Case No. D18/13

Profits tax – sale of property – intention at time of acquisition – onus of proof – sections 2, 14 and 68(4) of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Diana Cheung and Wong Fung Yi.

Date of hearing: 16 July 2010.
Date of decision: 29 October 2013.

The Appellant bought the Subject Flat in May 2004 and sold the same which had remained vacant since acquisition in August 2006 at a gain.

The Appellant claims that the intention of acquiring the Subject Flat was for its Sole Shareholder's residence. The profit derived from disposal of the Subject Flat was capital in nature and should not be chargeable to tax.

Held:

1. The onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant and that the onus cannot be shifted.

2. The relevant question is whether the stated intention existed at the time of the acquisition of the Subject Flat.

3. A single, one-off transaction can be an adventure in the nature of trade. The question is whether the Appellant was investing the money or doing a deal.

4. Whether the disposal of the Subject Flat is an adventure and concern in the nature of trade is a question of fact and degree upon a consideration of all the circumstances.

5. The Sole Shareholder of the Appellant absented himself from the hearing with no good reason.

6. The Revenue had no opportunity to cross-examine the Sole Shareholder of the Appellant to test the veracity of his assertions in the《證人表述》(literally 'witness statement') and the 《法定聲明》(literally 'statutory declaration'). The Board attaches no weight to either document.

7. The Board attaches no weight to the testimony of the Property Agent who is evasive and has no personal knowledge of the Appellant's or the Sole Shareholder's intentions at the time of acquisition of the Subject Flat.

8. The Subject Flat was assigned to the Appellant on 31 May 2004. Instructions to sell were given on about the following day, 1 June 2004. There is no element of permanence in the acquisition of the Subject Flat.

9. On what is alleged on behalf of the Appellant, the Appellant did not acquire the Subject Flat as a permanent investment, the allegation is that it was to be sold.

10. This appeal is frivolous and vexatious and an abuse of the process. The Board orders the Appellant to pay the sum of $2,000 as costs of the Board.

Appeal dismissed and costs order in the amount of $2,000 imposed.

Cases referred to:

Simmons v IRC [1980] 1 WLR 1196
Marson v Morton [1986] 1 WLR 1343
All Best Wishes Limited v CIR (1992) 3 HKTC 750
Lee Yee Shing v The Commissioner of Inland Revenue (2008) 11 HKCFAR 6
Real Estate Investments (NT) Limited v The Commissioner of Inland Revenue (2008) 11 HKCFAR 433

Ng Po Tung of Messrs P T Ng & Co for the Appellant.
Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant is a limited company with:

(a) an issued and paid up capital of HK$8;

(b) no income at all times material to this appeal; and

(c) an accumulated loss of $1,119,828 as at 31 March 2006.

2. The Appellant bought and sold the Subject Flat at a gain. The issue is whether the gain is chargeable to profits tax. Particulars of the acquisition and sale of the Subject Flat are as follows:

Date of provisional acquisition agreement	17-02-2004
Date of acquisition assignment	31-05-2004
Acquisition consideration	$21,000,000
Mortgage loan draw down date	31-05-2004
Mortgage loan of $14,700,000 repayable by	240 monthly instalments
Date of provisional sale agreement	15-07-2006
Date of sale assignment	08-08-2006
Sale consideration	$25,000,000

3. The Subject Flat was assigned to the Appellant with vacant possession.

4. During the whole period of the Appellant's ownership of the Subject Flat from 31 May 2004 to 8 August 2006:

(a) No decoration work had been carried out at the Subject Flat;

(b) The Subject Flat remained vacant; and

(c) The Sole Shareholder lived in the Quarters which had been provided by his employer since July 2003.

Agreed facts

5. The Appellant has agreed the following facts as stated in the Determination and we find them as facts.

6. This is an appeal against the Determination of the Acting Deputy Commissioner of Inland Revenue dated 19 February 2010 whereby the profits tax assessment for the year of assessment 2006/07 dated 22 February 2008, showing assessable profits of $2,612,716 with tax payable thereon of $457,225 was reduced to net assessable profits of $1,266,395 (after loss set-off of $1,119,828) with tax payable thereon of $221,619.

7. The Appellant has objected to the profits tax assessment for the year of assessment 2006/07 raised on it. The Appellant claims that the profit it derived from disposal of a property is capital in nature and should not be chargeable to tax.

