Case No. D14/08

Profits tax – land development – whether change of intention from capital holding to trading/business – charitable institution – whether exempt from tax – sections 2, 14(1), 68(4) & 88 of Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Albert T da Rosa, Jr and Vincent Kwan Po Chuen.

Dates of hearing: 8 and 9 October 2007, 21, 22, 25 and 29 April 2008.
Date of decision: 17 June 2008.

Appellants 1 and 2 (collectively referred to as 'the appellants') objected to the profits tax assessments for the years of assessment 1998/99 to 2004/05 raised on them in respect of their respective profits derived from development on land held by them.

The appellants were both regarded by the Inland Revenue Department ('IRD') as a charitable institution for the purposes of section 88 of the Ordinance. They owned certain pieces of land ('the Old Lots'). An orphanage (' the Orphanage'), which was established by the head of the appellants' community (' the Headbody') in 1935, was located on part of the Old Lots. The appellants had planned to develop the Old Lots since the 1970s. A Retirement Residence project (' the Retirement Residence project') was proposed in 1978 but was not subsequently pursued. Under the lease terms, the Old Lots comprised agricultural land and restricted building land. A land exchange was therefore required so as to implement the residential development. In December 1990, application was made to the District Lands Office (' DLO') for a land exchange of the Old Lots to permit residential development. After some negotiation, on 17 November 1993, the appellants surrendered the Old Lots to the Government in exchange for the grant of a new lot (' the New Lot'). On 23 July 1993, a property developer (' the Developer') submitted two tender offers: Option A being a sale and purchase offer and Option B being a joint venture offer. On 12 August 1993, the appellants accepted Option B of the Developer' s offer.

On 3 December 1993, the appellants entered into a joint venture agreement (' the Joint Venture Agreement') with a subsidiary company of the Developer (' the Subsidiary') and the Developer for the development of the New Lot into a private residential development. The Subsidiary was a wholly owned subsidiary of the Developer. On 18 March 1998, a supplemental agreement was entered into between the appellants, the Subsidiary and the Developer, under which 129 residential units and 194 car parking spaces were chosen by and allocated to the appellants pursuant to the Joint Venture Agreement. The residential development on the New Lot was later

named ' the JV Project' . The occupation permit for the JV Project was issued in August 1998. The JV Project was a residential development comprising 22 houses, 5 blocks of low-rise towers and 5 blocks of high-rise towers, totalling 381 residential units. Various numbers of saleable units and car parking spaces of the JV Project were sold by the appellants during the years from 98/99 to 05/06.

As to the Orphanage, there was some discussion regarding its re-provisioning. But it was not fruitful.

Held:

1. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellants. As the onus of disturbing the assessment lies on the appellants, failure to discharge the onus may be decisive against the appellants. Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166 {also reported in [1962] HKLR 258}; Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224; and All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750 considered.

2. A taxpayer' s tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. The absence or silence of a witness does not assist the taxpayer and the Board might draw adverse inferences in appropriate circumstances: Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296 at paragraph 34 (per Ma J (as he then was); and Wisniewski v Central Manchester HA [1998] Lloyd' s Rep Med 223, 240 (per Brooke LJ), which was applied in Bank of China (Hong Kong) Limited v Wong Tang and others, HCMP 4222 of 2003, 24 August 2006.

3. Section 2 of the Ordinance defines ' business' as including ' agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government' and ' trade' as including ' every trade and manufacture, and every adventure and concern in the nature of trade' . Section 14(1) excludes profits arising from the sale of capital assets.

4. Intention may be changed and a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention: Simmons v IRC [1980] 1 WLR 1196, 1199, per Lord Wilberforce.

5. Only one point is as a matter of law clear, namely that a single, one-off transaction can be an adventure in the nature of trade. The question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. There are certain features or badges which may point to one conclusion rather than another and the factors are in no sense a comprehensive list of all relevant matters, nor is any one of them decisive in all cases: Marson v Morton [1986] 1 WLR 1343, 1347-1349, per Sir Nicholas Browne-Wilkinson VC.

6. Whether it was an adventure and concern in the nature of trade is a decision of fact and the fact to be decided is defined by the Statute: All Best Wishes Limited v CIR (1992) 3 HKTC 750, 770-771, per Mortimer J (as he then was).

7. Business is a wider concept than trade: Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue at paragraph 17 (per Bokhary PJ and Chan PJ) & 68 (per McHugh NPJ).

8. There is a distinction between enhancement and substitution of an asset: Crawford Realty Ltd v Commissioner of Inland Revenue (1991) 3 HKTC 674, 693, per Barnett J.

9. It is clear that a charity may trade or carry on a business. This is expressly recognised by the proviso to section 88 of the Ordinance. As a matter of general principle, if a charitable institution in the course of its management carries on a profit-oriented trade or business, the profits of that trade or business will be subject to taxation, unless it can rely on the exemption in section 88: Coman v Governors of the Rotunda Hospital Dublin [1921] 1 AC 1; Royal Agricultural Society of England v Wilson (1924) 9 TC 62; Brighton College v Marriott (1925) 10 TC 213; British Legion, Peterhead Branch, Remembrance and Welcome Home Fund v CIR (1953) 35 TC 509; Carlisle and Silloth Golf Club v Smith [1913] 3 KB 75 and Grove v Young Men's Christian Association (1903) 4 TC 613 considered.

10. The Board found that the Retirement Residence project had been frozen since July 1980 and, in the absence of evidence to the contrary, the Board drew the inference that it has not at any material time been reactivated. The Board also found that as from September 1989 at the latest, the development of the Old Lots and the re-provisioning of the Orphanage, or the facilities provided by the Orphanage, became separate projects. These matters, which the appellants had been harping on, do not explain why the appellants still proceeded with the development of the Old Lots after September 1989. The facts called for an explanation by the appellants but they are by no means forthcoming on this. There is a vague

suggestion that money is needed for the re-provisioning of the Orphanage. The Board was unable to accept this suggestion. There is no evidence on the financial resources of the appellants or the Headbody. There is no evidence on the amount of the shortfall (if any) from public funding. There was no mention of any financing by the Headbody or from proceeds from development of the Old Lots in paragraph 3 of the Progress Report dated 24 August 1984 on financing, see paragraph 66(2) of the decision. The appellants' contemporaneous documents showed that the development project of the Old Lots and the re-provisioning of the Orphanage had become separate projects.

11. Witness2 was appointed a co-chairman of the Joint Development Committee in May 1989, after the re-provisioning of the Orphanage had been separated from the development of the Old Lots and the Retirement Residence project had been frozen for a long time. It is clear from the evidence of Witness2 that he approached the matter on commercial principles, with the laudable object of raising as much income as possible for the Headbody and its charitable activities. The appellants continued to retain the services of professional advisers including architects and lawyers to work on the development of the Old Lots. They actively marketed the disposal of the Old Lots by approaching leading developers in Hong Kong for offers and tenders. They sought and subsequently obtained town planning permission. The appellants have performed activities in relation to the Old Lots in an organised and coherent way with a view to maximising the income from their development. They sought and subsequently obtained a new grant by surrendering the Old Lots, thereby substituting the Old Lots by the New Lot. They have chosen to carry on a separate adventure or enterprise of a lucrative commercial and trade character, different and distinct from their charitable work.

12. Considering the 'badges of trade' stated by McHugh NPJ in Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue (2007-08) IRBRD, vol 22, 929 is not a mechanical exercise of counting the number of scores. The Board is required to 'make a value judgment after examining all the circumstances involved in the activities claimed to be a trade'. The Board must not lose sight of the fact that some of the factors are more relevant to the question of intention at the time of acquisition.

13. In the cases before the Board, it is common ground that at the respective times of acquisition, the appellants' intention was to hold the Old Lots indefinitely. The issue is whether there was a change of intention. Having considered all the circumstances, the Board found that there was a change of intention from capital holding to trading/business.

14. The profits being derived from a trade or business carried on by appellants are exempt from tax only if all the following are satisfied under section 88:

    (1) such profits are applied solely for charitable purposes; and

    (2) such profits are not expended substantially outside Hong Kong; and

    (3) (a) the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or

        (b) the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established.

15. The appellants have adduced no evidence on the application of the profits or on the profits not being expended substantially outside Hong Kong. The onus of proof under section 68(4) is on the appellants and they failed to prove that the proviso to section 88 applies. The Board declined to draw any inference in favour of the appellants. If the profits have in fact been applied solely for charitable purposes or not been expended substantially outside Hong Kong, the appellants may reasonably be expected to have material evidence on it. If any inference is to be drawn, it is one adverse to the appellants.

