

**Case No. D13/12**

**Profits tax** – real property – one-off transaction – intention genuinely held, realistic and realizable – sections 2(1) and 14(1) of the Inland Revenue Ordinance (‘the IRO’).

Panel: Cissy K S Lam (chairman), Chui Pak Ming Norman and Kong Chi How Johnson.

Date of hearing: 16 December 2011.

Date of decision: 27 June 2012.

The Appellant appealed against the determination of the Deputy Commissioner who rejected the Appellant’s claim that the disposal of a property was profits arising from the sale of a capital investment and thus not chargeable to tax under section 14(1). The Appellant had in her own name or jointly with others purchased four properties in the last ten years. Except for the property, the other three properties were/are held for medium to long term and used as residence for herself and/or her family. She stated that her intended or actual usage of the property was for her son’s residence in future and the reason for selling the property was that the size of the property was considered too small subsequently. The essential question was whether the Appellant’s purchase and sale of the property amounted to the carrying on of a trade or an adventure in the nature of trade within the meaning of the IRO.

**Held:**

All investors invest with a view to profit, just as much as traders do. Selling at a profit does not per se turn an investment into a trading stock. 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. The facts and circumstances were consistent with the Appellant being a careful investor with time and money on her side. Her intention to hold the property as a long term investment was an intention that could be ‘genuinely held, realistic and realizable’.

**Appeal allowed.**

Cases referred to:

Simmons v IRC [1980] 53 TC 461

All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750

Taxpayer in person.

To Yee Man and Wong Ka Yee for the Commissioner of Inland Revenue.

**Decision:**

1. The Appellant objected to the Profits Tax Assessment for the year of assessment 2007/08 raised on her in respect of the disposal of a property ('Property A'). The Appellant claimed that it was profits arising from the sale of a capital investment and thus not chargeable to tax under section 14(1) of the Inland Revenue Ordinance, Chapter 112 ('the IRO'). By determination dated 2 June 2011 ('the Determination') the Deputy Commissioner of Inland Revenue ('Deputy Commissioner') rejected her claim. She now appeals to us.

2. Property A was in a new development in Region B ('Development A'). The Appellant purchased Property A in March 2007 for HK\$4,037,500 and sold it in December 2007 for HK\$4,850,000. The gross profit was \$812,500 and the net profit after deducting the conveyancing and other expenses (that is the assessable profit) was \$643,392. The tax payable thereon was \$77,942. This is the amount of tax in dispute.

**Not the typical Hong Kong speculator**

3. The Appellant called one Miss C as her witness. She herself gave evidence after Miss C. Miss C was the property agent who introduced Property A to the Appellant. Miss C was also the property agent who introduced Property 2 (see below) to her in 2005. It was how they became acquainted. The Appellant and Miss C have the same surname which fact, as will be apparent below, is of significance. Whenever it is necessary to refer to that surname, it will be abbreviated to 'Ch' below.

4. The Appellant submitted detailed grounds of appeal. She confirmed they were true and accurate and elaborated on them in evidence before us. The Appellant impressed us as an honest and reliable witness. She worked as a senior programme director with one of the universities before she retired. She spoke excellent English and was able to express herself well. She was forthright and at times formidable in her evidence. She spoke of facts as she knew them and did not exaggerate. Miss C gave evidence of a telephone conversation she had with the Appellant's younger son about the sort of property that the younger son was looking for, a fact in favour of the Appellant's case. But the Appellant frankly said to us that she was not aware of such conversation and heard it for the first time in the course of Miss C's evidence. We do not doubt that the Appellant did not discuss the evidence with Miss C before the hearing. She came to the hearing to tell us the facts and she expected Miss C to do the same. She came across to us as a lady of principle. She started her testimony by saying that she despised property speculation in Hong Kong. It jacked up property prices. It was the one thing she would never do and she hated being labelled a

property speculator.

5. Indeed the Appellant is not what one would expect of a typical property speculator in Hong Kong. In the past ten years, she has purchased four properties. Apart from Property A, the other three were and are held for medium to long term and they were purchased for and indeed used as residence for the Appellant and her family.

6. 'Property 1' is her present residence in Area D. It is in the joint name of the Appellant and her husband. They moved into that property in April 2004 after both their sons had gone to study in Country E. Prior to that they lived on Hong Kong Island.