8. (a) The Appellant was incorporated in Territory A. At all relevant times, the Appellant's address in Hong Kong was [omitted here]. The Sole Shareholder was the sole director and shareholder of the Appellant.

(b) The issued and paid up capital of the Appellant was $8 consisting of one ordinary share of US$1.

(c) In its Profits Tax Returns for the years of assessment 2004/05 to 2006/07, the Appellant claimed that it did not carry on any business in Hong Kong and reported that its assessable profits or adjusted loss was nil.

(d) The Appellant closed its accounts on 31 March annually.

9. (a) By a provisional agreement dated 17 February 2004, the Appellant agreed to purchase the Subject Flat at a residential complex ('the Residential Complex') at a price of $21,000,000 with vacant possession. The purchase was completed by an assignment on 31 May 2004.

(b) By a provisional agreement dated 15 July 2006, the Appellant agreed to sell the Subject Flat at a price of $25,000,000 with vacant possession. The sale was completed by an assignment on 8 August 2006.

(c) The gross floor area of the Subject Flat was 1,911 square feet.

10. (a) By a provisional agreement dated 6 March 2006, the Appellant agreed to purchase another residential property on a different floor of a different tower of the Residential Complex ('the Second Flat') at a price of $25,600,000 with existing tenancy. The purchase was completed by an assignment on 12 May 2006.

(b) The gross floor area of the Second Flat was 1,911 square feet.

11. The Appellant submitted its profits tax returns for the years of assessment 2004/05 to 2006/07 together with audited financial statements and proposed tax computations. The Appellant's income statement showed, *inter alia*, the following particulars:

Year of assessment	**2004/05**	**2005/06**	**2006/07**
Period/Year ended	17-02-04 – 31-03-05	01-04-05 – 31-03-06	01-04-06 – 31-03-07
	$	$	$
Income			
Gain on disposal of fixed assets	-	-	3,761,907
Administrative expenses			
Audit fee	4,000	4,000	7,000
Bank charges	2,000	-	-
Building management fee and rates	94,389	120,132	152,245

Year of assessment	**2004/05**	**2005/06**	**2006/07**
Period/Year ended	17-02-04 – 31-03-05	01-04-05 – 31-03-06	01-04-06 – 31-03-07
	$	$	$
Depreciation	500,599	500,599	638,729
Legal and professional fee	9,575	4,953	8,228
Utility expenses	765	765	2,056
Finance expenses			
Secured bank loan interest	281,116	598,133	979,662
	892,444	1,228,582	1,787,920
Profit/(Loss) for the year	(892,444)	(1,228,582)	1,973,987

12. The gain on disposal of the Subject Flat referred to in Paragraph 11 was arrived at as follows:

	$	$
Sales consideration		25,000,000
Less: Cost	22,026,341[1]	
Less: Depreciation	1,001,198	
	21,025,143	
Legal fee	12,950	
Agency commission	200,000	21,238,093
Gain on disposal of the Subject Flat		3,761,907

Note 1:
The cost of sales was computed as follows:

	$
Purchase price	21,000,000
Stamp duty	787,600
Agency commission	210,000
Legal fee	28,741
	22,026,341

13. In response to the Assessor's enquiries in respect of the Subject Flat, Messrs P T Ng & Co, on behalf of the Appellant, stated, *inter alia*, the following:

(a) The Subject Flat was acquired with vacant possession from an unrelated party. It was left vacant since then.

(b) The acquisition of the Subject Flat was financed by the Sole Shareholder and a loan of $14,700,000 from a named bank.

(c) The Sole Shareholder intended to acquire a unit at the Residential Complex for own use through the Appellant. Due to the limited choice available and the anticipated rise in price, the Sole Shareholder decided to acquire the Subject Flat though it was not a satisfactory one and would like to make a replacement when other units were available.

(d) After acquiring the Second Flat, the Subject Flat was sold to an unrelated party.

(e) The sales proceeds were applied to repay the loans from the bank and the Sole Shareholder.

(f) The Appellant was not doing any business in Hong Kong.

(g) The purchase and sale of the Subject Flat was the only property transaction conducted by the Appellant since its commencement of activities on 17 February 2004.

(h) The Appellant should not be considered as a dealer because it was unreasonable for a dealer to sell and purchase similar items at similar price within a short period of time.

(i) The ability of the Appellant to buy another property (i.e. the Second Flat) before the disposal of the Subject Flat proved the financial strength of the Appellant.

