

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D19/98

**Profits tax** – rebuilding allowance – whether intention ‘realistic or realisable’ – whether liable to profits tax – sections 68(4) of the Inland Revenue Ordinance.

Panel: Audrey Eu Yuet Mee, SC (chairman), Joseph Cheung Wang Ngai and David Lam Tai Wai.

Date of hearing: 1 April 1998.

Date of decision: 28 April 1998.

The taxpayer purchased the Subject Property when it was still under construction and sold it half a year after its completion. The taxpayer claimed that it purchased the Subject Property for the purpose of a long term investment. Various reasons for the disposal of the Subject Property were given by the taxpayer.

Held:

1. The likely explanation for the sale of the Subject Property was the financial difficulties faced by the taxpayer. As the Board was not persuaded that the taxpayer had the financial ability to hold the Subject Property on a long term basis, it did not accept that the taxpayer had a realistic or realisable intention to hold the Subject Property as a capital asset.

**Appeal dismissed.**

Cases referred to:

Lionel Simmons Properties Ltd v CIR 53 TC 461  
All Best Wishes Limited v CIR HKTC 750  
D11/80, IRBRD, vol 1, 374

Tsui Siu Fong for the Commissioner of Inland Revenue.  
Taxpayer represented by its director.

**Decision:**

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### THE APPEAL

1. The Taxpayer (Company A) appeals against the determination of the Commissioner of Inland Revenue dated 29 July 1997 for the years of assessment 1994/95 and 1995/96 whereby it was refused rebuilding allowance and assessed to profits tax. Both issues relate to a flat together with a car parking space known as the Subject Property. The two questions stand or fall together. The answer depends on whether Taxpayer acquired the Subject Property for long term investment in which case no profits tax is chargeable and rebuilding allowance is deductible.

2. The proceedings were conducted in Cantonese. At the end of the proceedings, the Taxpayer's representatives indicated that the decision may be rendered in English. It can be translated into Chinese if so desired.

### THE ONUS OF PROOF

3. We remind ourselves that in all these appeals, section 68(4) of the Inland Revenue Ordinance puts on the Taxpayer the onus of proving that the assessment appealed against is incorrect.

### THE LAW

4. The applicable principles in this area of the law are well established. The Taxpayer's tax representative submitted that the facts in the authorities relied upon by the Revenue are totally different from the present case. The authorities cited are not relied upon for their facts, the principles therein are applicable irrespective of the differences in factual backgrounds.

The principles established in the cases are as follows:

- (1) 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? Lionel Simmons Properties Ltd v CIR 53 TC 461 at 491
- (2) The intention must not only be held by the taxpayer, but it must be shown by the surrounding circumstances to be *genuine, realistic and realisable*. All Best Wishes Limited v CIR HKTC 750 at 771. This is put in another way by the Board of Review in D11/80, IRBRD, vol 1, 374.

“‘Intention’ connotes an ability to carry it into effect. It is idle to speak of ‘intention’ if the person so intending did not have the means to bring it about or had made no arrangements or taken any steps to enable such intention to be implemented.’

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5. Thus we need to look at the evidence and decide whether the Taxpayer has persuaded us that it acquired the property with the intention to hold it for a long term and that this intention was genuine in the sense of being realistic and realisable.

### **THE MAIN CHARACTERS**

6. Before we look at the Taxpayer and the related companies, we will first look at the two main characters first: Mr B and Mr C. They described themselves as being very close friends in a very close relationship. Neither is married. They are both in the fashion business. Mr B said he started work when he was 14 years old. He said it was very difficult to find a close friend and he became rather emotional at one stage when he was trying to express how deeply he felt over his relationship with Mr C. Mr C was said to be very famous designer. They operate two boutiques through Company D.

### **THE TAXPAYER**

7. Mr B has been a director and shareholder of the Taxpayer since its inception. He described it as his company. Mr C has never held any shares in this company but he was made a director from 1 June 1993. Mr B's father and younger brother were or are at one time or other shareholders and/or directors of this company. But the details do not matter. The Taxpayer is financed by Mr B and he makes the decisions. For the intention of the Taxpayer, we can look simply to the intention of Mr B.

