

Case No. D21/01

Profits tax – acquisition and sale of property – adventure in the nature of trade – whether capital or investment asset – intention of purchaser at time of acquisition – burden of proof on taxpayer purchaser – whether tax chargeable on the profits of sale.

Panel: Benjamin Yu SC (chairman), Charles Chiu Chung Yee and William Tsui Hing Chuen.

Date of hearing: 10 October 2000.

Date of decision: 4 May 2001.

Between 1985 and 1989, the taxpayer purchased three separate properties on Street H. Prior to the purchase of the last property, an architect was appointed by the taxpayer for the redevelopment of the properties.

On 1 September 1989, the taxpayer was granted banking facilities in the amount of \$25,000,000, which included \$12,000,000 for financing the construction of a new building. The properties were developed into a 24-storey commercial building.

During the year ended 31 March 1991, the taxpayer sold the majority of the units of the building save for a small number which he retained. The taxpayer stated that the gains on the sale were capital gains as they had originally been intended for long term investment. In fact, the sale of the units had been necessitated by having to finance costly criminal proceedings. The assessor rejected this explanation and raised net assessable profits in the amount of \$20,355,809 which he later increased, on 21 December 1999, to \$23,456,763 with tax payable of \$3,870,365.

Held:

The onus of proof rested on the taxpayer. Evidence to support the taxpayer's position was required. The findings of the Board were as follows:

1. The taxpayer had never carried out a feasibility study on redevelopment of the properties.
2. Although the taxpayer may have wanted to keep part of the new building for long term, the development clearly produced more units than necessary.
3. It was not accepted that the taxpayer needed to sell the units in order to raise \$70,000,000 for his defence in criminal proceedings.

INLAND REVENUE BOARD OF REVIEW DECISIONS

4. The acquisition and subsequent dealings in the properties were ‘equivocal’ as defined in Iswera v CIR [1965] 1 WLR 663 and Kirkham v Williams [1989] STC 333.
5. The Board was not satisfied that the sole purpose of acquisition or subsequent dealing of the property was to keep part of the offices for his own use. The taxpayer had the intention to embark upon an adventure in the nature of trade: Simmons v IRC [1980] 1 WLR 1196 applied.
6. Accordingly, the taxpayer had failed to discharge his burden.

Appeal dismissed.

Cases referred to:

Simmons v IRC [1980] 1 WLR 1196

CIR v Paul [1956] 3 SALR 335

Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663

Kirkham v Williams [1989] STC 333

Fung Chi Keung for the Commissioner of Inland Revenue.

Chan Chi Hung Counsel instructed by Messrs Chan & Wan for the taxpayer.

Decision:

The appeal

1. This is an appeal by Company A (‘the Taxpayer’) against the determination by the Commissioner of Inland Revenue dated 21 December 1999. In that determination, the Commissioner increased the profits tax assessment for the year of assessment 1990/91 on the Taxpayer from \$20,355,809 to \$23,456,763 with tax payable thereon of \$3,870,365.

2. The profits in question were derived from the Taxpayer’s disposal of various units (‘the Sold Units’) in a building called Building B developed by the Taxpayer. The Taxpayer’s case is that the gains on the disposal of the Sold Units were gains arising from the disposal of a capital or investment asset and should not be assessable to profits tax. No issue arises on the amount of profits.

INLAND REVENUE BOARD OF REVIEW DECISIONS

The facts

3. The following facts are not in dispute and we find them proved:

- (1) The Taxpayer was incorporated on 24 August 1982. Since incorporation, its paid up capital had been \$2. On 8 July 1988, its paid-up capital was increased to \$1,000.
- (2) The Taxpayer was and is at all times a company controlled by Mr C. The directors and shareholders are members of his family.
- (3) On 22 August 1983, the Taxpayer acquired the properties at Address D ('Property 1') for \$3,265,700. On 8 July 1985, the Taxpayer sold this property for \$2,551,020.
- (4) The Taxpayer's accounts for the year ended 31 March 1986 showed a loss of \$836,758 on sale of Property 1. The Taxpayer claimed the loss as a trading loss. The Taxpayer's then tax representative claimed that Property 1 was purchased for resale.
- (5) On divers dates from 1985 to 1989, the Taxpayer acquired the following properties ('the Properties'):

Location	Date of assignment	Consideration \$
Property 2 on Street H	18-6-1985	2,300,000
Property 3 on Street H	20-8-1987	4,500,000
Property 4 on Street H	1-9-1989	28,000,000

Property 4 was acquired from Mr C who owned that property since 1955.