14. In response to the Assessor's enquiries in respect of the Second Flat, Messrs P T Ng & Co, on behalf of the Appellant, stated, *inter alia*, the following:

(a) The Second Flat was acquired with existing tenancy from an unrelated party and the tenant left in June 2006.

(b) The acquisition of the Second Flat was financed by the Sole Shareholder and a loan of $15,360,000 from another bank.

(c) The intention of acquiring the Second Flat was for own usage.

(d) The decoration was completed in around July 2007 and the Sole Shareholder moved in the Second Flat thereafter.

(e) According to the Sole Shareholder, the location and direction of the Second Flat was better than the Subject Flat. In addition, he preferred to have a unit named (as the Second Flat was) to (the Subject Flat).

15. Messrs P T Ng & Co furnished, *inter alia*, copies of the following documents:

(a) A written resolution of the Appellant dated 7 February 2004 approving the purchase of the Subject Flat.

(b) A written resolution of the Appellant dated 6 March 2006 approving the purchase of the Second Flat.

(c) An interior design proposal dated 31 August 2006 and issued by a Design Company to the Appellant in respect of the Second Flat.

(d) 4 bills issued by the electric company in respect of the electricity consumption in the Second Flat for the period from 12 July 2007 to 9 November 2007.

(e) Transaction records related to the Residential Complex during the year of 2005 provided by a named company.

16. The Assessor was of the view that the purchase and sale of the Subject Flat by the Appellant amounted to an adventure in the nature of trade. She raised on the Appellant the following Profits Tax Assessment for the year of assessment 2006/07:

	$
Profits per account (paragraph 11)	1,973,987
Add: Depreciation charged (paragraph 11)	638,729
Assessable profits	2,612,716
Tax payable thereon	457,225

17. Messrs P T Ng & Co objected, on behalf of the Appellant, against the Profits Tax Assessment in paragraph 16 on the grounds that:

(a) The gain on disposal of the Subject Flat was capital in nature and should not be subjected to tax; and

(b) If the gain was chargeable to tax, the assessable profits of the Appellant for the year of assessment 2006/07 should be computed as follows:

(i) ***Year of assessment 2004/05***

	$
Loss per accounts (paragraph 11)	(892,444)
Less: Depreciation charged (paragraph 11)	500,599
Adjusted loss	(391,845)
Statement of loss	
Loss for the year and carried forward	391,845

(ii) ***Year of assessment 2005/06***

	$
Loss per accounts (paragraph 11)	(1,228,582)
Less: Depreciation charged (paragraph 11)	500,599
Adjusted loss	(727,983)
Statement of loss	
Loss brought forward	391,845
Add: Loss for the year	727,983
Loss carried forward	1,119,828

(iii) ***Year of assessment 2006/07***

	$	$
Profits per accounts (paragraph 11)		1,973,987
Add: Depreciation charged (paragraph 11)		638,729
Expenses related to the Second Flat:		
Building management fee and rates	108,328	
Legal and professional fee	3,158	
Utility expenses	1,363	
Secured bank loan interest	661,856	774,705
		3,387,421
Less: Depreciation deducted from the cost of the Subject Flat (paragraph 12)		1,001,198
Assessable profits		2,386,223
Less: Loss set-off		1,119,828
Net assessable profits		1,266,395
Tax payable thereon		221,619
Statement of loss		
Loss brought forward		1,119,828
Less: Loss set-off		1,119,828
Loss carried forward		Nil

18. In response to the Assessor's further enquiries, Messrs P T Ng & Co stated, *inter alia*, the following:

(a) The intention of acquiring a unit in the Residential Complex was for the Sole Shareholder's residence.

(b) The decoration of the Second Flat commenced in around August 2006 and was completed in around July 2007.

(c) Before moving in the Second Flat, the Sole Shareholder was provided with quarters at a residential flat at the Residential Complex ('the Quarters') by the Employer since July 2003.

(d) Having resided in the Residential Complex, the Sole Shareholder considered that it was a suitable place for his residence.

(e) The acquisition of the Subject Flat should be considered as a protection against the price increase in the property market since the gain from the Subject Flat could compensate the price increase in the subsequent replacement.

(f) All the sales proceeds were reinvested in the Second Flat and hence the gain on disposal of the Subject Flat should be considered as a capital gain.

19. Messrs P T Ng & Co furnished, *inter alia*, copies of the following further documents:

(a) An extract of a tenancy agreement dated 29 July 2003 entered into between the Landlord, as the landlord, and the Employer, as the tenant, in respect of the Quarters for a term of two years commencing from 29 July 2003.