16. The appellants have not been able to identify any expressed object of Appellant2 or Appellant1. The Board rejected the appellants' contention that the proviso is also applicable to implied objects. The statutory requirement is 'expressed' objects or '**明文規定**' in Chinese. The onus of proof under section 68(4) is on the appellants and they failed to prove that the proviso to section 88 applies. The Board declined to draw any inference in favour of the appellants. Indeed, if any inference is to be drawn, it is one adverse to the appellants.

17. Further and in any event, property development is not alleged to be an object of Appellant2 or Appellant1. Thus, the trade or business in this case could not be said to be, and was not, exercised in the course of the actual carrying out of the objects or alleged objects of Appellant2 or Appellant1.

18. The work in connection with the trade or business was not carried on by persons for whose benefit the appellants were established. Requirement 3(b) in paragraph 14 above is not satisfied and the proviso to section 88 does not apply.

Appeal dismissed.

Cases referred to:

Ng Kam-Chun Stephen (Trading as Chun Mou Estate Agency) v Chan Wai-Hing, Janet and others [1994] 2 HKLR 89
Simmons v IRC [1980] 2 All ER 798
Ransom v Higgs [1974] 1 WLR 1594
Kowloon Stock Exchange Ltd v CIR (1984) 2 HKTC 99
Marson v Morton [1986] 1 WLR 1343
American Leaf Blending Co Sdn Bhd v DGIR [1979] AC 676
CIR v Woo Kwok-hing (1977) 1 HKTC 923
CIR v Bartica Investment Ltd (1996) HKRC §90-080
Religious Tract and Book Society of Scotland v Forbes (1896) 3 TC 415
CIR v Tai Hing Cotton Mill Development Ltd CACV 000343/2005, [2007] 2 HKLRD 380
Bath and West Counties Property Trust Ltd v Thomas (Inspector of Taxes) [1978] 1 All ER 305
Wing On Cheong Investment Co Ltd v The Commissioner of Inland Revenue (1987) 3 HKTC 1
CIR v The Incorporated Council of Law Reporting (1888) 3 TC 105
Grove v Young Men' s Christian Association (1903) 4 TC 613
Carlisle and Silloth Golf Club v Smith [1913] 3 KB 75
Coman v Governors of the Rotunda Hospital Dublin [1921] 1 AC 1
Royal Agricultural Society of England v Wilson (1924) 9 TC 62
Brighton College v Marriott (1925) 10 TC 213
British Legion, Peterhead Branch, Remembrance and Welcome Home Fund v CIR (1953) 35 TC 509
Crawford Realty Ltd v CIR [1991] 3 HKTC 674
Hong Kong Oxygen & Acetylene Co Ltd v CIR [2001] HKLRD 489
Dean Leigh Temperance Canteen v IRC (1958) 38 TC 315
IRC v Glasgow Musical Festival Association (1926) 11 TC 154
Real Estate Investments (NT) Ltd v CIR [2007] 1 HKLRD 198
Fenston v Johnstone (1940) 23 TC 29
HKSAR v Tam Yuk Ha [1997] HKLRD 1031
Wisniewski v Central Manchester HA [1998] Lloyd' s Rep Med 223
Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166
Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750
Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296
Bank of China (Hong Kong) Limited v Wong Tang and others, HCMP 4222 of 2003, 24 August 2006
Simmons v IRC [1980] 1 WLR 1196

Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue (2007-08) IRBRD, vol 22, 929

Wing Tai Development Co. Ltd v Commissioner of Inland Revenue [1979] HKLR 642

John Griffiths SC, leading Neil Thomson, instructed by Messrs P C Woo & Co for the taxpayer.
Peter Ng SC, leading Eugene Fung, instructed by Department of Justice for the Commissioner of Inland Revenue.

Decision:

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INTRODUCTION

1. All references to sections and subsections are, unless otherwise stated, to those of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

2. (a) Appellant1 is the appellant in BR76/06. The total amount of tax in dispute is $75,881,426.

(b) Appellant2 is the appellant in BR77/06. The total amount of tax in dispute is $108,912,965.

3. The assessor assessed the respective gains of Appellant1 and Appellant2 from their sales of units and car parking spaces in a residential development ('the JV Project') in the years of assessment 1998/99 – 2004/05 to profits tax. Having failed in their objections, the appellants appealed to this Board.

4. The appellants and the respondent agreed certain proposed pre-hearing directions which were approved by the Chairman of the Board on 11 May 2007. The 2 appeals were consolidated for hearing. The directions provided for agreement on facts, disclosure of documents relied on and service of witness statements and authorities. The deadline for service of the appellants' skeleton opening was 3 October 2007. The appeals were scheduled to be heard on 8 – 12 & 15 October 2007.

5. By letter dated 19 September 2007, Messrs P C Woo & Co. wrote to the Clerk to the Board to seek a 7-day extension to serve their bundles of documents, authorities and witness statements.

6. The Clerk replied by letter dated 20 September 2007 stating that:

> ' The Board should be given the full sets of documents in good time before the hearing, so that the Board may read such of the bundles as it sees fit to, with such assistance as the appellant' s skeleton arguments may provide. The appellant should expedite its preparation so that any consequential extension to be given to the Commissioner will not result in the Board not being furnished with the full sets of documents in good time.
>
> Both parties are requested to ensure that the hearing of the appeal will commence smoothly as scheduled on 8 October 2007.'

7. The appellants did not furnish the Board with any skeleton opening before the commencement of the abortive hearing[1] in October 2007.

[1] See paragraphs 33 – 37 below.

THE AGREED FACTS AND VALUATIONS

The agreed facts

8. The parties agreed the following facts and we make the following findings of fact.

9. (1) Appellant1 has objected to the profits tax assessments for the years of assessment 1998/99 to 2004/05 raised on it in respect of its profits derived from development on land held by Appellant1 and Appellant2. The profits tax assessments for the Determination of the Commissioner of Inland Revenue ('the Commissioner') were as follows:

Year of assessment	Charge no	Assessable profits ($)	Tax payable ($)
1998/99	1-1127383-99-8	300,000,000	48,000,000
1999/2000	1-1121080-00-4	4,914,000	786,240
2000/01	1-1123176-01-7	58,840,461	9,414,473
2001/02	1-1121435-02-3	10,166,144	1,626,583
2002/03	1-1118917-03-9	16,786,019	2,685,763
2003/04	1-1117960-04-6	86,438,068	15,126,661
2004/05	1-1103367-05-4	151,801,259	26,565,220

(2) Appellant2 has objected to the profits tax assessments for the years of assessment 1998/99 to 2004/05 raised on it in respect of its profits derived from development on land held by Appellant2 and Appellant1. The profits tax assessments for the Determination of the Commissioner were as follows:

Year of assessment	Charge no	Assessable profits ($)	Tax payable ($)
1998/99	1-1127504-99-A	300,000,000	48,000,000
1999/2000	1-1121095-00-1	293,624,829	46,979,972
2000/01	1-1123180-01-4	97,147,317	15,543,570
2001/02	1-1121440-02-7	42,770,437	6,843,269
2002/03	1-1118923-03-9	89,590,908	14,334,545
2003/04	1-1117969-04-3	121,299,945	21,227,490
2004/05	1-1103431-05-4	22,766,399	3,984,119

10. Appellant1 was incorporated by a Hong Kong Ordinance. Paragraph 2 of the Statement of Agreed Facts contained further information about Appellant1. At all relevant times, Appellant1 was regarded by the Inland Revenue Department ('IRD') as a charitable institution for the purposes of section 88 of the Ordinance.

11. Paragraph 3 of the Statement of Agreed Facts contained further information about the appellants' community which was headed by a legal person incorporated by a Hong Kong Ordinance. This legal person and its preceding unincorporated equivalent will be referred to as 'HeadBody'.

12. Appellant2 was incorporated by a Hong Kong Ordinance. Paragraph 4 of the Statement of Agreed Facts contained further information about Appellant2. At all relevant times, Appellant2 was regarded by IRD as a charitable institution for the purposes of section 88 of the Ordinance. Appellant2 was established for the continuing in existence as a body corporate and to hold property on behalf of the HeadBody.

