Case No. D21/02

Profits tax – whether the taxpayer has changed its intention and has embarked upon a trade or conduct in the nature of trade in the redevelopment and disposal of the properties – intention may change – an asset hitherto held as a capital investment can by reason of a change in intention be turned into a trading asset – making of a real profit – whether the profit is a realization of capital investment or a trading profit – description and classification of properties in the company's accounts, annual reports or the public documents are highly significant – not much weight on hearsay evidence – clear expression of intention in the public statements of the holding company of the taxpayer – the failure of the relevant chief executive officer or chairman or the then directors of the taxpayer to give evidence on appeal – burden of proof on the taxpayer – sections 14 and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Benjamin Yu SC (chairman), Herman Fung Man Hei and Patrick James Harvey.

Dates of hearing: 15, 16, 17, 19 and 25 January 2002.
Date of decision: 18 June 2002.

The taxpayer, a subsidiary of a public company at the material time, appealed against the profits tax assessments for the years of assessment 1994/95 and 1995/96.

During the relevant years of assessment, the taxpayer's business was described in its profits tax return as 'property re-development and investment'.

The key issue in the appeal was whether the taxpayer had changed its intention and had embarked upon a trade or conduct in the nature of trade in the redevelopment and disposal of the properties.

The facts appear sufficiently in the following judgment.

Held:

1. The Board found that the submission contending that a property originally acquired as a capital asset can never be turned into a trading asset was not acceptable.

2. In Simmons v IRC [1980] 1 WLR 1196 at 1199, Lord Wilberforce was clearly affirming the principle that intention may change, and that an asset hitherto held as a

capital investment can, by reason of a change in intention, be turned into a trading asset.

3. In short, the situation in Sharkey v Wernher was that of a person who appropriated her own trading stock and Yuen J held in CIR v Quitsubdue Ltd that under our system of taxation a trader cannot be taxed on a notional profit when he merely appropriates his own stock-in-trade. In the present case, the Board was not concerned with that situation. Here, the taxpayer did make a real profit. The question here was whether the profit was a realization of capital investment or a trading profit.

4. CIR v Quitsubdue Ltd was not authority for the proposition that a capital asset could never be turned into a trading asset, or that when that happened, a person could not be liable for profits tax on the profits he made as a result of trading activities.

5. The taxpayer did change its intention in 1988 with regard to the properties and did, from that time, embark upon a series of activities which constituted trading or an adventure in the nature of trade.

6. The change of intention was made explicit in the annual reports and accounts of its holding company which was a publicly listed company.

7. Whilst the treatment of the properties in the accounts of the taxpayer itself was equivocal, the Board regarded it as highly significant that the properties were described as properties for sale and classified as current assets in the public documents put out by the holding company.

8. The taxpayer led no evidence to explain why the properties were so classified in the accounts and annual reports of the holding company if there was no intention to change the assets into trading assets.

9. The Board noted the suggestion made by a partner of a firm of certified public accountants, who was called to assist the Board in understanding the financial statements of the taxpayer and of the holding company, that listed companies could be under financial pressure to 'dress up' their accounts, but did not feel able to regard this as little more than speculation in the absence of any evidence from members of the then management of the company.

10. The Board noted that there was evidence which could be said to point the other way that suggested that the intention was to let out the properties.

11. Furthermore, the subsequent disposition of 14 houses and 28 car parking spaces by the taxpayer to Company I was likely to have been the result of a restructuring

exercise.

12. Nevertheless, the Board did not consider such evidence, either individually or taken together, as sufficient to displace the view the Board reached on the totality of the evidence. The Board did not feel able to attach much weight to the expression of intention by the relevant chairman and chief executive officer to the surveyor and the projects manager, both because of their hearsay nature and because the circumstances of the expression of intention were unknown. They were of course contradictory to the clear expression of intention in the public statements of the holding company.

13. The memo of April 1989 appeared to stand alone amidst other documents disclosed by the taxpayer which pointed to the opposite conclusion.

