Case No. BR 20/73

Board of Review :

Chan Ying-hung, *Chairman*, J. L. Bray & Lau Chan-kwok, *Members.*

14th August 1974.

Profits tax—acquisition of agricultural land by landowner for the purpose of exchange for building land—development and sale of land—whether transactions were in the nature of a trade subject to profits tax.

The appellant, a landowner, purchased certain pieces of agricultural land in Kowloon and the New Territories at enhanced prices with a view to exchanging them with the Crown for building land. Having been granted such land by the Crown the appellant sold one lot of land within a short period of time at a profit using part of the proceeds of sale to discharge a judgment-debt. On another piece of land granted by the Crown and which adjoined land she already owned she constructed a 5 storey building consisting of 12 flats. The construction was partly financed by a bank loan secured by a mortgage on the property. Some of the flats were sold within a year of their completion to repay the bank loan; one flat was let on a 5 year tenancy; subsequently all the flats were sold. The appellant was assessed to profits tax on the profits derived from these transactions under section 59(3) of the Inland Revenue Ordinance. She appealed against the assessments on the ground that she was not trading in property and the gains on realization were gains of capital nature not subject to profits tax. The appellant failed to give evidence to prove that her intention in acquiring the properties was for long term investment. On appeal.

Decision: Appeal dismissed, assessments as determined by Commissioner confirmed.

A. A. Iles of Messrs. Lowe, Bingham & Matthews for the appellant.

Benjamin Shih, Chief Assessor, for the Commissioner of Inland Revenue.

Cases referred to:—

1. Leeming v. Jones (H.M. Inspector of Taxes), 15 T.C. 333.
2. Pilkington v. Randall, 42 T.C. 662.
3. Lam Woo Shang v. C.I.R., H.K.T.C. 123.
4. California Copper Syndicate Ltd. v. Harris, 5 T.C. 165.
5. West v. Philip, 38 T.C. 203.
6. James Hobson & Sons Ltd. v. Newell, 37 T.C. 609.
7. Gray & Gillette v. Tilley (Inspector of Taxes), 26 T.C. 80.
8. Hudson's Bay Co. v. Stevens, 5 T.C. 424.
9. Taylor v. Good (Spector of Taxes), The Annotated Tax Cases 1973, p. 103.
10. C.I.R. v. Sincere Insurance & Investment Co. Ltd., Inland Revenue Appeal No. 1 of 1973.

11. Pickford v. Quirke, 13 T.C. 251.

Reasons :

For a number of years since 1947 the Appellant has owned land in Kowloon and the New Territories and carried out transactions in respect thereof either in her own right or as agent for other person or persons.

The Revenue has not raised any assessment in respect of any of the properties except those concerning the surrender of S.D. 1 Lot No.—and 12 other lots and the grant by way of exchange of two lots in Tsuen Wan (thereinafter called "the Tsuen Wan Property") and the surrender of D.D. 450 Lot No.—for the grant of K.C.T.L. No.—in Kwai Chung (hereinafter called "the Kwai Chung Property").

Dealing first with the Tsuen Wan Property, we find that practically the whole of the lots surrendered consisted of agricultural land.

According to certain extracts made by the Assessor from the Land Office Records of the 13 pieces of land surrendered to the Crown two were surrendered on the 15th May *1962* and the 29th January *1962* respectively, and the remaining 11 were surrendered in some cases in February *1952* and in others in June *1954*. S.D. 1 Lot No.—[surrendered on 15th May 1962] was purchased on the 1st May 1962. The Appellant alleges in a Statutory Declaration made by her on the 16th March 1974 that she purchased 8 other lots from their previous owners between 1952 and 1954 without recording the transactions in the Land Office until May 1962. Since the previous owners were entitled on surrender of their land to compensation or exchange of land, what Appellant purchased must have been these rights. It is incredible that the purchases of such rights should not have been registered in the Land Office but allowed to remain in the names of her predecessors in title at the risk of complications arising in the event of death, bankruptcy, forfeiture, etc. The Appellant also says that these transactions were put through by her sister as her nominee. As to the remaining 4 lots she says they were "obtained" from her sister who had in turn "obtained" them from the previous owners during the same period. Again the transactions were not recorded at the Land Office. We do not know what the word "obtained" means. Whatever it means, a deed must have been executed to put the lots into the Appellant's name. Likewise, deeds must have been executed in cases where the lots were purchased. The question is when they were executed.

