Case No. D112/00

Profits tax – sale of property – whether profits derived from the sale of the property assessable to profits tax – intention at the time of acquisition – change of the intention of purchase – ability to carry out intention – onus of proof – section 68(4) of the Inland Revenue Ordinance ('IRO') – application to re-open hearing – finality to evidence – accounting treatment – whether purchase and sale of the subject property within short time span and sale as cofirmor indicative of trading intention.

Panel: Mathew Ho Chi Ming (chairman), Joseph Cheung Wang Ngai and Adrian Wong Koon Man.

Dates of hearing: 25, 30 August and 25 October 1999.
Date of decision: 29 December 2000.

The taxpayer is a private company in Hong Kong and the nature of its business was investment and trading of papers. Company F is a joint venture company held equally between the taxpayer and Company G. The taxpayer purchased the subject property on 9 December 1992. On 29 April 1993, the taxpayer sold the subject property and the transaction was completed on 10 June 1993 with the taxpayer as a confirmor. The Inland Revenue Department assessed that the profit of the taxpayer derived from the sale was trading in nature and therefore taxable. The taxpayer appealed against this determination.

The managing director of the taxpayer and the auditor gave oral testimony that the reason for the purchase was the development of the taxpayer's business and the wish to centralize all his companies together with Company F in the same office so that they can be managed together.

After completion of the appeal hearing, the taxpayer's solicitor asked to re-open the appeal in an attempt to introduce two witnesses and certain bank records in relation to the financial ability of the taxpayer to purchase the subject property and to service the mortgage loan. The Board disallows the request. The taxpayer's solicitor asked the Board to review his decision.

Held:

1. Section 68(4) of the IRO clearly stated that the onus of proving that the assessment of profits tax in respect of the gain on the sale of the Subject Property is excessive or incorrect rests on the taxpayer.

2. The Board must ascertain what was the intention of the taxpayer at the time of the acquisition of the subject property and whether such intention was genuinely held, realistic and realizable. The stated intention of the taxpayer is not decisive. Intention can only be determined by considering the whole of the surrounding circumstances including things said and done at the time, before and after. Actions speak louder than words (All Best Wishes Limited v CIR 3 HKTC 750 and Simmons v IRC [1980] 1 WLR 1196 followed).

3. Intention connotes an ability to carry it into effect (Cunliffe v Goodman [1950] 1 All ER 720 and D11/80, IRBRD, vol 1, 374 followed) and the intention must not only be genuinely held, but also realistically held and realizable (All Best Wishes Limited v CIR 3 HKTC 750 followed).

4. Having considered the evidence and the facts, the Board found the oral testimony of the managing director of the taxpayer unsatisfactory and was unconvinced even on a balance of probabilities due to its inconsistencies, ambiguities and strange logic. The Board did not believe that the stated intention was genuinely held because it was neither realistic nor realizable and could not be carried out by the taxpayer. The Board is not satisfied with the evidence presented in relation to the financial ability of the taxpayer to purchase and hold the subject property.

5. The Board is empowered to admit or reject any evidence adduced, whether oral or documentary under section 68(7) of the IRO. The Board is not duty bound to accept all evidence. However our power under section 68(7) cannot be exercised injudiciously or arbitrarily. General rules of evidence are followed by the Board albeit generally more laxed in their application. There must be finality to evidence, submissions and arguments from litigants (Ladd v Marshall [1954] 1 WLR 1489 considered).

6. Although the accounting treatment of the subject property by the taxpayer in its accounting records has been that of a fixed asset, the Board does not consider the accounting treatment in the taxpayer' s case per se as sufficient to persuade us of its long term intentions when we look at all the surrounding circumstances of the case.

7. The purchase and sale of the incomplete subject property within short time span of about four and a half months and the sale by the taxpayer as confirmor are indicative of a trading intention which needed explanation. The burden of proof rests on the taxpayer and the taxpayer had neither provided us with the explanations nor discharged its burden of proof.

Appeal dismissed.

Cases referred to:

All Best Wishes Ltd v CIR 3 HKTC 750
Simmons v IRC [1980] 1 WLR 1196
Cunliffe v Goodman [1950] 1 All ER 720
D11/80, IRBRD, vol 1, 374
Ladd v Marshall [1954] 1 WLR 1489

Fung Ka Leung for the Commissioner of Inland Revenue.
To Wai Keung Vincent of Messrs W K To & Co for the taxpayer.

Decision:

Nature of the appeal

1. Company A ('Taxpayer') has appealed against the determination of the Commissioner of Inland Revenue dated 15 January 1999 ('CIR Determination'). For the year of assessment 1993/94, the Inland Revenue Department ('Revenue') had assessed that the profit of the Taxpayer derived from the sale of the Subject Property in District M was trading in nature and therefore taxable. The Taxpayer objected to this assessment. The CIR Determination confirmed the said assessment.