14. The disposal of the remaining houses and car parking spaces to Company I was made quite some time after the initial change of intention. Whilst the Board agreed with the taxpayer's submission that since Company I was a company within the group, the Board should not draw from this disposition the inference that the original intention of the taxpayer was to sell all the houses and car parking spaces, the Board was unable at the same time to attach much weight to the fact that those units were retained within the group especially when Company I also treated the properties as its current assets.

15. Section 68(4) places the onus of showing that the assessment is incorrect or excessive on the appellant: see Commissioner of Inland Revenue v Board of Review ex parte Herald International Ltd [1964] HKLR 224, 242 where Mills-Owen J stated that the onus was on the appellant.

16. The taxpayer had failed in discharging the onus upon it of showing that the assessment appealed against was wrong or excessive.

Appeal dismissed.

Cases referred to:

Crawford Realty Limited v CIR (1991) 3 HKTC 674
Jones v Leeming [1930] AC 415
West v Phillips (1958) 38 TC 203
Lionel Simmons Properties Ltd v IRC [1980] 1 WLR 1196
Mamor Sdn Bhd v Director-General of Inland Revenue (1985) MLJ 387
Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue (1986) STC 255
All Best Wishes v CIR (1992) HKTC 750

Taylor v Good [1974] 1 WLR 556
Sharkey v Wernher [1956] AC 58
CIR v Quitsubdue Ltd [1999] 3 HKC 233
Commissioner of Inland Revenue v Board of Review ex parte Herald International Ltd [1964] HKLR 224

Russell Coleman Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.
Barrie Barlow Counsel instructed by Messrs Richards Bulter for the taxpayer.

Decision:

Introduction

1. This is an appeal by Company A, formerly known as Company B ('the Taxpayer') against the determination of the Commissioner of Inland Revenue dated 29 June 2001. In that determination, the Commissioner overruled the Taxpayer's objection but reduced the profits tax assessment on the Taxpayer for each of the years of assessment 1994/95 and 1995/96 ('the relevant years of assessment') from $91,850,982 to $83,600,129 and from $424,033,351 to $386,167,690 respectively. The net effect was that the Taxpayer was assessed to a tax liability of $13,794,021 for the year of assessment 1994/95 and $63,717,668 for the year of assessment 1995/96.

2. It is the opinion of the Commissioner that the profits in question were derived from the redevelopment and disposal of certain properties by the Taxpayer in the nature of trade or an adventure in the nature of trade.

3. At the material time, the Taxpayer was a subsidiary of a company called Company C, a public company with shares listed in the Hong Kong Stock Exchange ('the Holding Company'). Mr D was, at the time, the chairman and chief executive officer of the Holding Company. Mr D is no longer in control of the Taxpayer or of the group. New shareholders and management have taken over the Taxpayer and the group.

The facts

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

(a) The Taxpayer was incorporated on 17 October 1969. During the relevant years of assessment, the Taxpayer's business was described in its profits tax return as 'property re-development and investment'.

(b) In December 1969, the Taxpayer acquired the properties at Address E at a consideration of $1,750,000. The properties then comprised two semi-detached blocks of three-storey apartment buildings. The Taxpayer derived rental income from the letting of the properties since acquisition.

(c) Some time in or about 1988, the Taxpayer took steps to redevelop the properties. Events leading to the completion of the redeveloped properties included the following:

(i)	October 1988	Submission of building plans to the Government
(ii)	9 December 1988	The building plans were approved by the Government
(iii)	19 February 1991	The Taxpayer's proposed contemporaneous exchange of the properties was approved by the Government subject to, inter alia, the term that a premium of $26,160,000 would be paid to the Government
(iv)	15 August 1991	The premium of $26,160,000 was paid to the Government
(v)	1 October 1991	Construction Company F was engaged as the main contractor to perform the site formation works and building works
(vi)	11 May 1992	Mr G submitted a fee proposal for development consultancy services for the Taxpayer's redevelopment project. The scope of services included giving advice on means of increasing the total saleable area [which shall have the same definition as in the standard agreement for sale and purchase used in pre-sale of uncompleted developments] of the redevelopment
(vii)	15 May 1992	Mr G's fee proposal was accepted by the Taxpayer subject to certain revisions