On the evidence before us we hold that no purchase was made by the Appellant as alleged by her between 1952 and 1954. What probably happened was that she came to some arrangement with the previous owners, the exact nature of which we do not know, whereby she was given some position (probably that of a prospective purchaser) to negotiate terms with the Crown regarding the land to be exchanged. When the terms were agreed she then purchased the rights of exchange from the previous owners on different dates in May 1962.

The first purchase took place on the 1st May 1962, and that was the date on which all the trading activities began since when she has carried on a trade without cessation.

Having at last acquired the Tsuen Wan property, the Appellant lost no time in developing the same by the erection of a 5-storey building thereon consisting of 12 flats. According to the facts placed before us, an Architect was instructed to prepare a general plan of re-development on the 16th January 1963. Construction work commenced on the 1st July 1964 and the building was completed on the 3rd December 1964 at a cost of $400,829.75. This figure was taken from working accounts submitted by the Appellant and accepted by the Assessor. The construction was partly financed by a loan of $245,000.00 from the Hong Nin Savings Bank secured by a mortgage dated the 15th April 1964. There was a banking crisis in Hong Kong in 1965 triggered off by the failure of the Canton Trust & Commercial Bank and Mr. Iles submitted to us that because there was no prospect of obtaining further banking facilities, the Appellant was forced to repay the mortgage loan by selling some of the flats in the Tsuen Wan Property. But for such crisis she would have held on to them as an investment.

Details of the dates on which the flats were sold and the amounts of the proceeds of sale are stated below : —

Date	*Amount*
6. 4.65	$ 57,000.00
9. 4.65	52,000.00
24. 5.65	52,000.00
24. 5.65	46,000.00
3.12.65	170,000.00
12. 9.66	37,000.00
12. 9.66	44,000.00
15. 9.66	32,000.00
15.10.70	44,000.00
13.11.70	36,000.00

It will be observed from the above that by the 3rd of December 1965 a sum of $377,000.00 had been realised. It is on record that the mortgage loan of $245,000.00 was repaid and the first 5 flats redeemed on corresponding dates of their sale.

So far as the mortgage of $245,000.00 is concerned, we have no evidence before us that the Appellant was subject to any pressure by the Bank. On the contrary, we find that as soon as the whole mortgage was paid off (to be exact on the 3rd December 1965) the Bank granted a fresh loan of $80,000.00 to the Appellant and an overdraft of $50,000.00 at the same rate of interest as before. This was not only no pressure by the Bank, but they were quite prepared to make further funds available to the Appellant. All these facts seem to contradict the Appellant's allegation in her Statutory Declaration and through her tax-agent that she was forced to realize part of the Tsuen Wan Property to pay off the sum of $245,000.00. According to certain letters placed before us, it would appear that on 24th April 1970, about 4½ years later, the Bank did make its first demand for payment of the 2

later mortgages but that of course, has no bearing on the issue we are at present considering, our finding on which is that the sales which took place in 1965 were not made because of any bank pressure, and in our opinion, they were sold because there was a desirable profit to be made.

Turning now to K.C.T.L. No.—otherwise referred to as the Kwai Chung Property. D.D. 450 Lot No.—was purchased by the Appellant on the 20th February 1962 for the price of $15,681.00. Her original intention was to surrender it in exchange for D.D. 449 Lot No.—which adjoins Lot No.—(the two of them forming now together the Tsuen Wan Property). Government, however, did not agree to accept it in exchange. She kept it but made no attempt to develop it. Ultimately she surrendered it to the Crown in exchange for the Kwai Chung Property which was granted to her on the 29th October 1969 at a net premium of $141,773.00. She eventually disposed of the property on the 18th November 1969 for the price of $189,000.00 on condition that the purchaser pay the net premium direct to Government. It is common ground that she used part of the proceeds of sale of the Kwai Chung Property to discharge a judgment dated the 18th November 1969 for $52,032.00 which she owed the Canton Trust & Commercial Bank. It must be remembered that she disposed of the property for a profit of more than $40,000.00 so that the sale of the property was equally consistent with a desire to make a clean profit as with the pressure of a Court Judgment. In our opinion, she sold the property for both reasons.