13. According to the Constitution of the HeadBody (as at 28 February 2000), the operation of Appellant1 'shall be governed by its constitution and by-laws' while the operation of Appellant2 and the management of its property 'shall be governed by the Ordinance, its constitution and by-laws'.

14. Insofar as relevant, Appellant1 owned OldLot1 and Appellant2 owned OldLot2 and OldLot3 (collectively referred to as 'the Old Lots'). Appellant1 and Appellant2 shall collectively be referred to as 'the appellants'. Appellant2 also owned the adjacent lot ('the Adjacent Lot'). An orphanage ('the Orphanage') was established by the Headbody in 1935. It was located on part of the Old Lots.

15. The appellants had planned to develop the Old Lots since the 1970s. Relevant features of the development include but not limited to the following:

	Date	Development plan/proposal	Proposed institutional development		Proposed residential development	
(a)	Jul 1978	-	Details:	A Retirement Residence, a special school and additional facilities to the Orphanage	Details:	A high-class private residential estate
(b)	Jan 1981	M-1	Area: Details:	223,413 square feet Existing blocks, staff quarters, children living units and special	Area: Details:	1,205,790 square feet 3 high-rise complex, 26 medium-rise blocks, 70 villas

				school, Retirement Residence, care and attention home, retreat home, youth camp, etc.		(totalling 588 units) and a clubhouse
(c)	Jan 1986	SK-A	Area: Details:	17,000 square metre The Orphanage and a retreat centre	Area: Details:	119,533 square metre 19 blocks of 10 to 12-storey towers, 11 blocks of 8 to 10-storey towers, 38 houses (totalling 876 units) and a club home, supermarkets, food centre, nursery and kindergartens
(d)	Jun 1986	SK-C	Area: Details:	17,000 square metre The Orphanage and a retreat centre	Area: Details:	119,533 square metre 18 blocks of 14-storey towers, 6 blocks of 8-storey towers, 4 blocks of 6-storey towers and 22 units of 2-storey houses (totalling 814 units) and a clubhouse, supermarkets, food centre, nursery and

						kindergartens
(e)	Dec 1987	SK-F	Area: Details:	5,000 square metre The Orphanage	Area: Details:	131,533 square metre 22 blocks of multi-storey towers and 22 houses (totalling 1,014 units) and supermarkets, laundry, coffee shop, food centre and shopping mall
(f)	Sep 1989	SK-H	Nil		Area: Details:	109,679.08 square metre 20 blocks of multi-storey towers and 20 houses (totalling 838 units) and supermarkets, laundry, coffee shop, food centre and shopping mall
(g)	May 1990	SK-J	Nil		Area: Details:	60,000 square metre 2-storey houses and multi-storey towers (maximum 575 units) and a clubhouse

16. Under the lease terms, the Old Lots comprised agricultural land and restricted building land. A land exchange was therefore required so as to implement the residential development. Some of the relevant features include but not limited to the following:

(a) In December 1990, a firm of architects appointed by Appellant2 applied to the District Lands Office ('DLO') for a land exchange of the Old Lots to permit residential development.

(b) In August 1991, the DLO advised the firm of architects of the proposed basic terms of the land exchange and that the amount of premium payable to the Government was to be assessed. In October 1992, the DLO advised that the premium payable for the land exchange was $838,260,000. It also supplied the draft Special Conditions for the land exchange for comment.

(c) In November 1992, the firm of architects replied to the DLO that the basic terms of land exchange were acceptable but the premium was considered excessive. It also gave comments on the proposed Special Conditions for the land exchange.

(d) The DLO later proposed to reduce the premium to $704,240,000. In May 1993, the firm of architects accepted this proposed amount.

(e) On 17 November 1993, the appellants surrendered the Old Lots to the Government in exchange for the grant of a new lot ('the New Lot'). Appellant1 and Appellant2 owned the New Lot as tenants-in-common in the ratio of 44:56.

17. Some villagers raised objections to the proposed residential development on the New Lot. In particular, four clans of these villages objected to the residential development on the grounds of 'fung shui'. In February 1993, two firms of architects on behalf of the appellants attended a meeting with representatives of the villagers and the DLO in order to identify any possible solution to eliminate conflicts.

18. On 2 July 1993, a firm of solicitors [then] representing the appellants invited various property developers to submit tender offers either to purchase the New Lot or to enter into a joint venture agreement for development of the New Lot. Conditions for these options were set out in this letter.

19. On 23 July 1993, a property developer ('the Developer') submitted two tender offers: Option A being a sale and purchase offer and Option B being a joint venture offer.

20. On 12 August 1993, the appellants accepted Option B of the Developer's offer[2].

21. On 3 December 1993, the appellants entered into a joint venture agreement ('the Joint Venture Agreement') with a subsidiary company of the Developer ('the Subsidiary') and the Developer for the development of the New Lot into a private residential development. The Subsidiary was a wholly owned subsidiary of the Developer.

22. On 18 March 1998, a supplemental agreement was entered into between the appellants, the Subsidiary and the Developer, under which 129 residential units and 194 car parking spaces were chosen by and allocated to the appellants pursuant to the Joint Venture Agreement.

23. The residential development on the New Lot was later named 'the JV Project'. The occupation permit for the JV Project was issued in August 1998. The JV Project was a residential development comprising 22 houses, 5 blocks of low-rise towers and 5 blocks of high-rise towers, totalling 381 residential units.

24. The appellants sold the following appellants' saleable units and car parking spaces of the JV Project during the period/year shown below:

Period/Year	Number of units sold	Number of car parking spaces sold
Period up to 31-3-1999	18	13
Year ended 31-3-2000	8	19
Year ended 31-3-2001	2	1
Year ended 31-3-2002	8	13
Year ended 31-3-2003	17	26
Year ended 31-3-2004	29	40
Year ended 31-3-2005	20	28
Year ended 31-3-2006	10	15

25. Regarding the re-provisioning of the Orphanage, there were discussions among the Headbody (and its agents), the Social Welfare Department ('SWD') and the DLO, including but not limited to the following:

[2] In the ' Application to admit further ground' submitted by the appellants on 9 October 2007 in support of the appellants' application to amend their grounds of appeal, the appellants asserted that ' This means that the Appellants resile from agreement that the date of *unconditional* acceptance of Option B was 12th August. This was a conditional acceptance subject to the right to accept Option A up to the date of signing the JV' . The facts were agreed between the appellants and the respondent, but the appellants felt they were at liberty unilaterally to ' resile' from the agreement on facts, without agreement by the respondent or approval by us. We note that the word ' unconditional' is not in this paragraph in the agreed facts. See also our conclusion on the date of change of intention in paragraphs 73 and 74 below.

(a) In October 1983, SWD and the Headbody discussed the funding required for the repairs and renovation work to buildings and service installations at the Orphanage. There was a consensus of views that even if the major renovation works were carried out, the life of many of the structures of the Orphanage was unlikely to be prolonged for more than five years and that the best solution was for the re-provisioning of the Orphanage as a long-term measure.

(b) In November 1984, the Headbody informed SWD of its agreement in principle on the long term re-provisioning plan that the Children's Section of the Orphanage would be rebuilt on a new site adjacent to the existing Orphanage site and that the Babies' Section would be relocated to a public housing estate ...

(c) In July 1990, the Headbody's application for a commercial/residential development on the Old Lots was approved by the Town Planning Board. Meanwhile, the Headbody applied to the DLO for the surrender and regrant of the Adjacent Lot plus the adjacent Government land for the new Orphanage. In February 1990, June 1991, March 1993 and July 1999, the Headbody supplied to the DLO proposed plans and revised plans for the rebuilding of the Orphanage.

(d) In August 1999, the DLO rejected the Orphanage's application on the ground that the Adjacent Lot would be affected by a school project and part of the lot would be resumed by the Government.

(e) In March 2004, Appellant2 surrendered the Adjacent Lot to the Government for a consideration of $5,730,668.40.

