Case No. D26/02

Profits tax – selling of industrial building – balancing allowance – moneys – section 35 of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Horace Wong Ho Ming and Albert Yau Kai Cheong.

Dates of hearing: 24, 25 and 27 May 2002.
Date of decision: 8 July 2002.

The only ground argued concerns the claim of balancing allowance.

In February 1994, the appellant sold District A Property to Company C in return for District B Property. Furthermore, the appellant paid $118,000,000 to Company C.

For the year of assessment 1993/94, the appellant claimed a balancing allowance because it did not receive any kind of moneys in the sale. Thus, the residue value exceeded the sale moneys received.

Held:

1. The Board rejected the contention that the sale price must be a receipt of moneys. Rather, it is the amount, that is, the dollar value of the sale price that matters.

2. In this case, the residue value did not exceed the sale price. The appellant was not entitled to claim a balancing allowance.

Appeal dismissed.

Cases referred to:

SA Crate Pty Ltd v The State of South Australia 83 ATC 4587
Capcount Trading v Evans (Inspector of Taxes) [1993] 2 All ER 125
Bentley v Pike (Inspector of Taxes) [1981] STC 360
MacNiven (Inspector of Taxes) v Westmoreland Investment Ltd [2001] 1 All ER 865

Inland Revenue Commissioners v McGuckian [1997] STC 908
Shiu Wing Ltd & Others v Commissioner of Estate Duty (2000) 3 HKCFAR 215
In re Hodge's Policy [1958] Ch 239
The Society of Accountants in Edinburgh and Others v The Lord Advocate [1924] SLT 194
In re Townley (1884) 53 LJ Ch 516
Carver v Duncan [1985] 1 AC 1082
IRC v Hinchy [1960] AC 748

Ambrose Ho Senior Counsel instructed by Department of Justice for the Commissioner of Inland Revenue.
Steven Sieker of Messrs Baker & McKenzie for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 30 November 2001 whereby:

(a) The profits tax assessment for the year of assessment 1993/94 under charge number 1-5020551-94-3, dated 25 July 1997, showing assessable profits of $61,789,410 with tax payable of $10,813,146 was reduced to assessable profits of $60,630,795 with tax payable of $10,610,389.

(b) Additional profits tax assessment for the year of assessment 1994/95 under charge number 1-5040118-95-1, dated 25 July 1997, showing additional assessable profits of $16,297,044 with additional tax payable of $2,689,012 was reduced to additional assessable profits of $14,681,215 with additional tax payable of $2,422,400.

(c) Profits tax assessment for the year of assessment 1995/96 under charge number 1-3145137-96-2, dated 14 April 1999, showing assessable profits of $19,281,654 with tax payable of $3,181,472 was confirmed.

The agreed facts

2. The following facts are agreed by the parties and we find them as facts.

3. The Appellant has objected to the profits tax assessments for the years of assessment 1993/94 and 1995/96 and the additional profits tax assessment for the year of assessment 1994/95 raised on it.

For the year of assessment 1993/94, the Appellant claimed that it did not receive any 'sale money' on the disposal of an industrial building located in District A ('the District A Property') and therefore should be entitled to a balancing allowance in respect of the property in accordance with section 35 of the IRO.

For the year of assessment 1994/95, the Appellant claimed that the assessment was excessive since it had not been allowed for the loss brought forward from the year of assessment 1993/94.

For the year of assessment 1995/96, the Appellant claimed that there was a change of intention in holding a property located in District B ('the District B Property') from a capital asset to trading asset on 21 July 1995 and that a provision for diminution in value of the property after the date of change of intention should be deductible. The Appellant also claimed that the interest expenses incurred on a loan obtained to finance the acquisition of the property after the change of intention on 21 July 1995 should be regarded as revenue in nature and deductible.

4. The Appellant was incorporated as a private company in Hong Kong on 20 September 1977. It commenced business on 1 November 1977. In its profits tax return for the year of assessment 1993/94, the Appellant described the nature of its business as 'Property investment, development and management'. At all relevant times, the issued and paid up share capital of the Appellant remained at $23,850,000.

5. The Appellant was the developer of a tower located in District B ('the Tower'). The construction of the Tower was completed in October 1981. The Tower is a 24-storey building which comprises of basement floor to 24th floor. The Appellant sold the 14th floor to 24th floor to unrelated parties in the 1980s, and held the basement floor to 13th floor for rental purpose and for its own operating use.

6. In May 1983, the Appellant acquired a piece of land in District A for development of an industrial building. The construction of the District A Property on the land was completed in September 1986. The building was leased to Company C for manufacturing Company C's products on 1 March 1987.

7. Company C, formerly known as Company D, was founded in March 1940. It has been a manufacturer of soft drinks. It changed to its present name on 21 September 1990. Company C became a listed company on the Hong Kong Stock Exchange in March 1994.

8. The Appellant was a wholly-owned subsidiary of Company C up to 29 March 1994. Pursuant to an ordinary resolution passed by Company C at its extraordinary general meeting held on 28 December 1993, Company C and its then subsidiaries underwent a restructuring involving, inter alia, the following:

(a) the sale by Company C of the District B Property to the Appellant, in consideration for the acquisition by Company C of the District A Property from the Appellant and a cash consideration of $118,000,000 received by Company C from the Appellant; and

(b) the beneficial interest in the entire issued share capital of the Appellant was transferred to the shareholders of Company C by way of a dividend in specie on 28 February 1994.

Subsequent to the public listing of Company C on the Hong Kong Stock Exchange in March 1994, the Appellant was no longer related to Company C.

9. On 17 February 1994, the Appellant and Company C entered into an agreement for exchange ('the Agreement') and executed a deed of exchange in which the Appellant and Company C exchanged the District A Property and the District B Property and for equality of exchange the Appellant paid Company C $118,000,000. At that time, the District B Property was a seven-storey plus mezzanine level industrial building.

10. The market values of the District A Property and the District B Property as at the date of exchange were $140,000,000 and $258,000,000 respectively.

11. The District B Property acquired by the Appellant was leased back to Company C at a monthly rental of $783,420 for a period of four months from 17 February 1994 to 16 June 1994. The District B Property was then left vacant until it was demolished on 25 December 1996.

12. Rental income derived by the Appellant from leasing the District B Property to Company C during the years ended 31 March 1994 and 1995 amounted to $1,119,171 and $1,615,727 respectively.