8. The Taxpayer's business is properties investment. In addition to the Subject Property, it had acquired various properties as below:

- (a) Property E. It was acquired in 1985 for \$2,050,000. This has all along been let to (Company D) and used as the residence of Mr B.
- (b) Property F. It was acquired in 1988 for \$1,680,000. This was let to Company D for use as a workshop.
- (c) Property G. It was acquired in March 1991 for \$2,529,100 and let to Company D at \$18,000. It was sold in April 1993 for \$6,100,000.
- (d) Property H. It was acquired in August 1993 for \$1,880,000 and let out to Company D for use as a workshop.

### **COMPANY D**

9. Again Mr B has been a director and shareholder throughout. He also described it as his company. Mr C has been a director since 1 July 1987 and became a minority shareholder from 1 May 1994. Mr B's parents or bother or other relatives were or are at one time or other shareholders and/or directors. But again such details do not matter. We note that in a letter dated 7 October 1995 signed by Mr B for the Taxpayer and sent in answer to queries from the Inland Revenue Department, it was then said that 'Company D and

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Company A are separate companies but under the control of the same family members and directors'. None of the other family members gave evidence. We will accept, for the purpose of this appeal, that both the Taxpayer and Company D were at all material times the companies of Mr B.

10. As we said above, Company D operates the business of two boutiques, According to the letter dated 7 October 1995 referred to earlier, the nature of Company D's business is 'importer/manufacturer/retailer of garment goods'.

### **THE SUBJECT PROPERTY**

11. By two agreements for sale and purchase dated 3 May 1993 and 19 February 1994, the Taxpayer acquired the flat and later the car parking space from the developer at \$10,665,000 and \$1,400,000 respectively. The Property was then still under construction. Construction work was completed on 10 March 1994 and the Property was conveyed to the Taxpayer by an assignment dated 15 April 1994.

12. On 22 October 1994, the Taxpayer appointed an estate agent to sell the Property. By a provisional sale and purchase agreement dated 29 October 1994, the Taxpayer sold the Property for \$21,300,000. After paying the decoration fee, legal fee, stamp duty and other expenses ancillary to the sale, the net gain was \$8,144,372.

### **THE TAXPAYER'S CASE**

13. The Taxpayer called three witnesses: Mr B, Mr C and a Mr I of a decoration company.

14. Mr B testified that he had been living with Mr C since 1984 in Property E. However living and working together inevitably brought tension and pressure to the relationship. Each needed his own space. Thus for a time, in 1991 to 1993, Mr C had moved to live in Property G referred to above. However it was too far away and inconvenient. Eventually the Property G was sold and Mr C moved back to stay with him in Property E. He said that Mr C had always dreamed about living in District J and had talked about a former boss who used to live there. From where they were living in Property E, they could see the site for the Subject Property. Mr B was anxious to make Mr C happy. Mr C was a very talented person, he appreciated and admired him and wanted him to become the top designer in Hong Kong. He decided to buy the Subject Property as a residence for Mr C.

15. Even before the property was completed, Mr C was planning the interior design of the flat. He wanted to model it on the Sukahotai Hotel in Bangkok. After they took possession, they got Mr I, who had done work for them before, to start the decoration works as soon as possible. The Taxpayer produced a plan showing the extent of the decoration work. The flat originally had three bedrooms. Two of the bedrooms were knocked down to become an enlarged living/dining room. The two toilets were also knocked down and changed into a larger en suite bathroom for the master bedroom and a smaller guest bathroom. A workroom, a storeroom and a walk in closet were added. This meant

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knocking down and putting up partitions, changing the drainage pipes and electricity wiring, removing and putting in new tiles etc. There are also photographs, delivery orders and an invoice from the decoration company. They show Italian limestone mosaic, wood panelling, railed spotlights, false beam with moulding to cover A/C pipe, closet with oak veneer lay in pattern, new doors, fancy wash basins or vanity tops, lamps, mirrors, free standing cast iron bathtub with polished nickel feet, matching toilet accessories such as handvalves, pop up waste, shower set, tower rack, etc. The total decoration cost came to \$618,817. The work took about one and half months and finished by the end of May. Mr C moved in on 1 June. There were still some work to be completed such as the fitting of the bathtub or the toilet accessories. That took about a day when the materials arrived in June.

16. Mr B said he noticed that Mr C was not happy after he moved in. When he enquired, he was told that Mr C felt he was not doing as well as he used to in work. Whereas he used to be the designer for two very famous singers, they no longer came to him. He also mentioned losing a well known singer as a client. Mr C also mentioned that the business of one of the boutiques was on the decline. Mr B also said that Mr C did not like the lobby or the people living in the block but Mr B did not make clear what it was about these people that Mr C did not like. As for the lobby, Mr B mentioned something about a large lotus painting. Mr B said that he had never rented any of his properties to any strangers, he did not want trouble or hassle, when he found out that Mr C was not happy living in the flat, he decided to sell it.