Background facts

2. By an agreement dated 9 December 1992, the Taxpayer purchased the Subject Property at a consideration of $12,872,230. By a provisional agreement dated 29 April 1993, the Taxpayer sold the Subject Property for a consideration of $14,800,000. The transaction was completed on 10 June 1993 with the Taxpayer acting as a confirmor. The Taxpayer derived a net gain of $1,832,860 from the sale of the Subject Property which was arrived at as follows:

		$
Selling price		14,800,000
Less : Purchase price		12,872,230
		1,927,770
Less : Agency fee	50,000	
Legal fee	44,910	94,910
	Net gain:	1,832,860

3. The Taxpayer furnished its profits tax return for the year of assessment 1993/94 together with financial statements for the year ended 31 December 1993 and proposed tax computation. The profit on disposal of the Subject Property was treated in its financial statements as an extraordinary item and not offered for assessment.

4. On 25 September 1995, the assessor raised an additional profits tax assessment for the year of assessment 1993/94 on the Taxpayer which added back the $1,832,860 profit on disposal of the Subject Property as additional assessable profits. It is this profit on disposal of the Subject Property which is the subject matter of this appeal.

The issue

5. At issue in this appeal is the intention of the Taxpayer at the time of acquisition of the Subject Property. A trading intention means that the profit on disposal is taxable while an investment or self-use intention means the opposite.

The law

6. The onus of proving that the assessment of profits tax in respect of the gain on the sale of the Subject Property is excessive or incorrect rests on the Taxpayer. Section 68(4) of Chapter 112 states:

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

7. The law is clear on the taxation of profits gained on disposal of property and can be seen from the two leading cases of All Best Wishes Ltd v CIR 3 HKTC 750 and Simmons v IRC [1980] 1 WLR 1196. This Board must ascertain what was the intention of the Taxpayer at the time of the acquisition of the Subject Property and whether such intention was genuinely held, realistic and realizable. The stated intention of the Taxpayer is not decisive. Intention can only be determined by considering the whole of the surrounding circumstances including things said and done at the time, before and after. Action speaks louder than words.

The accepted facts

8. At the hearing of the appeal, the managing director of the Taxpayer, Mr B (' MD') and the partner of the Taxpayer' s previous and subsequent auditing firms, the Auditor, gave oral testimony. From the documents submitted to us and the oral evidence, we accept the following facts set out in this section.

9. The Taxpayer was incorporated as a private company in Hong Kong on 22 August

1989 commencing business on 1 January 1990. At the relevant times, the nature of its business was investment and trading of papers. The ultimate beneficial shareholders and directors of the Taxpayer are two brothers; the MD and his elder brother (' elder B' ; and together with the MD ' B Brothers'). The MD was responsible for the day-to-day management of the business of the Taxpayer while the elder B was responsible for handling factory production. The Taxpayer was managed in a loose family style with no formal meetings. The few minutes of meetings that can be found were drafted by the Taxpayer' s accountants for the purpose of accounts preparation.

10. On 28 December 1990, the Taxpayer purchased an office premises with a floor area of 505 square feet known as Property 1. This unit together with an adjacent unit was decorated as one office unit (collectively called ' Old Office'). The adjacent office unit was purchased at the same time by an associated company called Company C. Company C was also beneficially owned by the B Brothers. The Old Office was used by the Taxpayer, Company C and Company D (another company owned beneficially by the B Brothers) as their office premises. Company D subsequently changed its name to Company E.

11. Company F is a company incorporated in Hong Kong on 13 July 1990. It is a joint venture held equally between the Taxpayer and Company G. Company G was owned and controlled by people from mainland China. At first, the directors of Company F were the Taxpayer and Mr H. Mr H represented Company G' s interest on the board of directors of Company F. On 8 October 1992, a Mr I was appointed as the third director. On 1 June 1993, Mr H resigned and was replaced by a Mr J. On 3 August 1993, the elder B became a director.

12. In 1990, prior to the Taxpayer' s purchase of the Subject Property, Company F' s office was situate at Premises K which had a total gross floor area of about 1,600 square feet and a net floor area of 1,200 to 1,300 square feet. Since January 1988, it was originally owned by a company known as Company L of which Company G is a shareholder. In April 1992, Company G purchased Premises K. Hence the landlord of Company F' s office at the material times was Company G. According to the Taxpayer' s previous representative in a letter to the Revenue dated 14 December 1995, Company F used 400 square feet of Premises K. Since the landlord was the joint venture partner of the Taxpayer in Company F, there was no tenancy agreement and no binding tenure on the office tenancy.

Stated intention

13. The Taxpayer, through the MD, decided to purchase the Subject Property on 9 December 1992. According to the MD, the reason for the purchase was the development of the Taxpayer' s business and his wish to have Company F share its office with the Taxpayer together with Company C and Company D in one location as the B Brothers managed them all. The Auditor knew the MD since 1988 and met him quite often as initially they had their offices in the same building (where Property I is located). The Auditor testified that the MD had mentioned centralizing all his companies in the same office and moving to District M. But the Auditor

remembered that the MD had not mentioned whether the centralized office would be rented or purchased. Nor was it the Auditor's evidence that the MD mentioned to him whether Company F was included in his office centralization plan. The Auditor was not aware of the purchase of the Subject Property until after the event.