13. The Appellant incurred qualified expenditure of $67,442,601 in construction of the District A Property. The Appellant claimed and was granted industrial building allowance of total amount $32,213,264 for the years up to and including 1992/93.

14. In its profits tax return for the year of assessment 1993/94, the Appellant declared an adjusted loss of $7,417,915. The figure was arrived at after deducting a balancing allowance of $35,229,337 in respect of the District A Property and annual industrial building allowance of $430,000 in respect of the District B Property. The following particulars are extracted from the account submitted by the Appellant for the year ended 31 March 1994:

Balance sheet

	1994	**1993**
	$	$

Fixed assets		
Land and building, net book value		
– The District A Property	-	75,019,743
Investment property – The Tower	315,000,000	263,000,000
Office furniture and equipment	32,364	41,494
Motor vehicle	646,874	984,374
	315,679,238	339,045,611
Property held for redevelopment		
	260,269,920	-
Investment in subsidiary	2	2
Current assets	5,881,136	1,671,738
Current liabilities	(23,023,982)	(15,238,192)
Long term liability		
Bank loan	(97,000,000)	-
	461,806,314	325,479,159
Represented by		
Share capital	23,850,000	23,850,000
Reserves	437,956,314	301,629,159
	461,806,314	325,479,159

Profit and loss account

	$
Income –	
	33,981,664
	170,446
	34,152,110
Less: Expenditure	7,778,367
Profit before taxation	26,373,743

A copy of the Appellant's audited account for the year ended 31 March 1994 was attached to the determination.

15. The Appellant computed its adjusted loss for the year of assessment 1993/94 as follows:

	$	$
Profit per account [paragraph 14]		26,373,743
Add: Depreciation	3,129,528	

	Legal and professional fees	139,600	
	Provision for long service payment	271,367	
			3,540,495
Less:	Depreciation allowances	215,356	
	Industrial building allowances	1,716,456	
	Balancing allowance	35,229,337	
	Commercial building allowance	558	
	Offshore interest income	170,446	
			(37,332,153)
	Adjusted loss		(7,417,915)

A copy of the Appellant's profits tax computation for the year of assessment 1993/94 and the attached schedules were attached to the determination.

16. Industrial building allowances shown in the profits tax computation [paragraph 15] was calculated as follows:

The Tower	$	$
Cost brought forward	37,820,878	
Annual allowance		1,286,456
The District B Property		
Qualifying expenditure	11,959,917	
Less: Total allowances claimed up to 1992/93	(6,607,629)	
Balancing allowance	(1,052,288)	
Residue of expenditure	4,300,000	
Year of assessment of first use	1978/79	
First year of the Appellant's entitlement to annual allowance	1993/94	
25th year after first use	2002/03	
Number of year of assessment from 1993/94 to 2002/03	10	
Annual allowance from 1993/94 onwards [4,300,000 × 1/10]		430,000
Total industrial building allowances		1,716,456

17. The balancing allowance shown in the Appellant's profits tax computation was calculated as follows:

The District A Property	$

Qualifying expenditure [paragraph 13]	67,442,601
Total allowances granted up to 1992/93	(32,213,264)
Written down value	35,229,337
Sale moneys attributable to the building	-*
Balancing allowance	35,229,337

* 'The industrial building was transferred to [Company C] on 17 February 1994. The Company did not receive any sale money in connection with the transfer.'

18. During the year ended 31 March 1994, the Appellant credited to its reserves account a sum of $67,763,155 as 'unrealised gain on disposal of land and building' in respect of the District A Property. The sum was calculated as follows:

	$
Net book value as at 31-3-1993 [paragraph 14]	75,019,743
Less: Depreciation charged in the profit and loss account for the year ended 31-3-1994	(2,782,898)
	72,236,845
Less: Market value of the District A Property transferred to Company C in exchange for the District B Property	(140,000,000)
Unrealised gain on disposal of the District A Property	67,763,155

19. In its profits tax return for the year of assessment 1994/95, the Appellant declared assessable profits of $7,596,289. The following particulars are extracted from the Appellant's audited account for the year ended 31 March 1995:

	1995	**1994**
	$	$
Fixed assets		
Investment property		
– The Tower	315,000,000	315,000,000
Office furniture and equipment	74,674	32,364
Motor vehicle	309,375	646,874
	315,384,049	315,679,238
Property held for redevelopment		
– The District B Property	260,431,693	260,269,920
Investment in subsidiary	2	2
Current assets	8,295,014	5,881,136
Current liabilities	(26,268,012)	(23,023,982)
Long term liability		
Bank loan	(85,000,000)	(97,000,000)
	472,842,746	461,806,314

Represented by		
Share capital	23,850,000	23,850,000
Reserves	448,992,746	437,956,314
	472,842,746	461,806,314

The audited account was approved by the Appellant's board of directors on 25 August 1995.

A copy of the Appellant's audited account for the year ended 31 March 1995 was attached to the determination.

20. The assessor raised on the Appellant the following profits tax assessment for the year of assessment 1994/95:

	$
Profits per return [paragraph 19]	7,596,289
Less: Loss brought forward and set-off [paragraph 15]	(7,417,915)
Net assessable profits	178,374
Tax payable	29,431

Assessor's notes

'This assessment is raised subject to the acceptance of industrial building allowance claim which is being examined.'

21. In reply to enquiries raised by the assessor, Accountants' Firm E ('the Representatives') described the circumstances leading to the exchange of properties as follows:

' [Company C] reorganised the group activities prior to its public listing on the Hong Kong Stock Exchange in March 1994. Based on the professional advice obtained by [Company C], it was recommended that the group should focus its operations primarily on the production and distribution of a wide range of food and beverages in order to make it most attractive to the public. All the property investment activities should be separated from the group's production and distribution operations.

Accordingly, as part of the group reorganisation, [Company C] acquired the [District A] building from [the Appellant] for use as the group's main operational site. On the other hand, the [District B] building was transferred by [Company C] to [the Appellant] for redevelopment. The exchange of property between [Company C] and [the Appellant] therefore ensures that the listed group retains the property used for its production and distribution of food and beverages, whilst the other investment property will be concentrated in [the Appellant]. Subsequent to the public listing of

[Company C], [the Appellant] was no longer a wholly owned subsidiary of [Company C].'

22. The Representatives provided the following information:

(a) The District B Property was used by Company C for its production and distribution operations prior to the transfer to the Appellant for redevelopment.

