Case No. D35/10

Profits tax – onus of proof – appellant annexing a statement with her Notice of Appeal but without giving evidence – whether the appellant discharged her onus – section 68(4) of the Inland Revenue Ordinance ('IRO') – chargeability of profits tax – meaning of 'trade' – whether disposal of properties trades or sale of capital assets – whether there was intention at the time of acquisitions – whether the appellant's explanation credible – sections 2 and 14(1) of the IRO.

Panel: Horace Y L Wong SC (chairman), Edward Cheung Wing Yui and Wong Ho Ming Horace.

Date of hearing: 30 September 2008.
Date of decision: 31 December 2010.

The appellant was not a Hong Kong resident and did not have any employment income in Hong Kong. During 2004 and 2005, the appellant purchased and/or sold 5 properties, but did not report any profits derived from their sale.

The appellant was assessed with assessable profits of $600,000 (with tax payable thereon at $96,000) and $1,150,000 (with tax payable thereon at $184,000) for the years of 2004/05 and 2005/06. The appellant objected to the above assessment, and the Deputy Commissioner made a determination with a result that assessable profits for the years of 2004/05 and 2005/06 were increased to $665,824 (with tax payable thereon at $106,531) and $1,514,662 (with tax payable thereon at $242,345). The appellant appealed against the determination. In her statement attached to her Notice of Appeal, the appellant claimed, inter alia, that among the 5 properties: (a) Properties A, D and E had been held for more than 2 years; (b) Properties B and C were acquired for self-use or as long-term investment. The appellant further claimed that the Deputy Commissioner appeared to have ignored some information provided by the appellant upon coming to their decision in respect of 2 of the properties, and hence profits derived from disposal of properties should not be chargeable to profits tax.

Held:

Onus of Proof

1. Under section 68(4) of IRO, the onus of proving that the assessment appealed against was excessive was on the appellant. Failure to discharge the onus would be decisive against him. Indeed, where a taxpayer presented a case which, if believed, would establish a prima facie case, the Board was

not bound, even in the absence of contrary evidence, to accept the taxpayer's case as proven (Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224, Rhesa Shipping Co SA v Edmunds and another [1985] 1 WLR 948, Mok Tsze Fung v Commissioner of Inland Revenue [1962] HKLR 258, All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750, Cheung Wah Keung v Commissioner of Inland Revenue [2002] 3 HKLRD 773 and Yau Wah Yau v Commissioner of Inland Revenue [2006] 3 HKLRD 586 considered).

2. Despite the factual allegations raised in her statement, the appellant did not appear at the appeal hearing to give evidence in support of the said allegations. Neither did she produce any witness to give evidence on her behalf. In the circumstances, the Board was unable to accept the factual allegations made by the appellant in the statement, on the ground that they were unsubstantiated by the evidence.

3. In any event, the allegations of facts are inherently improbable and unbelievable when examined against the circumstantial evidence and uncontroverted documentary evidence before the Board.

Whether alleged disposal amounted to trade

4. Under section 14(1) of IRO, profits tax should be charged on every person carrying on trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong from such trade, profession or business (excluding profits arising from the sale of capital assets). Under section 2, 'trade' included 'every trade and manufacture, and every adventure and concern in the nature of trade'. It was also established that in deciding whether a taxpayer was carrying on a trade or business by acquiring an asset or property, the starting point was to ascertain the intention at the time of the acquisition of the asset or property in question. The intention was to be judged by considering all the circumstances, including things said and done (Simmons v Inland Revenue Commissioners [1980] 1 WLR 1196 and All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750 considered).

5. The mere allegation by the appellant in her statement that she had held 3 of the properties (Properties A, D and E) for more than 2 years did not prove that those properties were held by her as capital assets and not trade assets. Even though if they were held as capital assets, that did not necessarily mean that they were acquired by the appellant as capital investments. Each transaction must be examined according to its own circumstances.

