

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D32/02

**Profits tax** – sale of property – rules of evidence – section 68 of the Inland Revenue Ordinance ('IRO') – whether a property is a capital asset or a trading asset – intention at the time of acquisition – onus of proof on the appellant.

Panel: Andrew J Halkyard (chairman), Tse Tak Yin and David Wu Chung Shing.

Date of hearing: 17 June 2002.

Date of decision: 19 July 2002.

By an agreement for sale and purchase dated 7 November 1996, the appellant purchased a property. The said property was sold by an agreement for sale and purchase dated 20 May 1997. The appellant objected to the profit derived from this sale as the subject of the profits tax assessment.

The appellant contended that (1) she purchased the property as a residence for her elderly mother and for herself. As she did not intend to trade, she used her own name to purchase the property; (2) the short period for holding the property was because of *fung shui* problem culminating in her severe illness, the car-parking problem and a good offer made by an interested party; (3) she challenged the fact in dispute that the said property did not have any water consumption from January to July 1997. The question for decision is whether the appellant is assessable to profits tax by having entered into an adventure in the nature of trade.

In the hearing, the counsel for the appellant objected to the Commissioner being allowed to introduce documentation that was hearsay and was prejudicial to the appellant's case, and before relying upon it the Commissioner should be required to call the makers to give oral evidence to adduce the documents and thus be subject to cross-examination.

#### **Held:**

1. The Board ruled that it would allow the introduction of the documentation and allow the appellant to be cross-examined thereon, noting that it had the requisite power to so order and was not bound by the rules of evidence (section 68(7) of the IRO). The Board noted that in the great majority of appeals the Commissioner, under her statutory powers of obtaining information from third parties, adduced evidence adverse to the taxpayer (such as correspondence from employers, financial

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institutions etc) without the necessity of calling the maker to prove the document. The Board also ruled that the appellant can, of course, submit argument on the probative value of the documents and whether the Board should rely upon them in reaching its decision in this appeal.

2. To determine whether a property is a capital asset or a trading asset, the purchaser's intention at the time of acquisition is crucial (Simmons v IRC (1980) 53 TC 461 followed). An intention to hold property as a capital investment must be definite and not simply a wish incapable of fulfillment. Moreover, the stated intention of a person is not decisive. Actual intention can only be determined objectively (usually on the basis of the so-called 'badges of trade') (Marson v Morton [1986] 1 WLR 1343; All Best Wishes Ltd v CIR (1992) 3 HKTC 750 and D11/80, IRBRD, vol 1, 374 followed).
3. Having heard and considered the appellant's evidence, and on the fact found by the Board, the Board concluded on the balance of probabilities that (1) the appellant's stated reason for purchasing the said property had not been substantiated, (2) judged objectively and applying the authorities referred to above, in purchasing the said property the appellant engaged in an adventure in the nature of trade, and (3) the appellant had not discharged her burden of proof under section 68(4).

### **Appeal dismissed.**

Cases referred to:

Simmons v IRC (1980) 53 TC 461  
Marson v Morton [1986] 1 WLR 1343  
All Best Wishes Ltd v CIR (1992) 3 HKTC 750  
D11/80, IRBRD, vol 1, 374

Leung Wing Chi for the Commissioner of Inland Revenue.  
Ho Chi Ming Counsel instructed by Messrs Chan & Tsu for the taxpayer.

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### Decision:

1. The Appellant has objected to the profits tax assessment for the year of assessment 1997/98 raised on her. She claims that the profit derived by her from the disposal of a property was capital in nature and not chargeable to tax. The Commissioner rejected the Appellant's objection to the assessment. The Appellant has now appealed to the Board of Review from the Commissioner's determination.

### The facts

2. The background facts to this appeal are set out as facts 1 to 13 of the Commissioner's determination and we so find. We summarise these as follows.

(a) Property 1

Prior to the transaction giving rise to the profits in dispute, the Appellant and her family (husband and daughter) rented and resided in a property at Road A ('Property 1') for a term of two years, commencing 1 February 1996, at a rent of \$41,000 per month. Her employers (Solicitors' Firm B until 30 November 1996 and then Solicitors' Firm C until 14 September 1997) refunded the rent she paid for leasing Property 1.

(b) Property 2

The Appellant and her husband jointly owned another flat at Road A ('Property 2').<sup>1</sup> The Appellant's representative claimed that she regularly resided with her mother in this flat from 5 March 1996 to 4 January 1997.

(c) Property 3

(i) By an agreement for sale and purchase dated 7 November 1996,<sup>2</sup> the Appellant purchased a third flat at Road A ('Property 3') at a price of \$11,870,000. The size of Property 3 was 1,268 square feet and it had three bedrooms. The purchase was completed by assignment on 6 January 1997.