26. (1) On divers dates, Appellant1 filed profits tax returns for the years of assessment 1998/99 to 2004/05. It claimed that it did not carry on any business activity nor did it derive any assessable profits during those years. The supporting accounts, however, showed that Appellant1 had derived the following profits from the development of the JV Project:

Year of assessment	Profits ($)
1998/99	122,978,040
1999/2000	4,914,000
2000/01	58,840,461
2001/02	10,166,144
2002/03	16,786,019
2003/04	86,438,068
2004/05	151,801,259

(2) On divers dates, Appellant2 filed profits tax returns for the years of assessment 1998/99 to 2004/05. It claimed that it did not carry on any business activity nor did it derive any assessable profits during those years. The supporting accounts, however, showed that Appellant2 had derived the following profits from the development of the JV Project:

Year of assessment	Profits ($)
1998/99	0
1999/2000	293,624,829
2000/01	97,147,317
2001/02	42,770,437
2002/03	89,590,908
2003/04	121,299,945
2004/05	22,766,399

27. (1) The assessor considered that Appellant1's profits from the JV Project were assessable to profits tax.

(a) On 30 March 2005, the assessor raised on Appellant1 the following estimated profits tax assessment for the year of assessment 1998/99, pending submission of the profits tax return for that year.

Year of assessment	Assessable profits ($)	Tax payable thereon ($)
1998/99	300,000,000	48,000,000

(b) On 1 March 2006, the assessor raised further profits tax assessments on Appellant1 for the years of assessment 1999/2000 to 2004/05 as follows:

Year of assessment	Assessable profits ($)	Tax payable thereon ($)
1999/2000	4,914,000	786,240
2000/01	58,840,461	9,414,473
2001/02	10,166,144	1,626,583
2002/03	16,786,019	2,685,763
2003/04	86,438,068	15,126,661
2004/05	151,801,259	26,565,220

(2) The assessor considered that Appellant2's profits from the JV Project were assessable to profits tax.

(a) On 30 March 2005, the assessor raised on Appellant2 the following estimated profits tax assessment for the year of assessment 1998/99, pending submission of the profits tax return for that year.

Year of assessment	Assessable profits ($)	Tax payable thereon ($)
1998/99	300,000,000	48,000,000

(b) On 1 March 2006, the assessor raised further profits tax assessments on Appellant2 for the years of assessment 1999/2000 to 2004/05 as follows:

Year of assessment	Assessable Profits ($)	Tax payable thereon ($)
1999/2000	293,624,829	46,979,972
2000/01	97,147,317	15,543,570
2001/02	42,770,437	6,843,269
2002/03	89,590,908	14,334,545
2003/04	121,299,945	21,227,490
2004/05	22,766,399	3,984,119

28. (1) On behalf of Appellant1, Messrs P C Woo & Co, solicitors, objected against the profits tax assessments for the years of assessment 1998/99 to 2004/05 on the ground that the issuance of the tax assessments was wholly inappropriate. Messrs P C Woo & Co asserted the following:

(a) The assessor should be debarred from issuing the notice of assessment for the year of assessment 1998/99 because the notice was only received by Appellant1 after 31 March 2005.

(b) The money received from the JV Project was money arising from the realisation of a capital asset, which was not chargeable to tax as provided in section 14 of the Ordinance.

(c) Appellant1 was a charitable institution under section 88 of the Ordinance and should be exempt from tax, and there being no trade/business carried on by Appellant1, it did not need to rely on the proviso in section 88 of the Ordinance.

(d) On the facts, the proviso in section 88 of the Ordinance was not applicable to make Appellant1 taxable as it was able to rely upon the exclusion in the proviso.

(2) On behalf of Appellant2, Messrs P C Woo & Co, objected against the profits tax assessments for the years of assessment 1998/99 to 2004/05 on the ground that the issuance of the tax assessments was wholly inappropriate. Messrs P C Woo & Co asserted the following:

(a) The assessor should be debarred from issuing the notice of assessment for the year of assessment 1998/99 because the notice was only received by Appellant2 after 31 March 2005.

(b) The money received from the JV Project was money arising from the realisation of a capital asset, which was not chargeable to tax as provided in section 14 of the Ordinance.

(c) Appellant2 was a charitable institution under section 88 of the Ordinance and should be exempt from tax, and there being no trade/business carried on by Appellant2, it did not need to rely on the proviso in section 88 of the Ordinance.

(d) On the facts, the proviso in section 88 of the Ordinance was not applicable to make Appellant2 taxable as it was able to rely upon the exclusion in the proviso.

29. (1) In her Determination in relation to Appellant1, the Commissioner reduced the assessable profit and the tax payable thereon for the year of assessment 1998/99 to $122,978,040 and $19,676,486 respectively, and confirmed the profits tax assessments for the years of assessment 1999/2000 to 2004/05.

(2) In her Determination in relation to Appellant2, the Commissioner annulled the profits tax assessment for the year of assessment 1998/99[3], and confirmed the profits tax assessments for the years of assessment 1999/2000 to 2004/05.

30. The Commissioner of Rating and Valuation has valued the Old Lots/the New Lot at $285,000,000 and $990,000,000 as at 12 August 1993 (i.e. the date of accepting the Developer' s offer of Option B) and 3 December 1993 (i.e. the date of the Joint Venture Agreement)

[3] The assessor considered that the 1998/99 profits tax assessment should be annulled in accordance with the profits tax return filed by Appellant2 for that year (see paragraph 26(2) above). The Commissioner agreed with the assessor and annulled the assessment objected against.

respectively on a vacant possession basis. The latter valuation reflected the payment of the premium of $704,240,000 to the Government for the grant of the New Lot.

The agreed valuations

31. The parties agreed, and we find as facts, that the values of the Old Lots, and the subsequently re-granted New Lot, were as follows:

Valuation date	Land value ($)
28 September 1989	192.5 million
1 May 1990	222.48 million
12 August 1993	1.11 billion (exclusive of premium)
3 December 1993	2.3 billion (premium paid)

THE APPEAL HEARINGS

The initial grounds of appeal

32. By letter dated 5 December 2006, Messrs P C Woo & Co wrote on behalf of the appellants giving notice of appeal on the following grounds (written exactly as it stands in the original):

> ' ... in making her Determinations in respect of [Appellant1] and [Appellant2] both dated 6th November 2006, the Commissioner
>
> (a) wrongly rejected the representations and documentary evidence provided by the persons assessed that demonstrate the redevelopment of the land now known as [the JV Project] ' [the Property'] constituted the disposal of a capital asset;
>
> (b) wrongly concluded that the Property was trading stock of the persons assessed and that the proceeds of redevelopment of the Property were trading receipts arising from the conduct of a business conducted by the persons assessed;
>
> (c) wrongly concluded that the persons assessed had entered into a trade or business of property development;
>
> (d) failed to take account of the nature and purposes of the persons assessed when reaching her conclusion that they were carrying on a business;

(e) in the face of clear evidence to the contrary concluded that the persons assessed could and did carry on any trade profession or business;

(f) failed to take into account the evidence of the reasons for the redevelopment of the Property

(g) wrongly denied the persons assessed the exemption due to them as charitable bodies under Section 88 of the Inland Revenue Ordinance Cap 112.'

The amended grounds of appeal

33. The appeals came up for hearing on 8 October 2007.

34. Mr John Griffiths SC sought and obtained an adjournment to the following day. Before the hearing was adjourned on 8 October 2007, Mr Peter Ng SC told the Board that the respondent had received the appellants' 'Opening Submissions' on 5 October 2007 and pointed out that the contention in paragraph 6 of the Opening Submissions was not covered by the grounds of appeal.

35. On 9 October 2007, Mr John Griffiths SC sought leave[4] to add the following ground of appeal (written exactly as it stands in the original):

> ' If the Board should find that there was a ' change of intention' on the date of entering the JV agreement the land became trading stock on that date. Open market value of the land at the date of transfer should be taken into account in computing the chargeable profits or losses arising to the taxpayers. Open market value is the figure of $1.2 billion offered by [the Developer] ... under Option A.'

36. Mr Peter NG SC opposed the application and sought an adjournment should we accede to the application.

37. We gave our consent under section 66(3) to the appellants to rely on the additional ground and acceded to the application to adjourn the hearing.

The re-amended grounds of appeal

38. The hearing resumed on 21 April 2008.

39. Mr John Griffiths SC sought leave to add the following grounds of appeal in place of the ground put forward at the hearing on 9 October 2007. Mr Peter NG SC did not oppose the application and we gave our consent under section 66(3) to the appellants to rely on the following

[4] See also paragraph 20 above.

grounds of appeal in place of the ground put forward in the abortive hearing in October 2007 (written exactly as it stands in the original):

> ' (h) If the above propositions are not accepted, there was a "change of intention" on the date of entering the JV[5] such that the value of the asset at the date of transfer should be taken as the cost of the land – now trading stock.
>
> (i) The offer made by [the Developer] fixes the value of the land at the time of any "change of intention" if there were such a change made an alternative offer for outright purchase there is an unequivocal value.
>
> (j) The opening market value of the property exceeds the receipts from the alleged venture such that there are no profits to be assessed.'