As to the tax position, the Assessor considered that the profits from the development and sale of Tsuen Wan Property together with the rentals thereof were chargeable with Profits Tax and pursuant to sec. 59(3) of the Inland Revenue Ordinance, he estimated the profits and made the following assessments : —

Year of Assessment	*Estimated Assessable Profit*	*Net Tax Payable*
1965/66	$ 25,000	$ 3,125
1966/67	58,000	8,700
1967/68	28,000	4,200
1968/69	9,000	1,000
1969/70	9,000	1,000
1970/71	40,000	6,000
	$169,000	$24,025

Later the Assessor made an additional assessment on the estimated profits of the sale of the Kwai Chung Property as follows : —

Year of Assessment	*Estimated Assessable Profit*	*Additional Tax Payable*
1970/71	$47,000	$7,050

Notices of objection were lodged with the Commissioner of Inland Revenue in respect of all the assessments on the ground that the Appellant did not trade in property but was only a holder of property. In his written determination the Commissioner of Inland Revenue held that Appellant's "purchase of land in the New Territories for exchange of land in Tsuen Wan, her development of the land in Tsuen Wan into a building of 12 flats with the relevant sale of 10 flats of the building, flat by flat, together with her purchase of land at K.C.T.L. No.—which was in fact left over as a result of the development project and subsequently sold, amounted to a trading venture" and that profits tax was chargeable. Working accounts ended the 31st March in each year for the years 1965 to 1971 (both years inclusive) were submitted by the Appellant in respect of the Tsuen Wan Property together with an additional working account in respect of the Kwai Chung Property for the year ended 31st March 1970. Accepting such working accounts as correct, the Commissioner determined the assessments as follows : —

Year of Assessment	*Assessable Profit*
1965/66	Nil
1966/67	$172,014.00
1967/68	9,421.00
1968/69	Nil
1969/70	Nil
1970/71	40,431.00

The Appellant, in her notice of appeal to us, states her grounds in the following terms : —

(*a*) The Appellant was not trading in property during the relevant period and the gains on realization were gains of capital nature not subject to profit tax,

(*b*) The assessments are otherwise incorrect in law and in particular the additional assessment for the year 1970/1 was not competent.

At the hearing Mr. Iles abandoned the second ground of appeal so that all arguments turned on the issue stated in the first ground only.

For the Appellant, Mr. Iles submitted that in determining this issue, it is important to ascertain the intention of the taxpayer in acquiring the properties under consideration and he produced at the hearing some extracts from a letter written by the Appellant to the UMELCO dated the 10th February 1973 in which she states :

> "At the time when I constructed these two houses (on lot No. 5746) I had a genuine intention of holding it (sic) as a long term and private investment for the purpose of earning rental therefrom to maintain my living".

Mr. Iles also relied on the Statutory Declaration dated the 16th March 1974 mentioned above in which she made a statement re-affirming her intention in terms almost identical to the extracts quoted in her letter to UMELCO. The Assessor made it quite plain that he did

not agree with what was stated in these documents. We have already commented on the Appellant's failure to give oral testimony and we attach no weight at all to that part of the Statutory Declaration relevant to the Appellant's intention and, a fortiori, the extracts of the letter of the UMELOC. We have not even been furnished with a copy of the whole letter.

Furthermore, according to *Phipson's on Evidence* (11th Edn.) at p. 218 the following passages appear : —

> "Direct testimony. Witnesses may speak directly as to what were their own feelings, motives, intentions, opinions, knowledge, belief, and the like, at any given time, their testimony being based, not on inference, but consciousness though generally little reliance can be placed on evidence of this class".