7. 'Property 2' was purchased in October 2005 at \$6,690,000. It was purchased in the joint name of the Appellant and her elder son. When it was purchased the Appellant's elder son, who was 25 at the time, had returned to Hong Kong after having finished his studies in Country E. Property 2 was also in a new development and the sale was completed in November 2006. The elder son moved into Property 2 with his wife after they got married in December 2006 and lived there until September 2008 when they went to City F in Country F to further their studies. They together with their baby child were supported by the Appellant's husband at HK\$1.5 million a year. Property 2 was sold in April 2009 at \$6,138,000, that is at a loss. Part of the proceeds of sale went towards financing the elder son's family in City F.

8. Property A purchased in 2007 was the third property in the chronological sequence.

9. 'Property 4' was purchased in July 2010 in the joint names of the Appellant and her brother and his wife. It has since been used as the residence of the Appellant's brother and his wife.

10. All four properties were purchased without mortgage. This is again something one would not expect of a property speculator in Hong Kong looking to maximize his/her profits with the widest margin.

11. The Appellant accepted that she was interested in the property market. She liked viewing new developments. Since 2005 Miss C had taken the Appellant to see numerous new developments in Hong Kong, Kowloon and the New Territories. Being a retired lady, the Appellant had both the time and the resources. But despite such keen interests, she had only purchased four properties in the past ten years. This is likewise more the mark of a careful investor than that of a speculator buying and selling in quick succession.

### **Reasons for buying and selling Property A**

12. Section 14(1) of the IRO provides that *'profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or*

*business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) ....*’ By section 2(1), trade includes ‘*every trade and manufacture, and every adventure and concern in the nature of trade*’.

13. The essential question in the present case is whether the Appellant’s purchase and sale of Property A amounted to the carrying on of a trade or (as some authorities put it) an adventure in the nature of trade within the meaning of the IRO. The answer to this question depends on the Appellant’s intention at the time of the purchase. For section 14 to apply, we have to find an intention to trade. Lord Wilberforce stated the test in Simmons v IRC [1980] 53 TC 461 at pages 491 to 492 as follows:

*‘ One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock - and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company’s accounts, and, possibly, a liability to tax: see Sharkey v Wernher [1956] A.C. 58. What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status - neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.’ (at page 1196)*

14. Mortimer J (as he then was) in All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750 at page 771 expanded on the question of intention:

*‘ ..... 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*

(2012-13) VOLUME 27 INLAND REVENUE BOARD OF REVIEW DECISIONS

*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.'*

15. In response to the Tax Assessor's questionnaire in relation to the purchase and sale of Property A, the Appellant stated the followings:

- (1) Intended or actual usage of property: Her son's residence in future (she was there referring to her younger son).
- (2) Reasons for selling the property: The size of Property A was considered too small subsequently.

16. The younger son went to study in Country E in September 2003. At that time, the family was still living on Hong Kong Island. After the younger son left home, the Appellant and her husband moved out of the Island to Property 1 in Area D. When the Appellant purchased Property A, the younger son was still studying in Country E but was expected to graduate in 2008. The Appellant figured that the younger son would prefer to live 'in the city' when he returned. She had looked at many new developments and liked Development A. She liked the show flat which appeared sizable and comfortable. Development A was within walking distance of the MTR. It would be more convenient than Area D if the younger son had to travel to work in Central. And the younger son would most likely want to live close to Central as they had lived on the Hong Kong side before the sons left for study in Country E.

17. Around mid-2007, however, the younger son told the Appellant and her husband that he would like to stay on for a Master's Degree after graduation and thus would not return to Hong Kong until mid-2009 at the earliest.

18. After the Appellant took possession of Property A in August 2007, she found Property A a little smaller than what she had expected. For long term purpose, the property would not be big enough if the younger son got married and had his own family. And since the younger son was not coming back for another two years, she decided to rent out the property. Miss C offered to help the Appellant look for potential tenants. She offered to contact the estate agents on her behalf because the Appellant lived in Area D which was some distance from Property A. It would not be convenient for the Appellant to have to contact estate agents in 'Area A' where Property A was located.

19. The Appellant left Miss C duplicate keys and trusted her to look for tenants. The Appellant did not contact any estate agent herself. It was only after two months when the Appellant did not hear further from Miss C that she decided to contact a few agents herself which included the agents referred to as Agent G, Agent H and Agent J below.