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<sup>1</sup> The Appellant signed the provisional agreement to purchase Property 2 on 12 February 1996. The Appellant signed the provisional agreement to sell Property 2 on 30 October 1996.

<sup>2</sup> The Appellant signed the provisional agreement to purchase Property 3 on 18 October 1996.

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- (ii) By an agreement for sale and purchase dated 20 May 1997,<sup>3</sup> the Appellant sold Property 3 for \$16,850,000. The sale was completed by assignment on 27 June 1997. The profit derived from this Property 3 is the subject matter of this appeal.
- (iii) In response to the assessor's enquiries, the Appellant asserted that the intended usage of Property 3 was 'residence for mother & preparation for moving in as residence' and 'change of employment in 15.9.1997' and that 'No rented accommodation will be provided after Sept 1997 [upon change of employment] therefore when I bought [Property 3] was for residence for myself & my family with my mother'. Upon objection to the assessment in dispute she stated 'We moved in there in January 1997 and have no intention to move again within a reasonable time. We wished to settle down'.
- (iv) Upon objection to the assessment in dispute, the Appellant asserted that the reason for sale of Property 3 was 'After two to three weeks, my mother began to complain that she was not well most of the time. The whole flat ... was facing the west direction. ... My mother who is/was in her late seventies and housebound could not bear the heat and the sunshine. She was not used to live in an air conditioning room all day. She was so unwilling to stay in the flat that she had to go away in the morning and returned late in the evening. ... The heat was unbearable ...'. The Appellant claimed that even though they had resided in other units of the same building, these had not faced west and that neither she nor her mother realized the effect of this change of direction when Property 3 was purchased.
- (v) The Appellant claimed that there was no visitors' car park at Road A; the car parks were not for sale; and there was a long waiting list to rent a car park. Her married brothers 'found it difficult to visit [their] mother as they have to come to attend to her two to three times per week with food and other things for her'.
  - (1) The Appellant became ill in March 1997 and stayed in hospital for several days. Subsequently she underwent major surgery. She asserted that her mother and relatives blamed this on the bad *fung shui* of Property 3 that faced west and towards the Jewish mosque [*sic*]. This was later confirmed by the advice of a *fung shui* specialist.

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<sup>3</sup> The Appellant signed the provisional agreement to sell Property 3 on 5 May 1997.

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- (2) The Appellant claimed that, in order to realize her plan of bringing her mother and her family together under one roof, she had no alternative but to buy another property in the same vicinity. She stated she had to sell Property 3 to purchase a replacement property. She claimed her intention was to find a flat with a car park, a visitors' car park, and that did not face west. In the event, she purchased Property 4 (see below).

(d) Property 4

- (i) On 9 May 1997, the Appellant signed a provisional agreement to purchase a flat and a car parking space at Road D ('Property 4') at a price of \$13,780,000. The size of Property 4 was around 1,433 square feet and it had three bedrooms. The purchase was subject to a tenancy that was due to expire in March 1998. The purchase was completed by assignment on 18 July 1997.
- (ii) In her tax return for the year of assessment 1997/98 the Taxpayer declared that Property 4 was vacant.<sup>4</sup>
- (iii) In her tax return for the year of assessment 1998/99 the Taxpayer declared that Property 4 was let out for rental income during the period from 15 June 1998 to 31 March 1999. The Appellant's representative claimed in a letter to the assessor that Property 4 had been rented out since acquisition because the Appellant's mother changed her mind and decided to live with the Appellant's brother, Brother 1, who resided in Road E, District F. Brother 1's flat was 600 square feet and had two bedrooms.

(e) Property 5

After the expiry of the lease at Property 1, the Appellant and her family resided in another flat at Road D ('Property 5').

### **Fact in dispute**

3. According to the Water Supplies Department, Property 3 did not have any water consumption from 23 January 1997 to 5 July 1997. The Appellant challenges this.

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<sup>4</sup>In her oral evidence, the Appellant conceded that this was a mistake. She explained she meant that the property was vacant on the date she signed the tax return.