(b) The market value of the District B Property of $258,000,000 was determined by reference to a valuation report prepared by Company F. It was estimated on the basis that the existing property to be demolished and a 25-storey industrial tower over a three-level podium to be constructed on the site according to the redevelopment proposal prepared by Company G.

A copy of the valuation report prepared by Company F dated 30 June 1993 and a copy of the letter dated 23 May 1994 issued by the Appellant to Company G regarding the intended usage of the redeveloped property by Company C were attached to the determination.

(c) The cash consideration of $118,000,000 was settled by the Appellant with the following payments:

	Amount/$
Payment to Company C	
7 January 1994	15,500,000
17 February 1994 *	107,000,000
Refunded by Company C	
7 February 1994	(2,000,000)
11 March 1994	(2,500,000)
	118,000,000

* The payment was financed by a loan of $107,000,000 from Bank H.

(d) Based on a confirmation from Company F on 6 December 1993 that there was no significant change in the market value of $258,000,000 as at 6 December 1993, Company C transferred the District B Property to the Appellant on 17 February 1994 at $258,000,000.

23. The assessor was of the view that balancing charge should be added back in respect of the District A Property as the sale consideration was in excess of the residue value. The assessor also considered that interest and related expenditure in respect of the loans obtained for financing the redevelopment of the District B Property should be capitalised and not deductible in computing

the assessable profits for the year of assessment 1993/94. On 25 July 1997, the assessor raised on the Appellant the following assessments:

Year of assessment 1993/94	$	$
Loss per return [paragraph 15]		(7,417,915)
Add: Balancing allowance	35,229,337	
Balancing charge [see below]	32,213,264	
Loan expenses on the District B Property		
Interest on bank loan	949,677	
Legal fee on arrangement of bank loan	215,047	
Loan arrangement fee	600,000	69,207,325
Assessable profits		61,789,410
Tax payable		10,813,146

The District A Property	$
Written down value brought forward	35,229,337
Less: Sale value, restricted to cost	67,442,601
Balancing charge	32,213,264

Year of assessment 1994/95 (Additional)	$
Profits per return [paragraph 19]	7,596,289
Add: Interest on bank loan and overdraft	8,879,129
	16,475,418
Less: Profits previously assessed [paragraph 20]	178,374
Additional assessable profits	16,297,044
Additional tax payable	2,689,012

24. The Representatives, on behalf of the Appellant, objected to the assessment for the year of assessment 1993/94 on the ground that the assessment was incorrect and excessive and that the assessment failed to allow for the balancing allowance of $35,229,337. The Representatives contended that:

> ' [The Appellant] is unable to agree with the Department's comments that the [District A] property as transferred by the company to [Company C] for the sale money of HK$140,000,000 during the year ended 31 March 1994. In particular, [the Appellant] is firmly of the view that the company did not receive any sale money on the disposal of the [District A] property and, therefore, should be entitled to a

balancing allowance of HK$35,229,337 in the year of assessment 1993/94 in accordance with section 35 of the Inland Revenue Ordinance.'

25. The Representatives, on behalf of the Appellant, objected to the additional assessment for the year of assessment 1994/95 on the ground that the assessment was incorrect and excessive and that the assessment failed to allow for the adjusted loss of $7,417,915 brought forward from the year of assessment 1993/94.

26. In letter dated 21 January 1998, the Representatives contended that:

' we are of the view that a balancing charge need not be made under Section 35(3) of the IRO on the basis that [the Appellant] did not receive "sale moneys" on the transfer of the [District A] Property to [Company C] in exchange for [the District B Property] in the year of assessment 1993/94. In this regard, we do not consider that the market value of the [District A] property as at the date of transfer (i.e. HK$140 million) and the related accounting treatment adopted by [the Appellant] and [Company C] on the exchange of the industrial property are of relevance in determining whether [the Appellant] received any "sale moneys" from [Company C]. The reasons for our opinion are as follows:

1. Section 35(1) of the IRO provides for the making of a balancing charge or allowance, as the case may be, under section 35(2) or section 35(3), in a case where "the relevant interest" in an industrial building or structure is "sold". The "relevant interest" is defined in section 40(1) of the IRO as the interest to which the person who constructed the building was entitled when he constructed it.

   The IRO does not define the terms "sold", "sale", or "sell". However in section 3 of the Interpretation and General Clauses Ordinance, the term "sell" is defined for the purposes of the laws of Hong Kong to include exchange and barter, unless the context in which the term is used indicates otherwise. There is nothing in section 35 of the IRO indicating that "sold" cannot include "exchanged". In the present case, the [District A] property was therefore "sold" by [the Appellant] for the purposes of section 35 when such property was transferred to [Company C] in February 1994 in exchange for the [District B] property.

2. Section 35(1) provides that, when the relevant interest in an industrial building is sold, a balancing allowance or a balancing charge "shall, in the circumstances mentioned in this section, be made ...". Section 35(2) provides for the making of a balancing allowance where "there are no sale, insurance, salvage or compensation moneys, or where the residue of the expenditure immediately before the event (i.e. the sale or destruction of the building) exceeds those moneys ...".

Section 35(3) provides for the making of a balancing charge if "the sale, insurance, salvage or compensation moneys exceed the residue, if any, of the expenditure immediately before the event ..."

Thus, section 35 will not require the making of a balancing charge as a result of [the Appellant's] sale of the [District A] property unless [the Appellant] received "sale moneys" exceeding its residue of expenditure. It is therefore necessary to determine whether the [District B] property received by [the Appellant] constitutes "sale money" within the meaning of those words as used in section 35(3).

3. Neither the IRO nor the Interpretation and General Clauses Ordinance defines either the phrase "sale, insurance, salvage or compensation moneys" or the term "moneys". Similarly, there are no cases decided by the U.K. courts or other courts in the Commonwealth in which these terms were construed. In the absence of both a statutory definition and relevant case law, the courts will interpret a word according to its everyday meaning, unless the context in which the word is used indicates that a different interpretation is called for. In this regard, recourse may be had to a dictionary of a general nature, such as the Oxford English Dictionary, or to a legal dictionary.

The word "moneys" is defined in *The Shorter Oxford English Dictionary* (1977 ed.) as "sums of money" or simply "money". In turn, "money" is defined as "coin and such promissory documents representing coin (especially bank-notes) as are currently accepted as a medium of exchange", or, in another sense, as "coin in reference to its purchasing power; hence, possessions or property viewed as convertible into money". The latter definition reinforces the fact that "money" in its ordinary sense is different from "possessions or property" which are not "money" but may be converted into it.