(d) In August 1991, the Taxpayer obtained two loan facilities from a bank, viz Refinance Facility and Construction Facility. Refinance Facility was a loan facility of $46,500,000 made available to the Taxpayer for refinancing partially the acquisition cost of the properties. Construction Facility was a loan facility of $45,000,000 made available to the Taxpayer for financing the estimate construction costs of the redevelopment. The Taxpayer covenanted to repay the loan either within two years and three months from the first advance date or within three months from the date of issue of the occupation permit in respect of the redeveloped properties, whichever is the earlier.

(e) The completed development was called '[Property H]'. It comprised 22 three-storey terraced houses and 44 car parking spaces ('the Redeveloped Properties').

(f) The occupation permit for the Redeveloped Properties ('the Occupation Permit') was issued on 9 March 1995.

(g) On divers days between March and April 1994, that is, prior to the issue of the Occupation Permit, the Taxpayer sold eight houses and 16 car parking spaces, deriving an income of $299,900,000.

(h) By a preliminary transfer agreement dated 6 June 1995 entered into between the Taxpayer and Company I, the Taxpayer agreed to transfer to Company I the remaining unsold houses and car parking spaces, together with a sum of $23,430,000 being the balance it retained from the sale of the eight houses and 16 car parking spaces. The consideration for the transfer would be the aggregate of the sum of $23,430,000 and an amount equal to the valuation of the unsold houses and car parking spaces prepared by Property Management Company J dated 28 March 1995. Property Management Company J valued the houses at between $35,000,000 and $50,000,000.

(i) By a sale and purchase agreement also dated 6 June 1995 signed by the Taxpayer as vendor and Company I as purchaser, the Taxpayer agreed to sell the remaining 14 houses and 28 car parking spaces of the Redeveloped Properties to Company I at a total consideration of $520,000,000. These houses and car parking spaces were assigned to Company I on 6 June 1995. In correspondence with the assessor, the Taxpayer claimed that the transfer of the remaining houses and car parking spaces in the Redeveloped Properties to Company I was in consequence of a restructuring of the group. It was said that the minority interests in the Taxpayer was bought out by the Holding Company in 1987, and the transfer of the Taxpayer's assets to Company I was to avoid

the previous minority interests in the Taxpayer from making any claim on the Taxpayer.

(j) Company I was a company incorporated in Hong Kong on 4 April 1995. At the relevant time, its ultimate holding company was the Holding Company. In Company I's balance sheet as at 31 December 1995, stock of unsold flats amounting to $135,540,000 was classified under 'Current Assets'.

(k) The Taxpayer's detailed profit and loss account for the year ended 31 December 1994 showed a profit of $92,401,474 from disposal of properties, arrived at as follows:

	$
Sale proceeds	149,950,000
Less: Cost of properties disposed	57,548,526
Profits on sale of properties	92,401,474

(l) The Taxpayer's detailed profit and loss account for the year ended 31 December 1995 showed a profit of $424,413,672 from disposal of properties, arrived at as follows:

	$
Proceeds from disposal of investment properties	669,950,000
Less: Cost of properties disposed	245,536,238
Gain on disposal of investment properties	424,413,762

(m) The profits tax return submitted by the Taxpayer for the year of assessment 1994/95 submitted a loss of $225,645 for that year. The return for the year of assessment 1995/96 submitted a profit of $171,301. In other words, none of the profits derived from the disposal of the houses or car parking spaces in the Redeveloped Properties were offered for assessment in either of the relevant years of assessment.

(n) The assessor was of the opinion that whilst the properties were originally held by the Taxpayer as a capital asset, the Taxpayer changed its intention in October 1988 when the Taxpayer submitted building plans to the Government, so that all the houses and car parking spaces of the Redeveloped Properties became the Taxpayer's trading stock. The assessor took the value provided by the Commissioner of Rating and Valuation as the fair market value of the properties in computing the profits on the sale of the Redeveloped Properties. Accordingly, she considered that the profits tax assessment for the years of

assessment 1994/95 and 1995/96 should be revised to take in the profits generated from the disposal of the Redeveloped Properties.

