Case No. D19/13

Case stated – section 69(1) of the Inland Revenue Ordinance – whether the question of law was stated clearly and concisely – whether to decline a request to state a case unless a proper question of law can be identified – whether the question of law is an arguable question and would not be an abuse of process – the Board's duty to ensure that the questions of law are proper – whether it is the Board's duty to show that the conclusion must be the only one in order to make it stand.

Panel: Chow Wai Shun (chairman), Chau Cham Kuen and Wong Wang Tai Fergus.

Date of hearing: Stated case, no hearing.
Date of decision: 6 November 2013.

By a Decision of the Board, the Board allowed in part the Appellant's appeal against the determination of the Deputy Commissioner of Inland Revenue. The Appellant applied to the Board to state a case for the opinion of the Court of First Instance pursuant to section 69(1) of the Inland Revenue Ordinance regarding the part the Board disallowed.

The Appellant put forward four purported questions of law:

1. Whether upon the facts found by the Board in relation to Property G, the only true and reasonable conclusion at which the Board could properly have arrived was that the profits of the Appellant, the subject matter of the appeal, were profits arising from the sale of capital assets within the meaning of Section 14 of the Inland Revenue Ordinance and therefore exempt from tax;

2. Whether, in that part of the appeal relating to Property G, as a matter of law and on the facts found, the Board was correct to conclude that on the balance of probabilities the Appellant had not discharged its burden of proof in that part of the appeal and consequently to dismiss the appeal in that respect;

3. Whether, not having reached a positive conclusion that an intention to see existed at the time of acquisition, the Board was correct to conclude that Property G was acquired as a trading asset;

4. Whether the Board fell into error when it made and took into account judgments upon decisions of the Appellant as 'blatantly wrong and hasty' these being matters irrelevant to intention at the time of acquisition of Property G.

The Appellant further emphasized on two points in his Reply to the submissions of the Respondent: (1) it challenged the Board's conclusion in respect of Property G; and (2) the Decision raised questions of law given the findings of fact upon which the Board based its conclusion.

Held:

1. The question of law 'should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts', and an applicant for a case stated may not 'rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what materials must be marshalled in their case' (CIR v Inland Revenue Board of Review [1989] 2 HKLR 40 followed).

2. This Board, as a tribunal of facts, should have the jurisdiction to decide: (a) the extent to which a piece of evidence should be accepted or rejected; and (b) the use to which the evidence which has been accepted by the Board should be put. This Board should decline a request to state a case unless the applicant can show that a proper question of law can be identified (Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 followed).

3. A proper question law is one which is not just a question of law and relates to the decision sought to be appealed against, but also an arguable question and would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination (Honorcan Ltd v Commissioner of Inland Revenue [2010] 5 HKLRD 378 and Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456 followed).

4. Even if the proposed four questions are questions of law, it does not automatically make them proper questions for the Court of First Instance to consider. The Board sees it its duty to ensure that they are proper questions of law and the Board's power to scrutinize the proposed questions cannot be disputed.

5. The Board finds the first question imprecise or ambiguous, leaving the Board no clear idea of what materials must be marshalled in the case. It is not proper to be stated for the Court of First Instance to consider even though technically it is a question of law (CIR v Inland Revenue Board of Review [1989] 2 HKLR 40 followed).

6. On the second question, the Appellant does not take issue with the primary findings. It does not identify findings of fact for which there is no evidence or inferences which are wholly unsupportable. The proposed question is

untenable and is not a question of law for the purpose (CIR v Inland Revenue Board of Review [1989] 2 HKLR 40 followed).

7. On the third question, the Board does not accept this argument on the same basis as already stated for Question 1. In addition, the Board is reminded that whilst the Board may have to accept that there exist alternative true and reasonable conclusions, the Board does not find it its duty to show that their conclusions must be the only one in order to make it stand (Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51 followed) .

8. On the fourth question, the Board sets out the relevant finding of the facts before the Board used those words to comment and judge on the conduct of the controlling mind of the Appellant. The Board did not take those comments or judgments into account in arriving at the conclusion. The conclusion was based on the findings of facts which the Appellant chose not to challenge. As a result, the question is a misconceived one and is not proper to be stated in a case for the Court of First Instance to consider (All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750 followed).

Application dismissed.

Cases referred to:

CIR v Inland Revenue Board of Review [1989] 2 HKLR 40
Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
Honorcan Ltd v Commissioner of Inland Revenue [2010] 5 HKLRD 378
Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456
Real Estate Investments (NT) Limited v The Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750

Decision:

1. By a Decision of this Board dated 7 May 2013 ('the Decision'), we allowed in part the Appellant's appeal against the determination of the Deputy Commissioner of Inland Revenue dated 9 February 2012. A copy of the Decision is annexed and marked herein as 'Annexure A'.

2. Save where the context otherwise requires, the same terms and expressions as defined in the Decision are used and adopted in the following paragraphs.

3. By a letter dated 6 June 2013, the Appellant, via its solicitors, applied to the Board to state a case for the opinion of the Court of First Instance pursuant to section 69(1) of the Inland Revenue Ordinance ('the Ordinance') regarding the part we disallowed. The provision reads:

> '*69.(1) The decision of the Board shall be final:*
> *Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of the amount specified in Part II of Schedule 5, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.*'

4. The Appellant put forward the following four purported questions of law:

> '*(1) Whether upon the facts found by the Board in relation to Property G, the only true and reasonable conclusion at which the Board could properly have arrived was that the profits of the Appellant, the subject matter of the appeal, were profits arising from the sale of capital assets within the meaning of Section 14 of the Inland Revenue Ordinance and therefore exempt from tax.*
>
> *(2) Whether, in that part of the appeal relating to Property G, as a matter of law and on the facts found, the Board was correct to conclude that on the balance of probabilities the Appellant had not discharged its burden of proof in that part of the appeal and consequently to dismiss the appeal in that respect.*
>
> *(3) Whether, not having reached a positive conclusion that an intention to see existed at the time of acquisition, the Board was correct to conclude that Property G was acquired as a trading asset.*
>
> *(4) Whether the Board fell into error when it made, and took into account, judgments upon decisions of the Appellant as 'blatantly wrong and hasty' these being matters irrelevant to intention at the time of acquisition of Property G.*'

5. Pursuant to the usual directions of this Board, the Respondent made submissions to the Board by way of a letter dated 2 July 2013, commenting on the purported

questions of law. Reply was made by the Appellant, through its solicitors, by way of a letter dated 2 August 2013, in which the Appellant emphasized on two points: (a) it challenged our conclusion in respect of Property G; and (b) the Decision raised questions of law given the findings of fact upon which we based our conclusion.

6. The Appellant raised no dispute over the cases cited by the Respondent and hence the relevant law they set out. We summarize the relevant principles below.

7. The following parts of the judgment of Barnett J in CIR v Inland Revenue Board of Review [1989] 2 HKLR 40 (also known as the Aspiration case) are relevant.

> ‘ *The final conclusion [of the Board] may be attacked in three principal ways. First, it can be impugned upon the basis that the Board has misdirected itself, for example, upon the burden of proof, or by misinterpretation of a statute. Second, an inference or inferences or the final conclusion may be attacked upon the basis that the primary facts do not admit of an inference drawn from them, or that the primary facts or inferences, or a combination, do not admit of the final conclusion. Third, one or more findings of primary fact may be attacked upon the basis that there was no evidence upon which they could be found. Alternatively, it may be contended that the Board should have made findings of other relevant facts.*’ (at 57F-H)

> ‘ *After reviewing the authorities and carefully considering the arguments which have been addressed to me, I am satisfied of the following matters:*
>
> 1. *An applicant for a case stated must identify a question of law which it is proper for the High Court to consider.*
> 2. *The Board of Review is under a statutory duty to state a case in respect of that question of law.*
> 3. *The Board has a power to scrutinize the question of law to ensure that it is one which it is proper for the court to consider.*
> 4. *If the Board is of the view that the point of law is not proper, it may decline to state a case.*
> 5. *If an applicant wishes to attack findings of primary fact, he must identify those findings.*’ (at 57H-58A)

8. Further, according to the Aspiration case, the questions of law ‘should be stated clearly and concisely and care should be taken to ensure that the questions are not wider than is warranted by the facts’ (at 48E), and an applicant for a case stated may not ‘rely on a question of law which is imprecise or ambiguous and which gives the Board no clear idea of what materials must be marshalled in their case’ (at 50G).