Witnesses called

40. The appellants called Witness1, Witness2 and Witness3 to give oral evidence.

41. The respondent did not adduce any oral evidence.

42. In his 3-page witness statement, Witness1 stated that he had taken part in the financial control of Appellant1 and Appellant2, dealt with what he claimed to be the objects of Appellant1 and Appellant2 and gave examples of the charitable activities of a body which he did not define.

43. In his 7-page witness statement, Witness2 dealt with his work as co-chairman of … [the] Joint Development Committee. Paragraph 20 of his witness statement reads as follows:

> ' In addition to the above, I further refer to the documents set out in the Bundle of Documents for further details of the relevant events at all material times.'

44. Witness3 was the superintendent or director of the Orphanage. In his 5-page witness statement, he dealt with the re-provisioning of the Orphanage. Paragraph 16 of his witness statement reads as follows:

> ' I refer to the Bundle of Documents for the relevant events at all material times for further details.'

45. More than 10 years ago, Keith J (as he then was) spelt out the following requirements of a witness statement in Ng Kam-Chun Stephen (Trading as Chun Mou Estate Agency) v Chan Wai-Hing, Janet and others [1994] 2 HKLR 89 at page 90:

[5] The 'JV' is not defined.

> '*The witness statement should contain the whole of the witness evidence in the detail in which the witness would have given it if his evidence had been elicited by oral questions at the trial. Anything less than that prevents the statements from serving the purposes which they are intended to achieve - saving time, eliminating any element of surprise in the witnesses' evidence, enabling the parties to know the full strength of the case they have to meet, and enabling counsel to prepare a crisp and effective cross-examination.*'

We do not find paragraph 20 of Witness2's witness statement and paragraph 16 of Witness3's witness statement helpful.

46. The appellants' witnesses gave evidence along the lines of their witness statements and were cross-examined briefly by Mr Peter Ng SC.

Lists of authorities

47. The appellants furnished the Board with a bundle of the following authorities:

1. Simmons v IRC [1980] 2 All ER 798
2. Ransom v Higgs [1974] 1 WLR 1594
3. Kowloon Stock Exchange Ltd v CIR (1984) 2 HKTC 99
4. Marson v Morton [1986] 1 WLR 1343
5. American Leaf Blending Co Sdn Bhd v DGIR [1979] AC 676
6. CIR v Woo Kwok-hing (1977) 1 HKTC 923
7. CIR v Bartica Investment Ltd (1996) HKRC §90-080
8. Section 88 Inland Revenue Ordinance Chapter 112
9. Religious Tract and Book Society of Scotland v Forbes (1896) 3 TC 415
10. Section 14 Inland Revenue Ordinance Chapter 112
11. CIR v Tai Hing Cotton Mill Development Ltd CACV 000343/2005, [2007] 2 HKLRD 380[6]
12. Bath and West Counties Property Trust Ltd v Thomas (Inspector of Taxes) [1978] 1 All ER 305
13. Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue FACV No.14 of 2007
14. Wing On Cheong Investment Co Ltd v The Commissioner of Inland Revenue (1987) 3 HKTC 1

48. The respondent furnished the Board with a bundle of the following authorities:

1. Inland Revenue Ordinance, Chapter 112, sections 2, 14, 68, 88
2. CIR v The Incorporated Council of Law Reporting (1888) 3 TC 105

[6] The appellants subsequently deleted this item from their list.

3. Grove v Young Men' s Christian Association (1903) 4 TC 613
4. Carlisle and Silloth Golf Club v Smith [1913] 3 KB 75
5. Coman v Governors of the Rotunda Hospital Dublin [1921] 1 AC 1
6. Royal Agricultural Society of England v Wilson (1924) 9 TC 62
7. Brighton College v Marriott (1925) 10 TC 213
8. British Legion, Peterhead Branch, Remembrance and Welcome Home Fund v CIR (1953) 35 TC 509
9. Crawford Realty Ltd v CIR [1991] 3 HKTC 674
10. Hong Kong Oxygen & Acetylene Co Ltd v CIR [2001] HKLRD 489
11. Dean Leigh Temperance Canteen v IRC (1958) 38 TC 315
12. IRC v Glasgow Musical Festival Association (1926) 11 TC 154
13. Real Estate Investments (NT) Ltd v CIR [2007] 1 HKLRD 198
14. Fenston v Johnstone (1940) 23 TC 29
15. Interpretation and General Clauses Ordinance, Chapter 1, section 10B
16. HKSAR v Tam Yuk Ha [1997] HKLRD 1031
17. Wisniewski v Central Manchester HA [1998] Lloyd' s Rep Med 223

ISSUES

49. According to the Report and Opinion of the expert which the appellants intended to call:

(a) OldLot1 was granted in 1935. It was originally designated for agricultural purposes. In 1935, 0.3 acre was converted for building purposes and in 1955 a further 0.03 acre was converted for building purposes under building licences.

(b) OldLot2 was granted in November 1938. It was designated for agricultural purposes.

(c) OldLot3 was granted in March 1938. It was designated a building and garden lot subject to the General Conditions of Sale. This Lot was donated to the Headbody in May 1957.

50. The respondent accepts that at the respective times of acquisition of the Old Lots, the appellants' intention was to hold the land indefinitely.

51. The main issues in this appeal are as follows:

(a) Was there a change of intention from capital holding to trading/business?

If the answer is in the negative, the appellants succeed and there is no need to consider any further issue. However, if the answer is in the affirmative, the following issues arise.

(b) When did the appellants change their intention?

(c) What is the value of the Old Lots, or the New Lot, as the case may be, at the time of the change in intention?

(d) Are the appellants exempt from tax under section 88?

CHANGE OF INTENTION ISSUE

Onus of proof and drawing of inferences

52. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellants. As the onus of disturbing the assessment lies on the appellants, failure to discharge the onus may be decisive against the appellants. In Mok Tsze Fung v Commissioner of Inland Revenue 1 HKTC 166 {also reported in [1962] HKLR 258}, Mills Owens J said (at page 183 of the HKTC report and page 281 of the HKLR report) that:

> '*It was for the appellant to adduce evidence before the Board of Review in order to discharge the onus resting upon him, and on his failure to do so the Board was entitled, indeed bound, to reject his appeal (vide* ***Pyrah v. Amis****).'*

In Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224, Blair Kerr J said that:

> '*According to section 68(3) the assessor attends the hearing before the Board "in support of the assessment", but the onus of proving that "the assessment as determined by the Commissioner .... is excessive" is placed fairly and squarely on the appellant by section 68(4).' (at page 229)*
>
> '*The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive. As Mr. Sneath so aptly put it:-*
>
> > *"The question is: 'Did the Commissioner get the correct answer'; not 'did the Commissioner get the correct answer by the wrong method'."*
>
> *And the onus of proving that the assessment is excessive lies on the taxpayer-appellant.' (at page 237)*

In All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750 at page 772, Mortimer J (as he then was) said that:

> '*It must be remembered that the burden of disturbing the assessment, rests upon the taxpayer.*'

53. A taxpayer's tax affairs are matters peculiarly within the knowledge of the taxpayer and the taxpayer might be expected to have material evidence to give on its taxation affairs. The absence or silence of a witness does not assist the taxpayer. Ma J (as he then was) summarised the principle on drawing of inferences in cases of absence of material evidence as follows in Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296 at paragraph 34:

> '*None of the Defendants gave evidence. In these circumstances, adverse inferences may be more easily drawn against them and correspondingly, any inferences favourable to KLY can more confidently be drawn as well:- see Polaroid Far East Ltd v Bel Trade Co Ltd [1992] HKLR 447 at 454; Jones v Dunkel (1958-1959) 101 CLR 298. This is of course providing that the rest of the evidence allows such inferences to be drawn and that such evidence is credible in the first place.*'

In Wisniewski v Central Manchester HA [1998] Lloyd's Rep Med 223 at page 240, Brooke LJ derived the following principles from the line of authority he had cited:

> '*(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
>
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
>
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
>
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the*

> *potentially detrimental effect or his/her absence or silence may be reduced or nullified.'*

Wisniewski v Central Manchester HA was applied by Chu J in Bank of China (Hong Kong) Limited v Wong Tang and others, HCMP 4222 of 2003, 24 August 2006, at paragraph 60.