20. On 15 December 2007, Miss K from Agent G found a tenant for the Appellant. The signing of the lease was scheduled to take place on 17 December 2007. Before that, however, another agent also from Agent G, a Mr L, called the Appellant and told her that a young couple wanted to buy Property A and tried to persuade the Appellant to sell it to them. The Appellant recalled that when Mr L called her, she was at her husband's book signing ceremony in Area M and told Mr L she had no time to consider the matter. Mr L was so persistent that he took the young couple to Area M to meet with the Appellant. The Appellant liked the young couple. They were urgently looking for a flat and the price they offered was good. After due consideration and discussion with her husband she agreed to sell Property A.

21. We do not doubt that in deciding to sell, the Appellant took into consideration factors like the size of the property which was smaller than expected and the fact the younger son was not returning to Hong Kong until 2009. Nor do we doubt that the very attractive price offered played an important part in the Appellant's decision to sell. Such a substantial profit in the span of nine months would be a temptation to anyone. But all investors invest with a view to profit, just as much as traders do. Selling at a profit does not per se turn an investment into a trading stock. As Orr LJ said in the Court of Appeal of Simmons v IRC above at page 488E, '... 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.....' The Judgment of Orr LJ was approved by Lord Wilberforce as containing a generally correct statement of the law (see page 495A).

### **The estate agents records**

22. The Appellant's stated intention has to be examined objectively against 'the whole of the surrounding circumstances'. In her letter of 8 January 2011 to the Inland Revenue Department ('IRD') objecting to the assessment, she said that 'If property agents such as [Agent H], [Agent G] and [Agent J] still keep records of 2007, they will show that my original instruction to them was to rent out rather than to sell the flat.' This suggestion was taken up by the IRD who in April 2011 wrote to the three agents and obtained the relevant records.

23. We will first look at the computer records of Agent H appended to the Determination as Appendix H. The entries on these records were made by different agents of Agent H. Their names are left out in the entries quoted below. According to these records Agent H was first instructed on 5 September 2007 by one 'Ms Ch'. The Appellant and Miss C have the same surname and the Deputy Commissioner in the Determination mistook this 'Ms Ch' as the Appellant. It was in fact Miss C and Miss C confirmed to us that the mobile number on Agent H's records was her mobile number, or we should say one of her mobile numbers because she used a different mobile number when communicating with the Appellant.

(2012-13) VOLUME 27 INLAND REVENUE BOARD OF REVIEW DECISIONS

24. There are several entries relating to 5 September 2007. It appears that Miss C left the agent an asking price of \$4.5 million and an asking rent of \$19,000 on that day. Then we find the following entries:

‘ 10-9-2007 19:10:38 UD MS SD KEEP PX FOR SELL & RENT, NOT URGENT, HV CLIENT CAN NEG  
27-09-2007 21:03:09 MS SD NO CH PX AND NEW FLAT  
15-10-2007 17:59:47 MS Ch SD 4.45M FOR SELL’

25. We quote these entries in full to demonstrate that they are in short form and jargons which are not readily comprehensible. It appears that up to 15 October 2007, the instructions were still to sell as well as to rent. The entries after these, however, showed a complete reversal of attitude.

‘ 24-10-2007 16:18:33 MS NOT FOR SALE  
22-11-2007 16:34:21 MOBILE OFF  
27-11-2007 11:37:07 STILL MOBILE OFF  
29-11-2007 19:00:09 UD SO MANY TIMES MOBILE OFF  
3-12-2007 14:57:13 MS SAID NOT FOR SELL DON T UD  
8-12-2007 13:19:17 UD MS SD MUST NOT SALE.....MS SD IF OUR 再 UD FOR HER ... 佢會報警 ....’ (meaning she will call the police)

26. This sudden change in attitude can also be found in the other agents’ records. We will next look at the computer records provided by Agent J appended to the Determination as Appendix I. The entries on these records were also made by different agents of Agent J and their names are left out in the entries quoted below.