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### Grounds of appeal

4. In her notice of appeal, the Appellant contended that:
  - (a) She purchased Property 3 as a residence for her elderly mother and for herself. As she did not intend to trade, she used her own name to purchase the property.
  - (b) The short period for holding Property 3 was because of *fung shui* and an interested party made a good offer.
  - (c) She challenged the fact in dispute and claimed that to her recollection she and her mother had taken showers and boiled some water in Property 3. Meals were, however, taken at Property 1 and sometimes they took showers in that property before returning to Property 3 if her husband was not at home.
  - (d) The reasons for selling Property 3 were because of the fierce heat (that was not apparent in Property 1), the *fung shui* problem culminating in her severe illness and the car-parking problem.
  - (e) After selling Property 3 she had trouble buying a replacement flat and ultimately bought Property 4 that was subject to tenancy. The estate agent told her that the sitting tenant of Property 4 might move away soon. It is thus clear that Property 4 was not suitable for speculation. She purchased this flat with the intention to live with her mother. Ultimately, her mother changed her mind after moving out of Property 3 and while waiting to move to Property 4.

### Procedural issue before the Board

5. The Commissioner's bundle, R1 at pages 75 to 78 included correspondence and a computer printout from Property Agency G, the real estate agent who acted for the Appellant's purchase of Property 3. It purported to show that the Appellant had given instructions to the agency by at least 20 December 1996 (a date prior to completion) to sell Property 3. Mr Ho Chi-ming, Counsel for the Appellant, objected to the Commissioner being allowed to introduce this documentation. Mr Ho's objection was put on the basis that it was hearsay, was prejudicial to the Appellant's case, and before relying upon it the Commissioner should be required to call the makers to give oral evidence to adduce the documents and thus be subject to cross-examination.

6. The Board ruled that it would allow the introduction of the documentation and allow the Appellant to be cross-examined thereon, noting that it had the requisite power to so order and was not bound by the rules of evidence (section 68(7) of the IRO). The Board noted that in the great majority of appeals the Commissioner, under her statutory powers of obtaining information from

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third parties, adduced evidence adverse to the taxpayer (such as correspondence from employers, financial institutions etc) without the necessity of calling the maker to prove the document. The Board also ruled that the Appellant can, of course, submit argument on the probative value of the documents and whether the Board should rely upon them in reaching its decision in this appeal.

### **The Appellant's evidence before us**

7. The Appellant appeared before us and gave sworn evidence. She was cross-examined by the Commissioner's representative. Part of that evidence relates to matters that have been set out above. We do not repeat it here. Other matters raised by the Appellant are summarised as follows.

#### (a) The Appellant's family

She has four brothers and one sister. Two of the brothers were married with children. One brother, Brother 2 (now deceased), lived in her mother's flat at District H. Another unmarried brother, Brother 1, is described at paragraph 2(d)(iii) above. Her younger sister is married and lives in Country I. Previously her mother lived in her District H flat with Brother 1 and Brother 2. Brother 1 moved to a flat in Road E, District F because he could not get along with Brother 2. Gradually her mother could not cope living with Brother 2. Her mother did not wish to stay with the Appellant's married brothers because she did not get along with their wives. Thus, some time around 1995 to 1996 the Appellant decided she wanted her mother to live with or near her so that she could take care of her. She recognized, however, that this plan had to be balanced with her husband's feelings and she worried that her mother and husband would not get along.

#### (b) Property 1

As noted at paragraph 2(a) above, she and family (husband and daughter) previously resided in the leased Property 1. After the first 12 months the lease for Property 1 could be terminated with one month's notice. The decision to lease the property was made in a hurry. At that time she was very busy at work and only viewed one or two other flats prior to settling the lease. Her mother could not stay comfortably with her in Property 1 because there was no spare bedroom for her (the third room in this flat, which contained built-in furniture, was a purpose-made study and the landlord did not allow alteration).<sup>5</sup>

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<sup>5</sup> The lease of Property 1 describes the room as 'bedroom', not 'study' and the schedule to the lease shows that the only extra furniture placed in that room (as distinct from that contained in the second bedroom occupied by the Appellant's daughter) was '1 coffee table' and '2 chairs', but with no 'bed' provided. When asked why she chose to rent this property when it was claimed to be unsuitable for her mother's occupation, the Appellant