6. In relation to Property B, the shortness of time that the appellant held the property was prima facie inconsistent with her allegation that she acquired it for self-use, or as a long-term investment. Such explanation was bare

allegation and unsupported by any evidence. In any event, the explanation was unbelievable and there was no suggestion or explanation as to why it was necessary for the appellant to purchase Property B so urgently after learning that her mother was not going to come to Hong Kong to live with her and her sister. This was particularly strange if the appellant could not afford buying both Properties A and B at the same time and needed to dispose of one of the two. The appellant's story was even more incredible when one born in mind that when Property B was purchased, it was still under construction and would not have served the appellant's purpose. The allegation that the appellant was somehow forced by the circumstances to dispose of Property B shortly after its purchase was also incredible. There was no evidence to show why, if the appellant truly could not afford completing the purchase of Property B (having committed to buy Property A), she was nonetheless able to afford the purchase of the other properties in 2005. There was also no explanation as to why, if the appellant truly required a residential property for her own occupation, she would choose to buy Properties C, D and E, which were commercial rather than residential properties.

7. As to Property C, the fact that the appellant chose to sell it within 18 days after she agreed to purchase it was prima facie inconsistent with her claim that she intended to acquire it as a long-term investment. The appellant's allegation that she could not obtain 70% mortgage loan from the bank was unsupported by evidence. There was also no evidence that the appellant was told by the bank that she could only obtain a mortgage loan of 50-60% of the property's value. In any event, the appellant's allegations concerning Property C were incredible. If the appellant had proceeded to complete the purchase of Property C, she was only required to put up additional funds of $443,000 only. It was unbelievable that such a small difference would cause the appellant to sell Property C within 18 days after it was purchased because she was rendered financially incapable of completing the purchase of the property. In fact, the appellant had no problem in meeting the payment of deposits of Properties D and E, which grossly exceeded the shortfall in the aforesaid mortgage loan. Their completion, which were due shortly afterwards, would have involved a financial commitment much larger than that required by the completion of Property C.

Appeal dismissed.

Cases referred to:

Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224
Rhesa Shipping Co SA v Edmunds and another [1985] 1 WLR 948
Mok Tsze Fung v Commissioner of Inland Revenue [1962] HKLR 258

All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750
Cheung Wah Keung v Commissioner of Inland Revenue [2002] 3 HKLRD 773
Yau Wah Yau v Commissioner of Inland Revenue [2006] 3 HKLRD 586
Simmons v Inland Revenue Commissioners [1980] 1 WLR 1196

Taxpayer's representative for the taxpayer.
Leung To Shan and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. By an assessment dated 30 May 2006 under charge number X-XXXXXXX-XX-X, the Appellant was assessed with assessable profits of $600,000 (with tax payable thereon at $96,000) for the year of assessment 2004/05.

2. By an assessment dated 30 May 2006 under charge number X-XXXXXXX-XX-X, the Appellant was assessed with assessable profits of $1,150,000 (with tax payable thereon at $184,000) for the year of assessment 2005/06.

3. Following an objection made by the Appellant against the assessments, the Deputy Commissioner of Inland Revenue ('Commissioner') made a determination on 18 March 2008 ('Determination') as follows:

(1) Profits tax assessment for the year of assessment 2004/05 under charge number X-XXXXXXX-XX-X, dated 30 May 2006 is increased to assessable profits of $665,824 with tax payable thereon of $106,531.

(2) Profits tax assessment for the year of assessment 2005/06 under charge number X-XXXXXXX-XX-X, dated 29 September 2006 is increased to assessable profits of $1,514,662 with tax payable thereon of $242,345.

4. By a letter dated 15 April 2008 (received by the Board on 17 April 2008), the Appellant gave notice to appeal against the Determination.

The relevant facts

5. At the hearing, it was confirmed by the representatives of the Appellant and the Respondent that the facts set out in paragraph 1(1) – (9) of the Determination are agreed between the parties.

6. We set out below the facts agreed between the parties for the purpose of the present appeal:

(1) The Appellant had objected to the profits tax assessments for the years of assessment 2004/05 and 2005/06 raised on her. The Taxpayer claimed

that the profits derived from the disposal of properties should not be chargeable to profits tax.

(2) At all relevant times, the Appellant was not a Hong Kong resident. She did not have any employment income in Hong Kong.