The term "money" is defined in *Osborn's Concise Law Dictionary* (6th ed., 1976) as "the medium of exchange, and measure of value". This would appear to exclude property such as industrial buildings.

It is instructive that section 5B of the IRO, which defines the assessable value of land or buildings for the purposes of property tax, refers to "consideration, in money or money's worth, payable" to the owner of the land or buildings. This indicates that the drafters of the IRO did not consider that the term "money" alone would include non-cash property which could be converted into money.

It is also notable that the consideration received by a seller need not be "money" or "moneys". The term "sale" is defined in *The Shorter Oxford English Dictionary* as "the exchange of a commodity for money or other valuable consideration". Thus, it would appear that the term "sale moneys" in section 35 of the IRO refers to sums of money but not other forms of consideration received by a seller of an industrial building.

4. In light of the foregoing, we are of the view that [the Appellant] who exchanged the [District A] property for the [District B] property has not received "sale moneys" within the meaning of section 35 of the IRO. In the circumstances, [the Appellant] should not be subject to a balance charge under section 35(3); rather, it should be entitled to a balancing allowance under section 35(2) for the year of assessment 1993/94.

In this connection, although the term "sale moneys" as used in section 35 of the IRO could be seen as ambiguous, we point out that well-established principle of the interpretation of tax statutes would generally require adoption of the interpretation favourable to the taxpayer (as in the case of [the Appellant]) with respect to a charging provision. In numerous cases, the courts of England, Australia and other Commonwealth jurisdictions have applied the principle that "the intention to impose a charge upon a subject must be shown by clear and unambiguous language and where there is serious doubt as to the construction of a statute, all ambiguity should be resolved in favour of the person sought to be taxed" *(S.A. Crate Pty. Ltd. v The State of South Australia 83 ATC 4587).*'

27. The Representatives made the following comments on the deductibility of the interest expenses incurred by the Appellant for the years of assessment 1993/94 and 1994/95:

(a) The loan expenses incurred by the Appellant in the year of assessment 1993/94 [paragraph 23] is made up of:

	$
Interest on loan from Bank H	910,233
Legal fee on loan from Bank H	215,047
Arrangement fee on loan from Bank H	600,000
	1,725,280
Interest on loan from Bank I	39,444
	1,764,724

The District B Property was leased to Company C in return for rental income of $1,119,171 during the year ended 31 March 1994 [paragraph 12], which was fully assessable to the Appellant in the year of assessment 1993/94. The

Appellant is prepared to withdraw the deduction claim on interest expenses paid to Bank H and the related charges (after netting off the rental income for the year). The non-deductible portion is $606,109, that is, $1,725,280 less $1,119,171.

(b) The loan expenses incurred by the Appellant in the year of assessment 1994/95 [paragraph 23] is made of:

	$
Interest on loan from Bank H	8,879,027
Interest on loan from Bank I	102
	8,879,129

The District B Property was leased to Company C in return for rental income of $1,615,727 during the year ended 31 March 1995 [paragraph 12], which had been treated as fully assessable to the Appellant in the year of assessment 1994/95. The Appellant is prepared to withdraw the deduction claim on interest expenses paid to Bank H (after netting off the rental income for the year). The non-deductible portion is $7,263,300, that is, $8,879,027 less $1,615,727.

28. The assessor agreed that bank interest of $39,444 paid to Bank I for the year of assessment 1993/94 and $102 for the year of assessment 1994/95 were deductible because the loan was applied to finance the Appellant's working capital.

29. The assessor maintained that the Appellant was not entitled to any balancing allowance in respect of the District A Property; instead, balancing charge of $32,213,264 should be added back upon disposal of the property. The assessor proposed to revise the assessment for the year of assessment 1993/94 and the additional assessment for the year of assessment 1994/95 as follows:

Year of assessment 1993/94	$	$
Loss per return [paragraph 15]		(7,417,915)
Add: Balancing allowance		35,229,337
Balancing charge [paragraph 22]		32,213,264
Loan expenses on the District B Property		
Interest on bank loan		
[$949,677 - $39,444]	910,233	
Legal fee on arrangement of bank loan	215,047	
Loan arrangement fee	600,000	
	1,725,280	

Less: Deductible loan expenses	1,119,171	606,109
Assessable profits		60,630,795
Tax payable		10,610,389

Year of assessment 1994/95 (Additional)	$
Profits per return [paragraph 19]	7,596,289
Add: Interest on bank loan and overdraft [$8,879,129 - $102 - $1,615,727]	7,263,300
	14,859,589
Less: Profits previously assessed [paragraph 20]	178,374
Additional assessable profits	14,681,215
Additional tax payable	2,422,400

30. In its profits tax return for the year of assessment 1995/96, the Appellant declared an adjusted loss of $87,116,170. The loss was arrived at after deducting a provision of $97,469,663 against the District B Property and interest on loan from Bank H to finance the acquisition of the District B Property amounting to $8,928,161. In the Appellant's audited account for the year ended 31 March 1996, the District B Property was reclassified as 'Property held for sale'. The following particulars were shown in the note to accounts:

' Property held for sale

Cost:	$
At 1 April 1995	-
Transfer from property held for redevelopment	260,431,693
Additions	2,971,354
	263,403,047
Provision	(97,469,663)
At 31 March 1996	165,933,384

The property held for sale is situated in Hong Kong and held under a long lease.

A provision of HK$97,469,663 (1995: Nil) was made during the year. The directors have determined the provision by reference to a valuation of the property as a cleared site performed by [Company J], independent professional valuers, as at 31 March 1996, on an open market value basis.'

Copies of the Appellant's audited account for the year ended 31 March 1996 and the profits tax computation were attached to the determination.

31. (a) Regarding the alleged change of intention in holding the District B Property from a capital asset to a trading asset, the Representatives contended that:

'it was the original intention of the Company to redevelop the [District B] Property into a new industrial building for long term investment purposes ...

In July 1995, owing to the poor performance of the property market, the management considered it more appropriate to dispose of the land (after the demolition of the [District B] Property which commenced in February 1996). On 21 July 1995, the Company changed its intention in holding the [District B] Property from a capital asset to a trading asset. This could be evidenced by the appointment of [Company F] as its sole agent for a period of three months to sell the land.