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### (c) Property 2

- (i) When she and her husband purchased Property 2, she claimed that her initial plan was that she and her family would eventually live in the property and that her mother could then join them.<sup>6</sup> She stated that she decorated the property (although she did not indicate when) and the expenses (wall paper, painting and built-in wardrobes) amounted to \$95,600. She suggested that the property was purchased because she lacked confidence that her employee housing benefit would continue if she changed employment and she wished to own a home of her own.
- (ii) After the property was purchased she leased it to the vendor at a monthly rent until he could find another place to move. This lasted for several months. She could not give precise details of the lease arrangements nor say when she opened the utility accounts.<sup>7</sup> When cross-examined as to why she let the vendor occupy the property when her mother wanted to leave her District H flat (because her mother did not want to live with Brother 2), she stated that her mother changed her mind as to moving (depending upon her relations with Brother 2) and also the vendor refused to vacate the premises.
- (iii) After the vendor moved out, she and her mother stayed in Property 2 for several months prior to sale. This was part of the plan to have all her family living in close proximity and with the hope that, if her mother could get along with her husband, they could all live together in one flat. Occasionally during their occupation of Property 2 her mother stayed with the Appellant's brothers, Brother 1 and Brother 2, at the weekend. In cross-examination, she stated that she moved to live in the property with her mother 'in late 1996' and later amended this to 'August or September 1996' (specific dates not given). When reminded in cross-examination that she had previously advised the assessor (see paragraph 2(b)) 'We were there for 10 to 11 months', she said that this

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answered that her plan for having the whole family living together was not then finalized and that her mother changed her mind regularly. She repeated that the property was leased in a hurry.

<sup>6</sup> In a property transaction questionnaire dated 11 December 1997 submitted to the assessor, the Appellant claimed, and confirmed in cross-examination, that the property was purchased as a residence for her mother and also because her then employer provided her with rental benefit. In a letter to the assessor dated 21 April 1998 she claimed that 'The intention for the purchase is to live there as our matrimonial home'.

<sup>7</sup> The electricity account produced by the Commissioner showed that the vendor ceased to be the registered customer on 3 August 1996 and the Appellant became the registered customer on that date until the account was closed on 4 November 1996.



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was a mistake and what she really meant was that she owned the property for 10 to 11 months.<sup>8</sup>

- (iv) After staying in Property 2 for some time, she and her mother were not happy with it. Problems included noisy building works that bothered her mother (construction work had commenced in April 1996), low floor close to the road with no view, and the property was right on top of the refuse room. She stated that she moved out of the property in late December 1996 before leaving Hong Kong for a family holiday to Country J.
- (v) The electricity account produced by the Commissioner (note 7 above refers) showed minimal use of electricity for the period from 3 August to 4 November 1996. In the six weeks prior to 4 November 1996, a total of only five units were consumed. The Appellant's explanation to the proposition that this was inconsistent with her claim of self-residence was 'I disagree that we didn't move to [Property 2]. My mother and I did stay there. We went there late at night (around 10 to 11 p.m.) and went to bed straight away.'<sup>9</sup>

### (d) Property 3

- (i) Subsequently, without solicitation, an estate agent from Property Agency G introduced her to Property 3, a flat in the same tower as Property 2. It was a higher floor than Property 2 and had a better view. She then decided to dispose of Property 2 and purchased Property 3. She signed the provisional agreement to purchase Property 3 on 18 October 1996. The profit made on Property 2 was used to help finance Property 3.
- (ii) She purchased Property 3 in her own name because the provisional sale and purchase agreement was executed at 9:30 in the evening when the Property Agency G's agent took the agreement to the clubhouse in the Road A complex for her to execute.
- (iii) Prior to purchasing Property 3 she viewed it with Property Agency G's agent. At this time she did not appreciate the problem of its west facing

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<sup>8</sup> The Appellant gave a similar answer when reminded that her former solicitors had informed the assessor on 20 February 2001 that she 'regularly resided with mother at [Property 2]' in the period '05.03.96 – 04.01.97'. Although she admitted having read this letter, she said she read it in a hurry and did nothing further about it.

<sup>9</sup> The water account produced by the Commissioner for Property 2 showed the Appellant's husband as the registered consumer from 6 August to 30 October 1996. For the totality of this period, the account showed that the meter reading remained the same and nil consumption of water was recorded. The Appellant did not address this matter in her evidence.

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aspect because she viewed it in the late evening. Neither her husband nor mother had viewed Property 3 before she signed the provisional agreement. She said that this was signed in a hurry. She paid a deposit of \$300,000 upon signing the provisional agreement. Notwithstanding all the claimed problems that lead to the subsequent sale of the property as well as her current problems regarding Property 2, she said that she did not really think about the size of and possibility of forfeiting the deposit.