27. The Deputy Commissioner had likewise misidentified the ‘Ms Ch’ on these records as the Appellant. It was in fact Miss C and the mobile number given to the agent was Miss C’s mobile number. It appears from these records that Miss C contacted Agent J on 4 September 2007 leaving an asking price of \$4.5 million and an asking rent of \$18,000. These were amended on 5 September 2007 to an asking price of \$4.5 million, a bottom price of \$4.45 million and an asking rent of \$19,000.

28. The next entry was one on 13 September 2007 which seems to show that an agent from Agent J tried to call Miss C in the afternoon but failed to get hold of her. The entry next after that was on 18 September 2007 at 04:23:28 in the afternoon which reads: ‘MS Ch SD PX CAN NEGOTIATE SO I OFFER FOR RENT 15K SHE MAY BE UNHAPPY AND SD [HAHA] THEN CUT ME LINE’. Miss C was asked to explain this entry in cross-examination but as with many other questions pertaining to the agents’ records, she said she could not explain it and could not remember what the exact conversation was.

29. There followed another 23 entries on Agent J’s records between 28 September 2007 and 6 December 2007 from which it appears that various agents from Agent J had tried to contact Miss C but failed. When the agents finally managed to contact

(2012-13) VOLUME 27 INLAND REVENUE BOARD OF REVIEW DECISIONS

Miss C, there was again a 180 degree change of attitude as in Agent H's records:

‘ 07-12-2007 下午 06:31:42 MS Ch SD THIS UNIT FOR OWN USE ,, NOT FOR SELL’.  
10-12-2007 下午 06:15:38 MS Ch SAID 自住唔賣, 話再打來就報警’  
(meaning that the property was for own use and if they called again, the matter would be reported to the police)

30. Turning now to Agent G's records appended to the Determination as Appendix G. In this instance the records show the name and mobile number of the Appellant, not Miss C. Instead of listing all the telephone calls made, there are only four relevant entries in these records. They are largely in Chinese and parts of them are quite illegible. Doing the best we can, the entries seem to read as follows:

‘ 05-09-2007 .... 狀況更改為: C, 價錢更改為: 售價 Ask 456 萬, Bottom 445 萬, 租金 Ask 19000, Bottom 19000, (備忘: 大業主盤口, 聯絡人及電話 ms Ch)  
03-11-2007 ..... 狀況更改為: P, (備忘: don't call Ill already call police 大業主盤口, 聯絡人及電話 ms Ch)  
07-12-2007 .... 狀況更改為: C, 價錢更改為: 售價 Ask 480 萬, Bottom 480 萬, 租金 Ask 18000, Bottom 18000, (備忘: p=c by mandy 大業主盤口, 聯絡人及電話 ms Ch)  
18-12-2007 ..... 資料更改: 沽出, 成交備忘 sold by [Mr L], 成交售價 4.85 百萬’

31. We have grave misgivings about the way these records are laid before the Board:

- (1) Our first difficulty is in trying to understand them. A lot of the terms are in short form and jargons, and in the case of Agent G's records, part of them are not even legible. No evidence was called from the estate agents to explain the entries to us.
- (2) The Appellant and Miss C's evidence was that it was Miss C who contacted the three estate agents in September 2007. The Appellant herself contacted the agents about two months later. But none of the records reflect this. We would expect to see both Miss C's and the Appellant's names and contacts on the records. Instead there is only one contact person and one mobile number, those of Miss C in Agent H's and Agent J's records and those of the Appellant in Agent G's records. No enquiry was made to the estate agents to clarify this point.
- (3) Despite the initial instructions to sell as well as to rent, all the records contain entries in later months showing strong sentiment against any



attempt to sell including a threat to call the police. How are we to construe these contradicting entries? What was the reason for such contradictions and reversal of attitude? Were the agents all along speaking to one and the same 'Ms Ch' or to two 'Ms Ch', namely Miss C and the Appellant, each giving them different instructions? The entries on the records were made by different individual agents (as said, we have left out the names of the individual agents in quoting the entries). One person could be speaking to Miss C and another person to the Appellant without knowing that each was speaking to a different 'Miss Ch'.