9. In Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275, it was held that this Board, as a tribunal of facts, should have the jurisdiction to decide: (a) the extent to which a piece of evidence should be accepted or rejected; and (b) the use to which the evidence which has been accepted by the Board should be put (at 281H). It was further held that this Board should decline a request to state a case unless the applicant can show that a proper question of law can be identified (at 283B).

10. A proper question of law is one which is not just a question of law and relates to the decision sought to be appealed against, but also an arguable question and would not be an abuse of process for such a question to be submitted to the Court of First Instance for determination. Fok J (as he then was) in Honorcan Ltd v Commissioner of Inland Revenue [2010] 5 HKLRD 378 held that:

(a) '*The question here is whether the Board was correct in holding that section 69(1) of the Ordinance required it to apply a qualitative assessment to the proposed questions of law which the applicant sought to have referred to the Court for its opinion and, if so, whether the Board correctly applied the relevant test in reaching the conclusion that the proposed questions of law were not proper ones for the opinion of the Court.*' (paragraph 34)

(b) '*As will be apparent from the cases cited above, it has not been held that the right of appeal under section 69(1) of the Ordinance is unqualified and absolute.*' (paragraph 49)

(c) '*In my judgment, the Board is duty bound to decline to state a case if the question of law proposed to be stated is not a proper one, as the authorities have consistently held. A question proposed to be stated may, it seems to me, be improper for various reasons, as illustrated in the cases discussed above: it may be irrelevant or premature; it may be academic to the outcome of the appeal; it may be embarrassing; it may be plainly and obviously unarguable.*' (paragraph 50)

(d) '*If the Board did not have a duty to decline to state a case where a party sought to require it to state a case on a wholly unarguable question of law, there would inevitably be a risk of frivolous appeals being pursued in the Court of First Instance by way of the case stated procedure. I do not discern any intention in section 69(1) of the Ordinance that this should be the position.*' (paragraph 53)

11. Honorcan was applied in Tungtex Trading Co Ltd v Commissioner of Inland Revenue [2012] 2 HKLRD 456. Indeed, these principles have been invariably followed and applied by this Board in many instances. As a result, even if the proposed four questions are questions of law, it does not automatically make them proper questions for the Court of First

Instance to consider. We see it our duty to ensure that they are proper questions of law and our power to scrutinize the proposed questions cannot be disputed.

12. With these principles in mind and having considered the arguments and authorities put forward by both sides, we do not consider any of the four proposed questions proper questions of law for stating a case.

Question 1

13. By asking 'whether… the only true and reasonable conclusion at which the Board could properly have arrived was that the profits of the Appellant were profits arising from the sale of capital assets', the Appellant suggests that our conclusion is entirely unreasonable.

14. In addition, it is common ground that the Appellant does not challenge our findings of fact. Furthermore, it is not made clear to us which of the primary facts found by us do not admit of any of our inferences or the conclusion we reached in our Decision and why. We, therefore, find the question imprecise or ambiguous, leaving us no clear idea of what materials must be marshalled in the case. Applying the Aspiration case, it is not proper to be stated for the Court of First Instance to consider even though technically it is a question of law.

Question 2

15. By asking 'whether… as a matter of law and on the facts found, the Board was correct to conclude that on the balance of probabilities the Appellant had not discharged its burden of proof', we first thought it was the Appellant's suggestion that we misdirected ourselves in law or on the facts the only reasonable conclusion would have been that the burden had been satisfied.

16. We agree with the Respondent in this regard and indeed it is common ground that in relation to an appeal to this Board, according to section 68(4) of the Ordinance, the onus of proof is on the Appellant. We do not find that we misdirected ourselves when we referred to Real Estate Investments (NT) Ltd v Commissioner of Inland Revenue [2008] 11 HKCFAR 433 in paragraph 12 of the Decision.

17. As pointed out by the Respondent, the proposed question is similar to one of those in the Aspiration case (at 44C) where the applicant (the Commissioner in that case) asked whether the Board applied correctly the provision of section 68(4) of the Ordinance in holding that the onus of proof that the assessment was erroneous was satisfied by the taxpayer. Barnett J held that the question was not a question of law (at 50J) on the following basis:

> ' *…this is a thinly disguised attack upon the fact-finding function of the Board. Unless there was no evidence to support a finding of primary fact, or unless*

> *the primary facts could not support an inference found by the Board, whether the onus was discharged was a question of degree which depends upon the evaluation by the tribunal of fact.*
>
> *To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal. Unless the [applicant] can identify findings of fact for which there is no evidence or inferences which are wholly supportable and thus wrong in law, this question is untenable.*' (at 50I-J)

18. As said above, the Appellant does not take issue with the primary findings. It does not identify findings of fact for which there is no evidence or inferences which are wholly unsupportable. On the authority of the Aspiration case, this proposed question is untenable and is not a question of law for the purpose.

19. In its reply, the Appellant, by referring to the following statement of the Board in paragraph 45 of the Decision: 'an intention to sell… might even pre-exist', suggests that the statement, meaning no more than 'possibly exists', denotes a tentative conclusion in which case, on the balance of probabilities, the Appellant should have the benefit of the doubt.

20. We do not agree with the Appellant. Section 68(4) of the Ordinance puts the burden on the Appellant to prove a minimum of more than 50% probability that its case, being that Property G was a capital asset, not part of its trading stock and therefore, the IRD's assessment that its sale is chargeable to profits tax is incorrect, is true. The IRD, and indeed this Board, however, is not required to show that the Appellant has at least 50% probability of being wrong.

Question 3

21. By this proposed question, the Appellant suggests that we should have reached a positive conclusion that an intention to sell existed at the time of acquisition. This is contrary to the Real Estate Investments case that we cited in paragraph 12 of the Decision.

22. Indeed, we did not dismiss this part of the appeal merely on the Appellant's failing to discharge the burden of proof: see paragraph 45 of the Decision. As a result, we find this question misconceived and cannot be a proper one for the Court of First Instance to consider.

23. In its reply, the Appellant, by referring to the same statement of the Board in paragraph 45 of the Decision, suggests that the statement must imply that there exist alternative true and reasonable conclusions.

24. We find this similar to Question 1 raised by the Appellant and do not accept this argument on the same basis as already stated for Question 1 above. Furthermore, we are reminded of Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51 in

which the Court of Final Appeal confirmed that '*in an appeal on law only the appellant court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found*' and that '*the appellant court will not disturb the fact-finding tribunal's conclusion merely because its own preference is for a contrary conclusion*' (paragraph 28). Whilst we may have to accept that there exist alternative true and reasonable conclusions, we do not find it our duty to show that ours must be the only one in order to make it stand.

Question 4

25. The Appellant suggested that we should not have described the decisions of the Appellant 'blatantly wrong' and 'hasty' and taken that into account such judgments in arriving at our conclusion.

26. As per Mortimer J in All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750, things said at the time, before and after, and things done at the time, before and after must be considered in order to judge the relevant objective intention. We set out our relevant finding of the facts before we used those words to comment and judge on the conduct of the controlling mind of the Appellant. We did not take those comments or judgments into account in arriving at our conclusion. Our conclusion was based on our finding of facts which the Appellant chose not to challenge. As a result, the question is, again, a misconceived one and is not proper to be stated in a case for the Court of First Instance to consider.

27. For the reasons and analysis set out above, we dismiss the Appellant's application.

Annexure A
D5/13

BOARD OF REVIEW

Appeal by A Limited

(Date of Hearing: 12 October 2012)

****

D E C I S I O N

****

Case No. D5/13

Profits tax – trading or investment – sections 2(1), 14 and 68(4) of the Inland Revenue Ordinance.

Panel: Chow Wai Shun (chairman), Chau Cham Kuen and Wong Wang Tai Fergus.

Date of hearing: 12 October 2012.
Date of decision: 7 May 2013.