(b) An extract of a tenancy agreement dated 17 June 2005 entered into between the Landlord, as the landlord, and the Employer, as the tenant, in respect of the Quarters for a term of two years commencing from 29 July 2005.

(c) An agreement dated 26 June 2007 extending the tenancy period in respect of the Quarters ended on 28 July 2007 to 28 August 2007.

(d) A quotation dated 16 April 2007 issued by [name omitted here] to the Employer.

(e) An invoice dated 1 August 2007 issued by the Design Company to the Appellant in respect of the Second Flat.

(f) An official receipt dated 17 October 2007 issued by the Design Company to the Appellant in respect of the Second Flat.

(g) An official receipt for payment made on 29 March 2008 for the club at the Residential Complex.

20. The Assessor has ascertained that at all relevant times the Employer was the employer of the Sole Shareholder and he was also a director of the Employer since 22 March 2004.

21. The Assessor maintained the view that the profits derived by the Appellant from the disposal of the Subject Flat were trading profits and were therefore subject to tax. On the other hand, the Assessor accepted the computation of adjusted losses and assessable profits of the Appellant for the years of assessment 2004/05 to 2006/07 in Paragraph 17(b). The Assessor wrote to the Appellant explaining her view and proposed to revise the 2006/07 Profits Tax Assessment as per paragraph 17(b)(iii).

22. In reply, Messrs P T Ng & Co declined to accept the Assessor's proposal in Paragraph 21 and reiterated that the gain on disposal of the Subject Flat should be capital in nature.

The Determination

23. The Acting Deputy Commissioner considered that the profits derived from the sale of the Subject Flat were correctly charged to profits tax and by the Determination revised the assessment as per paragraphs 6, 17(b)(iii) and 21 above.

Grounds of appeal

24. By letter dated 3 March 2010, Messrs P T Ng & Co gave notice of appeal on behalf of the Appellant on the following grounds (written exactly as it stands in the original):

> ' *1. the assessment is incorrect*
>
> *2. the gain on disposal of the [Subject Flat] was a profit from the sale of a capital asset and therefore not chargeable to profits tax*'

The hearing

25. At the hearing of the Appeal, the Appellant was represented by Mr Ng Po Tung and the Respondent by Ms Chan Wai Yee.

26. Under cover of their letter dated 28 June 2010, Messrs P T Ng served, among other documents:

(a) A document called 《證人表述》 (literally 'witness statement') of the Sole Shareholder. It was undated and unsigned.

(b) A document called《證人表述》(literally 'witness statement') of an employee of a property agent. It was also undated and unsigned.

27. By letter dated 15 July 2010, Messrs P T Ng & Co wrote to the Clerk to the Board of Review in these terms (written exactly as it stands in the original):

> ' *We are sorry to inform you that [the Sole Shareholder], a witness to the case is unable to attend the hearing on July 16, 2010 due to unforeseen happenings. However, he will provide an affirmation to support the appeal.*
>
> *We apologise for any inconvenience caused.*'

28. At the hearing of the appeal on 16 July 2010, Mr Ng Po Tung handed in a document called《法定聲明》(literally 'statutory declaration') of the Sole Shareholder. The document purported to have been made on 14 July 2010.

29. The only witness called by Mr Ng Po Tung was an employee of the property agent ('the Property Agent').

30. Neither the Sole Shareholder nor any officer nor any employee of the Appellant attended the hearing. After his brief opening, Mr Ng Po Tung said:

> ' *So, this is the outline and now original planning we have [the Sole Shareholder] – as our witness as also he is the owner and the director of [the Appellant] and also [the Property Agent], a sales representative handled -, sorry, the sales representative of [the Appellant] to handle their property transactions, to attend this hearing. But unfortunately due to some unforeseen matters, [the Sole Shareholder] is unable to come. However, he is able to provide an affirmation to support this appeal. So, Chairman, should I present this for you?*
>
> *CHAIRMAN: If you have something to present, present it to us. Whether we will look at it, whether we will attach any weight to it, is a matter for later decision.*
>
> *MR NG: So, I do not give it to you now?*

CHAIRMAN: *What I said was, whether you wish to present something is up to you. If you present something to us, whether we decide at the end of the day to look at it or, if we look at it, what weight we attach to the contents, is a matter for later decision.*