(3) During the years 2004 and 2005, the Appellant purchased and/or sold a number of properties, details of which are as follows:

	Purchase	Sale
	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration	(i) Date of provisional agreement (ii) Date of formal agreement (iii) Date of assignment (iv) Consideration
(a) Property A	(i) 20-8-2004 (ii) 3-9-2004 (iii) 26-4-2005 (iv) $11,680,000	(i) 2-4-2007 (ii) 19-4-2007 (iii) 18-5-2007 (iv) $14,600,000
(b) Property B	(i) 22-9-2004 (ii) 9-10-2004 (iii) [Note] (iv) $7,700,000	(i) 15-12-2004 (ii) 17-12-2004 (iii) 28-2-2006 (iv) $9,330,000
(c) Property C	(i) 7-1-2005 (ii) 27-1-2005 (iii) [Note] (iv) $4,430,000	(i) 25-1-2005 (ii) 17-2-2005 (iii) 31-3-2005 (iv) $5,130,000
(d) Property D	(i) 24-1-2005 (ii) 16-2-2005 (iii) 31-8-2005 (iv) $8,000,000	[Unsold]
(e) Property E	(i) 15-3-2005 (ii) 8-4-2005 (iii) 15-7-2005 (iv) $4,830,000	(i) --- (ii) 5-12-2007 (iii) 27-2-2008 (iv) $6,500,000 (N.B. the sale of Property E was not known to the Commissioner at the

time of the Determination and accordingly paragraph 1(3) of the Determination referred to Property E as 'unsold'. However, at the appeal hearing, it was agreed that Property E had in fact been sold, particulars as above.)

Note: The Appellant did not complete the purchase of Property B or Property C and sold them in the capacity of a confirmor.

(4) In her tax returns for the years of assessment 2004/05 and 2005/06, the Appellant did not report any profits derived from the sale of properties.

(5) The Assessor was of the view that the purchase and sale of Property B and Property C by the Appellant amounted to adventures in the nature of trade. She raised on the Appellant the following estimated profits tax assessments for the years of assessment 2004/05 and 2005/06 in respect of Property C and Property B respectively:

(a) Year of assessment 2004/05

Assessable profits	$600,000
Tax payable thereon	$96,000

(b) Year of assessment 2005/06

Assessable profits	$1,150,000
Tax payable thereon	$184,000

(6) The Appellant's representative ('the Representative') on behalf of the Appellant objected against the above profits tax assessments on the ground that the profits derived from the sale of Property B and Property C were capital gains which should not be subject to profits tax. The Representative put forward the following contentions in respect of the purchase and sale of the properties:

(a) Property B

(i) '"[Property A]" was purchased in August 2004 with intention that [the Appellant], her mother and her sister would live therein treating it as their residential home. Her mother and sister should come from Shanghai to live with her in Hong Kong. However, her mother and her sister subsequently changed their mind and would remain in Shanghai. [Property A], with an area of around 1,700 sq.ft. and having 3 bedrooms, was considered too large for [the Appellant] to use as residence for herself alone. Accordingly, following the advice of property agents, [the Appellant] tried to sell [Property A] and purchased a smaller flat. In view of the fact that property prices was [sic] stable with a slight increasing trend at that time, there was confidence that it would not be difficult to sell [Property A] without a loss. Accordingly, when [Property B], a smaller flat of 875 sq.ft. with only 2 bedrooms (the unit was considered more suitable for a single person to use), became available and the price was considered reasonable, [the Appellant] decided to purchase it. Unfortunately, no purchaser was found for [Property A] perhaps because of its large size and the total sum size was high [sic]. [The Appellant] reckoned that she would not be in a position to afford both these 2 flats at the same time when the time for completion came along later. Hence, [the Appellant] had no alternative but to offer [Property B] for sale at the same time. Finally, there came a purchase for [property B] …'

(ii) '[The Appellant's mother] owned a shop in Shenzhen … therefore she had the idea of moving to live with family members in a place closer to Shenzhen. Accordingly, she originally intended to come to Hong Kong to live with [the Appellant] if latter bought a residential flat. [The Appellant] therefore chose to purchase a comparatively large flat and bought [Property A] …'

(iii) '[The Appellant's sister] got married in Japan in 1993 and her husband was transferred from [a Bank] to Hong Kong. Hence, they both moved to Hong Kong in early 1994 … They both worked in Hong Kong until 1997. They had their first daughter in 2000 … and then two more daughters (a pair of twin girls …) in 2004. [The Appellant's sister] … planned in 2004 to accompany [her mother] to come to live in Hong Kong to take care of [her mother] and at the same time obtain HKID cards for her [twin girls].'