Subsequent to the appointment of [Company F] as its sole agent, the Company appointed [Company J] (now known as [Company K]) as its agent to sell the [District B] Property.

Moreover, the Company has offered to sell the [District B] Property through various estate agents since the date of change of intention. There were numerous discussions between the Company and the estate agents in respect of the sale of the [District B] Property. However, the sale of the [District B] Property could not be effected as both the Company and the prospective purchasers could not reach an agreement on the terms of the sale.'

(b) The Representatives provided the following documents in support of the claims:

(i) a copy of the appointment letter dated 21 July 1995 issued by the Appellant to Company F

(ii) a copy of the minutes of the board of directors' meeting held on 25 August 1995

(iii) a copy of the letter dated 19 May 2001 issued by Company K confirming that it has been acting as the Appellant's agent to dispose of the District B Property since 22 October 1995

(iv) copies of the offer letter dated 10 July 1997 issued by the estate agent, Company L and the counter-offer letter dated 15 July 1997 issued by the Appellant

32. The Representatives stated that:

(a) It was the original intention of the late Mr M, the former chairman of the Appellant, to redevelop the District B Property into a new industrial building which would be held by the Appellant for long term investment. The redevelopment plan was abandoned following the death of the late Mr M on 5 May 1995.

(b) On 5 June 1995, Mr N was appointed as chairman of the Appellant to replace the office of the late Mr M. In view of the downturn of the property market, Mr N approached Company F on 4 July 1995 in order to revisit the redevelopment potential of the District B Property. A copy of the opinion letter dated 6 July 1995 issued by Company F to the Appellant was attached to the determination.

(c) After obtaining the advice from Company F, Mr N noted that there was a significant decrease in the accommodation value (that is, the site redevelopment value) of industrial property in District B area. In this regard, Mr N together with other directors of the Appellant considered that it would be in the best interest of the Appellant to dispose of the District B Property rather than to redevelop it into a new industrial building for long term investment. This resulted in the change of intention of the Appellant in holding the District B Property from a capital asset to a trading asset on 21 July 1995.

(d) The cleared site was leased to Company O on a short-term basis at a monthly rental of $100,000 from 1 January 1997 to 30 June 1997 and thereafter on a monthly basis. The lease can be terminated by either party upon serving one month written notice.

(e) The provision made against the District B Property for the year ended 31 March 1996 is calculated as follows:

	$	$
Cost of the District B Property transferred by Company C to the Appellant on 17-2-1994		258,000,000
Add: Costs of demolition incurred in		
– 1993/94	2,269,920	
– 1994/95	161,773	
– 1995/96	2,971,354	5,403,047
Provision for demolition costs for the year ended 31-3-1996		2,066,616
Total costs of the District B Property as at 31-3-1996	(a)	265,469,663
Market value of the District B Property as		

at 31-3-1996 per valuation report prepared by Company J	(b)	168,000,000
Provision made against the District B Property for the year ended 31-3-1996 (a) - (b)		97,469,663

33. The assessor did not accept that there was a change of intention in respect of the District B Property on 21 July 1995. The assessor considered that the property had along been held by the Appellant as capital asset. On 14 April 1999, the assessor raised on the Appellant the following profits tax assessment for the year of assessment 1995/96:

	$	$
Loss per return [paragraph 30]		(87,116,170)
Add: Provision for diminution in value of the District B Property	97,469,663	
Interest expenses	8,928,161	106,397,824
Assessable profit		19,281,654
Tax payable		3,181,472

34. By notice dated 3 May 1999, the Representatives, on behalf of the Appellant, objected to the assessment for the year of assessment 1995/96 on the grounds that the provision for diminution in value of the District B Property and the interest expenses should be deducted.

35. The Appellant explained the bases for the valuation of the District B Property for the years ended 31 March 1994 and 1995 as follows:

(a) 'According to the valuation report prepared by [Company F], the market value of the [District B] Property as at 30 June 1993 was $258 million which was determined on the basis that it would be developed into a new industrial building for long-term investment. [Company F] subsequently issued a letter confirming that there was no significant change in the market value of $258 million as at 6 December 1993. In the circumstances, the [District B] Property was transferred from [Company C] to the Company on 17 February 1994 at $258 million and reflected in its audited accounts for the year ended 31 March 1994.'

(b) 'According to the valuation report prepared by [Company J], the market value of the [District B] Property as at 28 June 1996 was $168 million which was determined on the basis that it would be sold as a cleared site reflecting its underlying redevelopment potential. On 15 October 1996, [Company J] issued a letter confirming that there was no significant change in the market value of $168 million between 31 March 1996 and 28 June 1996. As such, the market value of

$168 million was reflected in the Company's audited accounts for the year ended 31 March 1996.'

(c) 'Both the values of $258 million and $168 million have taken into account the redevelopment potential of the [District B] Property. In this regard, as the Company changed its intention in holding the [District B] Property on 21 July 1995, the market value of $168 million for the year ended 31 March 1996 only reflected the redevelopment potential governed by the prevailing Government Conditions, the Town Planning Ordinance and the Building (Planning) Regulations (but not the redevelopment of a specific new industrial building contemplated by the Company at the time of the acquisition of the [District B] Property).

The change in the basis of valuation of the [District B] Property in the year ended 31 March 1996 reflects the change of the Company's intention in holding the [District B] Property from a capital asset to a trading asset as from 21 July 1995.

The Company made a provision for diminution in value of the [District B] Property of $97,469,663 for the year ended 31 March 1995.

According to the valuation report prepared by [Company J], the market value of the [District B] Property as at 21 July 1995 (i.e. the date of change of intention) was $240 million, which was determined on the basis that it would be sold as a cleared site reflecting its underlying redevelopment potential.

The Company is prepared to treat a portion of the provision which occurred before the change of intention as capital in nature and not deductible in the year of assessment 1995/96. However, it claimed that the provision which occurred after the change of intention should be regarded as revenue in nature and deductible in the year of assessment 1995/96.'

The appeal

36. The objections failed and by the Representatives' letter dated 27 December 2001, the Appellant gave notice of appeal on the grounds that:

(1) 'The Company did not receive any "sale money" on the disposal of [the District A Property]. It therefore should be entitled to a balancing allowance of HK$35,229,337 in accordance with Section 35 of the IRO for the year of assessment 1993/94.'