- (4) When cross-examined the Appellant said she had no idea why the records showed instructions to sell as well as to rent. She herself did not contact the agents directly until about November 2007 and her instructions were only to rent out. She did not want to speculate whether Miss C had acted contrary to her instructions. What she could say for certain was that she herself never gave the agents instructions to sell.
- (5) Miss C was cross-examined extensively on the records. To a lot of the questions she simply could not remember or explain. Admittedly she was not the person who prepared those records and she was speaking from memory of events that happened back in 2007. While the burden of proof is on the Appellant, it is the IRD who is seeking to rely on these records and it is their duty to lay them before this Board with clarity. The Deputy Commissioner did not seem to have looked at the records in the same depth that we have. It is unfortunate that the Appellant and Miss C have the same surname. Otherwise the IRD would have been alerted to the fact that instructions given to the estate agents, at least as far as concerned Agent H and Agent J, were in fact by a different person and might have conducted more thorough investigations into the matter. As the evidence now stands with the many questions unresolved, the reliance and weight that we can place these estate agents records is limited.

### **Miss C's evidence**

32. Miss C gave evidence on behalf of the Appellant. She was the estate agent who introduced Property 2 to the Appellant in October 2005. Since then she had taken the Appellant to view many new developments. The Appellant was not a speculator. She was buying to invest and so was very careful in her decision. She knew the Appellant was looking for a property for her younger son when he returned to Hong Kong to live. She said she had spoken to the younger son on the phone once and got an idea of the sort of property they were looking for – most importantly easy transportation to Central. She confirmed that after the Appellant took possession of Property A, she offered to help the Appellant rent out the property because the Appellant lived in Area D and it would not be convenient for her to contact estate agents in Area A where Property A was located. She offered to help the

Appellant purely as a friend because in August/September 2007, she was not working as an estate agent and was not attached to any estate agent company. She left her then employer in May 2007 and resumed work at one of Agent G's Kowloon office in November 2007. The Appellant was not aware that Miss C was out of work between May and October 2007. Nor was she aware of any telephone conversation between Miss C and her younger son.

33. Miss C confirmed that the Appellant's instruction to her was to rent out Property A and not to sell, and she maintained that this was the instruction she gave to the other agents. When questioned why the records showed otherwise, she put the blame on the other agents and suggested foul play. She alleged that agents were required to report to their seniors every day how many calls they had made to potential clients and sometimes in order to make up the necessary quota of calls, they might fabricate call records. She said agents could get more commission by putting through a sale than by putting through a rental deal and she suggested that the agents might have fabricated the instructions to sell for this reason. She denied having ever engaged in such foul practice herself but alleged that it was not uncommon among other agents, even among her own colleagues.

34. So if the Appellant's instructions to Miss C was to rent out and not to sell, what are the possible explanations for the instructions to sell to appear in the estate agents' records? Could it be that the estate agents had indeed fabricated an asking price because they were hoping they could ultimately persuade the owner to sell and thus earn a higher commission? Or could it be that contrary to the Appellant's instructions, Miss C gave the estate agents instructions to sell as well as to rent hoping that if the property was eventually sold, she herself could earn a higher commission?

35. Unlike with the Appellant, we do not have the same level of confidence in relying on Miss C's evidence, especially in her answers pertaining to the estate agents' records. She was not straight forward in her answers. A lot of the events she could not remember or explain. She came to tears twice during the hearing when the questions put to her were in no sense provocative. Her answers in cross-examination and her demeanours at the hearing were far from convincing. Her evidence left us in real doubt whether she did carry out the Appellant's instructions to rent faithfully. We do not want to speculate. Suffice for us to say that we find Miss C's evidence far from satisfactory; likewise for the estate agents' records with the contradicting entries. We prefer the evidence of the Appellant and we accept her evidence that her instruction to Miss C was to rent out Property A. She had no contact with the agents directly until around November 2007 and her instruction to those agents was to rent out.

#### **The Deputy Commissioner's reasons for rejecting the Appellant's objections**

36. The Deputy Commissioner's first reason for rejecting the Appellant's objections was based on the estate agents' records. We have dealt with them above.

37. The Deputy Commissioner next doubted the Appellant's claim that she bought Property A for her younger son: 'The Taxpayer claimed that the usable size of the Property

(2012-13) VOLUME 27 INLAND REVENUE BOARD OF REVIEW DECISIONS

was found to be smaller than expected and [the younger son] would need to upgrade to a large flat [Fact (7)(b)]. However, purchase of property for residential use is an important decision. Had the Taxpayer really intended to acquire the Property as [the younger son's] residence, she should have thoroughly considered this factor and sought [the younger son's] view on it before deciding to purchase the Property.'