In the circumstances, we have decided that we must ascertain her intention from the surrounding circumstances of the case as a whole and having done so we have no hesitation in saying that the intention of the Appellant in acquiring the rights and title to the lots surrendered to the Crown in exchange for the Tsuen Wan Property was to turn the same to account for sale and not for long term investment as alleged by the Appellant. Our finding is the same as regards the acquisition of the lot later surrendered in exchange for K.C.T.L. In both cases we hold that the intention existed *ab initio* and the Appellant commenced to carry on a trade as from 1st May 1962. We wish to add that in the latter case the intention is even more apparent because the surrendered lot was acquired by the Appellant for the express purpose of extending an area available for development. According to Lord Hanworth, M.R. who gives the first judgment in **Leeming v. Jones (H.M. Inspector of Taxes)**[1]**,**

> "the diligence in discovering a second property to add to the first, and the disposing of the property"

is a factor which may have a determining effect as to whether there is an adventure in the nature of trade in any particular case.

Mr. Iles next argued that one element in deciding whether a trade exists or not is the reason for disposal. According to him, the sale of Tsuen Wan Property and the Kwai Chung Property was dictated by pressure on the part of the mortgages for repayment. The importance of this, so argued Mr. Iles, lies in the fact that this would show that the Appellant did not have any pre-conceived plan of realizing the properties and that the disposal thereof was brought about by force of circumstances. We have already dealt with the facts relevant to this argument and indicated that Appellant has not satisfied us that the realization of the flats in the Tsuen Wan Property was brought about by bank pressure in 1965. In the case of the sale of the Kwai Chung Property, which incidentally took place in November 1969, pressure from the mortgagee was one of the reasons, but in our opinion the sale of land to repay a mortgage loan after it becomes overdue is a very common feature in dealings in land and we do not think the argument advances the Appellant's case at all.

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[1] 15 T.C. 333 at p. 346.

It was then pointed out to us by Mr. Iles that on completion of the Tsuen Wan Property rents were received from some of the flats let and he emphasized in particular one flat in which there was a Tenancy Agreement for 5 years. In Mr. Iles's submission, these facts are hardly compatible with any planned disposal but are more consistent with the Appellant being an owner of land rather than a trader or dealer in land.

Mr. Iles has cited numerous cases on this and other aspects of the distinction of being a land owner and having dealings in land. He frankly admits by quoting from *Mellows on Taxation of Land Transactions* that in many cases the question whether an activity amounts to a trade might just as well be decided by spinning a coin as by a detailed examination of the decided cases. We do not necessarily endorse this view, although one cannot dispute the fact that many very similar activities have been held to produce very different results. The same may be said of the activities which have come to be called the "badges of trade". Before dealing with some of the cases which we think have a bearing on the appeal before us, we would like to say that the law as we understand it is that each case must be decided on its own facts and we must not just look at one particular activity alone but must look at all the circumstances together and come to a conclusion. In **Pilkington v. Randall**[2] Cross, J. who heard the case in the first instance and whose judgment was upheld by the Court of Appeal, states the governing principles in these terms : —

> "To my mind, the question whether what has been done in any particular case is simply the realization of an inheritance or amounts to an embarking upon a trade is a question of degree. I do not think that one can lay down hard and fast rules, such as that the construction of roads and sewers and the installation of services can never be enough to make the case one of embarking upon trade. One has to look at the whole picture and say whether the amount of money spent on the development before sale and the objects for which and the circumstances in which the money was spent are such as to make it reasonable to say that what was inherited has changed its character and become part of the raw material or stock-in-trade of a business".

Dealing now with the case of **Lam Woo Shang v. C.I.R.**[3] cited by Mr. Iles, that was a case in which a taxpayer re-developed a property acquired pre-war by the erection of 2 houses of 32 flats. The re-development was financed mainly by a bank loan. Nineteen flats were sold at various dates with the object of repaying the bank loan. Twelve flats were let furnished and one was occupied by the taxpayer. The Court was not concerned with the 19 flats sold as the Commissioner upheld an objection by the owner that she had not been carrying on any trade. So that issue was not before the Court. The issue that was actually decided was whether the taxpayer had been carrying on a business in collecting rent of the 12 flats which she retained. The Court decided the issue in the affirmative on the ground that the word "business" as defined in the Ordinance includes "the sub-letting by any person of any premises . . .". It appears to us, therefore, that anything said in the Court's judgment in that case would not be directly relevant to the issue before us.