The Appellant's appeal concerned the profits tax assessment in respect of its sale of two shops, Shop D and Shop G. The Appellants contended that both shops were acquired as capital assets for generating rental income but circumstances turned out to be not favourable for letting out the two shops as originally intended despite its effort to do so.

Shop D was acquired by the Appellant subject to an existing tenancy of a remaining term of more than a year. The then existing monthly rental was sufficient, albeit just marginally during this remaining term, to cover the monthly instalments of mortgage repayment. The margin was expected to increase at least to the extent possible on an option to renew by tenant, upon which the monthly rental would increase by 15%. The tenant, however, did not exercise the option to renew and indeed chose to move to another district where the rent was at a more affordable level. The Appellant first formalized its effort to locate a new tenant either shortly before or after the tenant vacated Shop D. The circumstances transpired that the Appellant simply could not find a tenant who would be willing to pay the rent that the Appellant had originally expected or even much lower. The Appellant eventually sold the shop having held it for about 17 months.

As to Shop G, the Appellant held it for just about 8 months, half the holding period of Shop D and among the shortest of all except two other sales by the Appellant as confirmor at a loss. Shop G was acquired by the Appellant subject to an existing one-year tenancy of a remaining term of about 7 months. One peculiar thing was that the vendor agreed to introduce the existing tenant to the Appellant and undertook to give the existing tenant sufficient notice to terminate the tenancy. The then existing monthly rental was insufficient to cover the monthly instalments of mortgage repayment. The Appellant formalized its effort to locate a new tenant in August 2004 and asked for a new rent at HK$130,000 per month, which subsequently increased to HK$145,000 but went down again to HK$135,000 in October 2004. The asking rent had been said to have come down to even HK$100,000 in October 2004. On the other hand, the rent obtained by the new purchaser from the Appellant of Shop G was HK$120,000 per month from November 2005 and HK$135,000 per month from November 2006.

Held:

1. Regarding Shop D, on the objective facts of the circumstances, the Appellant did intend to acquire Shop D for leasing purposes but the circumstances turned out not to be so warranting and that the Appellant had to change its plan and dispose of it when an opportunity arose.

2. As to Shop G, had the Appellant pursued the reduced asking rent at HK$100,000 by October 2004 for slightly longer, it should have stood a fair chance to secure a tenant and picked up the cash flow and hence the investment yield gradually. It would still have been possible to achieve this if it had stayed with HK$130,000 as the asking rent at all relevant times and prepared to wait for slightly longer and accept negotiation slightly downwards on receipt of a counter-offer. Judging from the overall circumstances, the Appellant's decision to sell Shop G was too hasty and perhaps the intention to sell might even pre-exist at the time of its acquisition. At the very least, the Appellant's intention to hold Shop G as a long-term investment could be said equivocal. As such, the Appellant's alleged intention to acquire Shop G for leasing purposes did not stand against the objective circumstances and facts of the case.

3. Due to lack of a comparable degree of similarities between the two transactions as what had happened in Pickford v Quirke (1927) 13 TC 251, the Board did not find it right to apply Pickford and reverse its findings regarding the sale of Shop D.

Appeal allowed in part.

Cases referred to:

Lee Yee Shing v Commissioner of Inland Revenue (2008) 3 HKLRD 51
Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461
All Best Wishes Limited v Commissioner of Inland Revenue (1992) 3 HKTC 750
Marson v Morton [1986] STC 463
Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433
Brand Dragon Ltd (in members' voluntary liquidation) and others v CIR (2001) 5 HKTC 502
Pickford v Quirke (1927) 13 TC 251

Messrs S Y Yang & Co for the Taxpayer.
Leung Kin Wa, Yim Kwok Cheong and Yu Wai Lim for the Commissioner of Inland Revenue.

Decision:

1. The Appellant appeals against the Determination of the Deputy Commissioner of Inland Revenue dated 9 February 2012 in respect of the revised additional profits tax assessment for 2004/05 and the revised profits tax assessment for 2005/06 ('the Determination').

A preliminary issue

2. By an 'errata to grounds of appeal' under the cover of letter dated 24 September 2012, the Appellant's representative sought to make certain amendments to the grounds of appeal. However, those suggested amendments, only dealing with typographical errors, are technical, none of which touches upon any of the stated grounds of appeal nor adds any new ground. As such, the Respondent raised no objection to any of those suggested amendments.

Facts

3. The Appellant raised no dispute to most of the facts upon which the Determination was arrived at. Regarding those paragraphs that the Appellant did not agree, we cannot see any cogent contrary evidence raised by the Appellant. Having considered the evidence given by the witnesses and other documentary evidence submitted, we find the following facts as the facts relevant to this appeal:

(a) i. The Appellant was incorporated as a private company in Hong Kong in October 1999.

ii. The issued and paid up share capital of the Appellant was $1,000, divided into 1,000 ordinary shares of $1 each. At all relevant times, the shareholders of the Appellant were:

	Number of shares held
Company A	999
Madam B	1

iii. At all relevant times, the directors of the Appellant were:

	Date of appointment	Date of resignation
Director 1	28-10-1999	4-11-2003
Madam B	28-10-1999	-
Director 2	28-10-1999	-
Director 3	17-10-2005	-

Director 3 is Madam B's husband and Director 2 is Madam B's brother.

iv. In its profits tax returns for the years of assessment 2004/05 and 2005/06, the Appellant described its principal business activity as property investment.

v. The Appellant closed its accounts on 30 April annually.

(b) Company A is a company incorporated in Country C. At all relevant times, the directors of Company A were Madam B, Director 4 and Director 5. The beneficial owners of Company A were the family members of Madam B.

(c) Address D ('Shop D')

i. By a provisional agreement for sale and purchase dated 15 March 2003, the Appellant purchased Shop D at a price of $10,000,000.

ii. An agreement for sale and purchase was executed on 30 May 2003.

iii. The purchase was completed on 20 June 2003.

iv. The purchase consideration of Shop D was financed by:

- An interest free and unsecured loan of $6,000,000 from Company A; and

- A mortgage loan of $4,000,000 from Bank E. The loan was repayable by 72 monthly instalments of $59,884 each (except the final payment). Fees at 3% on the amount of prepayment shall be charged if full prepayment was made within the first year from the date of advance.

v. Shop D was purchased with a sitting tenant. The tenancy agreement included the following terms:

- Term: 3 years from 29 June 2001 to 28 June 2004;

- Rent: $65,000 per month (exclusive of rates and management fee);

- Use: medical clinic only;

- Tenant's renewal option: a further term of two years at $74,750 per month (exclusive of rates and management fee).

vi. By a provisional agreement for sale and purchase dated 6 October 2004, the Appellant sold Shop D to Company F at a price of $16,000,000.

vii. An agreement for sale and purchase was executed on 21 October 2004. The agreement set out that the Appellant was responsible for the repair work required under a repair order issued by the Buildings Department.

viii. The sale was completed on 6 December 2004.

(d) Address G ('Shop G')

i. By a provisional agreement for sale and purchase dated 26 February 2004, the Appellant purchased Shop G at a price of $23,600,000.

ii. An agreement for sale and purchase was executed on 16 March 2004, which included the following terms:

- The Appellant was aware of an order issued by the Building Authority on Shop G and agreed to purchase the property with the order and be responsible for the liabilities under the order;

- The vendor agreed to introduce the existing tenant of Shop G to the Appellant and undertook, before six months upon expiration of the tenancy agreement, to require the tenant to quit and deliver up vacant possession of the property upon expiration of the tenancy agreement.

iii. The purchase was completed on 19 August 2004.

iv. The purchase consideration of Shop G was financed by:

- An interest free and unsecured loan of $15,600,000 from Company A; and

- A mortgage loan of $8,000,000 from Bank H. The facilities letter provided that the loan was repayable by 120 monthly instalments and a prepayment fee of 4 months' interest shall be payable if the loan was redeemed within the first

12 months of drawdown. The first 12 instalments ranged from $77,922 to $80,207.

v. Shop G was purchased with a sitting tenant. The tenancy agreement included the following terms:

- Term: 1 year commencing on 1 October 2003;
- Rent: $74,000 per month (exclusive of rates and management fee);
- Use: Shop.

vi. By a provisional agreement for sale and purchase dated 19 October 2004, the Appellant sold Shop G to Company J at a price of $34,500,000.

vii. An agreement for sale and purchase was executed on 9 November 2004. The agreement set out that the Appellant agreed to bear the costs and expenses required under the abovementioned order issued by the Building Authority.

viii. The sale was completed on 18 January 2005.