- (iv) A further clause in the provisional agreement provided that the Appellant could visit the property five times before completion. She went to visit the property on three different occasions: first on her own, and later with her husband and with her mother. The *fung shui* specialist she engaged to inspect the property was too busy to see the flat prior to completion. He only came in March and again later in April 1997.
- (v) Decorations for the property (wall paper and curtains) were completed in two or three days. The decoration expenses amounted to around \$57,000. All she then needed to do was to move basic furniture, including two beds, from Property 2 to Property 3.
- (vi) She and her mother moved in to Property 3 shortly after she obtained possession. Apart from spending a few nights in her District H flat with Brother 2, her mother spent almost every night at Property 3 during January to April 1997. On each of these nights she stayed with her mother. During this time, her mother would stay in Property 1 until bedtime, around 10 to 11 p.m., and she would then escort her mother to Property 3. Her intention was that this was a temporary arrangement and she would move the whole family to Property 3 when she was not so busy at work and her husband could get along with her mother. She later stated that she intended to give one-month notice to the landlord to terminate the tenancy of Property 1 in February 1997 and move to Property 3 in March to April 1997.<sup>10</sup>
- (vii) She opened an account with the Water Supplies Department in her own name for Property 3 as well as an electricity account. She does not understand the disputed fact above. She stated that she and her mother did use water during their occupation, although perhaps not much since they normally showered in Property 1 (sometimes the Appellant showered in the clubhouse after she took exercise) and they rarely

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<sup>10</sup> In the event, the Appellant did not give notice immediately after January 1997. She said that this was because she was very busy with her new job, she wanted more time for her husband to get used to her mother and there was no pressure from her new employer to cut off her housing benefit.

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cooked in Property 3 (they had two maids in Property 1). Moreover, the decorators would have used water and also during the period from 1 May to 15 June 1997 when she let her friend, Ms K and family, stay in the flat. When challenged in cross-examination that nil consumption was inconsistent with the claim of self-use the Appellant stated 'I can't understand why. I did use water, as did the decorators, as did [Ms K]. Maybe the reading was too low and nothing was recorded'.

- (viii) The electricity account produced by the Commissioner showed minimal use of electricity for the period from 8 January 1997 when the Appellant became the registered customer until 24 April 1997. During this period a total of less than 170 units were consumed. When challenged in cross-examination that this consumption was inconsistent with the claim of self-use the Appellant stated that 'there was no ironing, we only went back at 11 p.m. to sleep, and we did not use the refrigerator (it was not clean and was broken) and we did not use the washing machine which was unplugged'.
- (ix) Initially there was no real parking problem, but from February or March 1997 onwards the management office strictly prohibited visitors' cars at Road A.
- (x) Following her illness in March 1997 she and her mother no longer stayed in Property 3 after the end of April 1997. When reminded in cross-examination that her former solicitors had previously stated to the assessor on 20 February 2001 that she 'regularly resided with mother at [Property 3]' during the period from '12.01.97 – 27.06.97', she said that this latter date was a mistake and what she meant was that this was the date she gave the purchaser vacant possession. From May 1997 onwards her mother stayed in her own District H flat or with the Appellant's brother, Brother 1.
- (xi) In cross-examination she was asked how her mother knew Property 3 was so hot during the day if she only went there late in the evening. She replied that at the beginning of their stay in the property her mother stayed there during the day until around 3:30 to 4:00 p.m. when the Appellant's daughter returned home from school.
- (xii) She stated that she and her husband (a doctor in private practice) could finance the mortgage instalments for Property 3 that amounted to around \$74,000 per month. Although her employment income did drop significantly in the year of assessment 1997/98 (and appears to have been

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nil in the year of assessment 1998/99), and although her husband did not appear to be earning much more than \$20,000 per month in the year of assessment 1996/97, when she purchased Property 3 she anticipated that her income would double in the succeeding year and this would allow her easily to pay the mortgage instalments. If anything really went wrong financially, she expected that her brothers, sister and mother would support her.

- (xiii) Since she was a conveyancing lawyer she regularly talked to real estate agents about her clients' property transactions. After she purchased Property 3 she received many unsolicited calls from agents, enquiring whether she would sell. Although she admitted to giving a Property Agency G's agent a selling price, she said this was an unreasonably high price and she just wanted to know the market value of Property 3 as a matter of interest. She did not remember to whom she spoke or what price she quoted. But she did state that at that time she had not instructed any agent to sell. Finally, however, following the problems alluded to above, she decided to dispose of Property 3 in late March or early April and did so in early May 1997.<sup>11</sup>
- (xiv) The Appellant was cross-examined by the Commissioner's representative on the Commissioner's bundle, R1 at pages 75 to 78. These documents included correspondence and a computer printout from Property Agency G, the real estate agent who acted in the Appellant's purchase of Property 3. The documents purport to show that the Appellant had given instructions to the agency by at least 20 December 1996 (a date prior to completion) to sell Property 3 and that subsequently the Appellant changed the asking price for the property on various occasions. The Appellant denied that Property 3 was offered for sale before the assignment and was at a loss to explain how the agent could have obtained the key to the property prior to the assignment (since she did not obtain the key from the vendor until completion and she also thought she may have been in Country J at the relevant time). She was also at a loss to explain certain entries contained in the computer printout from Property Agency G. She agreed that she did discuss selling prices with some agents (details not given) but maintained that this must be looked at in the context of her need as a conveyancing lawyer to be on friendly terms with the agents. She stated that if she had offered the property for sale 'I didn't mean it' and 'I forgot what I said [to the agents]'

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<sup>11</sup> The Appellant signed the provisional agreement to sell the property on 5 May 1997.