14. The MD testified that after the purchase of the Subject Property, he consulted a Mr N of Company G and told him of his desire to move Company F to the Subject Property. Mr N did not like the property because of its perceived bad *fung shui* after he visited the property. This was an odd comment to make as construction of the Subject Property was incomplete at the time until the MD clarified that this could be ascertained from floor plans. The MD then said that, after this visit, Mr N persuaded him to move all of the companies to Premises K instead. Not only was the *fung shui* bad, it seemed that Mr N just did not want Company F to move to a new office, otherwise the joint venture in Company F would terminate. Mr N offered to expand the space used by Company F to accommodate the other companies of the B Brothers. The MD agreed. Company F retained its office at Premises K and the Taxpayer, Company C and Company D moved into the enlarged Premises K around July 1993 with a floor area of 1,600 square feet.

Assessment of the oral testimonies

15. We must look at the stated intention of the Taxpayer in the light of the evidence presented to us. While we find the oral evidence of the Auditor credible, this Board was not impressed at all with the oral testimony of the MD who was the primary witness for the Taxpayer. He was led by the Taxpayer's solicitor on key aspects of the evidence both in examination in chief and re-examination. Despite reminders from this Board, on many occasions, it was difficult to distinguish whether it was the questioner who was giving evidence or the witness.

16. Ignoring this unsatisfactory manner of presentation of the oral testimony of the MD, we are still unconvinced, even on a balance of probabilities, by the MD's testimony due to its inconsistencies, ambiguities and strange logic.

Evidence relating to reason for purchase

17. As pointed out by the Revenue's representative, intention connotes an ability to carry it into effect (Cunliffe v Goodman [1950] 1 All ER 720 and D11/80, IRBRD, vol 1, 374) and the intention must not only be genuinely held, but also realistically held and realizable (All Best Wishes Ltd v CIR 3 HKTC 750). If we were to believe that stated intention was genuinely held, clearly this intention was neither realistic or realizable and it could not be carried out by the Taxpayer for the following reasons:

a. The MD testified that he knew that if Company F were to move to the Subject Property, Company G would lose a stable source of rental income which it was receiving from Company F renting its Premises K. The Taxpayer also knew that

Company G was responsible for the financing aspect of Company F as evident from paragraph 4 of the statement of facts set out in the Taxpayer' s grounds of appeal dated 11 February 1999 (from Company O, the Auditor' s firm to the Clerk of this Board). Yet the Taxpayer chose to decide on a centralization of offices and moving the office of Company F to the Subject Property without consulting Company G prior to purchasing the Subject Property. If implemented, Company F would be paying rental to the Taxpayer rather than to Company G. It would come as no surprise to anyone that when consulted, Company G insisted that Company F remained at Premises K or risk termination of the Company F joint venture.

b. Moreover, according to the MD, the decision to centralize the offices of all the companies associated with the Taxpayer was made between the end of 1991 and the beginning of 1992. Yet prior to the acquisition of the Subject Property in December 1992 which was more than one year after the centralization decision was made, this idea was never discussed with Company G. The MD treated the purchase of the Subject Property as a very important decision. The underlying reason for the purchase was purportedly to amalgamate all the offices (including that of Company F of which the B Brothers are said to have management control). We find it extraordinary and in our view not in line with normal business logic that Company G was never consulted prior to carrying out such a major decision.

c. The Taxpayer' s solicitor urged us to take a global view of the financial picture of the Taxpayer, the B Brothers and their related companies. There was insufficient evidence presented to us to enable us to take this global view (even if we had allowed the Taxpayer to reopen its case and present evidence from Bank P; more on this follows in the later parts of this decision). More importantly, the MD or the Taxpayer never took this global view at the time of acquisition of the Subject Property. No financial assessment or feasibility analysis was done at that material time (and the MD testified that this was so). How realistic and realizable could the intention to purchase and keep the Subject Property be if the Taxpayer was ignorant of its financial ability or the funding available to it?

18. The MD testified that the B Brothers controlled 50% of Company F' s board of directors and that the daily management and operation of Company F rested on the B Brothers. On re-examination, the MD confirmed that he had concrete and firm control of Company F and that he was the person managing Company F. This was despite the Report of directors of Company F for the period ended 31 August 1993 showing initially that the Taxpayer and Mr H as directors but from 8 October 1992, Mr I was appointed as a third director resulting in Company G having two-third of the board voting power. On 3 August 1993 the elder B was appointed as the

fourth director. Between October 1992 and August 1993, which was the crucial time frame in this appeal, Company G had two-thirds of the Board votes. No meaningful explanation was given by the MD on this inconsistency between his testimony and the Report of directors of Company F. Further, the ability of Company G to override the B Brothers' decision regarding relocation of Company F's office was also inconsistent with the concrete and firm control alleged by the MD.