(e) At all relevant times, the Appellant had carried out the following property transactions:

		Purchase		Sale	
	Property	Date	Consideration	Date	Consideration
			$		$
(i)	Flat 1 and Car Parking Space (Note 1)	7-12-1999	20,500,000	-	-
(ii)	Shop K, Address K	15-9-2000	24,800,000	20-8-2004	34,000,000
(iii)	Shops 1, 2, 3 at Address L	9-2-2001	25,000,000	29-5-2002	29,800,000
(iv)	Flat 2 and Car Parking Space (Note 2)	14-12-2001	42,300,000	-	-
(v)	Flat 3	29-7-2002	3,000,000	28-8-2002 (Note 3)	1,500,000
(vi)	Flat 4	29-7-2002	3,000,000	28-8-2002 (Note 3)	1,500,000
(vii)	Shop M, Address M	16-9-2003	8,500,000	-	-
(viii)	Shop N, Address N	15-9-2004	14,500,000	-	-

Notes

i. The property was provided to a family member of Madam B as residence.

ii. The property was provided to Madam B and her husband as residence.

iii. The Appellant sold the property as confirmor.

(f) The Appellant submitted its profits tax returns for the years of assessment 2004/05 and 2005/06 together with audited financial statements and tax computations.

i. The Appellant reported assessable profits of $1,075,654 and $30,141 in its 2004/05 and 2005/06 profits tax returns respectively.

ii. The Appellant's detailed profit and loss accounts for the years ended 30 April 2004 and 2005 showed, among other things, the following:

	Year ended 30 April 2004	Year ended 30 April 2005
	$	$
Rental income	3,150,900	2,172,860
Bank interest received	300	4,422
Gain on disposal of investment properties (Note)	-	22,950,234
Other income	200,000	47,962
Total income	3,351,200	25,175,478
Less: Operating expenses	2,538,680	2,862,903
Profit for the year	812,520	22,312,575

Note:

The gain on disposal of investment properties for the year of assessment 2005/06 was computed as follows:

	Shop D	Shop G	Shop K
Sale proceeds	16,000,000	34,500,000	34,000,000
Less: Agency commission	80,000	172,500	170,000
Legal fee	17,000	12,980	12,140
Redemption penalty	-	47,189	-
	15,903,000	34,267,331	33,817,860
Less: Purchase consideration	10,000,000	23,600,000	24,800,000

	Shop D	Shop G	Shop K
Legal fee	17,645	23,490	59,436
Agency commission	50,000	118,000	148,800
Others	-	-	17,160
	5,460,355	9,640,841	7,862,464

$5,460,335 + $9,640,841 + $7,862,464 - $13,426 (loss on scrap of leasehold improvement) = $22,950,234.

iii. The Appellant's tax computations for the years of assessment 2004/05 and 2005/06 showed the following:

	2004/05	2005/06
	$	$
Profit per accounts	812,520	22,312,575
Add: Depreciation charged	1,376,120	1,496,206
Donation charged in accounts	-	100,500
	2,188,640	23,909,281
Less: Profit on disposal of investment properties	-	22,950,234
Commercial building allowance ('CBA') (Note 1)	822,820	872,499
Donation claimed	-	10,047
Others	290,166	424,671
	1,075,654	(348,170)
Add: Balancing charge (Note 2)	-	378,311
Assessable profits	1,075,654	30,141

Notes

1. The CBA claimed was computed as follows:

		CBA claimed#	
	Deemed cost	2004/05	2005/06
	$	$	$
Shop D	5,000,000 *	200,000	-
Shop M	4,250,000^	170,000	170,000
Leasehold improvement of Shop M	16,000	-	640
Shop N	7,250,000†	-	290,000
Leasehold improvement of Shop N	28,000	-	1,120
		370,000	461,760
Other properties		452,820	410,739
	Total	822,820	872,499

Calculated at 4% of the deemed cost
* 50% of the purchase price of $10,000,000
^ 50% of the purchase price of $8,500,000
† 50% of the purchase price of $14,500,000

2. Included a balancing charge of $200,000 for Shop D.

(g) The Appellant's balance sheets as at 30 April 2003, 2004 and 2005 showed, among other things, the following:

		As at	
	30-4-2003	30-4-2004	30-4-2005
	$	$	$
Non-current assets			
Investment properties	90,502,701	109,821,341	91,050,625
Others	3,819,779	4,450,489	1,044,659
Current assets			
Deposits and prepayment	23,735	2,404,106	35,093
Bank balances	703,500	2,230,995	2,597,218
Tax assets	-	-	54,540
	95,049,715	118,906,931	94,782,135
Current liabilities			
Current portion of bank loans	1,800,000	2,976,228	500,000
Others	903,431	1,122,827	456,175
Non-current liabilities			
Loan from Company A	77,888,009	95,528,853	66,027,770
Non-current portion of bank loan	13,800,000	17,996,467	4,208,333
Others	81,418	35,316	-
Net assets	576,857	1,247,240	23,589,857
Represented by:			
Issued capital	1,000	1,000	1,000
Retained profits	575,857	1,246,240	23,588,857
Shareholders' funds	576,857	1,247,240	23,589,857

Notes

(1) Notes to the financial statements for the year ended 30 April 2003, 2004 and 2005 showed the date of maturity of the bank loans was as follows:

		As at	
	30-4-2003	30-4-2004	30-4-2005
	$	$	$
Repayable within one year	1,800,000	2,976,228	500,000
Repayable within two to five years	7,200,000	12,209,982	2,000,000
Repayable over five years	6,600,000	5,786,485	2,208,333

	As at	
30-4-2003	30-4-2004	30-4-2005
$	$	$
15,600,000	20,972,695	4,708,333

(2) Notes to the financial statements for the years ended 30 April 2004 and 2005 showed that the Appellant had the following related party transactions:

Related party	Position / connected with	Nature	Year ended 30-4-2004	30-4-2005
			$	$
Madam B	Director	Rental income	480,000	480,000
Party P	Madam B	Rental income	480,000	480,000

(h) In accordance with the Appellant's profits tax return, the Assessor raised on the Appellant the following profits tax assessment for the year of assessment 2004/05:

Assessable profits (paragraph (f)i)	$1,075,654
Tax payable thereon	$188,239

(i) The Appellant did not object to the above assessment which had become final and conclusive.

(j) In response to the Assessor's enquiry, the former representatives of the Appellant, among other things, provided information and furnished copies of newspaper advertisements in respect of Shop D. The Appellant subsequently appointed the current representatives which, among other things, provided copies of certain other documents. Company J, the purchaser of Shop G provided certain information. Also in response to the Assessor's enquiry, Property Agency Q provided certain information. The Director of Rating and Valuation provided the open market rent (exclusive of rates and management charges) of Shop D and Shop G. All these evidence will be dealt with in paragraph 15 below.