(iv) 'However, due to health problems, [the Appellant's mother] had a heart surgery … and considered undesirable to travel long distance and advisable to stay in Shanghai so that in case there are health troubles again, it will take much less time to obtain treatment by the doctor who deals with her case. [The Appellant's mother] therefore changed her plan and decided not to move from Shanghai to Hong Kong.'

(v) 'As [the Appellant's mother] would not move to Hong Kong, it became not so necessary for [the Appellant's sister] to come to Hong Kong. Hence, [the Appellant's sister] dropped her idea of coming to live in Hong Kong and stay in Shanghai to take care of [her mother].'

(vi) The net sales proceeds received from the sale of Property B were used as reserve funds for other investments.

(b) Property C

(i) 'When [Property C] was purchased in January 2005, it was intended to be held as an investment for rental income. [The Appellant] thought that 70% of the purchase price would be financed by a mortgage loan from banker. However it was subsequently advised that the mortgage finance would not be more than 50%. Accordingly, [the Appellant] found that she had funding problem in settling the full purchase price. To avoid having the purchase deposit being forfeited as a result of not being able to complete the purchase, [the Appellant] thus had no alternative but to try to sell it as soon as possible. Fortunately, a buyer was found and by sheer luck that the selling price was more than sufficient for covering the purchase costs. The entire event was therefore purchase and sale of capital/investment asset.'

(ii) 'Even if [Property C] is sold at a loss, if the loss is smaller than the deposit, it is still worthwhile to sell in order to minimize the loss … The decision [to sell] was obviously not due to an intention at the beginning to sell for a profit but just purely a sensible decision that will normally be made by a reasonable person. There is no reason for not trying to save oneself from losses if there is such chance. Not taking possible actions but waiting till the completion of the assignment would mean letting the shortage to come first and have the deposits forfeited. This seems not to be what a sensible person would choose to do.'

(iii) The buyer of Property C expressed his interest in Property C and handed the first cheque to the agent before 24 January 2005 as a deposit for buying Property C.

(iv) The down payment for the purchase of Property C was financed partly by the Appellant's own funds. Property could be held on a long-term basis through funds from rental income generated from the property and salary income of the Appellant.

(v) The sale proceeds received from the sale of Property C were not planned for specific purpose.

(7) In support of the objections, the Representative supplied copies of the following documents:

(a) Computations showing the profits derived from the sale of Property B and Property C. The Appellant derived profits of $1,514,662 and $665,824 from Property B and Property C respectively.

(b) Provisional Sale and Purchase Agreements in respect of the purchase and sale of Property B and Property C.

(c) A letter from Bank F. Bank F confirmed that the Appellant had applied for a mortgage loan for an amount of $3,101,000 with the security of Property C on 2 March 2005. Bank F only approved the loan amount of $2,658,000, but finally the Appellant did not draw the loan from Bank F.

(8) In respect of the Purchase of the Property D, the Representative asserted that the down payments were partly financed by the funds originally reserved for payment of the purchase price of Property C and partly by funds received from the sale of Property C. If Property C had not been sold, there would be a shortage of funds for the purchase of Property D. After the sale of Property C, funds became available and the Appellant could invest in Property D. The date of completion for the purchase of Property D was 31 August 2005. By that time, the Appellant anticipated that she would have earned sufficient funds for paying the amount not covered by bank loan.