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(e) Property 4

- (i) The circumstances relating to her purchase of Property 4 are set out in the facts above. She also stated that, because she was busy at work, was not in good health, and because of the rapid increase in the price of flats, she purchased Property 4 and car park in her own name and in a hurry. She could not recall if she viewed the property prior to purchase, but she did view a similar flat in the same block. She could not recall whether she viewed the property with other members of her family, but she did recall that she did not consult her mother before purchasing the property. Although stating that she became worried because she could not find a replacement flat and this process took one or two weeks, she agreed that she signed the provisional sale and purchase agreement to buy Property 4 on 9 May 1997, only four days after agreeing to sell Property 3.
- (ii) In the event, she did not move into Property 4. When the purchase was completed in July 1997, her mother informed her that she did not want to move there and instead would go to live with the Appellant's brother, Brother 1.<sup>12</sup> Property 4 was purchased subject to tenancy and the tenancy continued until February 1998.

(f) Property 5

- (i) When the tenancy of Property 1 expired on 1 February 1998, the timing did not match the availability of Property 4 that would only have become vacant at the end of February 1998. After September or October 1997 she and her husband decided not to live in Property 4 and move to Property 5. They moved on 2 February 1998 and live there to the present day.
- (ii) A corporation controlled by her husband purchased this flat with vacant possession on 27 May 1997, a few weeks after the Appellant purchased Property 4. The assignment was executed on 20 August 1997. During the year ended October 2001 she paid rent for this property and her employer reimbursed the rental payment.
- (iii) Property 5 was situated on Road D (as was Property 4). The Appellant stated that purchasing this property allowed some flexibility because if her mother later decided to live nearby, her mother could live in Property 4 or with her in Property 5.

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<sup>12</sup> Earlier in her oral evidence the Appellant stated that her mother began to stay in her own flat or with the Appellant's brother in May 1997.

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### The relevant law

8. On the basis that this appeal was argued before us, the question for decision is whether the Appellant is assessable to profits tax by having entered into an adventure in the nature of trade (section 14, section 2(1) definition of ‘trade’). To determine whether a property is a capital asset or a trading asset, the purchaser’s intention at the time of acquisition is crucial. In Simmons v IRC (1980) 53 TC 461, Lord Wilberforce stated at 491:

*‘ 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?’*

9. An intention to hold property as a capital investment must be definite and not simply a wish incapable of fulfilment. Moreover, the stated intention of a person is not decisive. Actual intention can only be determined objectively (usually on the basis of the so-called ‘badges of trade’, see Marson v Morton [1986] 1 WLR 1343 at 1348 to 1349).

10. In All Best Wishes Ltd v CIR (1992) 3 HKTC 750, Mortimer J stated at 771:

*‘ It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.’*

11. A similar statement is found in D11/80, IRBRD, vol 1, 374 where the Board of Review held at 379:

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

12. Finally, the onus of proving the assessment appealed against is excessive or incorrect is on the Appellant (section 68(4)).

### The Appellant’s contentions

13. Mr Ho Chi-ming of counsel represented the Appellant. Essentially, Mr Ho argued that the Appellant purchased Property 3 as a residence, first for her mother and with the ultimate plan of moving her family (husband and daughter) to live there. To support this contention Mr Ho

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summarised the history of the Appellant's periods of residence in Properties 1, 2, 3 and 5 and contended that the various changes of residence were made for good reasons and that these supported the Appellant's main argument.

14. Mr Ho also contended that the dates for which the Appellant and her husband were the registered customers for electricity and water for Property 2 and Property 3, as well as the actual use of those utilities, supported the Appellant's case. He argued that water had certainly been used in Property 3 and that presumably the consumption was below the exemption level such that the Water Supplies Department treated the consumption as '0'.

15. Mr Ho repeated his objection to the admission of Property Agency G's documents in the Commissioner's bundle, R1 at pages 75 to 78, noted that he had restricted his re-examination only to those matters raised in the cross-examination, and asked us not to rely upon any other matter contained therein which was not directly put to the Appellant in cross-examination. Mr Ho argued that several Property Agency G's employees had contributed entries to these documents, that it was not clear what the annotations in the computer printout referred to, and that we should place little weight thereon. In conclusion, Mr Ho submitted that the evidence, including an instruction given to Property Agency L (another real estate agency) showed the Appellant only changed her mind to sell Property 3 in April 1997.