MR NG: *So, I will present this affirmation to you.'*

31. Ms Chan Wai Yee did not call any witness.

32. The only authorities on Mr Ng Po Tung's list of authorities were (written exactly as it stands in the original):

' 1. Simmons v IRC [1980] 1 WLR 1196

2. D13/08, (2008-09) IRBRD, vol 23[1]'

33. Ms Chan Wai Yee put the following on her Authorities Bundle:

'***1. Inland Revenue Ordinance (Chapter 112)***

(a) Section 2 – Interpretation

"business" and "trade"

(b) Section 14 – Charge of profits tax

(c) Section 68 – Hearing and disposal of appeals to the Board of Review

2. Tax Cases

(a) All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750

(b) Lee Yee Shing v Commissioner of Inland Revenue (2008) 3 HHKLRD 51

(c) Simmons v IRC (1980) 1 WLR 1196

(d) Marson (Inspector of Taxes v Morton and related appeals (1986) STC 463

[1] No page reference.

(e) Real Estate Investments (NT) Limited v The Commissioner of Inland Revenue (2008) 11 HKCFAR 433'

Authorities

Capital or trading/business issue

34. Section 2 of the Inland Revenue Ordinance, Chapter 112 ('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'.

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

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

Onus of proof

36. Section 68(4) provides that the '*onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant*'. See also paragraphs 38 and 45 below.

Costs

37. Section 68(9) provides that:

> ' *Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.*'

The amount specified in Part I of Schedule 5 is $5,000.

Simmons

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

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

> ' *Finally as to the decision of the Court of Appeal, the judgment, delivered by Orr L.J., contains a clear account of the facts, and, in my respectful opinion, a generally correct statement of the law. In particular, it is rightly recognised that a sale of an investment does not render its disposal a sale in the course of trade unless there has been a change of intention.*' (at page 1202)

In the Court of Appeal, Orr L J accepted that it was clearly established that on appeal to the Commissioners[2] the burden is on the taxpayer to displace the assessment and in the circumstances the burden was clearly on the taxpayers to establish that the sales in question gave rise to a surplus on capital account and not to a trading profit. His Lordship stated the general principles in these terms:

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

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

Marson v Morton

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

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

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

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

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

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

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

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

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

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

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

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

(viii) What were the purchasers' intentions as to resale at the time of purchase? If there was an intention to hold the object indefinitely, albeit with an intention to make a capital profit at the end of the day, that is a pointer towards a pure investment as opposed to a

trading deal. On the other hand, if before the contract of purchase is made a contract for resale is already in place, that is a very strong pointer towards a trading deal rather than an investment. Similarly, an intention to resell in the short term rather than the long term is some indication against concluding that the transaction was by way of investment rather than by way of a deal. However, as far as I can see, this is in no sense decisive by itself.

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

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

All Best Wishes

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

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

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

I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute - was this an adventure and concern in the nature of trade? The

> *intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.*' (at page 771)

Lee Yee Shing

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

42. Bokhary PJ and Chan PJ emphasised at paragraph 38 that the question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be answered by the fact-finding body upon a consideration of all the circumstances. McHugh NPJ thought that ultimately, the issue is one of fact and degree[3].

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

> (a) '*No principle of law defines trade. Its application requires the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade.*' (at paragraph 56)
>
> (b) '*The intention to trade to which Lord Wilberforce referred in Simmons is not subjective but objective: Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663 at 668. It is inferred from all the circumstances of the case, as Mortimer J pointed out in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 at 771. A distinction has to be drawn between the case where the taxpayer concedes that he or she had the intention to resell for profit when the asset or commodity was acquired and the case where the taxpayer*

[3] See paragraph 44(c) below.

asserts that no such intention existed. If the taxpayer concedes the intention in a case where the taxing authority claims that a profit is assessable to tax, the concession is generally but not always decisive of intention: Inland Revenue Commissioners v Reinhold (1953) 34 TC 389. However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition, the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case. It examines the circumstances to see whether the "badges of trade" are or are not present. In substance, it is "the badges of trade" that are the criteria for determining what Lord Wilberforce called "an operation of trade".' (at paragraph 59)

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

1. *has frequently engaged in similar transactions?*

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

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

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

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

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

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

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

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

(d) '*In some cases, the source of finance for the purchase may also be a badge of trade, particularly where the asset or commodity is sold shortly*

after purchase. But borrowing to acquire an asset or commodity is usually a neutral factor.' (at paragraph 61)