(k) Nevertheless, the Assessor was of the view that Shop D and Shop G were the Appellant's trading assets and that the profits derived from the sale of the properties were chargeable to profits tax and no CBA should be allowed in respect of Shop D. As such, the Assessor raised on the Appellant the following additional profits tax assessment for the year of assessment 2004/05 and profits tax assessment for the year of assessment 2005/06:

Year of assessment 2004/05 (Additional)

	$
Profit per return	1,075,654
Add: CBA previously allowed in respect of Shop D (paragraph (f) iii)	200,000
Revised assessable profits	1,275,654
Less: Profit already assessed	(1,075,654)
Additional assessable profits	200,000
Additional tax payable thereon	35,000

Year of assessment 2005/06

	$
Profit per return	30,141
Add: Gain on disposal of –	
Shop D (paragraph (f) ii)	5,460,355
Shop G (paragraph (f) ii)	9,640,841
Difference in depreciation allowance allowed	8,477
Donation previously allowed	10,047
	15,149,861
Less: Balancing charge on Shop D (paragraph (f) iii)	200,000
	14,949,861
Less: Donation allowable	100,500
Assessable profits	14,849,361
Tax payable thereon	2,598,638

(l) The current representative of the Appellant, on behalf of the Appellant, objected to 2004/05 additional profits tax assessment. After further investigation and consideration, the Assessor considered the 2004/05 additional profits tax assessment and the 2005/06 profits tax assessment should be revised as follows:

Year of assessment 2004/05 (Additional)

	$
Profit per return	1,075,654
Add: CBA previously allowed for	
Shop D (paragraph (f) iii)	200,000
Shop M (paragraph (f) iii)	170,000
	1,445,654
Less: CBA for Shop M	1,346
Revised assessable profits	1,444,308
Less: Profit already assessed	(1,075,654)
Additional assessable profits	368,654

Year of assessment 2004/05 (Additional)

	$
Additional tax payable thereon	64,514

Year of assessment 2005/06

	$
Profit per return	30,141
Add: Gain on disposal of –	
Shop D (paragraph (f) ii)	5,460,355
Shop G (paragraph (f) ii)	9,640,841
CBA previously allowed for	
Shop M (paragraph (f) iii)	170,000
Shop N (paragraph (f) iii)	290,000
Donation previously allowed	10,047
	15,601,384
Less: Balancing charge on Shop D (paragraph (f) iii)	200,000
CBA for –	
Shop M	1,346
Shop N	4,948
	15,395,090
Less: Donation allowable	100,500
Assessable profits	15,294,590
Tax payable thereon	2,676,553

(m) The Determination was so made and handed down. The Appellant lodged an appeal with this Board.

Grounds of appeal

4. The Appellant submitted a one-page summary statement of its grounds of appeal followed by another 8-page document elaborating on those grounds. In essence, the Appellant argued that Shop D and Shop G were acquired as capital assets for generating rental income but circumstances turned out to be not favourable for letting out the two shops as originally intended despite its effort to do so. As such, the subsequent sales were not sales of trading assets and hence the gains derived by the Appellant from those sales were capital gains and not chargeable to profits tax. According to the current representatives of the Appellant, this is particularly so given (a) that the Appellant had a long history of being a property investor and ample financial resources to hold the two shops as long term investments and (b) that the Appellant classified the two shops in its financial statements as investment properties. The Appellant, on the other hand, contended that the Respondent had failed to consider all the facts, given undue weight to the length of the Appellant's holding period of the two shops, taken into account other factors which should be considered neutral to this case, relied on speculation rather than evidence and so been misdirected in reaching the conclusion.

The law

5. It is common ground that the following provisions of the Inland Revenue Ordinance apply.

(a) Section 14 provides:

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

(b) Section 2(1) defines ‘trade’ to include ‘every trade and manufacture, and every adventure and concern in the nature of trade.’

(c) Section 68(4) provides:

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

6. Mr Leung of the Respondent, in his closing submission, submitted that the term ‘business’ was also of relevance. ‘Business’ is defined in the Ordinance to include ‘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.’ Apart from submitting, in accordance with Lee Yee Shing v Commissioner of Inland Revenue (2008) 3 HKLRD 51, that business is a wider concept than trade, the concept had not been referred to again. In fact, we do not see the concept of ‘business’ important, even if relevant, in the context in front of us.

7. It is also common ground that the following cases and the legal principles arisen therefrom apply.

(a) Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue (1980) 53 TC 461;

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

(b) Marson v Morton [1986] STC 463;

(c) Lee Yee Shing v Commissioner of Inland Revenue [2008] 3 HKLRD 51; and

(d) Real Estate Investments (NT) Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 433.

8. According to Simmons, '*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.*' (per Lord Wilberforce at page 491).

9. Mortimer J in All Best Wishes at page 771 stated that '*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 realizable, 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.*'

10. This is echoed by the Court of Final Appeal decision in Lee Yee Shing where Bokhary and Chan PJJ ruled that the question whether something amounts to the carrying of a trade (or business) '*is a question of fact and degree to be determined by the fact-finding body upon a consideration of all the circumstances.*' In the words of McHugh NPJ, the intention to trade to which Lord Wilberforce referred in Simmons is not subjective, but objective and it requires an examination of all the circumstances to see whether the 'badges of trade' are present. Specifically, they are whether the taxpayer:

(a) has frequently engaged in similar transactions

(b) has held the asset or commodity for a lengthy period

(c) has acquired an asset or commodity that is normally the subject of trading rather than investment

(d) has bought large quantities or numbers of the commodity or asset

(e) 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

(f) has sought to add re-sale value to the asset by additions or repair

(g) 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 and asset of that class

(h) has conceded an actual intention to resell at a profit when the asset or commodity was acquired

(i) has purchased the asset or commodity for personal use or pleasure or for income.

11. This list coincides much with a similar one in Marson v Morton [1986] STC 463 in which Sir Nicolas Browne-Wilkinson V-C held that '*a single, one-off transaction can be an adventure in the nature of trade*' and 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.*' Nonetheless, the list of factors was in no sense comprehensive, nor was any one of those decisive in all cases. They would provide common sense guidance to an appropriate conclusion. The matters which are apparently treated as a badge of trade consists of:

(a) That the transaction was a one-off transaction although a one-off transaction is in law capable of being an adventure in the nature of trade.

(b) Is the transaction in some way related to the trade which the taxpayer otherwise carries on?

(c) 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 realization?

(d) Was the transaction carried through in a way typical of the trade in a commodity of that nature?

(e) What was the source of finance of the transaction?

(f) Was the item which was purchased resold as it stood or was work done it or relating to it for the purposes of resale?

(g) Was the item purchased resold in one lot as it was bought, or was it broken down into saleable lots?

(h) What were the purchasers' intentions as to resale at the time of purchase?

(i) Did the item purchased either provide enjoyment for the purchaser or pride of possession or produce income pending resale?

In his words, '*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?*' Alternatively, one may ask, '*was the taxpayer investing the money or was he doing a deal?*'

12. In Real Estate Investments (NT) Limited, Bokhary and Chan PJJ opined that the list offered in Marson v Morton is no less helpful in Hong Kong than it is in the United Kingdom and held that the question of whether property is trading stock or capital asset is always to be answered upon a holistic consideration of the circumstances of each particular case. Regarding the taxpayer's burden of proof, '*the taxpayer will have to prove his contention*' and so '*his appeal to the Board of Review would fail if the Board positively determines that, contrary to his contention, the position is X [which is the footing on which the tax assessment is made]. And it would likewise fail if the Board merely determines that he has not proved his contention.*' This means that no appeal by the taxpayer could succeed unless the court is of the view that the true and only reasonable conclusion is that the position is what the taxpayer contends.

13. In his submission, Mr Leung referred us to Brand Dragon Ltd (in members' voluntary liquidation and others v CIR (2001) 5 HKTC 502 which confirmed the principle that although a limited company is an independent legal person, its intention has to be ascertained through its controlling mind. We find ourselves bound to follow this.

14. Mr Leung also referred to a number of Board cases in which the principles set out above have been consistently applied. We find no basis to disagree.

Other documentary evidence

15. (a) In response to the Assessor's enquiry regarding the objection, the former representatives of the Appellant furnished copies of newspaper advertisements in respect of Shop D, which the current representatives did not dispute and hence we find those as facts of this case:

Date of advertisement	Name of newspaper	Asking rent $
06-07-2004	Newspaper S	88,000
08-07-2004	Newspaper S	88,000
12-07-2004	Newspaper S	88,000

Date of advertisement	Name of newspaper	Asking rent $
13-07-2004	Newspaper T	88,000
14-07-2004	Newspaper S	83,000
15-07-2004	Newspaper T	83,000
19-07-2004	Newspaper S	83,000
20-07-2004	Newspaper T	83,000
21-07-2004	Newspaper S	83,000
22-07-2004	Newspaper T	83,000

(b) The former representatives did provide other information and put forward contentions which the current representative sought to dispute. However, the current representatives did not pinpoint specifically what they disagreed. In fact, much of these information and contentions were indeed consistent with what the current representatives and the witnesses were trying to say to us (see further below). The only exception was about the gross floor area of Shop D. It remained unclear at all relevant times if it should be 400 square feet as the former representatives claimed or 900 as stated in the advertisements that the former representatives furnished. In any event, we do not find this piece of information significant, material or even relevant to our decision.