5. In the determination, the Commissioner expressed the view that the properties were developed for sale purposes, and thus the Redeveloped Properties were the Taxpayer's trading assets. He listed the following factors in support of that conclusion:

(a) The annual reports of the Holding Company for the years 1988 and 1989 had declared unequivocally that the Redeveloped Properties were intended for sale, and the Redeveloped Properties were grouped under 'Current Assets' rather than 'Fixed Assets' in the Holding Company's annual reports throughout the period from 1990 to 1994.

(b) The credit facility obtained by the Taxpayer was short term.

(c) There was no evidence to show that the Holding Company could support the Taxpayer financially in completing the redevelopment and holding the Redeveloped Properties for long term purpose.

(d) The sales brochure clearly showed that the Taxpayer intended to sell all the houses and car parking spaces of the Redeveloped Properties.

The Commissioner rejected the argument that he should look at what Company I subsequently did with the remaining houses and car parking spaces. In his opinion, what was important was the Taxpayer's intention, and that the most cogent evidence of the Taxpayer's intention had already been reflected in the annual reports of the Holding Company for the years 1988 to 1994. He relied on a dictum of Barnett J in Crawford Realty Limited v CIR (1991) 3 HKTC 674 and expressed the view that there had been a 'substitution' and not mere enhancement of an asset.

The evidence

6. The Taxpayer called three witnesses, Mr K, Mr G and Miss L. It also adduces in evidence, without objection from the Commissioner, the statement of Mr M.

7. Mr K is the company secretary of the Holding Company, which has now changed its name to Company N. He has no personal knowledge of the events relating to the redevelopment of the properties by the Taxpayer but gives information to the Board by reference to documents that he has assembled for the appeal. Miss L is a partner in a firm of certified public accountants. She likewise has no personal knowledge regarding the accounts and financial position of the Taxpayer at the relevant time. She was called essentially to assist the Board in understanding the financial statements of the Taxpayer and of the Holding Company.

8. Mr G is a professional surveyor. He gave evidence to the effect that in about May 1992 he was consulted by Mr D to advise on the design of the redevelopment project. He came up with a design which, if implemented, would result in a significant increase in plot ratio and saleable floor area of the redevelopment. His design could not, however, be implemented unless the Government agreed to a further modification or variation of the Crown Lease. His evidence is that he was successful in obtaining the requisite modification and it was on the basis of his design that the properties were actually redeveloped.

9. Paragraph 8 of his first witness statement (which he adopted in evidence) stated:

> 'I had regular discussions with [Mr D] throughout the project. Although I was not involved in the details of the financing of the project from my regular discussions with [Mr D], it was my understanding that [the Holding Company] intended to pay for the redevelopment by selling off some of the completed houses and to keep the remainder as rental properties ...'

Mr Coleman did not seek to challenge Mr G on this statement.

10. Mr M worked for the Holding Company in Hong Kong some time between 1988 and March 1989. He then left Hong Kong for Country O and worked for a subsidiary of the Holding Company in Country O. He returned to Hong Kong around March 1993 when he resumed working for the Holding Company until the middle of 1994. His position in 1988 was that of the projects manager, mainly responsible for certain project in District P in Hong Kong. He stated in paragraph 8 of his statement that:

> 'My understanding, in both 1998 (which must mean 1988) and after my return in 1993, gathered from conversations with [Mr D], the then Chairman of [the Holding Company], was that [the Holding Company's] intention was to retain some of the redeveloped units for lease, while the rest would be sold to re-coup the development cost.'

11. We note that the Taxpayer has not called either Mr D or any of the then directors of the Taxpayer as witness. Nor has any explanation been proffered as to why these witnesses cannot be called.