17. According to the answers from the Taxpayer to the Inland Revenue Department queries, Mr C moved out on 31 August 1994. That may be to coincide with the fact that rent was paid by Company D to the Taxpayer for three months from June to August 1994. However, according to Mr C, he went back to the flat even in September to move his things. It was not clear why estate agents were only instructed in late October if Mr C had moved out by the end of August.

18. After the property was sold, Mr C moved back to live in Property E with Mr B. They never purchased another property for Mr C's residence.

19. Mr B denied that the sale of the property had anything to do with the finances of his companies or his own finances. He said that in 1994 they were planning to open a new shop, and this was opened in 1995. When he was asked as to why finances had been given as the reason for selling the property, he explained that it was because he did not want to reveal his relationship with Mr C.

20. As to his ability to hold the property on a long term basis, Mr B produced the financial statements of the Taxpayer and Company D. In addition, he produced exhibit A1 and A2. Exhibit A1 shows his cash or cash equivalent held in April 1993 at the time of the purchase of the property. The total amount is \$1,147,753.22. Exhibit A2 shows his cash or cash equivalent held in October 1994 at the time of the disposal of the property. The amount is \$2,360,037.68. According to Mr K, the Taxpayer's tax representative, the increase was mainly due to the increase in the price of shares. Mr B denied that he was not

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financially able to hold the property on a long term basis, he mentioned at one stage that he could sell the Home Ownership flat in which his parents were residing in.

21. Mr C was cross examined as to his reason why he did not like to live in the flat. The decoration was completed to his instructions and there is no evidence of any compliant. He was asked when he had worked for a well-known singer. Mr C said it would be sometime in 1990 before that singer retired from his career as a singer. As to two other signers, their concerts were some time in July and August 1993. Mr C said thereafter he still worked for them but such work dwindled. He could not say when he last worked for either of them.

22. He was also cross examined as to the time he spent in the flat. The water account for the flat showed that for the period from 20 May 1994 to 15 September 1994 when he was supposed to be residing in the flat, the water consumed was only a total of 16 cubic meters. Mr C explained that he seldom showered in the flat as he would either do so in the health club or in Property E before going back to the flat. As for his laundry, he gave it to the maid in Property E. He was asked about the amount of electricity consumed. Charges for June to September ranged from 581 units to 1134 units resulting in bills of \$465.96 to \$920.46. He explained that he did not like air conditioning and he never ate in the flat as he had to maid to cook for him. He would eat at Property E or outside. He was seldom in during the weekends. The time he spent in the flat was engaged in designing or sleeping. As for furniture, he said he moved his personal belongings, some chairs, a work table, a bed and some small items. There was no mention of sofas and he did not need any dining table. He said that the other furniture could be purchased later. He did not know much about the finances and if Mr B said he would buy the Property, he believed that Mr B would be able to afford it.

23. Mr I corroborated the evidence of the two witnesses on the decoration. He said it was essentially completed within the time mentioned, indeed it was possible to finish the work even within a month. As to the items that were delivered late, Mr I confirmed that they were fitted within a day. He agreed that it would have been usual to have stage payments during the progress of work. He was asked as to why the invoice in this case was as late as 22 August 1994 or as to why the payments spread over a rather long period of time. Mr I was not very clear on the usual practice but then the usual practice might not apply as he was obviously prepared to treat Mr B and Mr C as special customers.

### **THE REVENUE'S CASE**

24. The Revenue said that as an employee earning \$100,000 a year, it was incredulous that Mr C would be given quarters of such significant value.

25. In all the previous employer's tax returns or salaries tax returns in respect of Mr C there was never any mention of quarters, Mr C's address was shown as the workshop in Property F. The Revenue said that Mr C did not commence living with Mr B until April 1995 after the sale of the Subject Property.

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26. If Mr B and Mr C wanted to live separately in order to relieve tension or give each other space, the most logical step would have been to look for a completed property rather than to purchase a property that needed a year to complete.

27. The Revenue pointed out that no replacement property was purchased since the sale of the Property. Thus the intention to have separate living space for each other could not be genuine.