(c) For the objection, the current representatives provided copies of the following documents which were not disputed and hence we also find those particulars shown on and from the documents as facts of this case:

i. A letter dated 30 September 2008 issued by Property Agency R, which stated that it was appointed to put up Shop G for lease in August 2004 and the rent asked by the Appellant was $130,000 per month.

ii. A letter dated 3 May 2010 issued by Property Agency R, which stated that the Appellant orally appointed it to put up Shop G for lease in March 2004 after the Appellant had signed the provisional agreement to purchase the property.

iii. Newspaper advertisements in respect of Shop D, which showed the following particulars:

Date of advertisement	Name of newspaper	Asking rent $
08-09-2004	Newspaper S	79,000
27-09-2004	Newspaper S	75,000

iv. Newspaper advertisements in respect of Shop G, which showed the following particulars:

Date of advertisement	Name of newspaper	Asking rent $
08-09-2004	Newspaper S	145,000
27-09-2004	Newspaper S	145,000
11-10-2004	Newspaper S	135,000

(d) At that time, the current representatives also provided

i. A photo of a signboard allegedly bearing the address of Shop G; and

ii. a schedule showing the bank balances of Company A, Madam B and her husband during the period from January 2003 to December 2004.

Both of these documents were subject to cross-examination, which will be dealt with below.

(e) On the other hand, in the Determination, the Deputy Commissioner referred to information provided by Company J, the purchaser of Shop G, and Property Agency Q, which the current representatives of the Appellant sought to dispute but yet, again, failed to give any further particulars to assist us. Particularly, the trend of the asking rents for the two properties in question as indicated was consistent with other evidence accepted. In our view, the only contention is whether the Appellant had ever put up Shop D for sale on 27 September 2004, asking for a price at $17,000,000 through Property Agency Q. This will be addressed in our analysis below.

(f) The Deputy Commissioner, in his Determination, also referred to the open market rents (exclusive of rates and management charges) of Shop D and Shop G respectively per the Director of Rating and Valuation as follow:

	As at	Open market rent $ per month
Shop D	30-06-2004	60,000
Shop G	30-09-2004	85,000

Such valuations were contended by the current representatives of the Appellant. In relation to Shop D, they referred to records in the Land Registry showing comparable rents for adjacent shops. With regard to

Shop G, they referred to the demand by the Stamp Duty Office for additional stamp duty at the time of its purchase by the Appellant and from which worked out the monthly rent on the bases of the market value as adjudicated and a 6% return. This aspect of evidence will be dealt with in our analysis.

(g) The Respondent referred us to the following documents, which the current representatives of the Appellant did not seek to challenge, and as such we accept those as facts:

i. A letter dated 7 March 2012 from the representative of Company F, the buyer of Shop D, which enclosed the licence agreement and the first rental agreement entered into after the shop was changed hand. The rental agreement showed that Shop D was leased for three years from 16 April 2005 to 15 April 2008 at the monthly rent of $65,000.

ii. A letter dated 17 September 2012 from Company J, the buyer of Shop G, which enclosed the licence agreement and the first rental agreement entered into after the shop was changed hand. The rental agreement showed that Shop G was leased for 2 years from 5 November 2005 to 4 November 2007 at the monthly rent of $120,000 for the first year and $135,000 for the second year.

iii. An announcement in 2004 by the Transport Department on the implementation of a pedestrian scheme in part of the street where Shop G located.

iv. A report in 2004 in Newspaper S which recorded that the shop rent along the street where Shop G located had increased as a result of the implementation of the pedestrian scheme but the magnitude was not as high as the Appellant had asked for Shop G.

Evidence from witnesses

16. The Appellant called two witnesses: Mr V and Madam B, and submitted written statements in advance so that the examination-in-chief could be done swiftly.

17. Mr V was the estate property agent responsible to the Appellant for the purchase and the sale of the two shops. Madam B, as seen above, has been a director of the Appellant and a director of Company A, the majority shareholder of the Appellant. In our view, Madam B was indeed the controlling mind of the Appellant at all relevant times. Their witness statements, not unexpectedly, were consistent and corroborative to one another. From their statements and oral testimonies, it is also our view that Madam B valued so highly Mr V’s advice at the relevant times that she almost invariably followed his

suggestion in making a decision of the Appellant.

18. Regarding Shop D, it was purchased with a sitting tenant, for at least another 13 months, when Hong Kong was still an infected area of SARS. According to the witnesses, the Appellant started to look for a new tenant after the sitting tenant moved out, through advertisements on newspapers and assistance of Mr V. It was sold, according to the witnesses, because of an attractive unsolicited offer. In Madam B's written statement, she added 'repeated persuasion by the property agent.' From her oral testimony, as well as from the admission of Mr V, Mr V was the said property agent.

19. With regard to Shop G, the narrative was less straightforward. According to the written statements, it was purchased by the Appellant on Mr V's advice that a shopping centre was expected to be developed in the vicinity and so it would be good for long term investment. The transaction took almost half a year to complete because, as Madam B put it, 'the rental [by] the sitting tenant was below market rent and we expected that we could seek higher rental upon expiry of the tenancy'. However, the Appellant did not find it worthwhile to negotiate with the sitting tenant as the difference between the rent at that time and the rent they intended to ask was huge. The Appellant hence put effort in locating a new tenant instead. However, according to the witnesses, beyond their expectation, the Appellant was unable to find a suitable tenant for over 7 months even after reduction of the asking rent, reasons for which put forward by the witnesses included:

(a) wasted materials being dumped during loading and unloading of goods from lorries near the junction of the road just a few shops away from Shop G, which affected the environment and caused frequent traffic congestion at the junction;

(b) planned construction works making the area not attractive to customers;

(c) uncertainty about the future prospect of the economy.

Mr V took all blame for the failure to identify the severity of such problems when he suggested the purchase to the Appellant. Shop G, according to the witnesses, was sold due to an unsolicited offer and, again, on persuasion by Mr V.

20. Madam B gave further evidence regarding the financial aspect of the two acquisitions. In her evidence, the funding for the two acquisitions was from Company A and bank loans. So far as loans from Company A were concerned, they were unsecured, interest free and never called for full or partial repayment because Company A was beneficially owned by Madam B's family members. In relation to the bank loans, it is Madam B's evidence that the Appellant had no difficulty in meeting the schedule of repayment and indeed the Appellant had never encountered any financial problem since its incorporation and the financial positions of both the shareholders and the directors of the Appellant remained healthy during the relevant times.

Cross-examination

21. With respect, we find the cross-examination not so tactfully and effectively done and indeed, at times, done rather aimlessly.

22. Mr Leung first questioned, without either stating his purpose at the beginning or addressing further at his closing submission, why Mr V was not the signatory as property agent in all the provisional agreements for purchase and sale. Clearly from the examination-in-chief, Madam B considered Mr V personally her property agent who, therefore, had the necessary direct knowledge of the transactions, irrespective of whether he appeared as the signatory as agent on those agreements.

23. In his cross-examination of Mr V's evidence, Mr Leung focused on just Shop G; whereas in the subsequent cross-examination of Madam B, he attempted to strike a better balance between the two shops.

24. In cross-examining Mr V with regard to the photo of a signboard allegedly bearing the address of Shop G, Mr Leung asked the witness if there was any Chinese character between '代理' ('agent') and '出租' ('for lease') on the signboard. We believe what he was trying to suggest that there might be the character '售' ('sale') which would make the intention of the Appellant equivocal. Mr V's reply was straightforward and made sense to us. He said that a normal design usually carried two Chinese characters which were '租售' ('for lease and for sale'), '出售' ('for sale') or '出租' ('for lease'). Mr Leung also asked about the existence of the name plates of other agents. Mr V's reply, again, was succinct. He said categorically that they were not authorized by Madam B.