- (6) On 16 April 1988, before the Taxpayer acquired Property 4, the Taxpayer appointed an architect for the redevelopment of the Properties.
- (7) On 1 September 1989, the Taxpayer executed a debenture in favour of Bank K, Hong Kong Branch ('the debenture') for the grant of banking facilities of \$25,000,000 for the following purposes:
 - (a) \$8,450,000 for the repayment of loans from shareholders of the Taxpayer,
 - (b) \$12,000,000 for financing construction of the new building,

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (c) \$4,550,000 for financing miscellaneous expenses and interest payable by the Taxpayer under the debenture.

The moneys borrowed were repayable within 24 months from 1 September 1989 and were secured by, inter alia, the Properties and an assignment of sale proceeds.

- (8) The Taxpayer developed the Properties into a 24-storey commercial building with two shop units on the G/F and one office unit on each of the 1/F to 24/F except for the 5/F which housed the pump rooms and the emergency generator room. The occupation permit of this building, named Building B (‘ the new building’), was issued on 17 September 1990.
- (9) On 12 April 1990, the Taxpayer formally appointed Development Company F as sales agent to sell all units, other than a shop unit on the G/F, the whole of 6/F, 7/F, 8/F, 23/F and 24/F (‘ the Retained Units’).
- (10) During the year ended 31 March 1991, the Taxpayer sold all Sold Units, that is, the units in the new building other than the Retained Units.
- (11) The Taxpayer’s accounts for the year ended 31 March 1991 showed, among other items, an extraordinary item of \$21,955,261, being gain on disposal of the Sold Units.
- (12) The assessor did not accept that the profit on disposal of the Sold Units was a capital gain. He raised on the Taxpayer the following profits tax assessment for the year of assessment 1990/91 with net assessable profits of \$20,355,809 and tax payable thereon of \$3,358,708.
- (13) The Taxpayer through Messrs Kennic L H Lui & Company (‘ the Former Representatives’) objected to the assessment on the ground that it was excessive.
- (14) In reply to the assessor’s enquiries, the Former Representatives alleged the following:
 - (a) ‘ Our client had intended to redevelop the properties to derive the rental income for long term investment purpose. At the time of acquisition of the properties, sufficient funds were available for the redevelopment project. However, part of the properties was sold when fund is needed to repay

INLAND REVENUE BOARD OF REVIEW DECISIONS

bank loans and loans from director. Excess cash was generated when the margin for market variation turn [*sic*] in the company' s favour.'

- (b) ' The loan from the bank and directors were [*sic*] intended to be long term finance as the company' s original intention was to hold the redeveloped properties for long term rental income. However, due to a fear of the unstable political environment in Hong Kong and the possible downturn in the property market, the company sold the properties and then repay [*sic*] the bank and the directors.'
- (c) ' There is no minutes approving the holding of the redeveloped properties for rental income as long term investment.'
- (d) ' (The assignment plan fees) were received from the disposal of investment properties which is capital in nature, therefore such fees should not be assessable to Hong Kong profits tax.'
- (15) When asked whether any feasibility study was conducted as to the viability of the project in terms of return on capital and servicing of the loan, the Former Representatives replied as follows:

' Feasibility study

	\$
Land - purchase price	34,800,000
Construction cost contracted	17,494,000
Estimated interest expenses	<u>1,250,000</u>
Total estimated cost	<u>53,544,000</u>

Total saleable area 2,228.49 square metres = 23,987 square feet

Monthly rental required by the company = \$22 /square feet

Average return per year = 23,987 square feet x \$22 x 12

= \$6,332,568

= 11.83% per annum

The then market rental in the vicinity was about \$25 to \$30 per square feet'

INLAND REVENUE BOARD OF REVIEW DECISIONS

(16) By letter dated 11 June 1999, Messrs Lui and Mak (‘the Present Representatives’) advanced further contentions as follows:

(a) History of the company

‘ The company changed its principal activity from property trading to property letting since 1 April 1985. All properties acquired thereafter are held for long term and are treated as capital assets. This is borne out by the fact that the company did not sell any of its properties on hand during the many boom years in the property market.’