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[2] 42 T.C. 662.

[3] H.K.T.C. 123.

The case of **Lam Woo Shang**[3], however, is of interest in that the re-development scheme was mainly financed by a bank loan and the 19 flats sold were sold for the purpose of repaying the same. In these circumstances, among others, the Commissioner held the taxpayer was not chargeable with profits tax. In the case before us, the Assessor argued that the fact that a mortgage loan had to be raised to finance the development of the Tsuen Wan Property would indicate that the sale of the same must have been contemplated at the inception of the project. We agree with Mr. Iles that such an argument is obviously untenable, because, if the Assessor is right, no building financed by a mortgage would qualify as an investment. That does not mean however, that we must decide the matter in the same way as the Commissioner did in **Lam Woo Shang's** case[3]. In our opinion, that case can be easily distinguished from the present one because it was an agreed fact in **Lam Woo Shang's** case (*supra* at p. 125) that "the purpose of the loan was to cover the cost of development of the land and the construction of 32 flats; the *intention then* being to sell sufficient flats to repay the loan". The Case Stated discloses that it was also originally intended to let the unsold flats but not to furnish them. Such evidence would indicate very strongly a case of investment. In the case before us, there is no such evidence at all. On the contrary what we have is clear evidence that the whole of the scheme had to be financed by borrowed money at high interest and there was a total and continuous lack of funds on the Appellant's part to complete the scheme or to permit her to keep the property as a long term investment, and this can, and, in our opinion, does suggest an adventure in the nature of trade. (See **California Copper Syndicate Ltd. v. Harris,**[4]. In that case a Company which had an authorised capital of £30,000.—and a paid up capital of £28,332.—invested £24,000.—in a copper bearing field, and the balance of £4,332.—was spent in development of the filed.

Lord Trayner in his judgment says at p. 167 :—

> "The properties were bought for £24,000.- leaving only a share capital of less than £6,000.- a capital quite inadequate (even if all subscribed which it was not) to enable the Company to work their minerals and bring them to market".

Lord Trayner considers this as one of the facts which point to the Company acquiring the mineral fields not to work the same themselves but solely with the view and purpose of re-selling the same at a profit.

Another submission of Mr. Iles has to do with the letting and the 5-year Tenancy Agreement which Mr. Iles contends is unquestionably a hindrance to sale ad a property so let commands a smaller and less lucrative market than property with vacant possession. This, he says, furnishes a strong indication that the property was acquired for the purpose of investment. He calls our attention to **West v. Philip**[5]. In that case the taxpayer had a number of houses known as Class A houses which were built to let as an investment and also

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[3] H.K.T.C. 123.
[4] 5 T.C. 165.
[5] 38 T.C. 203.

some Class B houses which were built for sale. As a result of changes in circumstances, Class A houses had become more of a liability than a profit. He therefore changed his original intention and proceeded to sell Class A houses together with Class B house. Both classes of houses were then re-decorated, got ready and advertised for sale by the same estate agency. The point decided in that case is that notwithstanding all these activities, properties which were built with the original intention of investment would remain so as long as there were compelling reasons for changing the intention from letting to selling the Class A houses. We can find nothing in that case to support Mr. Iles's proposition that letting of flats in a newly completed building must always be taken as one of the indicia of investment. As to the case before us, it is interesting to note that the flat let for 5 years was in fact sold by the Appellant for $170,000.00 on the 3rd December 1965 while the Tenancy Agreement was dated 20th February 1968 more than 2 years later. This seems to show that Mr. Iles's argument as regards the hindering effect of the Tenancy Agreement is based on wrong premises.