25. In cross-examining Madam B, Mr Leung sought to suggest that the two acquisitions could not have been for investment when one compared the amounts of rent payable by the sitting tenants and the instalment repayment of the mortgage loan payable by the Appellant. However, the case for Shop D was that the former exceeded the later and in the case of Shop G the witnesses already suggested that the existing rent was far below market price and they expected and hence called for a higher rent.

26. Mr Leung also referred Madam B to the clause in the bank facilities letter which provided that the bank would be entitled at any time in its absolute discretion to cancel the loan facilities or any part thereof and/or to demand immediate repayment of all principal, interest and fee and asked her if it was strange to have such a clause. Madam B replied that it was just a common provision that all banks would have in place, which is entirely consistent with what people commonly understand. Madam B further said confidently that had she been demanded to pay she would have had enough money to do so.

27. In the course of challenging if Company A and the directors have had sufficient financial resources so that the Appellant had the ability to hold the two shops as long term investment, Mr Leung asked Madam B for Company A's financial statements including audited accounts. However, it is commonly understood that Country C companies,

as Company A is, are not so required. Then Mr Leung asked for bank statements. When Madam B replied that she had submitted them all to the Respondent, Mr Leung said that they only had a summary. Further inquiries transpired that the summary was supplied to the Respondent in August 2009 in response to a requisition raised by the Respondent and indeed some sample statements were submitted in April 2010 prompted by a further follow-up letter of the Respondent. No further requisitions were raised by the Respondent since then and it was not until prompted by a question of a member of this panel that if Mr Leung found any discrepancy between the bank statements and the schedule submitted that Mr Leung said yes after checking through the file in hand. Such sample bank statements were not adduced as evidence beforehand and Mr Leung did not pinpoint and explain further to us such discrepancy.

Our analysis

28. Neither of the sales falls into either of the extremes of cases. The subject matter of the transactions can be used for trading or investment. The sales were not one by a property developer or a confirmor. The financial arrangements for the acquisitions were not unusual in circumstances like these. The terms of the bank loans were not particularly extraordinary.

29. The Appellant did engage in buying and selling properties since its incorporation, it still held 4, out of 10, properties. Among the 6 sold, 2 were the subject matters of this appeal; the Appellant sold the other two as confirmor at a loss; another one was sold about 15 months after its acquisition with a gross gain of $4.8 million; another one was sold, also in the year of assessment 2004/05 but after a longer holding period of about 4 years, with a gross gain of about 10 million. We take Mr Leung's point that whether the Appellant traded, or in our view was assessed, in any or any combination of the other four properties sold is not an issue in this appeal. However, we also find it hard to agree with Mr Leung that the Appellant had thereby frequently engaged in similar transactions, which should be in turn considered unfavourable to the Appellant. Having said so, a single transaction can be an adventure in the nature of trade. We are also mindful of another English authority: Pickford v Quirke (1927) 13 TC 251. In Pickford, a syndicate was formed to buy and sell cotton mills. After making a profit in the first transaction, it repeated the transaction three times. The court indicated that an isolated transaction would have given rise to a capital gain but drew a completely difference inference from the four incidents taken together. Accordingly, the court held that each of four transactions constituted trading.

30. We asked Mr Leung if it would be possible for us to hold differently with regard to the two transactions in dispute. He replied that it would be possible since each property should be viewed in its own in isolation. We, therefore, hold that we may reach a different conclusion in respect of each of the two transactions. In light of Pickford, we may hold both transactions constituted trading if we find a comparable degree of similarities between the two transactions as what had happened in Pickford.

31. Before we turn to analyze each of the two transactions, we find it appropriate to address the following issues common to both transactions at this juncture.

(a) We are bound to apply the well-established legal principles agreed by the parties and set out above. Among other things, the lists of factors in Lee Yee-shing and Marson v Morton are by no means comprehensive and exhaustive. They must be considered in light of and together with all circumstances of the case before us.

(b) We find both witnesses credible. Mr V has been forthcoming and honest, particularly proud of how he managed to talk the parties into sales and purchases in these two shops and hence creating a business with valuable commissions from scratch. However, Mr V's evidence does not offer much help in determining the objective intention of the Appellant except to the extent that his advice had been all along mostly followed by Madam B, the controlling mind of the Appellant. Such heavy reliance, in our view, also explains at least to an extent why the Appellant had only carried out feasibility study informally and casually with no written record of any such study. We cast no doubt on the creditability of Madam B either. She is a traditional Chinese woman engaging in typical family investment of properties. She does have sufficient, if not abundant financial resources herself and from her other family members but probably does not have much expertise or professional knowledge, relying on professional advice from others, typically from an accountant and a property agent whom she believes reliable. Although she may be able to stand with a short period of negative cash flow, she would understandably be under pressure and hence change her mind if the period may be unnecessarily prolonged.

(c) Mr Leung submitted that the declared (or subjective) intention of the Appellant was not properly documented since: no minutes had been produced for the acquisition of Shop D; the minutes for the acquisition of Shop G did not record that the company acquired the shop for investment purpose; the minutes for the sales of the two shops did not record any detail of the disposal. In our view, Mr Leung would have said that the minutes were at best self-serving if they had been prepared in the way that prevented him from making such comment. This view receives support from Mr Leung's another submission that the Appellant's classification of the two shops as investment properties in the audited accounts was irrelevant or had to be considered with other objective facts.

(d) With regard to the counting of the holding period, we do not agree with Mr Leung's approach which suggests that time should be counted from the date of the assignment for the acquisition to the date of provisional

agreement for sale and purchase for the disposal. Specifically, we see no legal basis for this suggested approach. We cannot see any reason or logic why different dates should be picked. The suggested approach cannot be applied to confirmor sales. It makes much better sense to us to count the holding period from the first binding agreement, usually the provisional agreement for sale and purchase, in relation to the acquisition to that in respect of the disposal.

(e) Mr Leung also submitted that the sale proceeds from the disposal of the two shops were used to repay part of the debt due to Company A rather than acquiring another investment. Relying on what Lord Wilberforce said in Simmons that a permanent investment may be sold in order to acquire another investment thought to be a more satisfactory and that does not involve an operation of trade, Mr Leung argued that the absence of replacement property in this appeal showed that the Appellant did not regard the two shops as permanent investment. We do not find the statement quoted stretched to that far. The Appellant's explanation that it found no suitable property for investment at that time and its conduct to reduce its liability towards a shareholder are at least plausible and should not be considered unfavourable to its case.

(f) Both the two shops were subject to a building order issued by the Building Authority at the time of the Appellant's acquisition and on disposal the agreements for sale and purchase provided that the Appellant agreed to bear the cost and expenses of such repair work as required. It is Mr Leung's submission that the Appellant had sought to add re-sale value to the two shops by such repair. With respect, we cannot agree. Our understanding of this badge of trade is that there is an inference of trading if the taxpayer has to perform some work, typically extensive renovation, on properties before reselling them, or if the taxpayer has to set up an organization to sell them, in particular, the use of selling staff, large-scale advertising and establishing a sales office all point to more than mere sale. Repair work as prescribed by the Building Authority is an encumbrance on title to the properties which a prudent solicitor acting for the purchaser would ask for its removal before completion or at least an undertaking of the vendor to remain responsible for the cost and expenses of such repair work. From time to time, it is even not unusual to see that some purchasers do prefer to buy the properties with structures which may not be exempted or have been properly authorized.

Shop D

32. The Appellant held Shop D for about 17 months (from 15 May 2003 to 6 October 2004). While there is no such legal principle in taxation law that an asset held for more than 12 months is a long-term investment, there is no such principle either that anything held for less than 12 months must be a trading asset. The relevant principle is just that the longer an asset is held, the more likely it is that it was bought for use or investment rather than resale. In this regard, we compare the Appellant's sale of the shops at Address L (see paragraph 3(e) above). The holding period of Shop D is even a month longer. This is, nevertheless, neither the sole nor the decisive factor and must be considered against other objective circumstances.