38. The Appellant's answer was that she purchased Property A based on her impression of the show flat which appeared sizable and comfortable. She bought the property for the son's long term use and expected it to be large enough to house a small family. After taking possession she genuinely thought that the property was too small for such a purpose. It was not uncommon for buyers to be disappointed after taking possession given the glossy manner in which show flats were presented. The Appellant did not think there was any need for her to consult her younger son. In her own words, she 'did not expect to get any insightful advice from a 20-year old who had no experience in property acquisition whatsoever.' She could decide for him. She was paying for the property, not the younger son.

39. The Deputy Commissioner next questioned why no 'replacement' property was purchased: '[The younger son] has been living with the Taxpayer since he returned to Hong Kong in 2009. No replacement property has been acquired as his residence after the disposal of the Property [Fact (8)(d)]. Further, it seems to me that the Taxpayer should have the option of letting [the younger son] reside at [Property 2] but chose to sell the property in April 2009 [Fact (3)]. All the objective facts cast doubt on the alleged need of acquiring a property as [the younger son's] residence.'

40. The Appellant explained that Property 2 became vacant in September 2008 when the elder son moved to City F. She put the property up for rent and sale and took the first offer to sell and sold the property in April 2009 before the younger son returned to Hong Kong. The sale proceeds were used to finance the elder son's family in City F. Further she said that the Deputy Commissioner confused intention with need. There was never any absolute need to buy the younger son a separate home.

41. The Deputy Commissioner further questioned the reason the Appellant gave for not buying a 'replacement' property: 'The Taxpayer also claimed that she did not buy a replacement property for [the younger son] owing to the soaring property price [Fact (8)(d)]. I find this claim unconvincing. First, the property market experienced a downturn with noticeable drops in prices after the outbreak of the global financial tsunami in September 2008. Second, when the prices in the property market posted considerable growth during the year 2010, the Taxpayer managed to acquire [Property 4] in July 2010 [Fact 3]. It showed that the Taxpayer should have the financial means to acquire a replacement property for [the younger son] but she chose not to do so.'

42. The Appellant's answer was that while property prices came down in late 2008, they soon went up in mid-2009. The younger son came back to Hong Kong in May 2009 and got a job in Central in October 2009. She had been trying to look for a flat on the Island since late 2009 but prices continued to soar during her search. Take Grand Seaview Heights in Tin

(2012-13) VOLUME 27 INLAND REVENUE BOARD OF REVIEW DECISIONS

Hau as an example – a 16<sup>th</sup> floor flat of 997 square feet cost \$7.1 million in May 2009 and a same-size 15<sup>th</sup> floor flat cost \$8.5 million in March 2010. The increase was 20% in 10 months. She continued to look for a property for the younger son but would prefer to wait for a market correction when there was no urgency in doing so. She purchased Property 4 in July 2010 for a totally unrelated purpose – it was purchased jointly with her brother as his home. Her brother had been renting and could not acquire a property on his own, so she helped her brother buy Property 4.

43. Miss To representing the Commissioner of the Inland Revenue referred us to Private Domestic Price Indices by Class published by the Rating and Valuation Department. The size of Property A puts it under Class B.

| Year | Month | Class B | All classes |
|------|-------|---------|-------------|
| 2007 | 4-6   | 97.5    | 98.3        |
|      | 7-9   | 101.2   | 101.9       |
|      | 10-12 | 109.0   | 110.8       |
| 2008 | 1-3   | 119.9   | 122.7       |
|      | 4-6   | 120.7   | 123.7       |
|      | 7-9   | 119.1   | 121.4       |
|      | 10-12 | 104.8   | 106.8       |
| 2009 | 1-3   | 105.1   | 106.9       |
|      | 4-6   | 113.6   | 115.8       |
|      | 7-9   | 122.4   | 125.4       |
|      | 10-12 | 127.6   | 131.1       |
| 2010 | 1-3   | 134.8   | 139.0       |
|      | 4-6   | 140.3   | 144.8       |

44. Miss To argued that the property market experienced a downturn with noticeable drops in prices in the second half of 2008 after the outbreak of the global financial tsunami. The downward adjustment continued into 2009. The price indices from the 4<sup>th</sup> quarter of 2008 to the 2<sup>nd</sup> quarter of 2009 were in the region of 106.8 to 115.8, which were lower than or close to that of 110.8 for the 4<sup>th</sup> quarter of 2007, that is the quarter during which Property A was sold. However, the Appellant did not acquire a replacement property for the younger son despite the market setback.