19. Paragraph 13 of a letter from the Auditor to the Revenue dated 14 December 1995 set out the reason why there was a change of decision to rent office space rather than to own office space. The reasons stated were the office-sharing agreement (titled 'tenancy agreement') reached with Company G and the Taxpayer's opinion that it was more economic to share office premises than to own one. If this were true and the Auditor correctly instructed, why was the Subject Property purchased at all?

20. According to the MD in his examination in chief, he initially stated that Company G used about one-third of the space while the B Brothers and their companies and Company F used two-thirds of the space after the MD could not refuse Company G's request to relocate to Premises K in July 1993 instead of moving Company F to the Subject Premises. This sharing ratio was changed when prompted by the Taxpayer's solicitor and reference was made to a document titled 'tenancy agreement' which was signed by the Company F. This 'tenancy agreement' showed that the space sharing ratio of Premises K was 25% by Company G, 37.5% by Company F and 37.5% by the Taxpayer. The 'tenancy agreement' document itself is a curious piece of documentation. Despite its heading, it looked more like an office sharing agreement. It was not stamped with stamp duty. Although Company G was the registered owner of the Premises K as at its purported date of 1 May 1993, it showed that the rent (with other recurring property occupation expenses) was to be shared amongst the three signing parties.

21. In paragraph 7 of the statement of facts set out in the Taxpayer's grounds of appeal to this Board dated 11 February 1999, the Auditor stated that Company G approached the Taxpayer for a new lease in March 1993 and that was when negotiations began with the result that Company F and the Taxpayer increased its office space share in Premises K. However the MD testified to the contrary in cross examination when he stated that he had mentioned Company F's possible relocation to the Subject Property all along (but not seriously) and that he formally raised the matter in February or March 1993.

22. The MD also testified that if Company G had refused to allow Company F to move to the Subject Property, he was prepared to work harder and walk between the Subject Property (which presumably would have been used for the Taxpayer and other B Brothers companies) and Premises K (where Company F would have remained). The two properties were within 15 minutes walking distance of each other. Company G did refuse, yet the MD did not move the Taxpayer and his other companies to the Subject Property despite his expressed willingness to commute between the two premises.

23. There was no satisfactory explanation of why the Taxpayer needed 2,600 square feet which was the size of the Subject Property. Before the purchase of the Subject Property, the Taxpayer together with Company C and Company D were using the Old Office which had a combined gross floor area of 1,100 square feet and usable floor area of around 700 to 800 square feet. At the same time, the usable floor area occupied by Company F at Premises K was 400 square feet. The MD was of the view that Company F, the Taxpayer and the other B Brothers companies required only 1,200 to 1,300 square feet of office space. This was about the size of the usable floor area of Premises K. Why would the Taxpayer purchase 2,600 square feet (in the Subject Property) when the MD was of the view that only half of that floor area was required? The MD alleged that the usable floor area of the Subject Property was 1,500 to 1,600 square feet. It would have assisted the Taxpayer if further evidence on the usable floor area of the Subject Property was produced; especially when the Subject Property was an incomplete development and the Taxpayer had never had the opportunity to inspect it.

Evidence on financial ability

24. We are not satisfied with the evidence presented in relation to the financial ability of the Taxpayer to purchase and hold the Subject Property. After the hearing of this appeal was completed, the Taxpayer sought to introduce further evidence relating to financial ability. This will be dealt with in a separate section of this decision under the ' Application to re-open hearing' .

25. According to the MD in his oral testimony, he was seeking to rely on three sources of financing.

a. The first source was the trust receipts (TR) and letter of credit (L/C) facilities which the Taxpayer had with Bank P. Somehow the Taxpayer would be able to use these trading facilities without resorting to a mortgage or installment payments under a mortgage. The MD alleged that the bank would welcome this use of the TR and L/C facilities since this would attract a higher interest rate return for the bank. We had some difficulties in understanding this curious use of trading facilities in the non-trading activities of the Taxpayer. It is highly likely that the witness himself did not understand the exact intricacies of bank financing; hence adding to the confusion.

The MD believed that Bank P was quite lax in its mortgage policies and that, with the trade line that the Taxpayer had with the bank, it was expected that the bank was willing to lend not less than 80% of the purchase price of the Subject Property. It was odd that despite this belief, mortgage was not the method of financing considered. Instead the MD would have us believe that the bank would grant or increase the TR and L/C banking facilities to the Taxpayer which would somehow allow the Taxpayer to finance the purchase price. It is common knowledge that TR and L/C facilities are granted to businesses to

finance their trading activities. The Taxpayer sold goods on credit and with the receivables in its books, the bank was able to grant such trade financing facilities to the Taxpayer. The use of trading facilities to finance the purchase of the Subject Property would be, of itself, indicative of a trading intent. What is perhaps confusing to this Board is how the MD was going to utilize the L/C and TR facilities to purchase what was supposedly a fixed asset or investment asset of the company. Was the Taxpayer going to drawdown the TR and/or L/C facilities to obtain sufficient money to purchase or complete the purchase of the Subject Property? If yes, how was this technically possible? How would the supporting documentation have been done? The bank will need to be cooperative and agree to changes in the normal documentation required or the documentation would be done in such a way that the bank would not know the real purpose for the drawdown.