12. We turn to the documentary evidence adduced before this Board. Some of these documents were equivocal as to what the intention was with regard to the redevelopment, some point to the intention of selling all the houses in the redevelopment, whilst one of the documents we have seen points to a contrary intention. We do not intend to go through each of them. We should, however, mention the following:

(a) There is a document dated 1 August 1988 prepared by Mr Q, assistant estate manager of the properties division headed 'Redevelopment of [the properties at Address E]'. This document referred to the relaxation of plot ratio from 0.45 to 0.75 and indicated that instructions had been given to the company's architect to prepare a proposed scheme of 24 terrace house. Mention was made in the document that interest in purchase of luxury residential properties remained strong, resulting in upward movement of prices and rental. There were four appendices to this document. Appendix A were the drawings for the redevelopment. Appendix B was a redevelopment programme. In this redevelopment programme, there is a 'marketing programme' which envisaged pre-sale of properties. Phase one – 30% sold (20% deposit received) between December 1989 and February 1990, phase two – 30% sold (20% deposit received) between March and May 1990 and phase three – 40% sold (20% deposit received) between June and August 1990; and the balance of 80% of the total proceeds received in November 1990. Appendix C was the feasibility study and correspondence. That study projected a revenue of $140,000,000 on the basis of the sale of 62,266 square feet at $2,250 per square feet and a cash return of $65,925,000 after taking into account, inter alia, marketing expenses and finance charges. Appendix D was a cash flow forecast. That document projected the receipt of sale proceeds between January 1990 and December 1990.

(b) On 27 April 1989, Mr R sent a memo to Mr D setting out the notes of a meeting with Property Management Company S on 26 April 1989. The notes recorded Mr R stating the objectives of the Holding Company to be 'a long term investment primarily for lease purpose. Target market sector would be foreigner in particular Japanese'. It was noted that Mr T of Property Management Company S would prepare a proposal on the project covering, inter alia, the expected return attainable, ranging from $25 to $30 per foot per month.

13. As pointed out in the determination, the annual reports of the Holding Company since 1988 and up to 1994 consistently treated the properties as current assets. In the 1988 annual report of the Holding Company, which appears on its face to be published in or about May 1989, the properties in question were included in the section 'Properties for sale'. Miss L confirmed in her statement that the properties for sale were listed within 'Current Assets' in the accounts.

The Taxpayer's arguments

14. Mr Barlow for the Taxpayer stressed that the Commissioner does not dispute that the Taxpayer originally held the properties as a capital asset.

15. He then advanced various propositions directed to the submission that the Taxpayer had not been engaged in trading. He submitted that

(a) a 'one-off' transaction is less likely to be a trading transaction than a realisation of a capital investment (Jones v Leeming [1930] AC 415, 419-421);

(b) the disposition of capital investment due to the impracticality of retaining it as such does not constitute trading (for example, West v Phillips (1958) 38 TC 203, 212-214 and Lionel Simmons Properties Ltd v IRC [1980] 1 WLR 1196 at 1202 and 1203);

(c) a transfer of a reconstituted or redeveloped capital asset involving no change of beneficial ownership does not indicate an intention to trade and an inference of a change of intention should not be drawn from such a fact, relying on Simmons v IRC;

(d) the carrying out of subsidiary transactions as a necessary or incidental part of a reconstruction or redevelopment of a capital asset, which has the effect of mitigating the cost of the primary project, is nonetheless part of capital reconstruction and not trading, relying on Mamor Sdn Bhd v Director-General of Inland Revenue (1985) MLJ 387 and Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue (1986) STC 255;

(e) an intention to pay for the redevelopment of a capital investment by selling off part of the redeveloped investment does not constitute trading, relying on All Best Wishes v CIR (1992) HKTC 750 at 771.

Some of these propositions were not disputed by Mr Coleman.

16. Mr Barlow relies on Taylor v Good [1974] 1 WLR 556 where Russell LJ said at page 560D:

> *' All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a property developer, merely takes steps to enhance the value of thee property in the eyes of a developer who might wish to buy for development.'*

Mr Coleman does not quarrel with this proposition but contends that the Taxpayer was in this instance a property developer.