Authorities on capital or trading/business issue

54. Section 2 of the Ordinance defines 'business' as including 'agricultural undertaking, poultry and pig rearing and the letting or sub-letting by any corporation to any person of any premises or portion thereof, and the sub-letting by any other person of any premises or portion of any premises held by him under a lease or tenancy other than from the Government' and 'trade' as including 'every trade and manufacture, and every adventure and concern in the nature of trade'. Section 14(1) excludes profits arising from the sale of capital assets.

55. Lord Wilberforce recognised in Simmons v IRC [1980] 1 WLR 1196 at page 1199, that intention may be changed and at page 1202 that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention:

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

> '*Finally as to the decision of the Court of Appeal, the judgment, delivered by Orr L.J., contains a clear account of the facts, and, in my respectful opinion, a*

generally correct statement of the law. In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention.' (at page 1202)

56. In Marson v Morton [1986] 1 WLR 1343 at pages 1347 –1349, Sir Nicholas Browne-Wilkinson VC stated that only one point is as a matter of law clear, namely that a single, one-off transaction can be an adventure in the nature of trade; that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case; that the most that his Lordship had been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another and that the factors are in no sense a comprehensive list of all relevant matters, nor is any one of them decisive in all cases:

'*I will deal first with the submission that the true and only reasonable conclusion in this case was that the taxpayers were entering into an adventure in the nature of trade. It is well established in dealing with appeals of this nature that there is a band of cases, sometimes referred to as 'no-man's-land,' in which different minds might come to different conclusions in the circumstances on the question of whether or not there was an adventure in the nature of trade. There are some cases where the position is so clear, one way or the other, that there is only one true and reasonable conclusion. If so, then if the commissioners reached something other than that conclusion, an error of law was disclosed. But if the case falls within the band where more than one conclusion is possible on the basis of the facts found, then in the absence of misdirection on the face of the decision the court has no jurisdiction or right to intervene. Against that background one turns to consider what the position is so far as the law on this matter is concerned. Like the commissioners I have been treated to an extensive survey of the authorities. But as far as I can see there is only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade. Beyond that I found it impossible to find any single statement of law which is applicable to all cases in all circumstances. I have been taken through the cases and invited to compare the facts in some cases with the facts in the case here before me. I fear that the commissioners may have become as confused by that process as I did. The purpose of authority is to find principle, not to seek analogies on the facts.*

It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may

point to one conclusion rather than another. In relation to transactions such as this, that is to say a one-off deal with a view to making a capital profit, there do seem to be certain things which the authorities show have been looked at. For convenience I will refer to them in a moment. But I would emphasise that the factors I am going to refer to are in no sense a comprehensive list of all relevant matters, nor is any one of them, so far as I can see, decisive in all cases. The most they can do is provide common sense guidance to the conclusion which is appropriate. The matters which are apparently treated as a badge of trading are as follows: (i) that the transaction in question was a one-off transaction. Although a one-off transaction is in law capable of being an adventure in the nature of trade, obviously the lack of repetition is a pointer which indicates there might not here be trade but something else. (ii) Is the transaction in question in some way related to the trade which the taxpayer otherwise carries on? For example, a one-off purchase of silver cutlery by a general dealer is much more likely to be a trade transaction than such a purchase by a retired colonel. (iii) The nature of the subject matter may be a valuable pointer. Was the transaction in a commodity of a kind which is normally the subject matter of trade and which can only be turned to advantage by realisation, such as referred to in the passage that the chairman of the commissioners quoted from Inland Revenue Commissioners v. Reinhold, 1953 S.C. 49. For example, a large bulk of whisky or toilet paper is essentially a subject matter of trade, not of enjoyment. (iv) In some cases attention has been paid to the way in which the transaction was carried through: was it carried through in a way typical of the trade in a commodity of that nature? (v) What was the source of finance of the transaction? If the money was borrowed that is some pointer towards an intention to buy the item with a view to its resale in the short term; a fair pointer towards trade. (vi) Was the item which was purchased resold as it stood or was work done on it or relating to it for the purposes of resale? For example, the purchase of second-hand machinery which was repaired or improved before resale. If there was such work done, that is again a pointer towards the transaction being in the nature of trade. (vii) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots? If it was broken down it is again some indication that it was a trading transaction, the purchase being with a view to resale at profit by doing something in relation to the object bought. (viii) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of

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

I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question - and for this purpose it is no bad thing to go back to the words of the statute - was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?'

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

'Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.' (at page 770)

' The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of the acquisition of the land that it was for development is conclusive.

I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute - was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot

be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.' (at page 771)

58. In Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue (2007-08) IRBRD, vol 22, 929, McHugh NPJ stated that:

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

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

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

1. *has frequently engaged in similar transactions?*

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

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

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

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

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

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

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

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

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

59. It has long been recognised that business is a wider concept than trade, per Bokhary PJ and Chan PJ in Lee Yee Shing & Yeung Yuk Ching v The Commissioner of Inland Revenue at paragraph 17. McHugh NPJ is of the same view, stating in paragraph 68 that business is a wider term than trade. McHugh NPJ went on to state that:

(a) *'What then is the definition or ordinary meaning of "business"? The answer is that there is no definition or ordinary meaning that can be universally applied. Nevertheless, ever since Smith v. Anderson (1880) 15 Ch D 247, common law courts have never doubted that the expression "carrying on" implies a repetition of acts and that, in the expression "carrying on a business", the series of acts must be such that they constitute a business: Smith v. Anderson (1880) 15 Ch D 247 at 277 – 278*

per Brett LJ. Much assistance in this context is also gained from the statement of Richardson J in Calkin v. Commissioner of Inland Revenue [1984] 1 NZLR 440 at 446 where he said "that underlying … the term 'business' itself when used in the context of a taxation statute, is the fundamental notion of the exercise of an activity in an organised and coherent way and one which is directed to an end result". In Rangatira Ltd v. Commissioner of Inland Revenue [1997] STC 47, the Judicial Committee said that it found these words of Richardson J "of assistance".' (paragraph 69).

(b) *'Ordinarily, a series of acts will not constitute a business unless they are continuous and repetitive and done for the purpose of making a gain or profit: Hope v. Bathurst City Council (1980) 144 CLR 1 at 8 – 9 per Mason J; Ferguson v. Federal Commissioner of Taxation (1979) 79 ATC 4261 at 4264. However, as Lord Diplock pointed out in American Leaf Blending Co. Sdn Bhd v. Director-General of Inland Revenue (Malaysia) [1979] AC 676 at 684 "depending on the nature of the business, the activity may be intermittent with long intervals of quiescence in between". Exceptionally, a business may exist although the shareholders or members cannot obtain any gain or profit from the activities of the business: Inland Revenue Commissioners v. Incorporated Council of Law Reporting (1888) 22 QBD 279 (law reporting body prohibited by its constitution from dividing profits among members). It may exist even though the object of the activities is to make a loss: c.f. Griffiths v. JP Harrison (Watford) Ltd [1963] AC 1 (dividend stripping operation). And a corporation, firm or business may carry on business in a particular country even though its profits are earned in another country: South India Shipping Corp Ltd v. Export-Import Bank of Korea [1985] 2 All ER 219.' (paragraph 70)*

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

> *a business. In such a case, an appellate court, although debarred from finding facts, may reverse the finding of the tribunal of fact and hold that a business was or was not being carried on.' (paragraph 71)*

60. In Crawford Realty Ltd v Commissioner of Inland Revenue (1991) 3 HKTC 674 at page 693, Barnett J drew a distinction between enhancement and substitution of an asset:

> '*In my judgment what the Board is clearly saying is that, while having in mind all the considerations urged on it by counsel, the activity constituted by the Agreement was such that it outweighed, and outweighed heavily, those considerations. I am unable to say the Board was wrong. Enhancement of an asset, making it as attractive and saleable as reasonable expenditure of time and money can achieve, is one thing. The end product remains substantially the same. Substitution, however, is another matter. It is the taking of one's old car, removing the bodywork, engine and suspension from the chassis and replacing them with the latest styling and mechanical components. And that is effectively what happened here. The appellant obtained a price for the old car in excess of its apparent value (about which no complaint is made by the Commissioner) but then went on to participate in the expenditure of time and money on rebuilding the car with new components in the hope of another profit therefrom. The appellant was actively involved in this process. Without going so far as to say the Board could have come to no other conclusion, I do not find it difficult to see why the Board reached the conclusion it did. As the Board says, "the document speaks for itself."*
>
> *I accept that it is possible to quibble with the way in which the Board expressed its conclusion. I am satisfied, however, that there is foundation for all the points made by the Board which, perhaps somewhat clumsily, is essentially seeking to say that the signposts point not to mere realization but rather a profit making scheme amounting to an adventure.'*

Whether change of intention

61. In a thorough, properly cross-referenced, meticulous and helpful submission, the respondent argued that the appellants changed their intention and embarked on trade or business in:

(a) February 1984 at the earliest;

(b) January 1987;

(c) December 1987; or

(d) September 1989 at the latest.