While the Auditor was not a banker, he was examined in chief on how it was possible that the Taxpayer could use L/C facilities to purchase property. His answer was that it was impossible. His personal view was that the MD had an incomplete knowledge of the banking process. The Auditor suggested that because a company had trading facilities from a bank to finance its trading activities, it freed up its own available cash (if any) for its own (and presumably non-trading) purposes. This is common sense. The L/C or TR facilities had nothing to do with financing the purchase of property. The Auditor did not suggest that (and he was not questioned on whether), given the trading facilities and other loans granted to the Taxpayer by its lenders to finance its trading business, the Taxpayer had the available cash to finance what was supposedly the acquisition of a fixed asset in the form of the Subject Property.

b. The second source was the proceeds that could be obtained from the sale of Old Office by the Taxpayer and Company C. Both offices were mortgaged to the Bank Q at the time. There was no evidence as to how much was due to Bank Q and whether there would have been sale proceeds left after repayment of the mortgages. Further we do not know what price the MD had expected to sell these two premises for and how he would have planned the cash flow resulting from such a sale. From the MD' s own testimony, no feasibility or cash flow analysis was ever done by him to see if the Taxpayer had sufficient funds to purchase the Subject Property.

c. The third source was a sum of about $10,000,000 which was available from the sale of the B Brothers' personal interest in a factory in China. But the sale was done in 1993 after the decision to purchase the Subject Property. There was no evidence on how much the MD thought he would be able to get from a possible sale in 1992. Even the evidence relating to the actual sale and how the

> $10,000,000 was paid to the B Brothers was confusing. $2,000,000 was paid through Company C and a company called New C which was revealed to this Board only in re-examination. The evidence relating to the exact relationship between the New C, Company C and the factory in China was totally confusing. Somehow 50% of the China factory was sold for the $10,000,000 and the New C, which was owned 50% by the Chinese party, ended up taking over the business of Company C. The balance of $8,000,000 was said to be paid in cash (using, as the MD put it, the underground method) to the B Brothers supposedly due to foreign exchange controls. There was no explanation on how such foreign exchange controls could have prevented repatriation of legitimate sale of investment in China unless the investment itself was not structured in accordance with Chinese law. Furthermore, the supposed manner of ' cash' payment of the $8,000,000 (paid by installments) was unclear and the MD could not recall the exact mechanism as the elder B handled this matter.

26. According to the Auditor, the MD had only related to him two sources of financing for the purchase of the Subject Property when the Auditor took instructions to reply to queries by the Revenue on this subject. The two sources as related to him were the sale proceeds from the Old Office and a mortgage. The MD had never informed the Auditor about the possibility of selling the Chinese factory and utilizing the sale proceeds therefrom as a source of financing. That was the reason why this financing source was not mentioned by the Auditor in his correspondence with the Revenue and mentioned only during this appeal. We have serious doubts on whether this financing source was really considered by the Taxpayer at the time of acquisition.

27. In the financial statement of the Taxpayer for the period ended 31 December 1992 (when the Subject Property was purchased), Note 12 stated that the Taxpayer had capital commitments of $18,116,977 for ' investment in PRC subsidiary' and $1,396,123 for ' motor vehicles' . These were in addition to the capital commitment of $12,872,230 for the purchase of the Subject Property. In the same financial statement, it could be seen that the turnover of the Taxpayer had dramatically declined from $33,891,517 in 1991 to $15,312,898 in 1992. Its operating profits were $259,802 in 1991 and $221,422 in 1992. Its balance sheet showed a net current liability of $3,265,096. It had $223,408 liquid cash. Even without the additional capital commitments in respect of the PRC subsidiary investment and motor vehicle, it is obvious that the Taxpayer would not be able to self finance the acquisition of the Subject Property. Even if the Taxpayer had sold the Old Office with minimum repayment to the mortgagee (Bank Q), the total sale proceeds amounted to only $1,860,000 which was totally inadequate to meet the projected capital commitments.

28. According to the MD, $18,000,000 odd capital commitment categorized as ' investment in PRC subsidiary' was for a factory in China. He was of the view that everyone makes double the money by sending machines to China and the money needed to purchase the

machines would have been financed by banks. The evidence in this regard was particularly obscure and too generalized for us to attach any significance to the MD' s views. No feasibility study was done by the MD in respect of this capital commitment and no evidence was given as to how the capital commitment was structured in 1992.