33. Shop D was acquired by the Appellant subject to an existing tenancy of a remaining term of more than a year, which does not resemble at the outset to an intention to dispose of it quickly afterwards. The then existing monthly rental, HK$65,000, was sufficient, albeit just marginally during this remaining term, to cover the monthly instalments of mortgage repayment, which was about HK$60,000. The margin was expected to increase at least to the extent possible on an option to renew by tenant, upon which the monthly rental would increase by 15% to HK$74,750. Mr Leung submitted that hardly any money had been left to finance any repayment to Company A if the latter demanded interest and regular repayment on the shareholder's loans. However, this has never happened in this case. Indeed it is unlikely, if ever possible, to happen in such a way because of the close connection between Company A and the Appellant.

34. In cross-examination, Madam B said the tenant did not exercise the option to renew and indeed chose to move to another district where the rent was at a more affordable level. Mr Leung challenged this by submitting that the tenant was not called to give corroborative evidence. As we find Madam B a credible witness, together with what we are going to explain below, we do not see, at least this part of her testimony is concerned, her being successfully challenged by the Respondent.

35. The current representatives of the Appellant contended earlier in their correspondence with the assessor that the Appellant appointed the agency that Mr V owned for leasing of Shop D in July 2004. On evidence, we find that the Appellant first formalized its effort to locate a new tenant either shortly before or after the tenant vacated Shop D and initially asked for an even higher rent at HK$88,000, reduced it to HK$83,000 in mid-July and further down to HK$79,000 and HK$75,000 by the end of September 2004. Mr Leung submitted, on the basis of the initial asking rent only, that the asking rent was excessive. In our view, however, he chose to ignore entirely the reduction in the Appellant's asking rent over the period, which we do not think it right. Indeed, the last asking rent was close to the rent on renewal if the tenant exercised the option which appears to be reasonable to us but the Appellant still could not find a tenant. Despite the absence of any corroborative evidence called for from that tenant and that 12 advertisements were placed in July and September 2004 (both as submitted by Mr Leung), this sufficiently indicates to us that the circumstances transpired that the Appellant simply could not find a tenant who would be willing to pay the rent that the Appellant had originally expected or even much lower. The

fact that the buyer of Shop D from the Appellant managed to rent it out at a monthly rent of HK$65,000 only from April 2005, almost another 6 months after the disposal by the Appellant, supports this. The valuation from the Department of Rating and Valuation quoted by Mr Leung, which is just HK$60,000, further supports this. Since we are on the Department of Rating and Valuation, Mr Leung referred us to its 'Hong Kong Property Review 2005' which indicated that the market performance of retail properties in 2004 was indeed very good but suggested that 'rents moved up by only 9% leading to lower market yield'. We find this supportive of the Appellant's case rather.

36. Contrary to Mr Leung's submission that, inter alia, since Shop D was of substantial value it would be reasonable for the Appellant 'to allow longer vacant period between two tenancies in order to get the most satisfactory return from the investment', all these seem to us that continue to hold Shop D would not produce the return as expected by the Appellant. It appears only natural to us that the Appellant considered another option, that is, to dispose of Shop D, when it was opportune to do so. However, this does not necessarily mean or lead to the conclusion that the Appellant had a trading intention at any relevant time.

37. The Appellant submitted that it did not intend to sell Shop D when the shop was bought; that the sale was prompted by an unsolicited attractive offer; and that it had never instructed Property Agency Q as its agent. Mr Leung submitted to the otherwise and relied on the response from Property Agency Q to the Assessor's enquiry that Shop D was offered for sale at HK$17 million, which the Appellant disputed. He also relied on the response from the purchaser from the Appellant of Shop D, which contended that it took the initiative in enquiring the offer and the original price it counter-offered (HK$16 million) was the final price. We did not hear from anyone from Property Agency Q or the said buyer. The Appellant was not in a position to offer any evidence in rebuttal. Indeed, in her cross-examination, Madam B said that she could not recall if she had contacted Property Agency Q regarding the sale of Shop D. Nevertheless, she did explain that she might have asked Property Agency Q for its market value. The explanation is plausible to us not just because we have found Madam B a credible witness but also because the said instruction to sell was put up only when the last asking rent at HK$75,000 was made out. From both Mr V's cross-examination and Madam B's re-examination, it was possible that Mr V talked to the purchaser about the shop and came to Madam B with a cheque of the purchaser as an unsolicited offer, in response to which, Madam B asked Property Agency Q to see if the offered price was about right. From these, we do not find it appropriate to infer that the Appellant had actively engage agents to solicit offers to purchase from it Shop D.

38. Mr Leung also submitted that the quick finalization of price is more consistent with a trading deal and is at odds with a long-term investment strategy. However, in light of the circumstances analyzed above, we do not agree with his submission. Instead, we find on the objective facts of the circumstances that the Appellant did intend to acquire Shop D for leasing purposes but the circumstances turned out not to be so warranting and that the Appellant had to change its plan and dispose of it when an opportunity arose.

Shop G

39. We are less with the Appellant, however, so far as Shop G is concerned.

40. The Appellant held Shop G for just about 8 months (from 26 February 2004 to 19 October 2004), half the holding period of Shop D and among the shortest of all except the two sales as confirmor at a loss.

41. Shop G was acquired by the Appellant subject to an existing one-year tenancy of a remaining term of about 7 months. The peculiar thing in the acquisition of Shop G is that the vendor agreed to introduce the existing tenant to the Appellant and undertook to give the existing tenant sufficient notice to terminate the tenancy. This was allegedly prompted by the understanding, probably caused by an advice of Mr V, which a much higher rent could be fetched (see further below).

42. The then existing monthly rental, HK$74,000, was insufficient to cover the monthly instalments of mortgage repayment, which ranged from about HK$78,000 to HK$80,000. Even in light of Madam B's evidence that generally she did not care too much about the level of cash flow and specifically she could accept negative cash flow for a month or so, this is probably not a wise, if not blatantly wrong, decision to make even at the outset except what was expected by the Appellant could be materialized very soon after the expiry of the existing tenancy.

43. The current representatives of the Appellant contended earlier in their correspondence with the Assessor that the Appellant appointed the agency that Mr V owned for leasing of Shop G in March 2004. From the evidence, we find that the Appellant formalized its effort to locate a new tenant in August 2004 and asked for a new rent at HK$130,000 per month, which subsequently increased to HK$145,000 but went down again to HK$135,000 in October 2004. According to the current representatives in their earlier response to the Respondent, the asking rent had been said to have come down to even HK$100,000 in October 2004. The rent obtained by the new purchaser from the Appellant of Shop G was HK$120,000 per month from November 2005 and HK$135,000 per month from November 2006. Had it pursued the reduced asking rent at HK$100,000 by October 2004 for slightly longer, as contended by the current representatives, it should have stood a fair chance to secure a tenant and picked up the cash flow and hence the investment yield gradually. It would still have been possible to achieve this if they had stayed with HK$130,000 as the asking rent at all relevant times and prepared to wait for slightly longer and accept negotiation slightly downwards on receipt of a counter-offer.

44. The current representatives of the Appellant submitted, with reference to the demand by the Stamp Duty Office for additional stamp duty at the time of the Appellant's disposal of Shop G, that the asking rent of HK$135,000 was less than that on the basis of a 6% return from the market value as adjudicated. In our view, this is retrospective, contingent, arbitrary and inappropriate. The reality, from the objective circumstances, has been that it is grossly on the high side.

45. So, judging from the overall circumstances, the decision to sell Shop G is considered by us too hasty and perhaps the intention to sell might even pre-exist at the time of its acquisition. At the very least, the Appellant's intention to hold Shop G as a long-term investment could be said equivocal. As such, we find that the Appellant's alleged intention to acquire Shop G for leasing purposes does not stand against the objective circumstances and facts of the case.

46. Since we hold against the Appellant, we see it unnecessary to dwell on other submissions made by Mr Leung, including the pedestrian scheme in part of the street where Shop G located and the surrounding neighbourhood of Shop G.

Other issues

47. We do not find it right to apply Pickford and reverse our findings regarding the sale of Shop D. This is due to lack of a comparable degree of similarities between the two transactions as what had happened in Pickford.

48. The Appellant had raised no issue regarding the adjustment of CBA for Shop M and Shop N made in the Determination. As such, we hold that the adjustment be maintained.

Conclusion

49. Accordingly, we allow partly the appeal of the Appellant and remit the case to the Respondent to further revise the assessments in paragraph 3(l) in light of our opinion.