(2) 'The Company changed its intention in holding the property located [in District B] ("the [District B] Property") from a capital asset to a trading asset during the year of assessment 1995/96. It therefore should be entitled to a deduction for the provision for diminution in value of the [District B] Property and the interest expenses incurred on the loan for acquiring the [District B] Property after the change of intention.'

37. The appeal came before us on 24, 25 and 27 May 2002. The Appellant was represented by Mr Steven Sieker of Messrs Baker & McKenzie, solicitors, and the Respondent was represented by Mr Ambrose Ho, senior counsel. The facts stated under 'facts upon which the determination was arrived at' in the determination were agreed by the parties. A small bundle of documents was placed before us. Neither party adduced any oral evidence.

38. Mr Steven Sieker abandoned ground (2) of the grounds of appeal on change of intention. Ground (1) was the sole ground argued before us.

39. Mr Steven Sieker cited:

(a) Interpretation and General Clauses Ordinance (Chapter 1), section 3

(b) Probate and Administration Ordinance (Chapter 10), section 68

(c) Companies Ordinance (Chapter 32), section 161

(d) Money Changers Ordinance (Chapter 34), section 2

(e) New Territories Ordinance (Chapter 97), section 2

(f) Estate Duty Ordinance (Chapter 111), sections 3, 5 to 7, 9 to 10, 13, 18, 35, 39, 40 and 43

(g) IRO, sections 2, 5B, 7C, 9, 15A, 51D, 52 and 76

(h) Stamp Duty Ordinance (Chapter 117), sections 2, 18, 21, 23, 24, 29 and 51

(i) Banking Ordinance (Chapter 155), section 2

(j) Money Lenders Ordinance (Chapter 163), section 2

(k) Conveyancing and Property Ordinance (Chapter 219), section 2

(l) Organized and Serious Crimes Ordinance (Chapter 455), section 24A

(m) Inheritance (Provision for Family and Dependants) Ordinance (Chapter 481), sections 2 and 12

(n) Francis Bennion's Statutory Interpretation, 3rd edition, pages 320 to 322, 425 to 433, 665 to 670, 917 and 969 to 971

(o) Inland Revenue Department's Departmental Interpretation and Practice Notes No 37 Concessionary Deductions: Section 26C Approved Charitable Donations (January 2000)

(p) Halsbury's Laws of England, 4th edition reissue, volume 32, paragraph 102

(q) The Digest, 1992, 2nd reissue, volume 34(2), paragraphs 1942, 1946 to 1947

(r) Stroud's Judicial Dictionary of Words and Phrases, 6th edition, volume 2, pages 1632 to 1633

(s) Black's Law Dictionary, 7th edition, pages 1021 to 1022

(t) Capcount Trading v Evans (Inspector of Taxes) [1993] 2 All ER 125

(u) Bentley v Pike (Inspector of Taxes) [1981] STC 360

(v) Halsbury's Statutes of England and Wales, 4th edition, volume 41, pages 471, 474 to 475

(w) MacNiven (Inspector of Taxes) v Westmoreland Investments Ltd [2001] 1 All ER 865

40. Mr Ambrose Ho cited:

(a) Encyclopaedia of Hong Kong Taxation by PG Willoughby and AJ Halkyard, volume 3, II [13863] to [13950], II [14000] to [14220]

(b) The New Shorter Oxford English Dictionary, volume 1, page 1813

(c) Stroud's Judicial Dictionary of Words and Phrases, 5th edition, volume 3, pages 1615 to 1619

(d) Scottish Contemporary Judicial Dictionary of Words and Phrases, page 362

(e) Inland Revenue Commissioners v McGuckian [1997] STC 908

(f) Shiu Wing Ltd & Others v Commissioner of Estate Duty (2000) 3 HKCFAR 215

(g) In re Hodge's Policy [1958] Ch 239

(h) The Society of Accountants in Edinburgh and Others v The Lord Advocate [1924] SLT 194

(i) In re Townley (1884) 53 LJ Ch 516

(j) IRO, Part VI, also sections 17, 18F

(k) Income Tax Act, 1945 (Chapter 32), Parts I and VIII

(l) Extract of Inland Revenue Bill 1947

(m) Interpretation and General Clauses Ordinance (Chapter 1), sections 2 and 5

(n) Interpretation Ordinance 1950, sections 2 and 3

(o) Extract of Interpretation Bill 1950

(p) Bennion's Statutory Interpretation, 3rd edition, pages 897 to 905

(q) Interpretation and General Clauses Ordinance (Chapter 1), section 19

(r) Carver v Duncan [1985] 1 AC 1082

(s) IRC v Hinchy [1960] AC 748

Our decision

41. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

'Sale moneys'

42. Section 35 provides that:

‘ *(1) Where any capital expenditure has been incurred on the construction of a building or structure and any of the following events occurs while the building or structure is an industrial building or structure, that is to say – (Amended 30 of 1950 Schedule)*

(a) the relevant interest in the building or structure is sold; or

(b) that interest, being a leasehold interest, comes to an end otherwise than on the person entitled thereto acquiring the interest which is reversionary thereon; or

(c) the building or structure is demolished or destroyed or, without being demolished or destroyed, ceases altogether to be used,

an allowance or charge, to be known as a "balancing allowance" or a "balancing charge" shall, in the circumstances mentioned in this section, be made to or, as the case may be, on the person entitled to the relevant interest immediately before that event occurs for the year of assessment in his basis period for which that event occurs:

Provided that no balancing allowance shall be made to any person where the building or structure is demolished for purposes unconnected with or not in the ordinary course of conduct of the trade, profession or business for the purposes of which the building or structure was used in circumstances qualifying for annual allowances under section 34. (Replaced 35 of 1965 s. 18. Amended 32 of 1998 s. 19)

(2) Where there are no sale, insurance, salvage or compensation moneys, or where the residue of the expenditure immediately before the event exceeds those moneys, a balancing allowance shall be made and the amount thereof shall be the amount of the said residue or, as the case may be, of the excess thereof over the said moneys.

(3) If the sale, insurance, salvage or compensation moneys exceed the residue, if any, of the expenditure immediately before the event, a balancing charge shall be made and the amount on which it is made shall be an amount equal to the excess or, where the residue is nil, to the said moneys.