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

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

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

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

Real Estate Investments

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

> ' *It is natural and appropriate to strive to decide on something more satisfying than the onus of proof. And it should generally be possible to do so. But tax appeals do begin on the basis that, as s.68(4) of the Inland Revenue Ordinance provides, "[t]he onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant". And it is possible although rare for such an appeal to end – and be disposed of – on that basis*', at paragraph 32.
>
> ' *As for the notion of a shifting onus, such a notion is seldom if ever helpful. Certainly it cannot shift the onus of proof from where s.68(4) of the Inland Revenue Ordinance places it, namely on a taxpayer who appeals against an assessment to show that it is excessive or incorrect)*', at paragraph 35.

46. Their Lordships went on to state that:

- the badges of trade are no less helpful here than in the United Kingdom;
- they do not fall to be considered separately from the issue of intention or any assertion made by Taxpayer or on its behalf as to intention; and

- the question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case.

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

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

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

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

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

That is as far as it goes, which is not very far when taken on its own. At p.1349 C-D the Vice-Chancellor emphasised that his list is not comprehensive, that no single item is in any way decisive and that it is always necessary to look at the whole picture.

The question of whether property is trading stock or a capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case’ at paragraphs 54 to 55.

Absence of the Sole Shareholder

47. The Sole Shareholder absented himself from the hearing. The excuses put forward by Mr Ng Po Tung for his absence are:

- '[The Sole Shareholder], a witness to the case is unable to attend the hearing on July 16, 2010 due to unforeseen happenings'[4]; and

- 'But unfortunately due to some unforeseen matters, [the Sole Shareholder] is unable to come'[5].

48. Both excuses are conspicuous for their absence of particulars on any alleged 'happening' or alleged 'matter'. If good cause existed for the Sole Shareholder's absence, Mr Ng Po Tung had simply failed to tell us and there was no good reason for him not to have told us.

49. The crucial issue in this appeal is a factual one.

50. The 《證人表述》 (literally 'witness statement') of the Sole Shareholder and the 《法定聲明》(literally 'statutory declaration') of the Sole Shareholder contain brief, generalised and vague self-serving bare assertions. The Revenue simply had no opportunity to cross-examine the Appellant to test the veracity of his assertions. No good reason had been given for the Sole Shareholder's absence. We attach no weight to either document.

The Property Agent's evidence

51. Plainly the Property Agent had no personal knowledge of the Appellant's or the Sole Shareholder's intentions at the time of acquisition of the Subject Flat. It was not for the Property Agent to conjecture as to what was 'possible' or 「可能」.

52. He was evasive as to his employer's record which recorded that the Appellant first verbally appointed his employer to sell the Subject Flat on about 1 June 2004 and that the asking price was changed 9 times by 15 May 2006.

53. He was referred to a letter dated 26 April 2010 written by his employer to the Revenue in which his employer stated that:

> The Appellant 'first verbally appointed (the agency company) to sell (the Subject Flat) on or about June 1 2004 at an original asking price of HK$26,000,000.00.'

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4 See paragraph 27 above.
5 See paragraph 30 above.

> ' The asking price of the property had been changed 10 times upon verbal enquiry by our staffs and the schedule is set out as follows …'

54. He was asked whether he agreed or disputed the contents of the passages. He said:

> ' Yes, I agree.'

55. No attempt had been made to explain how the changes in asking prices came to be made in the company's computer records.

56. We attach no weight to his testimony.

No intention of permanent holding

57. The Subject Flat was assigned to the Appellant on 31 May 2004. Instructions to sell were given on about the following day, that is to say, 1 June 2004. There is no element of permanence in the acquisition of the Subject Flat.

Further findings of fact

58. Based on the evidence before us, we find the facts stated in paragraph 1 to paragraph 4 above as facts.

Subject Flat itself must be capital asset for section 14 exclusion to apply

59. The profits excluded from the section 14 charge to profits tax are 'profits arising from the sale of capital assets'. The profits in this case arose from the sale of the Subject Flat. Unless the Subject Flat **itself** was the Appellant's capital asset, this appeal does not get off the ground and must fail. The fact that some other property may or may not be capital assets is irrelevant.

60. The case law is very clear on the point.

61. In Simmons, Lord Wilberforce stated at page 1199 (emphasis added) that the relevant question is whether the stated intention existed at the time of the acquisition of the asset – was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?