16. Mr Ho asked us to note that there was a good reason why the Appellant's mother did not give evidence, namely she was a very elderly lady and the appeal also touched upon her relationship with Brother 2, who subsequently died in tragic circumstances. We accept this explanation.

### **The Commissioner's contentions**

17. Ms Leung Wing-chi represented the Commissioner. She contended that the Appellant purchased Property 3 with the intention of resale at a profit when the opportune time arose. She argued that the Appellant's submissions as to her intention for purchasing Property 3 as a residence for her mother and later for her family should not be accepted and that the objective facts show that the property was purchased as an adventure in the nature of trade.

### **Analysis**

18. We considered very carefully the evidence and demeanour of the Appellant. She struck us throughout as being quite impulsive in entering into virtually all her property transactions, and particularly so in purchasing Properties 2, 3 and 4. For instance, the deposit paid for entering into the provisional sale and purchase agreement for Property 3 was \$300,000, an amount exceeding three months of her salary. Yet she still maintained that she purchased the flat as a residence for her mother and later for her family home, even though she then had several problems with Property 2 (allegedly purchased for a similar purpose). In the event, not one of Properties 2,

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3 and 4 was used for the avowed purpose of housing her family and her mother under one roof. In our view, the purchase of Property 3 is much more consistent with the conclusion that it was bought on impulse, a spur-of-the-moment decision.

19. The Appellant’s answers in cross-examination, whilst not evasive, sometimes appeared forced and opportunistic. For instance, when asked in cross-examination how her mother knew it was unbearably hot in Property 3, when her evidence in chief was that her mother only stayed there at night, she added that in the early period of their residence her mother stayed in the flat during the day until the Appellant’s daughter came home from school. This embellishing comment, which was only uttered upon challenge, indicates a switch in thinking from her previous evidence. How this extended period of occupation was consistent with the non-existent water consumption and minimal electricity consumption was never properly explained. Such answers did not enhance the Appellant’s credibility. In the event, we reject the Appellant’s evidence that she and her mother spent months sleeping in Property 3. (If necessary, we would make a similar conclusion regarding Property 2.) Other discrepancies between her evidence and the objective facts did little to allay our concerns that her stated intention for purchasing Property 3 had not been substantiated. To illustrate this conclusion, we have produced the following table showing some of the concerns. The left-hand table sets out some of the Appellant’s claims; the right-hand table shows the facts and [in square brackets] some matters on which we have made inferences.

<p><b>Property 1</b> Plan made in the year of assessment 1995/96 that the family (including the Appellant’s mother) would all be housed under one roof</p>	<p>The Appellant’s mother did not occupy this property</p> <p>The decision to lease the Property was made ‘in a hurry’</p> <p>In view of claimed problems with housing the Appellant’s mother in the third bedroom, this rented property was simply not suitable for realizing the plan</p>
<p><b>Property 2</b> Continuation of plan that the family (including the Appellant’s mother) would all be housed under one roof</p> <p>The Appellant’s mother had indicated that she wanted to leave her District H flat</p> <p>The Appellant and her mother lived in the property</p>	<p>When purchased, the property was immediately leased to the vendor. Vendor refused to vacate the premises</p> <p>Mother changed her mind</p>



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<p>(a) in late 1996                  (b) from August or September 1996</p> <p>(c) 10 to 11 months</p> <p>Problems leading to sale included                  (a) noisy construction site next door                  (b) low floor with no view                  (c) flat sited above refuse room</p>	<p>(a) Wrong                  (b) Electricity account shows the Appellant as the registered customer from 3-8-1996 to 4-11-1996. However, the electricity account shows minimal use of electricity – only five units consumed in the six weeks prior to 4-11-1996                  (c) Wrong. The Appellant admitted mistake (see note 8 and accompanying text)</p> <p>The water account shows nil consumption during the period 6-8-1996 to 30-10-1996</p> <p>[We are not prepared to accept that the Appellant and her mother lived in this property]</p> <p>(a) construction commenced by April 1996 (prior to 3-8-1996)                  (b) [obvious at time of purchase]                  (c) [obvious at time of purchase]</p>
<p><b>Property 3</b>                  West facing problem not appreciated at the time of purchase</p> <p>The Appellant intended to give one-month notice to the landlord of Property 1 and for the family to move to Property 3 in March to April</p>	<p>The Appellant was familiar with the complex at Road A. [It is reasonable to think, particularly in view of her claimed experience with the (unsatisfactory) Property 2, that she would very carefully consider her purchase of this property if it were truly to realize her long-held plan]</p> <p>The property was purchased ‘in a hurry’</p> <p>Deposit of \$300,000 paid upon signing provisional agreement for purchase. The Appellant stated ‘She really didn’t think about this’</p> <p>This did not happen</p>