(b) The period of holding and the use of Property 4

‘ Before its sale to the company, Property 4, owned by (Mr C), a director, a shareholder and the major loan provider of the company, was wholly used by his business since 1955. ... As the company has already invested in Properties 2 and 3 for generating rental income, (Mr C) considered to sell his Property 4 to the company for the purpose of developing a larger investment unit with a view to move [*sic*] all his businesses to one location for centralisation of management, to make [*sic*] room for expansion of his businesses (including the company) and get [*sic*] a better investment return. The company was also willing to acquire (Property 4) as the directors were of the opinion that a bigger site should increase the return on investment.’

(c) The loan from Bank E

‘ ... it is the bankers’ practice to provide finance to property developers, whether for trading or investment purpose, by way of building loans ... The lending period normally coincides with the estimated building period of two to three years. Upon completion of the development, another arrangement will be offered by the bank to refinance the building loan in case the completed property is held for investment.’

‘ Therefore, a short period of lending by banks with the security of the assignment of sale proceeds is not an indication to determine the intention of the company’ s investment in the property as trading in nature. It is the lending requirement of Bank E.’

(d) Financing the concerned property

INLAND REVENUE BOARD OF REVIEW DECISIONS

- ‘ For the reasons given below, it is considered that the company and its directors had no difficulties in financing the development of the properties for rental income.
 - i) ... Included in the cost of the property under development is the land cost of \$35,737,376 which was wholly financed by (Mr C). All other development cost was mainly financed by bank loans.
 - ii) ... the whole of the loan facility of \$25,000,000 [see Fact (7)] was in fact applied in payment of the construction cost of the property under development and no portion thereof had ever been used to repay shareholder/director loans.’
 - (e) Return on investment property
 - ‘ The informal feasibility study [see Fact (16)] was prepared by the directors and was [*sic*] wrongly adopted the net area of 23,987 square feet instead of the gross area of 37,977 square feet in calculating return on investment. Based on the revised figures, the investment return was about 18% to 21% and the company required only six to eight years to pay off all the loans (including the loans from bank and director). Obviously, the high profitable return on property letting explained why the company decided to hold the property as long term investment beyond doubt.’

A copy of the revised calculation is at appendix D.
 - (f) Circumstances leading to the disposal
 - ‘ ... the repayment of loans demanded by a director leading to one of the reasons to the disposal of the property was [*sic*] that (Mr C) was affected by the litigation case ...’
 - ‘ The company therefore had been forced to sell additional units to meet his request because under the terms of the building loan, the bank had to be repaid before any fund could be released to any director by way of repayment of his advances to the company.’
 - (g) Loan interest of \$3,313,972 was all payable to Mr C.
- (17) The assessor maintained the view that the profits derived by the Taxpayer from disposal of the Sold Units were revenue in nature. Moreover, he was not

INLAND REVENUE BOARD OF REVIEW DECISIONS

satisfied that the loan interest of \$3,313,972 met any one of the conditions set out in section 16(2) of the Inland Revenue Ordinance (‘IRO’) and thus should be disallowed in ascertaining the cost of the Sold Units. Accordingly, the assessor increased the assessment for the year of assessment 1990/91 to \$23,456,763 with tax payable thereon of \$3,870,365.

Evidence

4. Mr C gave evidence before the Board. Mr C is a stockbroker by profession. He had run Company G for some twelve years. In his witness statement, which formed part of his evidence, he affirmed that he was the directing mind of the Taxpayer, and that his intention and that of the Taxpayer in acquiring and developing the Properties was to hold the same for self use, as headquarters of his group of companies. He explained in his oral testimony that he wanted to develop the building on Street H as the ‘flagship’ of his businesses. He decided to name the new building ‘Building B’ to enhance the credibility of his stockbroking business, called Business B. He gave an account of property transactions he was involved in, with the view of persuading us that he was no speculator, but had always tried to keep properties he owned. He explained that even Property 1 was originally bought by him with the intention of using it as an office for Business B, because of its close proximity to Company G. He decided, however, to dispose of Property 1 when he became aware that the company would move to Exchange Square. He then nominated the Taxpayer to take up the assignment for the purchase of Property 1, and it then disposed of the same at a loss.