For ourselves we find **James Hobson & Sons Ltd. v. Newell**[6] to be a more relevant authority. There a Company which was authorised by its memorandum of association to build houses for sale and to let erected houses of both types. For many years they let the houses built for sale and then realized them at a profit. In his judgment at p. 17 Harmon J. says : —

> "The houses built in 1928 and 1929 to let are no less so built and so let as a part of the trading activities of the Company than those which were built for sale; and it is quite idle in my opinion merely to say, because we did not make immediate efforts to sell them, they are no part of our trading assets. That is only another way of carrying on precisely the same business. Builders are not bound to build houses for sale; they can also build for letting; and it is no less a part of their business if they do.".

Admittedly the case concerned a limited company and not an individual and we are dealing with an individual in our case. In our opinion, however, the same principle applies. In the case before us, we have evidence that some flats were let immediately upon completion of the building, i.e. the 3rd December 1964, but we also have evidence that sales started very soon thereafter, i.e. April 1965. With such a short time gap, we have derived little help from the fact of the early lettings in determining whether the intention of the Appellant was to build the houses for sale or to let. What, in our opinion, clinches the issue is that in the end practically all the flats were sold.

On the question of the lettings the Assessor's argument is that the rents actually received ending the 31st day of March in each year for the six years 1965-1971 are shown in the working accounts to have been as follows : —

	Loss	*Profit*
1965 …….	$12,629	—
1966 …….	1,195	—

[6] 37 T.C. 609.

1967 …….	—	$3,971
1968 …….	7,343	—
1969 …….	12,666	—
1970 …….	3,048	—
1971 …….	3,349	—

In each case there was a loss and from this the Assessor contends that it was obviously uneconomic to hold the Tsuen Wan Property as an investment for rent collecting when interest at 1.2% per month had to be paid on money borrowed for the project. Mr. Iles's reply is that interest paid on the mortgages was included in the working accounts in respect of flats which were unoccupied but sold so that the expenses shown in the accounts were not directly related to rentals actually received. Moreover no account was taken of potential income from unlet space in the working accounts. Mr. Iles has also supplied us with estimated figures showing the viability of the development as an investment. He takes the value of the building at $800,000.—This is based on the proportionate amount for the sale of 5/12th of the property up to the end of 31st March 1966. The working accounts show the total cost of the building at $305,000.00. He contends that if we take a yield of 8% on a capital cost of $800,000.00 it would give us an income of $64,000.00. Mortgage interest at 1.2% per month on $305,000.00 would only amount to $42,700.00 per annum. There would therefore be a surplus of $21,300.00 a year. In our opinion, one weakness in Mr. Iles's argument is that it is based on a 100% occupancy of the buildings. Also it does not take into consideration rates and outgoings. If one looks at the matter from another angle and assumes for a moment that the scheme was undertaken, as we think it was, with a view to the property being sold then the scheme has not only proved itself viable but very successful. On this aspect of the case, we would like to quote from **Gray & Gillette v. Tilley (Inspector of Taxes)**[7] in which the opinion stated by Macnaghten J. at p. 85 appears to coincide with our view in this case : —

> "If it were building land when the Appellants bought it, the presumption arises that the Appellants bought it with that object in view. This, of course, may not be the proper inference. It may be that they were minded to present it to the National Trust, or were thinking of entering into a covenant with the National Trust which would have the effect of preventing the erection of any buildings upon Grange Farm. But, in the absence of any evidence of such intention, one would naturally suppose that these two gentlemen had bought building land and intended to dispose of it for that purpose. When it is found that within six years they did dispose of part of it to a development company and the rest of it to another development company in which they held more than half the shares, and of which they were the directors, it seems only reasonable to assume that the company bought the land with that object in view . . . The fact that within six years of the purchase the whole of Grange Farm was sold at enhanced prices for development as building land, confirms the view which the other facts strongly suggest".

Mr. Iles proceeded to submit that in this case the Appellant did not maintain a sales office or employ any staff; the properties were not advertised and no sales brochure was

[7] 26 T.C. 80.

printed. In short, there was no evidence of any organized selling. These activities have sometimes been treated as badges of trade, the absence of which may tend to suggest that no trade has been carried on. In our opinion, these activities, or the absence there of, are by no means conclusive.