17. Mr Barlow further relies on the well-known dictum of Lord Wilberforce in Simmons v IRC [1980] 1 WLR 1196 at 1199:

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

The Sharkey point

18. Relying on Lord Wilberforce's dictum quoted above, Mr Barlow next advanced before this Board the following submission:

(a) Lord Wilberforce's dictum in Simmons that investment asset may be turned into trading stock is based on the authority of Sharkey v Wernher;

(b) the principle in Sharkey v Wernher is not applicable in Hong Kong, see CIR v Quitsubdue Ltd [1999] 3 HKC 233;

(c) hence, there is no basis in law for finding that an asset acquired as a capital investment has been transferred to trading stock.

19. This submission, if accepted, means that a property originally acquired as a capital asset can never be turned into a trading asset.

20. We are unable to accept this submission. It seems to us that, with respect, Lord Wilberforce's dictum in Simmons is against, rather than for, the Taxpayer's proposition. In

Simmons, Lord Wilberforce was clearly affirming the principle that intention may change, and that an asset hitherto held as a capital investment can, by reason of a change in intention, be turned into a trading asset. His Lordship was not referring to Sharkey v Wernher as the authority in support of the proposition that this may happen. Rather, Sharkey v Wernher was cited to emphasize the point that any finding of change of intention should be made with precision since it may have tax consequences. We do not believe that Yuen J's decision in CIR v Quitsubdue Ltd [1999] 3 HKC 233 assists the Taxpayer either. We shall endeavour to explain why.

21. In CIR v Quitsubdue Ltd, the taxpayer company purchased all units in two buildings and redeveloped the properties into a new commercial building. The shares in the taxpayer changed hands twice in 1987; but the properties were never disposed of by the taxpayer. The Revenue charged the taxpayer with certain additional profits tax on the basis that the taxpayer's intention from the time it acquired the properties was to trade in the properties. The Revenue assessed the taxpayer's profits as a notional profit calculated from the difference between the cost and market value of the properties as at the date of change of intention by applying Sharkey v Wernher. The learned Judge disposed of the Commissioner's appeal by holding that it was plain on the evidence that the intention of the taxpayer had always been to hold the properties as a capital investment and that the intention of the *shareholders* of the taxpayer with respect to the shares does not reflect upon the intention of the taxpayer. The learned Judge went on, *obiter*, to consider the question of whether the principle of Sharkey v Wernher applied. The facts of that case are well-known. The taxpayer carried on both the running of a stud farm and that of racing stables. The profits of the stud farm were taxable, whereas those from the racing stables were not. She transferred some horses from her stud farm to her racing stables. It is important to note that the taxpayer accepted that some amount must be credited in the accounts of the stud farm in respect of the transfer, and the only question before the House of Lords was whether that amount should be the cost of rearing the horses or their market value. Yuen J held that since section 14 of our IRO is a charge only on real profit, it follows that a person cannot be charged with profits tax on 'self-trade' as no profit actually exists. In short, the situation in Sharkey v Wernher was that of a person who appropriated her own trading stock and Yuen J held in Quitsubdue that under our system of taxation a trader cannot be taxed on a notional profit when he merely appropriates his own stock-in-trade. We are not concerned with that situation. Here, the Taxpayer did make a real profit. The question here is whether the profit was a realization of capital investment or a trading profit.

22. In our view, CIR v Quitsubdue Ltd is not authority for the proposition that a capital asset can never be turned into a trading asset, or that when that happens, a person cannot be liable for profits tax on the profits he makes as a result of trading activities.

The issue

23. In the present case, where it is not disputed that the properties were originally held by the Taxpayer as a capital investment, it seems to us that the key issue is whether the Taxpayer has

changed its intention and has embarked upon a trade or conduct in the nature of trade in the redevelopment and disposal of the properties. We bear in mind Lord Wilberforce's observation in Simmons that if findings of this kind are to be made precision is required. We also bear in mind and generally accept the various points made by Mr Barlow as recorded in paragraph 15 above.

24. The parties have agreed that if the Board were to find that the Commissioner was correct in holding that there was a change of intention in 1988, there is no dispute over the quantum of assessable profits.