(4) Notwithstanding anything in subsection (3), in no case shall the amount on which a balancing charge is made on a person exceed the aggregate of the following amounts, that is to say –

> *(a) the amount of the initial allowance, if any, made to him under section 34(1) in respect of the expenditure in question;*
>
> *(b) the amount of the annual allowances, if any, made to him under section 34(2) in respect of the expenditure in question. (Amended 32 of 1998 s. 19)'*

43. It is common ground that there was a sale of the District A Property within the meaning of section 35(1). What is at issue is whether there should be a balancing allowance or balancing charge. The Appellant claims a balance allowance and the Respondent seeks to impose a balancing charge.

44. In our decision, the Representatives were plainly correct when they contended in their letter dated 21 January 1998 [paragraph 26] that 'moneys' in the context of 'sale moneys' meant 'sums of money' (emphasis added). A balancing allowance must have a dollar value. Likewise, a balancing charge must have a dollar value. What we are concerned with under section 35(2) and (3) are:

> (a) the (dollar) value of the 'sale moneys', 'insurance moneys', 'salvage moneys' or 'compensation moneys'; and
>
> (b) the (dollar) value of the 'residue of the expenditure immediately before the event'.

Where the latter exceeds the former [and this includes the case of the (dollar) value of the former being nil], subsection (2) provides for the making of a balancing allowance. Where the former exceeds the latter, subsection (3) provides for the making of a balancing charge. In these two subsections, 'sale moneys' means the 'sale price' or 'sale sums of money'.

45. It is the amount that matters, not how that amount is satisfied. The sale price may be satisfied by the payment of cash, by the discharge of a debt, by the transfer or allotment of shares, by the assignment of land, or by other means, bearing in mind that section 3 of the Interpretation and General Clauses Ordinance (Chapter 1) provides that '"sell" includes exchange and barter'. The Appellant repeatedly argued that it did not receive any 'sale moneys', but there is no requirement in section 35 of the 'receipt' of any 'sale moneys', 'insurance moneys', 'salvage moneys' or 'compensation moneys', not to mention 'cash' or 'cash or its equivalent'. If the 'receipt' of 'sale moneys' were a requirement, a taxpayer who sold an industrial building to his creditor in discharge of his indebtedness to his creditor would be entitled to a balancing allowance in the amount of the residue since he had 'received' no 'sale moneys' and the creditor purchaser would not be entitled to any allowance under section 34. This construction is in our decision absurd.

Section 38B

46. Section 38B is fatal against the Appellant's contention.

47. Section 38B, added in 1955, provides that:

> ' *Where an asset which qualifies for initial or annual allowances is sold, and –*
>
> *(a) the buyer is a person over whom the seller has control; or*
>
> *(b) the seller is a person over whom the buyer has control; or*
>
> *(c) both the seller and the buyer are persons over both of whom some other person has control; or*
>
> *(d) the sale is between a husband and wife, not being a wife living apart from her husband, (Added 71 of 1983 s. 18)*
>
> *the Commissioner shall, if he is of the opinion that the sale price of such asset does not represent its true market value at the time of such sale, determine such true market value and the amount so determined shall be deemed to be the sale price of such asset for the purpose of calculating the allowances and charges provided for in this Part. (Added 36 of 1955 s. 45)'*

48. It is an anti-avoidance provision which substitutes the amount determined by the Commissioner to be the 'true market value' at the time of the sale for 'the sale price of such asset'. This substitution is 'for the purpose of calculating the allowances and charges provided for in this Part'.

49. Reading section 35(2) and (3) with section 38B, it is clear that the phrase 'sale moneys' in section 35(2) and (3) has the same meaning as 'the sale price of such asset' in section 38B.

UK Income Tax Act, 1945

50. The Explanatory Memorandum of the Inland Revenue Bill 1947 stated that clauses 35 to 37 of the Inland Revenue Bill were taken from Part I of the UK Income Tax Act, 1945 and 'varied'. Clause 36 became section 35 of the IRO. Clause 36 provided that:

> ' *(1) Where any capital expenditure has been incurred on the construction of a building or structure and, in or after the basis period for the year of assessment 1947/48, any of the following events occurs while the building or structure is an industrial building or structure, that is to say –*

(a) the relevant interest in the building or structure is sold; or

(b) that interest, being a leasehold interest, comes to an end otherwise than on the person entitled thereto acquiring the interest which is reversionary thereon; or

(c) the building or structure is demolished or destroyed or, without being demolished or destroyed, ceases altogether to be used,

an allowance or charge, to be known as a "balancing allowance" or a "balancing charge" shall, in the circumstances mentioned in this section, be made to or, as the case may be, on the person entitled to the relevant interest immediately before that event occurs for the year of assessment in his basis period for which that event occurs.

Provided that no balancing allowance or balancing charge shall be made to or on any person for any year of assessment by reason of any event occurring after the end of his basis period for the fiftieth year of assessment after that in which the building or structure was first used.

(2) Where there are no sale, insurance, salvage or compensation moneys, or where the residue of the expenditure immediately before the event exceeds those moneys, a balancing allowance shall be made and the amount thereof shall be the amount of the said residue or, as the case may be, of the excess thereof over the said moneys.

(3) If the sale, insurance, salvage or compensation moneys exceed the residue, if any, of the expenditure immediately before the event, a balancing charge shall be made and the amount on which it is made shall be an amount equal to the excess or, where the residue is nil, to the said moneys.'

51. Section 3 of the UK Income Tax Act, 1945, provided that:

' *(1) Where any capital expenditure has been incurred on the construction of a building or structure, and, on or after the appointed day, any of the following events occurs while the building or structure is an industrial building or structure, that is to say –*

(a) the relevant interest in the building or structure is sold; or

(b) that interest, being an interest depending on the duration of a foreign concession, comes to an end on the coming to an end of that concession; or

(c) that interest, being a leasehold interest, comes to an end otherwise than on the person entitled thereto acquiring the interest which is reversionary thereon; or

(d) the building or structure is demolished or destroyed, or, without being demolished or destroyed, ceases altogether to be used,

an allowance or charge (in this Part of this Act referred to as "a balancing allowance" or "a balancing charge") shall, in the circumstances mentioned in this section, be made to, or, as the case may be, on, the person entitled to the relevant interest immediately before that event occurs, for the year of assessment in his basis period for which that event occurs:

Provided that no balancing allowance or balancing charge shall be made to or on any person for any year of assessment by reason of any event occurring after the end of his basis period for the fiftieth year of assessment after that in which the building or structure was first used.

(2) Where there are no sale, insurance, salvage or compensation moneys, or where the residue of the expenditure immediately before the event exceeds those moneys, a balancing allowance shall be made and the amount thereof shall be the amount of the said residue or, as the case may be, of the excess thereof over the said moneys.

