal, Orr L J accepted that it was clearly established that on appeal to the Commissioners[1] the burden is on the taxpayer to displace the assessment and in the circumstances the burden was clearly on the taxpayers to establish that the sales in question gave rise to a surplus on capital account and not to a trading profit. His Lordship stated the general principles in these terms:

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

Marson v Morton

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

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

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

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

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

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

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

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

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

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

  (v) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the

item with a view to its resale in the short term; a fair pointer towards trade.

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

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

(viii) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

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

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

All Best Wishes

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

> *'Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.' (at page 770)*
>
> *'The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of the acquisition of the land that it was for development is conclusive.*
>
> *I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute - was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.' (at page 771)*

Lee Yee Shing

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

42. Bokhary PJ and Chan PJ emphasised at paragraph 38 that the question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. McHugh NPJ thought that ultimately, the issue is one of fact and degree[2].

[2] See paragraph 44(c) below.

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

(a) *'No principle of law defines trade. Its application requires the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade.' (at paragraph 56)*

(b) *'The intention to trade to which Lord Wilberforce referred in Simmons is not subjective but objective: Iswera v. Commissioner of Inland Revenue [1965] 1 WLR 663 at 668. It is inferred from all the circumstances of the case, as Mortimer J pointed out in All Best Wishes Ltd v. Commissioner of Inland Revenue (1992) 3 HKTC 750 at 771. A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit when the asset or commodity was acquired and the case where the taxpayer asserts that no such intention existed. If the taxpayer concedes the intention in a case where the taxing authority claims that a profit is assessable to tax, the concession is generally but not always decisive of intention: Inland Revenue Commissioners v. Reinhold (1953) 34 TC 389. However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition, the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case. It examines the circumstances to see whether the "badges of trade" are or are not present. In substance, it is "the badges of trade" that are the criteria for determining what Lord Wilberforce called "an operation of trade".' (at paragraph 59)*

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

1. *has frequently engaged in similar transactions?*

2. *has held the asset or commodity for a lengthy period?*

3. *has acquired an asset or commodity that is normally the subject of trading rather than investment?*

4. *has bought large quantities or numbers of the commodity or asset?*

5. *has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition?*

6. has sought to add re-sale value to the asset by additions or repair?

7. has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell an asset of that class?

8. has conceded an actual intention to resell at a profit when the asset or commodity was acquired?

9. has purchased the asset or commodity for personal use or pleasure or for income?' (at paragraph 60)

(d) 'In some cases, the source of finance for the purchase may also be a badge of trade, particularly where the asset or commodity is sold shortly after purchase. But borrowing to acquire an asset or commodity is usually a neutral factor.' (at paragraph 61)

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

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

(b) 'Ordinarily, a series of acts will not constitute a business unless they are continuous and repetitive and done for the purpose of making a gain or profit: Hope v. Bathurst City Council (1980) 144 CLR 1 at 8 – 9 per Mason J; Ferguson v. Federal Commissioner of Taxation (1979) 79 ATC 4261 at 4264. However, as Lord Diplock pointed out in American Leaf Blending Co. Sdn Bhd v. Director-General of Inland Revenue (Malaysia)

[1979] AC 676 at 684 "depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between". Exceptionally, a business may exist although the shareholders or members cannot obtain any gain or profit from the activities of the business: Inland Revenue Commissioners v. Incorporated Council of Law Reporting (1888) 22 QBD 279 (law reporting body prohibited by its constitution from dividing profits among members). It may exist even though the object of the activities is to make a loss: c.f. Griffiths v. JP Harrison (Watford) Ltd [1963] AC 1 (dividend stripping operation). And a corporation, firm or business may carry on business in a particular country even though its profits are earned in another country: South India Shipping Corp Ltd v. Export-Import Bank of Korea [1985] 2 All ER 219.' (at paragraph 70)

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

Real Estate Investments

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

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

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

46. Their Lordships went on to state that:

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

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

'Suppose a tax assessment is made on the footing that the position is X and the taxpayer appeals against the assessment by contending that the position is Y. The taxpayer will have to prove his contention. So his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X. And it would likewise fail if the Board merely determines that he has not proved his contention that the position is Y. Either way, no appeal by the taxpayer against the Board's decision could succeed on the "true and only reasonable conclusion" basis unless the court is of the view that the true and only reasonable conclusion is that the position is Y', at paragraph 47.