The respondent submitted in detail on each of the alternative dates for change of intention.

62. The appellants made no attempt to deal with the respondent's arguments about change of intention between February 1984 and September 1989. In the 'Final Reply by Appellants', the appellants simply asserted that:

> 'The issue before the Board is whether there was a change of intention by reason of the decision to sell the [Orphanage] and its land to [the Developer] in a so-called joint venture for the building and provision of residential units in 1993, so that the [Orphanage] became a trading rather than a capital asset.'

63. What the appellants did was to harp on their status as charitable institutions, what was called the Retirement Residence and the re-provisioning of the Orphanage.

64. It is clear that a charity may trade or carry on a business. This is expressly recognised by the proviso to section 88 of the Ordinance. Furthermore, we accept the respondent's submission that as a matter of general principle, if a charitable institution in the course of its management carries on a profit-oriented trade or business, the profits of that trade or business will be subject to taxation, unless it can rely on the exemption in section 88, see Viscount Cave in Coman v Governors of the Rotunda Hospital Dublin [1921] 1 AC 1 at pages 24 – 25 and Lord Atkinson at page 31; Rowlatt J in Royal Agricultural Society of England v Wilson (1924) 9 TC 62 at pages 67 – 68; Viscount Cave LC in Brighton College v Marriott (1925) 10 TC 213 at page 231; Lord President Cooper in British Legion, Peterhead Branch, Remembrance and Welcome Home Fund v CIR (1953) 35 TC 509 at page 514; Buckley LJ in Carlisle and Silloth Golf Club v Smith [1913] 3 KB 75 at page 81 and Ridley J in Grove v Young Men's Christian Association (1903) 4 TC 613 at pages 617 & 618.

65. As the appellants well knew, the Retirement Residence project had been frozen since July 1980. In a report submitted by Witness3 dated October 1981, he reported that:

> '(1) A study-group was set up … in 1977 to look into the possibility of building a [Retirement Residence] ...
>
> ...
>
> (4) In Early 1980, the Development Committee … requested the Project Committee to submit further details concerning the project and it was obvious that the project needed to be put in the proper perspective of overall … Development plan and programmes. Since July, 1980, the project has been forzen (*sic*) pending further instruction ...'

Witness3 gave the following answers to the Chairman's questions about whether the retirement village project had been reactivated:

'CHAIRMAN: Has further instruction ever been given?

A. These things happened 30 years ago, so I can't specifically remember whether there has been any further instruction. Of course, there also has been change of leadership.

CHAIRMAN: Has further instructions been given?

A. No, I can't remember, Mr Chairman.

CHAIRMAN: If further instructions had been given to reactivate the project, work would have started and you would have meetings, committees, working on it, wouldn't you?

A. Yes, there would be committee meetings. This committee never had meeting after this submission.

CHAIRMAN: No meeting after October 81?

A. Right.

CHAIRMAN: Thank you.'

Whether any instructions had since July 1980 been given are matters peculiarly within the appellants' knowledge. It behoved the appellants to tell us about them. We find as a fact that the Retirement Residence project had been frozen since July 1980 and, in the absence of evidence to the contrary, draw the inference that it has not at any material time been reactivated.

66. We turn now to the re-provisioning of the Orphanage.

(1) In a Memo dated 16 July 1984, Witness3 enclosed a copy of the letter dated 9 July 1984 from SWD and reported to members of the executive committee as follows:

'Concerning our proposed reprovisioning, Social Welfare Department is making a counter proposal which can be summarized in two parts:

(1) That our Babies' Section (in particular the residential nursery for 2 – 6 years old) be reprovided in the community, i.e. public housing;

(2) Our Children's Section would be rebuilt on the site[7] proposed by the [Orphanage] but without many of the facilities proposed by the Architects.

In principle, the counter proposal is very much inlined with the trend of thought of the [Orphanage] except the matter concerning with the residential creche needs further review.'

(2) In a 'Progress Report on Major Renovation and Reprovisioning of the [Orphanage]' dated 24 August 1984, Witness3 reported that:

'(1) Introduction ...

- Early 1984 – "Land and Building Sub-Committee" finalized report on major renovation and possible reprovisioning and submitted report to the Executive Committee.

- At the Executive Committee Meeting on 28th February, 1984, the said report was accepted and the Committee approved the motion of reprovisioning of the [Orphanage].

- The report and motion adopted was related to the Social Welfare Department by the superintendent on 7th March, 1984.

- The Director of Social Welfare replied on 9th July, 1984, agreeing about the proposal of reprovisioning but suggesting to move the Babies' Section to a Community (i.e. within a Public Housing Estate.) The said letter and an interim reply by the superintendent dated 16th July, 1984 was circulated to members of the Executive Committee on 16th July, 1984 ...

(2) The Proposal: To reprovide the Babies' Section (residential nursery in particular) of the [Orphanage] in the Community, i.e. within a Public Housing Estate. The Department proposed to offer a site … for the reprovisioning.

(3) Details of the Proposal: From information conveyed by the Development Branch, details of the proposed site are summarized:

[7] Under cross-examination, Witness3 stated that this was at the Adjacent Lot.

- The building is a separate building located within the Public Housing Estate;

- The total floor area is in the region of 1,000 sq. m. with a podium level and a upper level. Two lower level for kitchen and store-area are located below the podium-level;

- It is quite an ideal building with good ventilation and unobstructed view. The estate was only completed in late 1982 and the said building is unused as commercial activities are not necessary within the estate;

- As for finance, Lotteries Fund Grant will be applied to renovate the said building.

(4) Conclusion – Taking into the consideration of the situation of the existing buildings in the Babies' Section and the location, it would be appropriate to relocate the section. Even if the existing buildings are repaired and the slopes stabilized, the situation may worsen again in 3 to 5 years time. The proposal of relocation offers a golden opportunity for the [Orphanage] to improve its service and serve the children better. A decision by the Executive Committee is required before negotiation with the Social Welfare Department.'

(3) It is an agreed fact that in November 1984, the Headbody informed SWD of its agreement in principle on the long term re-provisioning plan that the Children's Section of the Orphanage would be rebuilt on a new site adjacent to the existing Orphanage site and that the Babies' Section would be relocated to a public housing estate, see paragraph 25(b) above. It was none other than Witness3 himself who wrote the letter dated 26 November 1984 to SWD.

(4) By a document dated 19 January 1987, Witness3 concluded that it was a golden opportunity to press ahead with the overall development and that the reprovisioning of the Orphanage should be separated from the main development:

'(A) Overall Development

(1) Separation of the development – Reprovisioning of [the Orphanage]; Development of overall site by the Diocese.

…

(B) Present Position on Reprovisioning of [the Orphanage]

(1) Babies' Section will be reprovided in Public Housing – the final draft plan is being studied by relevant Government Department and funding application will be done very soon. It is forecast that the section can move out of the present site in 18 months' time.

(2) Children's Section – the original plan of rebuilding on adjacent site [Adjacent Lot] is still being pursued ...

(C) Conclusion – A Golden opportunity to press ahead with the overall development; as for the reprovisioning of [Orphanage] it should be separated from the main development.'

(5) In September 1989, the appellants' architects submitted development proposal SK-H for town planning permission to develop 20 blocks of multi-storey towers and 20 houses (totalling 838 units) and supermarkets, laundry, coffee shop, food centre and shopping mall, but without any institutional development, see paragraph 15(f) above. In this connection, we would add that although the earlier proposal SK-F dated December 1987 included an area reserved for the Orphanage, that area was outside the Old Lots.

67. It is clear from the appellants' own documents that, as from September 1989 at the latest, the development of the Old Lots and the re-provisioning of the Orphanage, or the facilities provided by the Orphanage, became separate projects.