Our finding on the Taxpayer's intention

25. We have, on the evidence before us, come to the view that the Taxpayer did change its intention in 1988 with regard to the properties and did, from that time, embark upon a series of activities which constituted trading or an adventure in the nature of trade.

26. The predominant documentary evidence before this Board shows that the Taxpayer decided in 1988 to redevelop the properties for resale. The actions carried out by the Taxpayer with regard to the properties in the period since (and including) 1988 were not materially different from those of a property developer engaged in the development of a property for resale. The change of intention is made explicit in the annual reports and accounts of its Holding Company which, as we have observed already, was a publicly listed company. Whilst the treatment of the properties in the accounts of the Taxpayer itself was equivocal, we regard it as highly significant that the properties were described as properties for sale and classified as current assets in the public documents put out by the Holding Company. The Taxpayer led no evidence to explain why the properties were so classified in the accounts and annual reports of the Holding Company if there was no intention to change the assets into trading assets. We note the suggestion made by Miss L that listed companies could be under financial pressure to 'dress up' their accounts, but do not feel able to regard this as little more than speculation in the absence of any evidence from members of the then management of the company.

27. We do not overlook the fact that there is evidence which can be said to point the other way. In particular, there is the evidence of Mr G and that of Mr M as to the expression of intention by Mr D. There was also the April 1989 memo from Mr R which suggested that the intention was to let out the properties. Furthermore, the subsequent disposition of 14 houses and 28 car parking spaces by the Taxpayer to Company I was likely to have been the result of a restructuring exercise. Nevertheless, we do not consider such evidence, either individually or taken together, as sufficient to displace the view we reach on the totality of the evidence. We do not feel able to attach much weight to the expression of intention by Mr D to Mr G and Mr M, both because of their hearsay nature and because the circumstances of the expression of intention are unknown. They are of course contradictory to the clear expression of intention in the public statements of the Holding Company. The memo of April 1989 appears to stand alone amidst other documents disclosed by the Taxpayer which point to the opposite conclusion. We have no evidence of how much Mr R

would have known of the company's intention at the time. The disposal of the remaining houses and car parking spaces to Company I was made quite some time after the initial change of intention. Whilst we agree with the Taxpayer's submission that since Company I is a company within the group, we should not draw from this disposition the inference that the original intention of the Taxpayer was to sell all the houses and car parking spaces, we are unable at the same time to attach much weight to the fact that those units were retained within the group especially when Company I also treated the properties as its current assets.

Onus of proof

28. Before concluding, we should mention the Taxpayer's argument over the question of who bears the burden of proof. Mr Barlow contended that once he shows that the reasoning in the determination is wrong, he has discharged the burden placed on him under section 68(4) of the IRO and it is then incumbent on the Commissioner to support the assessment. We do not agree. Section 68(4) places the onus of showing that the *assessment* is incorrect or excessive on the taxpayer. We derive some support for this conclusion from Commissioner of Inland Revenue v Board of Review ex parte Herald International Ltd [1964] HKLR 224, 242 where Mills-Owen J stated that the onus on the taxpayer:

> '*... is not one of proving that the Commissioner is wrong, whether it be in a matter of procedure, evidence or law. It is an onus of proving that the assessment was excessive and it necessarily involves a finding by the Board of what the correct assessment should be (including a "nil" assessment if need be).*'

As in many of the cases on appeal to this Board, the materials placed before the Board are often substantially more than those which were at the disposal of the Commissioner when he made his determination. The intention of the legislature is plainly to put the burden on the taxpayer to adduce such evidence as he can to show that the *assessment* is wrong or excessive. For the avoidance of doubt, we should state that it is our conclusion, based on the evidence before us, that the Taxpayer did, in 1988, change its intention with regard to the properties and embarked upon an adventure in the nature of trade. *A fortiori*, the Taxpayer has failed in discharging the onus upon it of showing that the assessment appealed against is wrong or excessive.

Conclusion

29. For the reasons we have endeavoured to give, we have arrived at the same conclusion as the Commissioner, although not for exactly the same reasons. We accordingly dismiss the appeal and confirm the assessment appealed against.