5. Mr C explained how the Taxpayer came to acquire the Properties. He himself acquired Property 4 since January 1955. He had used the premises for running his business. In September 1989, he assigned Property 4 to the Taxpayer, for it to be redeveloped together with Properties 2 and 3. Property 3 was acquired by the Taxpayer on 20 August 1987 and had been held by the Taxpayer until demolition for redevelopment in July or August 1988. Property 2 was acquired by the Taxpayer on 18 June 1985 and was also held by the Taxpayer until demolition for redevelopment in July or August 1988.

6. In his witness statement, Mr C affirmed that:

‘ In order to move all my business to one location for centralisation of management, and to make room for expansion of my business (including the Taxpayer), I decided to redevelop Property 4. However, as the site area of Property 4 was too small, to develop it alone was not worthwhile. Therefore, the Taxpayer acquired Properties 2 and 3 for the purpose of developing a larger development unit to have a better redevelopment potential. If not for my decision to set aside funds for the defence of a prosecution against me ... the Taxpayer would have held the Street H property as investment for rental income and for self use by my business and companies.’

INLAND REVENUE BOARD OF REVIEW DECISIONS

7. The latter part of the above-quoted paragraph refers to Mr C's successful defence of a criminal charge against him. Mr C was charged in August 1988 by the Independent Commission Against Corruption. Mr C's evidence is that it was because of his need for funds for the conduct of his defence that he changed his intention and decided to dispose of some of the units in the new building. He said:

‘ Because of the outstanding prosecution against me, I had to get ready a huge sum of cash for the litigation. However, the Taxpayer was required by the debenture to pay the building loan before repayment of director's loan. Therefore, I had no choice but to sell some of the units in Street H property so as to raise the fund for the criminal litigation.’

8. Mr C further pointed out that the permission to commence construction of the superstructure was granted on 29 May 1989. It was said that if the Taxpayer had the intention to sell, it would have taken steps to pre-sell the Street H property as uncompleted units as early as May 1989. The fact that it did not do so was relied on as evidence supporting the Taxpayer's case.

9. In cross-examination, Mr C admitted that the Taxpayer never carried out any feasibility study on the redevelopment. The figures and calculations presented by the Taxpayer's tax representative to the assessor were all done *ex post facto*. Mr C explained that he had all the figures in his mind, and reckoned that the Taxpayer should have no difficulty repaying the bank loan in three to four years. Mr C was asked why the Taxpayer thought it was necessary to sell all the Sold Units, producing some \$70,000,000. His explanation was that he thought the legal fees would amount to some \$30,000,000 to \$40,000,000, and he also needed to repay Bank E on the debenture before the Taxpayer could repay the shareholder's loan due to him. He also said that he did in fact have other assets which he could have realized at the time, but doing so could have led to liquidity or other problems and he did not wish to disturb or upset the ratio of the mix of various types of assets in his portfolio. He apparently regarded the Sold Units as 'idle assets' and therefore the best candidate to be realised in his time of need.

Our findings on the Taxpayer's intention

10. Having considered Mr C's evidence and all the matters placed before us, we make the following findings:

- (1) we find that when the Taxpayer acquired Properties 2, 3 and 4, its intention was to redevelop the composite site into a new building;
- (2) we also accept and find that it was the Taxpayer's intention to keep *part* of the new building for long term use as offices for use by the Taxpayer or other related companies controlled by Mr C;

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (3) we are, however, not satisfied that the Taxpayer intended either at the time of the acquisition of the Properties or thereafter, to keep all the units in the new building for long term investment purpose;
- (4) we find that the Taxpayer must have known that the development would produce office space which would vastly exceed the needs of the Taxpayer or of its associated company (we shall call this 'surplus space' for convenience);
- (5) we are not satisfied that the Taxpayer's sale of the Sold Units since April 1990 was due to Mr C's need to realise cash for the preparation of his defence in the criminal proceedings;
- (6) we find that the Taxpayer had the intention, when acquiring the Properties, to embark upon an adventure in the nature of trade in the development of the Properties and subsequent disposal of the surplus space.