45. One must bear in mind that we are looking at these indices retrospectively. They do not represent market sentiment at the time. It is easy to say in retrospect that one should have bought between October 2008 and March 2009. But without a crystal ball one could not have known whether the market would have fallen further or when would be the opportune moment to buy. In any event the window to buy was narrow, about six months.

After March 2009 prices did escalate sharply as the Appellant told us.

46. We agree with the Appellant that this skepticism about the need to buy Property A as the son's home and the failure to buy a 'replacement' property were founded on a misreading of the facts. The true position as we understand from the Appellant's evidence was this: The Appellant had ready cash to invest in a property. In Hong Kong if one buys a property to invest, the obvious options are to either live in it or to rent it out. The younger son would finish his study in another year, or so she thought. So the natural thing to do was to buy the property and let the son live in it. She looked for a property that would suit the son's needs. But she was not buying a property for the son's needs. That was the difference between intention and need. When the younger son later told her that he was not returning to Hong Kong until mid-2009, the next obvious option was to rent it out. She tried to rent out Property A. Before she did so, a very attractive offer came along. She allowed herself to be persuaded no doubt by the very respectable profit to be made. In any event Property A was smaller than she expected and would not be big enough to house a small family. In the long run they would have to find another property more suitable for the younger son to live in. So selling became the right thing to do. She did not sell because she needed to sell. There was never a need to buy nor a need to sell. She did not sell because Property A was too small, size was but a consideration in the decision to sell. She sold because she considered it the right decision at that time. After she sold Property A she did look at other properties. She had no problem financially. But she found property prices too high. She was waiting for the next opportune moment to buy. There was no hurry to buy again. Once these facts are properly understood, one can understand why no 'replacement' property was bought.

47. Moreover one can equally argue that a trader of property who has just made a handsome profit in a quick sale is more likely to want to jump into another trade irrespective of market condition whereas a cautious investor with a genuine intention to buy for long term would be less tempted to buy again. The absence of a 'replacement' property can at most be an arbitrary factor in deciding whether a transaction is a trade or an investment.

48. The Deputy Commissioner concluded by saying that a one-off transaction could amount to an adventure in the nature of trade. This was made clear by Sir Nicholas Browne-Wilkinson VC in Marson v Morton [1986] STC 463 at pages 470 to 471 when he discussed the nine badges of trade. But his Lordship went on to say that '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.' Further in discussing the source of the transaction as a badge of trade, his Lordship had this to say: '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.' Here, on the contrary, the purchase price was paid upfront, more the badge of a long term investor.

## Conclusion

49. In summary, we find as follows:

- (1) The Appellant was a reliable witness. We accept her evidence that all along her intention was to hold Property A as a long term investment.
- (2) An instruction to the estate agents to sell would certainly be a strong indication of an intention to trade. But as explained above, we are not persuaded that the Appellant ever gave instructions to sell. We accept her evidence that her instruction was all along to rent out Property A.
- (3) Once the estate agents records are set aside, we ask ourselves what other objective facts are there to suggest an intention to trade? The Appellant has in her own name or jointly with others purchased four properties in the last ten years. Except for Property A, the other three properties were/are held for medium to long term and used as residence for herself and/or her family. All four properties were purchased without mortgage. Property A was the only property she sold within a short period of time. It was a one-off transaction. Do these circumstances carve her out as a speculator or trader of property? We think not. Rather they are more consistent with her being a careful investor with time and money on her side. Her intention to hold Property A as a long term investment was an intention that could be 'genuinely held, realistic and realizable'.
- (4) We repeat paragraph 46 above. We find that those facts represent the true facts of this case.

50. The onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant. After a careful analysis of all the facts and circumstances, we find that the Appellant has proved to us on a balance of probabilities that there was no intention to trade. The sale and purchase of Property A did not amount to the carrying on of a trade and was not an adventure in the nature of trade. The profit she made from that transaction was profit arising from the sale of a capital asset. We allow her appeal accordingly. The Profits Tax Assessment for the year of assessment 2007/08 is hereby annulled.