68. For the reasons given above, we conclude that the matters which the appellants had been harping on do not explain why the appellants still proceeded with the development of the Old Lots after September 1989. The facts called for an explanation by the appellants but they are by no means forthcoming on this. There is a vague suggestion that money is needed for the re-provisioning of the Orphanage. We are unable to accept this suggestion. There is no evidence on the financial resources of the appellants or the Headbody. There is no evidence on the amount of the shortfall (if any) from public funding. There was no mention of any financing by the Headbody or from proceeds from development of the Old Lots in paragraph 3 of the Progress Report dated 24 August 1984 on financing, see paragraph 66(2) above. The appellants' contemporaneous documents showed that the development project of the Old Lots and the re-provisioning of the Orphanage had become separate projects.

69. Whether there was a change of intention from capital holding to trading/business is a question of fact.

70. Witness2 was appointed a co-chairman of the Joint Development Committee in May 1989, after the re-provisioning of the Orphanage had been separated from the development of the Old Lots and the Retirement Residence project had been frozen for a long time. It is clear from the evidence of Witness2 that he approached the matter on commercial principles, with the laudable object of raising as much income as possible for the Headbody and its charitable activities. The appellants continued to retain the services of professional advisers including architects and lawyers to work on the development of the Old Lots. They actively marketed the disposal of the Old Lots by approaching leading developers in Hong Kong for offers and tenders. They sought and subsequently obtained town planning permission. The appellants have performed activities in relation to the Old Lots in an organised and coherent way with a view to maximising the income from their development. They sought and subsequently obtained a new grant by surrendering the Old Lots, thereby substituting the Old Lots by the New Lot. They have chosen to carry on a separate adventure or enterprise of a lucrative commercial and trade character, different and distinct from their charitable work.

71. We turn now to the 'badges of trade' listed by McHugh NPJ and quoted by us in paragraph 58(c) above. This is not a mechanical exercise of counting the number of scores. What we are required to do, in the words of McHugh NPJ, is to 'make a value judgment after examining all the circumstances involved in the activities claimed to be a trade'. In considering the 'badges of trade', we must not lose sight of the fact that some of the factors are more relevant to the question of intention at the time of acquisition. In the cases before us, it is common ground that at the respective times of acquisition, the appellants' intention was to hold the Old Lots indefinitely. The issue here is whether there was a change of intention.

(a) Whether the appellants have frequently engaged in similar transactions – no.

(b) Whether the appellants have held land for a lengthy period – yes for the Old Lots but no for the New Lot.

(c) Whether the appellants have acquired an asset that is normally the subject of trading rather than investment – land can be the subject of trading or investment. It is normal to seek surrender and re-grant in trading cases.

(d) Whether the appellants have bought or acquired large quantities of land – there is no evidence on whether the appellants hold other land.

(e) Whether the appellants have sold the asset (or parts thereof) for reasons that would not exist if they had an intention to resell at the time of acquisition – no for the New Lot, see paragraph 70 above.

(f) Whether the appellants have sought to add re-sale value to the asset by additions or repair – yes, see paragraph 70 above.

(g) Whether the appellants have conceded an actual intention to resell at a profit when the asset was acquired – no.

(h) Whether the appellants have acquired the asset for personal use or pleasure or for income – for 'personal' use in the provision of charitable activities in respect of the Old Lots, for re-sale in respect of the New Lot.

72. Having considered all the circumstances urged on us, we find that there was a change of intention from capital holding to trading/business. The grounds of appeal on this issue fail.

TIME OF CHANGE IN INTENTION

73. For reasons given in the section 'Whether change of intention', we find that this took place by September 1989 at the latest.

74. In December 1990, a firm of architects appointed by Appellant2 applied to DLO for a land exchange of the Old Lots to permit residential development, see paragraph 73 above. If we are wrong in our conclusion in paragraph 73 above, we find in the alternative that the change of intention took place in December 1990.

VALUE OF THE OLD LOTS AT TIME OF CHANGE IN INTENTION

75. The parties agreed that as at 28 September 1989, the value of the Old Lots was $192.5 million.

76. The parties also agreed that as at 1 May 1990, the value of the Old Lots was $222.48 million. There is no evidence on the value in December 1990. Applying Wing Tai Development Co Ltd v Commissioner of Inland Revenue [1979] HKLR 642, we determine the value of the Old Lots as at December 1990 to be no more than $300 million.

77. The respondent accepts that the value of the Old Lots at the time of change of intention has to be taken into account in computing the profits or loss from the trade/business. IRD has not included the $300 million upfront payment under the Joint Venture Agreement in its computation and assessment of the appellants' assessable profits. As the value of the Old Lots at the time of change of intention did not exceed $300 million, grounds (h) to (j) of the re-amended grounds of appeal fail.

WHETHER EXEMPT FROM TAX UNDER SECTION 88

78. Section 88 provides that:

'*Notwithstanding anything to the contrary in this Ordinance contained there shall be exempt and there shall be deemed always to have been exempt from tax any charitable institution or trust of a public character:*

Provided that where a trade or business is carried on by any such institution or trust the profits derived from such trade or business shall be exempt and shall be deemed to have been exempt from tax only if such profits are applied solely for charitable purposes and are not expended substantially outside Hong Kong and either-

(a) the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or

(b) the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established.'

79. The following is the Chinese version of section 88:

'***即使本條例載有相反規定，任何屬公共性質的慈善機構或信託，均獲豁免並當作一直獲豁免繳稅：***

但凡任何行業或業務是由任何該等機構或信託經營，而得自該行業或業務的利潤是純粹作慈善用途及其中大部分並非在香港以外地方使用，並符合以下規定，在此情況下，該等利潤方獲豁免並當作獲豁免繳稅-

(a) 該行業或業務是在實際貫徹該機構或信託明文規定的宗旨時經營的；或

(b) 與該行業或業務有關的工作主要是由某些人進行，而該機構或信託正是為該等人的利益而設立的。'

80. As we have concluded that the profits were derived from a trade or business carried on by appellants, the profits are exempt from tax only if all the following are satisfied:

(1) such profits are applied solely for charitable purposes; and

(2) such profits are not expended substantially outside Hong Kong; and

(3) (a) the trade or business is exercised in the course of the actual carrying out of the expressed objects of such institution or trust; or

(b) the work in connection with the trade or business is mainly carried on by persons for whose benefit such institution or trust is established.

81. The appellants have adduced no evidence on the application of the profits. The onus of proof under section 68(4) is on the appellants and they fail to prove that the proviso to section 88 applies. We decline to draw any inference in favour of the appellants. If the profits have in fact been applied solely for charitable purposes, the appellants may reasonably be expected to have material evidence on it. If any inference is to be drawn, it is one adverse to the appellants.

82. The appellants have adduced no evidence on the profits not being expended substantially outside Hong Kong. The onus of proof under section 68(4) is on the appellants and they fail to prove that the proviso to section 88 applies. We decline to draw any inference in favour of the appellants. If the profits have in fact not been expended substantially outside Hong Kong, the appellants may reasonably be expected to have material evidence on it. If any inference is to be drawn, it is one adverse to the appellants.

83. The appellants have not been able to identify any expressed object of Appellant2 or Appellant1. We reject the appellants' contention that the proviso is also applicable to implied objects. The statutory requirement is 'expressed' objects or '**明文規定**' in Chinese. The onus of proof under section 68(4) is on the appellants and they fail to prove that the proviso to section 88 applies. We decline to draw any inference in favour of the appellants. Indeed, if any inference is to be drawn, it is one adverse to the appellants.

Further and in any event, property development is not alleged to be an object of Appellant2 or Appellant1. Thus, the trade or business in this case could not be said to be, and was not, exercised in the course of the actual carrying out of the objects or alleged objects of Appellant2 or Appellant1.

84. The work in connection with the trade or business was not carried on by persons for whose benefit the appellants were established. Requirement 3(b) in paragraph 80 above is not satisfied and the proviso to section 88 does not apply.

85. The appellants fail on each and every one of the requirements and the proviso to section 88 does not apply.

CONCLUSION

86. The appeals fail. Both appeals are to be dismissed and the assessments appealed against are to be confirmed.

DISPOSITION

87. We dismiss Appellant1' s appeal (BR76/06) and confirm the assessments appealed against.

88. We will dismiss Appellant2' s appeal in our decision on BR77/06.