11. Before arriving at our conclusions, we considered the evidence and all the points made by Counsel for the Taxpayer. We summarise our views below:

- (1) We do not place much weight on the past property transactions of Mr C or of the Taxpayer. In our view, those transactions were far too different in nature from the development of the Properties to constitute any reliable evidence of the Taxpayer's intention.
- (2) Whilst we accept that Mr C had wanted to develop the Properties into a building which carried either his own name or the name of his business as a 'flagship', this is equally consistent with the Taxpayer wishing to keep all the units as with an intention to keep only some of the units and sell the remainder.
- (3) Nor do we feel able to put much weight on the accounting treatment in the Taxpayer's accounts from the years ended 31 March 1986 to 1990 as evidence of the Taxpayer's intention. How various sums are treated in the accounts depend very much on who gave the instructions to the accountant, how accurate and detailed were those instructions, and whether the instructions were properly reflected in the accounts. We have no evidence on these matters. In this connexion, it is to be noted that the Taxpayer had not kept any minutes to record what its intention was with regard to the development.
- (4) We are unable to agree that the absence of marketing or sale efforts prior to April 1990 supports the Taxpayer's case. It is well known that the property market suffered a downturn after the June Fourth incident in 1989.

INLAND REVENUE BOARD OF REVIEW DECISIONS

12. What we find significant, however, is that in April 1990, the Taxpayer instructed sales agent to sell *all* of the units other than those which were required to be retained for use by the Taxpayer or its associated companies. We also find it significant that there was no attempt by the Taxpayer to look for alternative or additional financing. The original financing by Bank E was for 24 months from 1 September 1989. There was no suggestion that the Taxpayer had, at any time in 1989 or 1990, sought alternative or additional financing. If the Taxpayer did not have the intention of keeping all the units for long term investment, we would expect at least some evidence that such alternatives had been considered.

13. Whilst it is a fact that Mr C was prosecuted for an offence and whilst we also accept that Mr C did spare no efforts in defending himself, we are, at the end of the day, left unsatisfied that this had triggered a decision to realise some \$70,000,000 worth of assets. The objective evidence, in the form of the final cash statement produced by Mr C's solicitors, was that Mr C had only paid \$1,000,000 on his legal costs before April 1990. We accept of course that the amount spent may not be a good guide for the likely costs to be incurred in the future. But what is significant is that when Mr C referred to \$30,000,000 to \$40,000,000, he was quoting only a figure mentioned by his co-accused in the proceedings. One would have expected Mr C to have obtained a quote from his solicitors and counsel as to the likely fees he would have to incur. As to this, there was simply no evidence. Even if Mr C did anticipate having to pay a substantial legal bill for his defence, there was no evidence as to the time when he was obliged to make such payment. The figure of \$30,000,000 to \$40,000,000 he mentioned was said to include costs of the appeal. Evidently, any costs of an appeal would not be payable until some time in the future. Mr C said in oral evidence that he had other assets which he could have used to meet the anticipated legal costs. (We note that in his witness statement, he said he had 'no choice' but to sell the units.) If it had been his intention, as the directing mind of the Taxpayer, to keep all the interests in the new building within the Taxpayer, we would have expected him to have given much more serious consideration to utilizing his other assets to meet the anticipated legal costs than what was suggested in the evidence. We have no explanation as to why the Former Representative stated to the Revenue that the disposal of the Sold Units was 'due to a fear of the unstable political environment in Hong Kong and the possible downturn in the property market'. In all the circumstances, we remain unconvinced that the sale of the Sold Units was motivated by Mr C's urgent need for cash.

14. We note that Mr C himself had already owned Property 4 and had his office accommodated in that building for a long time. In a sense, he already had his own building. What was it that motivated Mr C, through the vehicle of the Taxpayer, to acquire Properties 2 and 3? As recorded above, Mr C said in his witness statement that:

'...the site area of Property 4 was too small, to develop it alone was not worthwhile.'