28. Finally the Revenue said the evidence showed that neither the Taxpayer nor Company D nor Mr B had the financial ability to hold the property long term.

### THE FINDINGS

29. We accept that Mr B and Mr C had a special relationship much more than that between an employer/employee. Thus it is not possible to measure Mr C's importance to Mr B by simply looking at the salary he was paid. We also accept that Mr C was living with Mr B in Property E despite the inaccuracy stated in the employer's tax returns or Mr C's salaries tax returns.

30. We note that this property was held for a very short period of time, this is one factor to be taken into account. We also bear in mind that this Taxpayer has apparently no history of trading in property. The strongest factor in favour of the Taxpayer and against an intention to trade is the extent and nature of decoration in this case. It is quite obvious that the decoration was done to the special tastes and wishes of Mr C. The amount involved was not insubstantial. It by no means increased the marketability of the flat. On the contrary, it might well make the flat less marketable. To reduce three bedrooms into one probably reduced the number of potential buyers. We fully appreciate that if the Taxpayer had all along intended to sell the property, it did not seem to make any sense to spend this sizeable sum of money on moving partitions, pipes, wires or such like. This was specially when the property was newly completed and part of a very high class development. We attach a lot of weight to this factor. Despite the rather meagre evidence of occupation or the lack of a written tenancy agreement, we are prepared to accept that Mr C did reside in the flat.

31. We note the minutes of a directors' resolution dated 1 May 1993 whereby the Taxpayer's directors resolved to purchase the property for the purpose of a long term investment. This shows that the Taxpayer was well aware of the different tax implications in purchasing the property. It was of course a self serving statement and the stated intention would need to be tested against the objective circumstances.

### *Reason for disposal*

32. We examine the reason or reasons given at various stages for the disposal of the property.

33. The first letter is dated 31 July 1995 signed by Mr B for the Taxpayer. It is a very short letter. The material paragraphs are as follows:

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‘... It was used as a quarters for the designers of Company D. The directors of our company and the directors of tenant Company D are close relatives. However due to unexpected decline in business of Company D, short of working capital, the Property was then decided to be sold to relieve the Company’s financial difficulty ...’

Only one reason was given, the financial difficulty of Company D. It is noteworthy that even at this initial stage, it was made clear that the property was for the residence of Mr C described as the designer. There is no difficulty in mentioning the involvement of Mr C without at that time revealing his relationship with Mr B.

34. The second letter is dated 7 October 1995 also signed by Mr B for the Taxpayer. It gives more details about Mr C. His month salary is said to be \$9,300 plus quarters. As for the reason of sale, it is stated thus:

‘The main revenues of Company D came from one of its boutiques, an unincorporated body wholly owned and operated by Company D and there was a decline in business in the period from June 1994 to October 1994 to the extent of about 8-10% when comparing the turnover of the same period in previous year while the overhead costs increased by about 10%. The decline in business was also the general business trend in Hong Kong resulting the termination of tenancy of the Subject Property with effect from September 1994. At the same time, Company A was short of working capital drawing a bank overdraft of over \$5,000,000. The sale of the property would definitely relieve financial difficulty of Company A turning from an overdraft of more than \$5,000,000 (O/D) to credit balance.’

Again only one reason was given and that was the same one.

35. The third letter is dated 8 March 1995. It was from the Taxpayer’s accountant. This says:

‘As there was a decline in business. Company D decided to terminate the tenancy of the Subject Property. Therefore Mr C moved out in September 1994. Subsequently our client found that it was difficult to find another new tenant. At the same time, the Company was short of working capital, hence, the Company resolved to sell the Property in October 1994 ... The Property was let to Company D for having a monthly rental of \$76,000 which could repay the monthly mortgage loan instalment substantially. However, due to the decline in business. Company D decided to terminate the tenant of the Subject Property with our client. Subsequently, our client found that it was difficult to find another new tenant for the Property. Our client had to sell the abovementioned Property instead of paying the loan interest for a vacant premise.’



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So in this third letter, a second reason appeared. The Taxpayer said it was difficult to find a tenant. The first reason remained and appeared to be the dominant reason.

36. The fourth letter takes us to 25 October 1996. It was from the Taxpayer's accountant. This says:

'The Property was acquired with the intention for holding as long term investment and was held for rental collection. However, as there was a sharp decline in business, the tenant terminated the tenancy of the Subject Property. Company D sustained a significant loss of over \$2,000,000 during the year ended 31 March 1995. The net current liabilities of \$2,480,000 led to the shortage of working capital. The audited accounts of Company D for the year ended 31 March 1995 proved the facts...'