For example, it has been held that a landowner may lay out part of his estate with roads and sewers and sell it in lots for building without his trading in land **(Hudson's Bay Co. v. Stevens**[8]**).** But in another case, road making, construction of drains, installation of services and employment of an agent were facts relied on by the Special Commissioners in their decision that the taxpayer had embarked upon a trade—a decision which was upheld by the Court of Appeal in **Pilkington v. Randall** mentioned before.

As to advertising, in **Gray and Gillette v. Tilley (H.M. Inspector of Taxes)** (*supra*) the Special Commissioners found that at no time did the taxpayer advertise or otherwise offer any part of his land for sale but that did not prevent Macnaghton. J. from upholding their finding that the taxpayer was engaged in transactions in the nature of trade.

We think we have said enough to demonstrate what we have said earlier that we do not look at any one particular activity alone but must look at all the circumstances as a whole.

We now come to the case of **Taylor v. Good (Inspector of Taxes)**[9] which is one of most recent cases on the subject of the distinction between transaction in land as a trader and an owner. It was decided by the Court of Appeal in England in February 1974 and we are using a copy of the judgment printed by the Association of Official Shorthand Writers Ltd. The case in the Court of first instance is reported in *The Annotated Tax Cases* for 1973 at p. 103. It concerns the purchase and sale of land in Cheltenham. Megarry, J. who heard it in the High Court, held that there was no evidence to support a finding of trade *ab initio* but there were activities of a supervening trade subsequent to the original purchase and he remitted the case to the Special Commissioners to determine the date of commencement of the supervening trade because every "trading (or an 'adventure') must have a commencement". The subsequent activities in that case consisted of applying for and obtaining planning permission, co-operation with the owner of neighbouring land to provide facilities for access by road and preparing building plans.

From this the taxpayer appealed to the Court of Appeal when Megarry J's judgment was set aside and the appeal allowed on the grounds that (*a*) if the Special Commissioners thought the events including the purchase constituted trading, it by no means follows that they would have arrived at the same conclusion without taking in the purchase as part thereof and (*b*) the activities of the taxpayer subsequent as part thereof and (*b*) the activities of the taxpayer subsequent to the purchase could not be regarded as sufficient to establish a trade and the case should not be remitted to the Special Commissioners.

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[8] 5 T.C. 424.

[9] The Annotated Tax Cases 1973, p. 103.

In our opinion, the Court of Appeal does not lay down any new law in **Taylor v. Good**[9]. It merely reaffirms a long line of cases commencing with **Hudson Bay Company v. Stevens** (*supra*) which point strongly against the theory that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of his property. **Pilkington's** case[2] was expressly referred to in **Taylor v. Good** (*supra*) by Russell, L.J. who distinguished the facts in that case from the one before him but was prepared to accept the law enunciated in the **Pilkington** case[2] to the effect that the activities of the landowner on or in connection with his land and its improvement and enhancement in value might of themselves be of such a quality and degree as could properly be regarded as constituting an adventure. To our mind, therefore, the law stated in the **Pilkington** case[2] is still good law and we have endeavoured to act on the principles quoted above.

Another point which we think material to the issue of trade or investment has to do with the nature of the land with which we are dealing. The Assessor has called our attention to the case of **C.I.R. v. Sincere Insurance & Investment Co. Ltd.**[10] where Leonard, J. at page 11 of his judgment states : —

> "In Hong Kong where almost all land is a chattel real leased from the Crown and since land is inevitably and continuously in short supply it is as much the object of speculation as any other type of investment and almost as readily realizable".