(3) If the sale, insurance, salvage or compensation moneys exceed the residue, if any, of the expenditure immediately before the event, a balancing charge shall be made and the amount on which it is made shall be an amount equal to the excess, or, where the residue is nil, to the said moneys.

(4) If, for any of the relevant years of assessment (as defined for the purposes of this subsection), neither an annual allowance nor a scientific research allowance has been made, the two last preceding subsections shall have effect subject to the modification that the amount of the balancing allowance, or, as the case may be, the amount on which the balancing charge is to be made, shall be reduced by applying thereto the fraction, the numerator of which is the number of the relevant years of assessment

for which an annual allowance or scientific research allowance has been made in respect of the expenditure and the denominator of which is the total number of the relevant years of assessment.

In this subsection, the expression "the relevant years of assessment" means all years of assessment after that in which the building or structure was first used for any purpose up to and including that in which the event takes place which gives rise to the allowance or charge:

Provided that where, before the said event but on or after the appointed day, the building or structure has been sold while an industrial building or structure, the said expression means all years of assessment for which either –

(a) an annual allowance is made by reason of the building or structure being an industrial building or structure at any time between the sale and the event, or, where there has been more than one such sale, between the last such sale and the event; or

(b) an annual allowance would have fallen to be made if the building or structure had been an industrial building or structure at all times between the sale, or, as the case may be, the last such sale, and the event.

(5) Notwithstanding anything in the preceding provisions of this section, in no case shall the amount on which a balancing charge is made on a person in respect of any expenditure on the construction of a building or structure exceed the amount of the initial allowance, if any, made to him in respect of that expenditure together with the amount of any annual allowances or scientific research allowances in respect of that expenditure, and any relevant mills, factories or exceptional depreciation allowances in respect of that building or structure, made to him for years of assessment his basis periods for which end on or before the date of the event which gives rise to the charge.'

52. Our section 35(2) is taken *verbatim* from section 3(2) of the 1945 Act and our section 35(3) is taken *verbatim* from section 3(3) of the 1945 Act. In the context of the UK Act, sale 'moneys' and sale 'price' seem to be interchangeable, see section 68(1) and section 58. Although there is no local equivalent of sections 68(1) and 58, the Hong Kong legislature clearly intended that sale 'moneys' in our section 35(2) and (3) have precisely the same meaning as sale 'moneys' in section 3(2) and (3) of the UK Act. Otherwise, the legislature should have used some other

wording such as 'receipt of cash or its equivalent' instead of a verbatim reproduction in our section 35(2) and (3). Sections 68(1) and 58(3) of the UK Act read as follows:

Section 68(1)

' *"sale, insurance, salvage or compensation moneys" mean, in relation to an event which gives rise or might give rise to a balancing allowance or a balancing charge or on any person, or is material in determining whether any, and, if so, what, annual allowance is to be made to a person under Part III of this Act, –*

(a) where the event is a sale of any property, the net proceeds to that person of the sale;

(b) ...'

Section 58

' *(1) Any reference in this Act to the sale of any property includes a reference to the sale of that property together with any other property and, where property is sold together with other property, so much of the net proceeds of sale of the whole property as, on a just apportionment, is properly attributable to the first-mentioned property shall, for the purposes of this Act, be deemed to be the net proceeds of the sale of the first-mentioned property, and references to expenditure incurred on the provision or the purchase of property shall be construed accordingly.*

For the purposes of this subsection, all the property which is sold in pursuance of one bargain shall be deemed to be sold together, notwithstanding that separate prices are or purport to be agreed for separate items of that property or that there are or purport to be separate sales of separate items of that property.

(2) The provisions of the last preceding subsection shall, with the necessary adaptations, apply in relation to other sale, insurance, salvage or compensation moneys as they apply in relation to the net proceeds of sales.

(3) This Act shall have effect as if any reference therein (including any reference in the preceding provisions of this section) to the sale of any property included a reference to the exchange of any property and, in the case of a leasehold interest, also included a reference to the surrender

thereof for valuable consideration, and any provisions of this Act referring to sales shall have effect accordingly with the necessary adaptations and, in particular, with the adaptations that references to the net proceeds of sale and to the price shall be taken to include references to the consideration for the exchange or surrender and references to capital sums included in the price shall be taken to include references to so much of the consideration as would have been a capital sum if it had taken the form of a money payment.

(4) ...'

53. The provision (currently in section 3 of the Interpretation and General Clauses Ordinance (Chapter 1)) that '"sell" includes exchange and barter' has been in our statute books since the enactment of the Interpretation Ordinance 1950 (sections 2 and 3).

Factual basis of the Appellant's ground of appeal

54. Last but not least, we do not accept that there is any factual basis for the Appellant's ground of appeal that the Appellant 'did not receive any "sale money"'.

55. Clause 2 of the Agreement dated 17 February 1994 provided that:

'[Company C] and [the Appellant] have mutually agreed to exchange [the District B Property] and [the District A Property] and for equality of exchange [the Appellant] has agreed to pay [Company C] HK$118,000,000.00. The sale and purchase shall be completed at the office of ...'

56. The Appellant's 'Consolidated Cash Flow Statement for the year ended 31st March, 1994' showed the following cash flows:

'INVESTING ACTIVITIES		
Purchase of Property held for Redevelopment	$(260,269,920)	
Sale of fixed assets	140,000,000	
NET CASH OUTFLOW FROM INVESTING ACTIVITIES		(120,269,920)'

57. The Appellant's own cash flow statement shows that there was **cash inflow** of $140,000,000 (for the sale of the District A Property); a cash outflow of $260,269,920 (for the purchase of the District B Property at $258,000,000); and **net** cash outflow of $120,269,920. If the Appellant 'did not receive any "sale money"' from the sale of the District A Property, it should not have a cash inflow of $140,000,000. The cash inflow of $140,000,000 was used in part

payment of the District B Property. The cash flow statement shows that what the Appellant received from the sale of the District A Property was $140,000,000, **not** the District B Property (or a part or parcel or portion thereof), as contended by the Appellant in correspondence and on appeal before us.

58. Failing to establish the factual basis for its ground of appeal is by itself fatal to the Appellant's appeal.

Conclusion

59. The appeal fails.

Disposition

60. We dismiss the appeal and confirm the assessments as reduced or confirmed by the Commissioner.