37. The fifth letter moves to 1997, it is dated 12 February 1997 and from the same accountant. This says:

'However due to the decline of business, Company D could not afford to pay the quarters anymore. After discussion with Mr C, Mr C understood the company's difficulties and agreed to move back and share the quarters with Mr B at Property E temporarily until the situation is turnaround.'

38. The situation developed further with the sixth letter dated 23 June 1997 from the accountant. It talks about the two directors Mr B and Mr C moving into the Property.

'The Company had torn down the walls portioning (sic) two adjacent rooms so that the property would be more spacious partitioning for the directors. The two directors, Mr C and Mr B were lovers and they chose to cohabitate in the Property ... The interior design was tailor-made to the personal preferences of the directors...'

39. As for the circumstances leading to the disposal, it says:

'Company D's accumulated loss had been increased. Company D had accumulated goodwill in the business and the directors used to have confidence in having Company D to pay for the rent. However, within a few months, Company D experienced a period of very few orders from clients. Thus the Property was considered to be sold.

One of the occupants of the Property, Mr C found he did not like the Property. As a designer, Mr C was sensitive to whether he feel the place comfortable or not. The circumstances could not have been foreseen unless and until the two persons had the opportunity to stay and live in the Property.'

40. This is the first letter which refers to Mr B and Mr C as lovers. So by then it was decided that the relationship should be openly acknowledged, yet it is significant that

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this mentions the two of them moving to the Property and the bedroom being enlarged for that purpose. When Mr B was asked about this, he said it was never his intention to move into the Property. A mistake like this cannot be easily dismissed as purely the misunderstanding of the accountant. At the hearing, Mr K of the same accountant's firm told us that it was he who persuaded Mr B to come out and state his true relationship with Mr C. Since this was the letter which revealed the true nature of their relationship for the first time, one would expect that they took special care over this letter. We would also note that Company D's financial difficulties was still mentioned as one if not the main reason for the sale.

41. We move on to 1998. The seventh letter is dated 6 February 1998. Again it mentions the financial difficulty of Company D.

'Being the tenant of the property for the period from 1 June 1994 to 31 August 1994, Company D main revenue sourced from its wholly owned company. It was expected that both companies could have sufficient cashflow to pay for Company D's rent for the Property. However, from June 1994 to October 1994, Company D was facing downturn of business and increase in overhead...'

42. Finally we come to the statement of Mr B. Unlike the previous letters, this statement is in Chinese. It is signed by Mr B and is dated as recently as 5 March 1998. In this statement, Mr B gave three reasons for the sale of the Property:

- (1) the Property was purchased uncompleted, there was no way of telling what it would look like when completed, it was only when he took possession of the flat that he discovered as soon as he saw it that he did not like it, his work did not go smoothly during his stay in the flat, he lost important clients, he felt depressed, his dislike of the flat grew and he did not want to live in it anymore;
- (2) Company D's business dropped and it did not want to rent the Property anymore;
- (3) at the time it was difficult to find a new tenant.

When Mr B came to give evidence, he deviated from his own statements. There was no mention of Mr C disliking the flat as soon as he saw it. He also retracted an earlier part of his same statement where he said that as the Subject Property was a newly completed development, there was really no need for extra decoration. Instead he said that they knew even before they saw the flat that the interior would not matter, Mr C would not like it anyway and was going to change the entire interior to his liking, thus the interior design was planned even before they took possession. More importantly, as explained above, he denied that (2) or (3) were reasons for the sale of the Property.

43. In brief, there were seven documents in the past all repeating in various forms that the Property had to be sold due to the unforeseen decline in the business and the

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financial difficulties then faced. The last document was as recent as March 1998 and in Chinese and signed by Mr B. For the first time, at the hearing, Mr B said that was never a factor.

44. The reference to finding a new tenant had been mentioned in two earlier documents but discarded at the hearing. There is no evidence that the Taxpayer had ever attempted to find a tenant.