The Assessor submits that the surrendering of land at prices substantially lower than those originally paid would point to speculation. The prices paid for all the lots surrendered in exchange for the two lots which comprise the Tsuen Wan Property came to $56,326.00. In addition, net premium to the extent of $37,837.60 had to be paid to the Crown so that the cost was boosted up to $95,101.75. These were surrendered to the Crown in exchange for the said two lots valued at $30,000.00 each, totalling $60,000.00. Furthermore, the Appellant in her letter to the UMELCO dated the 10th February 1973 voluntarily admits that she paid a "high" price for D.D. 450 Lot No.—which was offered to Government for exchange when she was not even sure that it would be acceptable. Mr. Iles contends that it is possible for a person to speculate in land without the speculative gains being necessarily taxable because speculation is not a badge of trade. In our opinion a speculator in land is a trader in land. No authority is required for this proposition and in our mind the combined circumstances herein stated certainly support the Assessor's argument which we accept.

Both sides also addressed us as to whether there was any system or pattern in the alleged trading activities of the Appellant in this case. In our opinion, the answer must be in the affirmative. Both the Tsuen Wan Property and the Kwai Chung Property were acquired in exchange for the surrender of agricultural lots—a procedure somewhat out of the ordinary for sale and purchase of land. It is well settled that one transaction of buying and selling

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[2] 42 T.C. 662.
[9] The Annotated Tax Cases 1973, p. 103.
[10] Inland Revenue Appeal No. 1 of 1973.

does not make a man or trader, but if it is repeated and becomes systematic, then he becomes a trader (**Pickford v. Quirke**[11]). In our view, this case comes within those principles.

We think we have now dealt with all the facts (both primary and inferential) and the law on the only issue before us, namely, whether the profits in this case arose out of trade or were they gains of a capital nature. In the course of his submissions, however, some further points were raised by Mr. Iles which we think should be dealt with. As we understand him, his first point is that because the Commissioner merely says that Business Profits Tax is chargeable without expressly stating that it is chargeable under sec. 15(1) of the Ordinance, the Commissioner must be taken to have treated the case as falling within sec. 15(2) under which sums of money credited to or received by a person carrying on a trade shall be deemed to arise from such trade. As there is no evidence of any trade to which the moneys referred to under sec. 15(2) could be "attached", Mr. Iles argues that the appeal must be allowed.

We think the material question is whether the taxpayer carried on a trade which produced profits. The profits of such trade would, of course, be assessable under section 15(1). The Commissioner has given a written determination that there was a trade venture the profits of which are chargeable to Business Profits Tax, and bearing in mind that the objection that came up before him for determination was based on the sole ground that the taxpayer did not trade in property but was only a holder of property, it seems to us that from beginning to end the one and only issue within the contemplation of all parties concerned was "trade or no trade" under sec. 15(1). Section 15(2) was not mentioned in the objection nor was there any suggestion at any time that any sum of money within the scope of sec. 15(2) was involved. We can also find nothing in the Ordinance which makes it obligatory on the part of the Commissioner to specify in his determination the charging section. This ground, therefore, fails.

Finally there remains the term "trading venture" used by the Commissioner in his written determination. Mr. Iles, after pointing out that "trade" is defined in section 2 of the Ordinance to include "every adventure and concern in the nature of the trade" submits that he is not clear whether the Commissioner considers the taxpayer to be carrying on a trade or an adventure in the nature of trade. It is true that the expression "trading venture" does not appear in the Ordinance. The Assessor, however, calls in aid the definition of the word "venture" in *Silke on South African Income Tax* at p. 174 as being "a transaction in which a person risks something with the "object of making a profit i.e. a financial or commercial speculation". We repeat that if one recalls the background of the objection which came up before the Commissioner, there can be no doubt in our mind that what he decided was that the taxpayer had been carrying on a trade which would of course include "an adventure in the nature of trade". We do not think the use of the term "trade venture" can be a valid ground bearing in mind the history background of this appeal.

For all the reasons set out above, this appeal is dismissed. It is common ground that if 1st May 1962 were to be taken as the date of commencement of the trade, then no

[11] 13 T.C. 251 at p. 263.

adjustment would have to be made to the assessments appealed against. We have made it clear that in our judgment the Appellant's trade commenced on that date when she acquired S.D. 1 Lot No. Consequently all the assessments as determined by the Commissioner are hereby confirmed.