Whilst we have little doubt that this is true, it only explains why the Taxpayer wished to acquire a larger site, that is, for a better and more 'worthwhile' development; but it does not give any clear indication as to the Taxpayer's intention with regard to the surplus area. On all the evidence, we

INLAND REVENUE BOARD OF REVIEW DECISIONS

form the view that the sale of the Sold Units was pre-ordained and what the Taxpayer contemplated at the time of acquiring the Properties.

15. The Taxpayer called a second witness, Mr I. Mr I told the Board that he had called someone at Bank E to inquire whether the terms of the debenture were standard. Such evidence was called because the debenture contained terms which expressly contemplated the sale of units in the new building by the Taxpayer after completion of the development. Under the terms of the debenture, the Taxpayer had to open a designated account for receiving all the proceeds of sale of units in the development. The 'project' was defined in the debenture to include the completion of construction of the new building and thereafter the sale of the premises of the new building. In the absence of any direct evidence from the bank itself, we do not feel able to attach much weight to Mr I's evidence, especially when he was unable to give either the name or position of the person he spoke to. We also find it surprising that the Taxpayer had chosen not to call the directors of the Taxpayer (a Mr J) who was responsible for the execution of the debenture to explain to the Board what arrangement, if any, the Taxpayer had with the bank with regard to subsequent disposal of the units.

The law

16. Simmons v IRC [1980] 1 WLR 1196 established the proposition that in determining whether a Taxpayer was trading when he acquired and then disposed of a property, one must look at his intention at the time of the acquisition of the property. Here, the property originally acquired by the Taxpayer was the various lots of land comprising Properties 2, 3 and 4, but the disposition we are concerned with is the undivided shares in the development with the exclusive right to use the Sold Units. At the end of the hearing, the Board requested the parties to make further submissions on the law. We are grateful for the parties' written submissions which were received by the Board on 17 October 2000.

17. Mr Chan for the Taxpayer cited the case of CIR v Paul [1956] 3 SALR 335. There, the respondent intended to purchase some 30 to 40 acres of land for his own use as a farm. The owner of the land, however, was not prepared to sell less than 167 acres. The respondent then asked his brother-in-law, who wanted about 30 acres for himself, to join him on the purchase, with the intention of selling the balance of the land. Later, the respondent unexpectedly came into money sufficient to enable him to finance the purchase of the entire property. He went on with the purchase, intending to keep the 30 to 40 acres for himself and sell off the rest to the best advantage. He later did sell many plots of land at a profit. The revenue assessed those profits and overruled the respondent's objection. The Special Court reversed that decision, finding that the intention of the respondent was to make a capital investment, notwithstanding the respondent's admission that he intended to sell the surplus land in lots. On appeal, the Court refused to disturb the finding of the Special Court, holding that there was ample evidence on which a reasonable person may find that the respondent did not purchase the property for speculative purposes.

INLAND REVENUE BOARD OF REVIEW DECISIONS

18. Mr Chan further relies on the decision of the Privy Council in Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663 in which the decision of Centlivres CJ in Commissioner of Inland Revenue v Paul was referred to without any disapproval. Their Lordships said that they did not doubt the correctness of that decision.

19. Mr Fung, for the Respondent, relied on Iswera as the authority governing dual intention transactions. He further cited to us the case of Kirkham v Williams [1989] STC 333. In Iswera, the taxpayer wished to reside near the school attended by her daughters. She found a building site of two and a half acres nearby and tried to buy a building plot. The owner was only willing to sell the whole site. The taxpayer then borrowed the amount of the deposit, had plans for the development of the site (giving twelve building plots) drawn up and found sub-purchasers for nine of the plots. She ended up with a double plot worth Rs 87,040 at in effect a price of Rs 71,765 on the footing that the whole transaction was an adventure in the nature of trade. Lord Reid, in delivering the opinion of the Privy Council, said:

‘ ...Clearly she did not buy the whole site as a capital investment. It was an essential part of her plan that the greater part of it should immediately be sold to sub-purchasers because without the money paid by them she could not have found the money to pay the balance due to the vendor. No doubt she acquired the part of the site which she retained as a capital investment, but in order to acquire it she had to buy, divide, and immediately resell the rest of the site ...’