29. If the sale proceeds from the sale of the Old Office was insufficient to fund the capital commitments, would the Taxpayer have been able to use its existing facilities with banks? There is conflicting evidence in respect of the extent of the banking facilities enjoyed by the Taxpayer as at 31 December 1992.

a. On the one hand, it can be seen from Note 11 of the 1992 financial statements that the Taxpayer had pledged its land and buildings with an aggregate net book value of $2,229,117 to secure banking facilities for itself, and even a third party. The land and building refers to the residential unit (' Property 2') purchased by the Taxpayer for the MD' s mother and elder sister. It probably also included the Old Office. Both premises were acquired in 1990. Even if property prices had dramatically improved between 1990 and 1992 (there is no evidence in this regard), it would be safe to assume that the banking facilities available to the Taxpayer as at the end of 1992 would have been insufficient to meet its capital commitments.

b. On the other hand, the Auditor was asked by the Taxpayer' s solicitor to prepare an available funds analysis of the Taxpayer and Company F for the purpose of the Auditor giving evidence at the hearing. The Auditor stated that these analyses were done based on accounting records, bank statements and banking facility letters. The available fund analysis of Company F was meaningless as Company F would not have agreed to finance the Taxpayer to purchase the Subject Property due to reasons stated elsewhere in this decision. Furthermore both analyses done were done for the purpose of the Auditor giving evidence. This was also meaningless because this sort of analysis was never undertaken or commissioned by the MD or the Taxpayer at the time when the Subject Property was acquired. The MD had no idea what the available cash position of the Taxpayer was at the relevant times when it mattered (at the end of 1992 when the purchase agreement was signed and in the early to mid 1993 when completion was to have taken place if the Taxpayer had not sold as confirmor). We do not see how the available funds analysis assists us in ascertaining the intention of the Taxpayer at the time of acquisition of the Subject Property.

   Even if the available fund analysis was relevant, it provided an incomplete picture. It does not show the capital commitments to which the Taxpayer was liable nor does it show the working capital available. The analysis was also

inaccurate and conflicts with the MD' s testimony. The available funds of the Taxpayer stated in the analysis as at December 1992 was $8,700,000 (round figures are used here) and as at May 1993 $7,700,000 with fluctuations in-between from about $6,800,000 to $8,900,000. The Auditor was careful to note that the analysis may show that the Taxpayer had the money but whether it was sufficient to purchase the Subject Property depended on how the available fund was used. The actual available funds to pay the purchase price or any part thereof was not as much as the $8,700,000 or 7,700,000 suggested on first impression. Much of the available funds was in the form of TR facilities which could not be utilized to purchase the Subject Property. The only possible funds which could be used was the apparently undrawn Bank R overdraft of $2,000,000 and in addition the undrawn overdraft facilities of Bank P in May 1993 of $1,400,000. The MD had never mentioned in his evidence the existence of these two overdraft facilities nor using them to finance the purchase of the Subject Property. From the available fund analysis of the Taxpayer on the two relevant dates, the final available fund figures showed that the funds were inadequate on its own to purchase the Subject Property. As for the submission by the Taxpayer' s solicitor that it was not required to show that funds for the entire purchase price was available when the Subject Property itself could be used as collateral in a mortgage covering 80% of the purchase price, we must not forget that the MD has testified specifically that mortgage was not considered by Bank P to which he looked as a source of financing.

Other sources of financing on re-examination

30. There were other sources of financing for the Taxpayer which the MD added on re-examination. The Taxpayer attempted to show a ' global' picture of its financial strength. The Taxpayer' s solicitor submitted that the Taxpayer had available funds if the mortgaging plan did not go smoothly (but, as we noted, there was no ' mortgage' plan in evidence). Those funds would have come from money transferred from healthy associated companies by way of directors' loan. We note at this juncture how the picture relating to source of financing for the acquisition painted by the Taxpayer through its previous tax representatives and the Taxpayer' s solicitor was changing and progressing in the course of time. Prior to the CIR Determination, the financing sources were bank mortgage loan and sale proceeds from the Old Office. Then the L/C and TR facilities and the sale of 50% interest in a factory in China was added at the hearing. And now the new global view of financing sought to be evidenced by the testimony and documents submitted in re-examination of the MD.

31. Again, much of this additional evidence was led by the Taxpayer' s solicitor which damages its credibility. The Taxpayer' s solicitor produced in re-examination a bundle of documents in an attempt to convince this Board to look at the financial situation ' globally' and not confining ourselves to the Taxpayer. We accept the Taxpayer' s submission that one can take a

global view of the financing of a corporate vehicle, especially the family run and operated variety. We have no doubt that shareholders and directors of such companies commonly provide financing to their own companies and the finances of other associated companies under common control can be considered as well. But the actual evidence presented in this regard falls far short of the global picture submissions of the Taxpayer' s solicitor.