> ' *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?***'

62. In All Best Wishes, Mortimer J. (as he then was) said (emphasis added):

> ' *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.*'

63. What was alleged by Messrs P T Ng & Co on behalf of the Appellant in their letter dated 18 December 2007 was that (written exactly as it stands in the original with emphasis added):

> '*[The Sole Shareholder] intended to acquire a unit at the [Residential Complex] for own use through [the Appellant]. Due to the limited choice available and the anticipated rise in price, [the Sole Shareholder] decided to acquire [the Subject Flat] though* ***it was not a satisfactory one*** *and* ***would like to make a replacement*** *when other units were available. It was left vacant since then*'[6].

64. To like effect was what was alleged by Messrs P T Ng & Co on behalf of the Appellant in their letter dated 27 March 2008 as follows (written exactly as it stands in the original with emphasis added):

> ' *1. The intention for the acquisition is to find* ***a*** *residential flat for own use.*
>
> *2. Due to the limited supply and the anticipated in price [the Appellant] decided to buy [the Subject Flat] first.* ***In case there is to be any gain, they are going to compensate for the price increase in the subsequently (sic) acquisition. The move should be considered as a protection to (sic) the price increase.***'

65. On what is alleged through Messrs P T Ng & Co on behalf of the Appellant, the Appellant did not acquire the Subject Flat itself as a permanent investment.

66. Not only is there no allegation that the Subject Flat itself was acquired as a capital asset, the allegation is that it was to be sold.

67. The Appellant's appeal does not even get off the ground. We see no reason why the Board should be vexed by such a hopeless appeal. For this reason alone, the appeal must be dismissed.

Subject Flat left vacant with no improvement work

68. If the intention were to hold the Subject Flat permanently or for the Sole Shareholder's residence, it would not:

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[6] See paragraph 0(c) above.

- have been left vacant;
- without doing any decoration work; and
- with an estate agent being immediately instructed on acquisition to find buyers.

No evidence on availability in early 2004

69. It was alleged that due to the limited choice available, the Appellant grabbed the Subject Flat. There is simply no evidence on the availability when the Subject Flat was acquired in early 2004. There was no attempt for the Appellant to get the appeal off the ground.

Financial ability

70. We repeat paragraph 1 above.

71. The Subject Flat was acquired entirely by borrowed funds.

72. The Appellant itself clearly does not have the financial strength and ability to hold the Subject Flat on a permanent basis.

73. The Sole Shareholder's salaries tax assessment only shows his salary income, but not his personal liabilities and financial commitments.

74. There is no evidence on the Sole Shareholder's commitment to fund the Appellant's holding of the Subject Flat on a permanent basis.

Badges of trade

75. For the reasons given above, this appeal fails and must be dismissed.

76. For completeness, we turn to the badges of trade summarised by McHugh NPJ in Lee Yee Shing:

(1) Whether the Appellant has frequently engaged in similar transactions: No.

(2) Whether the Appellant has held the asset or commodity for a lengthy period: 2 years

(3) Whether the Appellant has acquired an asset or commodity that is normally the subject of trading rather than investment: The subject matter is residential property which can be the subject of trading or investment.

(4) Whether the Appellant has bought large quantities or numbers of the commodity or asset: No.

(5) Whether the Appellant has sold the commodity or asset for reasons that would not exist if the taxpayer had an intention to resell at the time of acquisition: No.

(6) Whether the Appellant has sought to add re-sale value to the asset by additions or repair: No.

(7) Whether the Appellant has expended time, money or effort in selling the asset or commodity that goes beyond what might be expected of a non-trader seeking to sell an asset of that class: It instructed an estate agent to sell on the day after acquisition.

(8) Whether the Appellant has conceded an actual intention to resell at a profit when the asset or commodity was acquired: Yes.

(9) Whether the Appellant has purchased the asset or commodity for personal use or pleasure or for income: No.

(10) Source of finance: It was entirely on borrowed funds. The Appellant itself had no income but had a 7 digit accumulated loss.

77. Upon a holistic consideration of the circumstances of this particular case, we conclude that the Appellant was doing a deal. In other words, it carried on an adventure in the nature of trade and acquired the Subject Flat as a trading stock.

78. The appeal fails and falls to be dismissed.

Disposition

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

Costs

80. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the Ordinance, we order the Appellant to pay the sum of $2,000 as costs of the Board, which $2,000 shall be added to the tax charged and recovered therewith.