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

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

> *"What was the source of finance of the transaction? If money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade."*

> *That is as far as it goes, which is not very far when taken on its own. At p.1349 C-D the Vice-Chancellor emphasised that his list is not comprehensive, that no single item is in any way decisive and that it is always necessary to look at the whole picture.*
>
> *The question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case' at paragraphs 54 – 55.*

Subject property – trading stock or capital asset

47. The subject property in this case is the Agricultural Land. Apart from any town planning restrictions, it is clear from paragraphs 19(a), 24(b) and 26(a) & (b) above that the lease conditions restricted the user to agricultural use. There is no allegation that the appellant or Director1 acquired the Agricultural Land for farming.

48. The allegation is that it was hoped that the Agricultural Land would be rezoned and the price of the Agricultural Land would increase. In the event of the land being rezoned, the owner had an option of disposing of the land or developing it. In the event of a development, the owner had an option of long term holding for rental income or selling individual units in the development. Increase in price in the Agricultural Land would not be relevant unless the Agricultural Land was sold or unless the units in the development on it were sold. What is conspicuous in its absence in this case is any allegation about the appellant's intention to develop for rental income in the event of any rezoning. On the contrary, it is asserted in ground (6) of the grounds of appeal that:

> '... The proposed residential developments are proposals made solely for the purpose of rezoning requests. The Taxpayer did not know whether the rezoning requests would be approved and what development schemes would be allowed. The Taxpayer does not have a crystal ball to ascertain (a) on which date in the indefinite the Agricultural Land will be approved. (b) how much land modification premium will then be charged by the Government for changing the user of the Agricultural Land, (c) how much the construction costs will then be, and (d) how the property market will then look like.'

Plainly, the proposed residential developments did not represent what the appellant intended.

The appellant has not discharged the burden of proving that the Agricultural Land was an investment asset.

49. We turn to the badges of trade summarised by McHugh NPJ in Lee Yee Shing to see if we could do better than deciding on the basis of burden of proof.

(1) Whether the appellant has frequently engaged in similar transactions: No, but the appellant was and is a special purpose vehicle.

(2) Whether the appellant has held the asset or commodity for a lengthy period: The acquisition agreement for the Agricultural Land was dated September 1993. The Resumed Portion was resumed in March 1999. We assume in favour of the appellant that the remainder is still held by it.

(3) Whether the appellant has acquired an asset or commodity that is normally the subject of trading rather than investment: The subject matter is land. It is hollow to speak in terms of investment in land without going into one's intention to invest in what is or is to be built on land.

(4) Whether the appellant has bought large quantities or numbers of the commodity or asset: The Barrister-CPA asserted that the site area was large.

(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: The Resumed Portion was resumed by compulsion of law.

(6) Whether the appellant has sought to add re-sale value to the asset by additions or repair: Yes. It made various applications for rezoning.

(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: It made various applications for rezoning. The resumption was by compulsion of law.

(8) Whether the appellant has conceded an actual intention to resell at a profit when the asset or commodity was acquired: The Agricultural Land was of little or no use to the appellant on an as was basis. The appellant's case was that it hoped and applied for rezoning. The developments were 'solely' for the purpose of the rezoning applications.

(9) Whether the appellant has purchased the asset or commodity for personal use or pleasure or for income: No. There is no question of personal farming use, no allegation of pleasure of agricultural land holding and no allegation and no evidence of acquisition for income.

(10) Source of finance: The Revenue conceded that the appellant had the financial resources to hold on a long term basis.

50. Upon a holistic consideration of the circumstances of this particular case and bearing in mind paragraphs 47 and 48 above, we conclude that the appellant was doing a

deal in the hope of the Agricultural Land being rezoned, in other words, it carried on an adventure in the nature of trade and acquired the Agricultural Land as a trading stock.

51. The appeal fails and falls to be dismissed.

Disposition

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