32. The global financial picture presented in re-examination was difficult to follow. The evidence was not ' global' as submitted by the Taxpayer' s solicitor. It can be seen that the bulk of such additional documentary evidence produced was post-acquisition of the Subject Property (that is, after December 1992 and mid 1993). Further, the evidence did not show what was the financial picture which confronted the MD at the time of and prior to his decision to purchase the Subject Property in December 1992. As such, the evidence cannot assist this Board in trying to ascertain what the intention of the MD, or the Taxpayer, was at or near the time of acquisition. In any event, the attempt to show the increases in the banking facilities post-acquisition clearly showed that such increases were more due to various relatives and related parties of the B Brothers putting up various properties up as collateral rather than due to the good reputation and bank confidence as testified by the MD. The evidence relating to the finances of Company F was also meaningless. If the B Brothers could not persuade its Company F joint venture partner to relocate Company F' s office, it is highly unlikely that the B brothers could have utilized Company F' s finances to serve the purpose of the Taxpayer or other companies belonging to B Brothers. The MD was evasive when cross-examined on whether he could have reasonably expected Company F to support the Taxpayer' s purchase of the Subject Property and, even then, had to admit that he was not sure of such support. As noted earlier, it would be a surprise if Company G would have supported a move whereby it would lose a well connected tenant; not to mention supporting the Taxpayer in purchasing another premises into which Company F would be relocated. The Taxpayer could have expected a distribution of Company F' s 1992 accumulated profits of $1,100,000 as its 50% shareholder and the Taxpayer would have been entitled to half. There was mention of this potential source of financing in the MD' s testimony. But this assumes that Company G agreed to distribute all of this accumulated profits. And there is no reason to think that the B Brothers had sufficient say in the affairs of Company F. Further even if the full amount was distributed, it would have added only a little over $500,000 to the cash position of the Taxpayer.

History of property acquisitions

33. The Subject Property was not the Taxpayer' s first purchase of property. It had purchased the part of the Old Office which was sold on 1 July 1993. It had purchased Property 2 in January 1990 which was used as the residence of the MD' s mother and elder sister. It had purchased another residential unit (' Property 3') in August 1993 which was used as the residence of the elder B and later rented to the Taxpayer' s senior accountant when the Taxpayer purchased a residential unit (' Property 4') for the use of the elder B in July 1996. (Another inconsistency in the evidence of MD should be noted here. The MD testified that the senior accountant rented the Taxpayer' s Property 3 around the end of 1994 when the elder B moved to Property 4. But

Property 4 was acquired only one and half years later in July 1996.) In September 1994, the Taxpayer purchased another residential unit (' Property 5') which was used by the MD as his own residence. This history of purchase and owning properties related more to the MD or the B Brothers using the Taxpayer as the corporate vehicle for their own or family' s residential use and does not point to any tendency of the Taxpayer to hold on to property for business or investment purpose. Such history does not assist the Taxpayer' s case.

Application to re-open hearing

34. After completion of the appeal hearing, on 4 November 1999, the Taxpayer' s solicitor asked to reopen the appeal in an attempt to introduce two witnesses and certain Bank P records. There was a Ms S who was the bank manager of Bank P in the District M branch and who, according to the Taxpayer, was able to assist in evidence relating to the financial ability of the Taxpayer to purchase the Subject Property and to service the mortgage loan. The solicitor alleged that the material evidence was not known or available to the Taxpayer at the time of the hearing of the appeal as Ms S was away from Hong Kong. There was also a Mr T. At that point of time, we had no idea who Mr T was and what his evidence would be.

35. After considering the Taxpayer' s request and the Revenue' s objection to reopening the case, this Board disallowed the request on 12 November 1999. The financial ability of the Taxpayer had always been in issue and was one of the factors which must be considered in this appeal. It was one of the factors considered in the CIR Determination where the Commissioner stated that ' I am not satisfied that the Company (Taxpayer) could be able to service the mortgage loan, if any, on a long term basis.' It is incumbent on the Taxpayer and those advising it to present the Taxpayer' s case properly. Ms S and Bank P records have always been relevant and available to the Taxpayer. It is not new evidence. The notice of appeal was filed on 11 February 1999. The notice of hearing of this appeal was sent to the parties on 24 June 1999. The first hearing date was refixed on the Taxpayer' s application. There was ample time to investigate and determine the nature of Bank P' s evidence and the availability of Ms S prior to the first hearing date. Furthermore the Taxpayer had unique second opportunity to consider whether to tender any of Bank P' s evidence. The hearing took three separate non-consecutive days with one month intervening between the second and third hearing dates. The Taxpayer' s solicitor had even indicated on the second hearing date that Ms S might be called as a witness. The Taxpayer had given totally inadequate, and in our view, wrong reasons to justify the reopening of the appeal. As for Mr T, no reasons were given at all as to why we should allow Mr T to give evidence after the hearing.