After referring to the findings made by the Board of Review, and the judgment of the Supreme Court of Ceylon, Lord Reid said:

‘ Before their lordships, counsel for the appellant came near to submitting that, if it is a purpose of the taxpayer to acquire something for his own use and enjoyment, that is sufficient to show that the steps which he takes in order to acquire it cannot be an adventure in the nature of trade. In their Lordships’ judgment that is going much too far. If, in order to get what he wants, the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal his purpose or object may be a very material factor when weighing the total effect of all the circumstances.

In the present case not only has it been held that the appellant’s dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its subdivision and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site. The case may be a borderline one in the sense that the Board of Review might have taken a different view of some of the evidence. But, on the facts as found by the Board,

INLAND REVENUE BOARD OF REVIEW DECISIONS

their Lordships find it impossible to hold that in law they were not entitled to reach their conclusion.'

20. In Kirkham v Williams [1989] STC 333, [1991] STC 342, the taxpayer carried on business as a general dealer, demolition contractor and hirer of plant. In 1978, he purchased a ten acre site including a mill. The General Commissioners found that the site was acquired principally to provide office accommodation and storage space for his demolition and plant hire business. He also intended to carry on limited farming activities on the land. In 1977, before he acquired the site, he applied for planning permission to erect an agricultural worker's dwelling. That application and a subsequent one in 1978 was refused. Planning permission was granted in 1980 for the erection of a dwelling house, which the taxpayer built himself. He sold the whole site and house in October 1982 and moved to a farm. The commissioners found that the taxpayer did not intend to use the whole of the land for office and storage space nor to live there. They held that the purchase, development and resale of the land was an adventure in the nature of trade. The taxpayer appealed. Vinelott J dismissed his appeal. In the Court of Appeal, the majority (Lloyd and Nourse LJJ) allowed the appeal, holding that, in the absence of any finding by the commissioner that the taxpayer's subsidiary purpose in acquiring the site was a trading purpose, the true and only reasonable conclusion from the facts found was that the whole site had been acquired by the taxpayer as a capital asset.

21. Lloyd LJ summarised four propositions advanced by the Crown which he accepted as correct:

- (1) If, on objective analysis, the transaction has all the characteristics of trading, that analysis must prevail over the subject intention of the taxpayer.
- (2) If, on objective analysis, the transaction is equivocal, the subjective intention of the taxpayer is relevant in weighing up the circumstances, and concluding whether it is a trading transaction or not.
- (3) If, in an equivocal case, the taxpayer's sole objective is non-commercial, then that is conclusive against the transaction being a trading transaction.
- (4) In all other cases, including cases where the taxpayer's principal or paramount objective is non-commercial, it is a question of fact for the commissioners to determine what the overall nature of the transaction is.

A transaction is regarded as 'equivocal' (in the sense of the phrase used by Lord Reid in Iswera v IRC [1965] 1 WLR 663 at 668C) if, analyzing objectively what the taxpayer did at the time of the acquisition and in subsequent dealing with the land, his acts are consistent with the land having been acquired as a capital asset which was subsequently sold to best advantage, and also consistent with

INLAND REVENUE BOARD OF REVIEW DECISIONS

the site having been acquired as a trading asset which was subsequently applied to that purpose (see per Ralph Gibson LJ at [1991] STC 352j).

22. In the present case, the acquisition and subsequent dealing with the Properties can be said to be ‘equivocal’ in the sense expressed above. Whilst one of the purposes of the acquisition and subsequent dealing with the land was for the purpose of keeping *part* of the new building for long term use as offices for use by the Taxpayer or other related companies controlled by Mr C, we are not satisfied that this was the sole purpose of the acquisition or subsequent dealing. As stated above, we find that the Taxpayer had the intention, when acquiring the Properties, to embark upon an adventure in the nature of trade in the development of the Properties and subsequent disposal of the surplus space.

Conclusion

23. Accordingly, we find that the Taxpayer has failed to discharge the burden of proof of showing that the assessments were wrong. We would dismiss the appeal and confirm the assessments appealed against.