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<p>1997</p> <p>Intended that arrangement with the Appellant's mother living in the property would be temporary until whole family moved in</p> <p>Former solicitors said that the Appellant regularly resided with her mother in the property from 12-1-1997 to 27-6-1997</p> <p>Water was used while the Appellant and her mother occupied the property / and by the decorators / and by Ms K</p> <p>Initially, the Appellant's mother resided in the property during the day before the Appellant's daughter came home from school</p> <p>The Appellant and her mother lived in the property from January to April 1997</p>	<p>This did not happen. The whole family did not reside in the property</p> <p>Wrong. The Appellant admitted the mistake</p> <p>Water account showed nil consumption. Not only was no charge for water made, but the meter reading stayed <i>exactly</i> the same</p> <p>Electricity account showed minimal consumption from 8-1-1997 to 24-4-1997. Water account showed nil consumption (see above)</p> <p>[In light of the above facts, as well as the other evidence before us, we do not believe this claim]</p>
<p><b>Property 4</b></p> <p>Continuation of plan that the family (including the Appellant's mother) would live together under one roof</p> <p>The Appellant faced difficulty in finding a</p>	<p>The property was purchased subject to a tenancy that would expire at the end of ten months. It was thus not immediately suitable for realizing the plan</p> <p>The property was purchased 'in a hurry'</p> <p>The Appellant could not recall if she viewed the property with other family members. Her mother did not view before purchase</p> <p>In the event, the family did not move into the property</p> <p>Ultimately, the Appellant's mother did not live in the property. She 'changed her mind'</p> <p>The provisional sale and purchase agreement</p>

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<p>replacement property for Property 3</p> <p>During the year of assessment 1997/98 the property was vacant</p>	<p>for the purchase was signed within four days of the Appellant selling Property 3</p> <p>Wrong. The Appellant admitted the mistake (see note 4)</p>
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20. Notwithstanding all these problems and inconsistencies, we must add that we believe that the Appellant genuinely wished her family to live together with her mother. What we do not find proved to our satisfaction is that she purchased Property 3 with the intention that she could realistically accomplish this plan. The overall impression we gained was that, as a loving daughter, the Appellant *ideally* wanted to reside together with her family and her aged mother. But her purchase of Property 3, judged objectively, could not be intended to achieve this goal. In short, we do not accept her evidence that she resided in Property 3 with her mother to anything like the extent she said, if at all (the utilities records speak volumes in this regard) and that she then had to sell it in totally unforeseen circumstances. When these matters fall away, we have no doubt whatever that the objective facts before us, including the quick purchase and sale, disclose a very different picture from that painted by the Appellant.

21. In these circumstances, the Appellant could only succeed in her appeal by showing demonstrably that the Commissioner was wrong in reaching the conclusion that the Appellant had embarked upon an adventure in the nature of trade. In view of the short holding period, our rejection of the Appellant's claims made regarding her occupation of Property 3, as well as the other evidential factors and concerns set out in the table above, it was clearly open to the Commissioner to decide that in purchasing and selling this property the Appellant had entered into an adventure in the nature of trade.

22. In reaching our decision we have decided not to rely upon Property Agency G's documentation and we are prepared to accept Mr Ho's arguments as to its lack of probative value. If we were wrong, however, and we should have placed weight on the disputed documentation, then we would conclude that the matters referred to therein are fatal to the Appellant's case.

23. The evidence on the remaining issue concerning the Appellant's financial capacity to hold Property 3 was fairly well-balanced. But given the Appellant's income earning prospects in 1996, and the likely support of her husband and other family members, we find it more probable than not that the Appellant could have financed the holding of Property 3 *if* her evidence for purchasing long-term as a family residence had been accepted.

**Conclusion**

24. Having heard and considered the Appellant's evidence, and on the facts found by us, we conclude on the balance of probabilities that (1) the Appellant's stated reason for purchasing

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Property 3 has not been substantiated, (2) judged objectively and applying the authorities referred to above, in purchasing Property 3 the Appellant engaged in an adventure in the nature of trade, and (3) the Appellant has not discharged her burden of proof under section 68(4). We thus order that the appeal be dismissed and that the assessment in dispute be confirmed.