45. The only reason now relied on is the negative feeling Mr C had towards the flat. He was unhappy living there. Although it was mentioned as early as 31 July 1995 in the first letter of Mr B to the Inland Revenue Department that the flat was for Mr C (the designer), it was not until 23 June 1997 that it was mentioned that Mr C, as one of the occupants, found he did not like the Property. Although Mr B explained that he did not want to mention this earlier as he did not want to reveal his special relationship with Mr C, we do not accept this explanation. Mr C's involvement with the flat was mentioned right from the start. Mr C's wish was given as the reason for the purchase of the flat, there was no reason why Mr C's dislike could not have been mentioned at the same time as the reason for the sale of the flat. Furthermore it is one thing not to wish to reveal one's special relationship with another person, it is quite another to make up a reason for the sale which is now said not to be true.

46. This negative feeling was not really explained by Mr C. The reference to losing a well-known singer as a client is far fetched, he no longer worked for that singer since the latter retired from his singing career. It could have nothing to do with the Property. Although there was also mention of two other singers, Mr C was unable to say when he last worked for them. The onus is on the Taxpayer and we have not been told of anything that happened during those three months in June to September 1994 when Mr C was residing there, after the flat was decorated according to his wishes, which could have so drastically changed his dream about living in District J.

47. In the circumstances, we are not persuaded that the Property was sold for this latest reason now relied on or recently relied on. A far more likely explanation for the sale is the financial difficulties that had been mentioned throughout and this brings us to the much more important question of whether the Taxpayer had the financial ability and in that sense a realistic and realizable intention to hold the Property long term.

### *Financial ability to hold the Property long term*

48. The Taxpayer is a property holding company, Its sole income depended on the rental. The rental came from Company D and its boutique business.

49. According to its accounts, for the three years prior to the purchase of the Subject Property, the rental income was unable to cover the interest expense and the other expense. Shortly prior to the purchase of the Subject Property, the Taxpayer had just sold Property G. This produced about a profit of \$3,000,000 and some return of capital which were used as the down payment and the early stage payments. The tax representative

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agreed that it would leave about \$1,000,000. Whatever the surplus, the accounts of the Taxpayer, for the year ending 30 June 1993, shortly after the purchase of the Subject Property, revealed an overdraft from the bank for \$1,096,722. The Taxpayer would have to pay overdraft interest on this.

50. In addition, the Taxpayer needed a loan from the bank to pay for the balance of the purchase price on completion. The loan from the bank was for \$8,165,000 at 8.75% p.a. repayable by 144 instalments of \$91,775 each. Since the property was let to Company D for \$76,000, this meant that the Taxpayer still needed a sum to pay for the difference every month. By the end of June 1994, the bank overdraft increased from \$1,096,722 to \$5,716,232.95. That was earlier given as one of the reasons for selling the property.

51. As for Company D, its accounts ending 31 March 1993 showed that the company had a net loss of \$628,999. By the following year, the profit was insufficient to wipe out the accumulated loss. An accumulated loss of \$209,604.69 was to be carried forward. This included directors quarters expenses of \$549,000 in respect of Property E. It meant that if Company D had to pay \$76,000 a month rental for Mr C's residence, the directors quarters expenses would have to be further increased by \$912,000, bringing account of Company D further into the red. There is no evidence to suggest that Company D would be able to afford this on a long term basis. When asked about it, Mr B repeatedly said that everyone could hope and he hoped that business would be better. He was astute enough to point out that the decision to purchase was made in 1993 and that was the material time. The fact that things in 1994 did not turn out as well as he had hoped for in 1993 would not disprove his hope. But he had not given any factor or reason to justify such hope and we do not accept his bald assertion of hope.

52. We also have regard to the Taxpayer's own financial resources. Exhibit A1 produced by him only shows that he could afford to pay one year of the instalments, that is hardly evidence of financial ability to hold the property on a long term. The Taxpayer's tax representative adroitly argues that the Taxpayer could have other financial resources that he had not revealed. The onus is on him to persuade us that the appeal should be allowed, if he has other resources he chooses not to put forward, we cannot take non-existent evidence into account. We do not forget that he holds other properties through the Taxpayer but there is no evidence that he would ever sell any of those in order to hold the Subject Property on a long term basis. He did mention selling the Home Ownership property in which his parents resided in, but that would not yield substantial amounts and we do not accept that he put that forward as a serious possibility.

53 For reasons given, we are not persuaded that the Taxpayer, or Company D or Mr B or all of them had the financial ability to hold the Subject Property on a long term basis. To put in another way, we do not accept that the Taxpayer had a realistic or realizable intention to hold the Subject Property as a capital asset.

54. In the premises, we dismiss the appeal accordingly.