36. After the Board' s rejection of the hearing reopening application, the Taxpayer' s solicitor asked this Board to review this rejection on 19 November 1999. The Taxpayer' s solicitor stated that the Taxpayer had not been given the opportunity to make a full submission in respect of the hearing reopening application. He also stated that as far as he knew, the Revenue has raised no objections to the application. This was blatantly untrue as the Revenue had objected to

the initial application to reopen the hearing and had again objected to the request to review the decision to reject the reopening application. The Taxpayer was given the opportunity to reply to the Revenue's objections. The Taxpayer was informed by this Board that an actual hearing of the application will not be required unless the Taxpayer was of the view that the hearing will add anything to the written submissions in respect of the application. The Taxpayer had not asked for an actual hearing.

37. In its further written submissions, the Taxpayer's solicitor cited Ladd v Marshall [1954] 1 WLR 1489 and submitted a copy of the relevant pages of O.59 r.10 of the White Book relating to appeals to the Court of Appeal. The solicitor did not rely on the White Book passage copied to us but relied on the three conditions set out in Ladd v Marshall which must be satisfied before further evidence can be received. According to Ladd v Marshall, the three conditions are:

(1) '*first, it must be shown that the evidence could not have been obtained with reasonable diligence for use at the trial;*

(2) *secondly, the evidence must be such that, if given, it would probably have an important influence on the result of the case, though it need not be decisive;*

(3) *thirdly, the evidence must be such as is presumably to be believed, or, in other words, it must be apparently credible though it need not be incontrovertible.*'

The Taxpayer's solicitor submitted that this Board is duty bound to hear all evidence, that the application of these three conditions is more stringent in Ladd v Marshall as judgment had been given and that since judgment had not been given in this appeal (at the material time), Ladd v Marshall should be applied less stringently.

38. As pointed out by the Revenue, this Board is empowered to admit or reject any evidence adduced, whether oral or documentary under section 68(7) of chapter 112. We reject the submission that we are duty bound to accept all evidence. However our power under section 68(7) cannot be exercised injudiciously nor arbitrarily. Even on the Taxpayer's own submissions, it had been unable to establish that it had met the first condition set out in Ladd v Marshall. We are of the view that the evidence which the Taxpayer sought to admit after the hearing has finished was evidence which, with even the slightest of reasonable diligence, could have been obtained for the hearing of this appeal. General rules of evidence are followed by the Board albeit generally more laxed in their application. There must be finality to evidence, submissions and arguments from litigants. In the circumstances, we do not consider it fair to allow the Taxpayer to re-present its case on financial ability.

39. Moreover, the Taxpayer's solicitor had clarified the status of the mysterious Mr T as

an account executive of the District U branch of Bank P who could assist. It was alleged that the MD applied for a mortgage from the District U branch of Bank P. Again the nature of the evidence was such that it could have been obtained with reasonable diligence on the part of either the Taxpayer itself or those advising it to be adduced at the hearing. Further, this evidence, if admitted, would have directly contradicted the MD' s testimony both in chief and under cross examination that he had spoken with Ms S of the District M branch about the financing the purchase of the Subject Property, that mortgage financing was not considered and that Ms S told him that a loan of ' 80 or 90 percent (of the purchase price) was no problem' .

40. On 27 May 2000, we informed the parties that our initial rejection of the application to reopen the case remained unchanged.

Conclusion

41. There were no minutes recording any board decision in respect of the purchase of the Subject Property. According to the Taxpayer' s solicitor, this was understandable as the Taxpayer was a family run business with no formal meetings and the absence of the minutes was neutral to the issue of intention. In the circumstances, the presence or absence of these minutes and what would have been stated in these minutes would have no effect in our finding on intention.

42. The accounting treatment of the Subject Property by the Taxpayer in its accounting records has been that of a fixed asset. While this Board is entitled to look at accounting treatment as part of the evidence which supports an intention to hold for investment for long term, we do not consider the accounting treatment in the Taxpayer' s case per se as sufficient to persuade us of its long term intentions when we look at all the surrounding circumstances of the case.

43. When cross-examined on the sudden decrease in the turnover of the Taxpayer stated in its 31 December 1998 profit and loss accounts from $169,699,044 to $2,690,120, the MD testified that this was due to a restructuring whereby the Taxpayer became a holding company and the operations were handed over to Company F. But this part of the MD' s testimony was contradicted by a special resolution of Company F dated 29 September 1998 which resolved to make an application to strike off Company F from the Companies Registry.

44. The purchase and sale of the incomplete Subject Property within short time span of about four and a half months and the sale by the Taxpayer as confirmor are indicative of a trading intention which needed explanation. In addition, the burden of proof rests on the Taxpayer. The Taxpayer had neither provided us with the explanations nor discharged its burden of proof. After considering all the evidence presented to us, we find that the intention of the Taxpayer was to trade the Subject Property. We agree with reasons set out in the CIR Determination and the evidence produced to us has failed to persuade us to the contrary. This appeal is dismissed and the CIR Determination confirmed.