(9) The Assessor now considers that the profits tax assessments for the years of assessment 2004/05 and 2005/06 should be revised as follows:

(a) <u>Year of assessment 2004/05</u>

		Amount ($)
	Assessable profits [Fact (7)(a)]]	665,824
	Tax payable thereof	106,531

(b) Year of assessment 2005/06

	Amount ($)
Assessable profits[Fact (7)(a)]	1,514,662
Tax payable thereon	242,345

The grounds of appeal

7. In a letter dated 15 April 2008 to the Board as her notice of appeal, the Appellant annexed thereto a 'Statement of Facts and Reasons for the Appeal' ('the said Statement') in which she made various allegations regarding what she called 'Background/Reasons for the purchase and subsequent sale' of Property B and C. She alleged, inter alia, as follows:

In respect of Property B:

' - Taxpayer's mother and sister were originally supposed to come to Hong Kong to live with her. Hence, Property A … was purchased in 2004. Owing [to] mother's health, mother & sister changed their mind and would not come to live with Taxpayer in Hong Kong.

- Taxpayer alone didn't need so large a flat. If a smaller flat was used instead, the costs of building management fees, rates & utilities would be less. Accordingly, she bought a smaller flat (which is the captioned property). The general professional opinion of real estate agents at that time was that it would not be difficult to dispose of Property A at a price close to Taxpayer's purchase price. That's why she was comfortable in buying a smaller flat first.

- Because of the larger size and thus a larger sum of money for Property A's price, it was then noticed that it was [not] so easy to dispose of it in a short period of time. It was an "uncompleted building" transaction and the construction completion date was expected to be some time in March 2005. As Taxpayer could not afford 2 flats at the same time, she had no alternative but to sell one of them and therefore put both Property A & Property B on market for sale. Eventually, a buyer came along in December 2004 for the captioned property (i.e. Property B).'

In respect of Property C:

'- few days after the signing of the Provisional Agreement, Taxpayer called various banks to arrange for mortgage. The feedback was that the valuation might be less than 100% of the purchase price and the loan would only be 50-60% of the valuation or purchase price, whichever was the lower, and not 70% as expected by the Taxpayer. The explanation of banks was that there was difference between commercial premises & residential premises for mortgage purposes. As a result, there could be a possible shortage of funds up to HK$0.8 million. Hence, she needed to minimize loss by selling it as soon as possible. Otherwise there might be a forfeiture of the purchase deposit. Fortunately, a buyer was found.'

8. As her ground of appeal, the Appellant alleged that IRD 'appears to have ignored some of the information / points provided to them upon coming to their decision in respect of Property B…and Property C… This appeal is intended to point out the relevant important information/points ignored, probably due to oversight, so that the correct procedure will come back to light and a correct assessment can be made'. There were some other miscellaneous arguments or points made in the said 'Statement of Facts'. We will not set them out here, as it will be clear from our discussion below that we reject those arguments as untenable.

Appellant did not give evidence at the appeal hearing

9. Despite the various factual allegations made by the Appellant in the said Statement attached to her notice of appeal, the Appellant did not appear at the appeal hearing to give evidence in support of the factual allegations made by her. Neither did she produce any witness to give evidence on her behalf.

10. By virtue of section 68(4) of Inland Revenue Ordinance ('IRO'), the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant. As Blair Kerr J said, in the oft-quoted judgment in Commissioner of Inland Revenue v The Board of Review, ex parte Herald International Ltd [1964] HKLR 224, at pages 229 and 237:

'*According to section 68(3) the assessor attends the hearing before the Board "in support of the assessment", but the onus of proving that "the assessment as determined by the Commissioner…. is excessive" is placed fairly and squarely on the appellant by section 68(4)…..*

The question for the Board of Review is not whether the Commissioner erred in some way, but whether the assessment is excessive. As Mr. Sneath so aptly put it:-

"The question is: "Did the Commissioner get the correct answer"; not "did the Commissioner get the correct answer by the wrong method."

> *And the onus of proving that the assessment is excessive lies on the taxpayer-appellant.'*

11. As the onus of proving that the assessment is excessive or incorrect rests with the taxpayer, failure to discharge the onus would be decisive against him: see, Rhesa Shipping Co SA v Edmunds and another [1985] 1 WLR 948, Mok Tsze Fung v Commissioner of Inland Revenue [1962] HKLR 258, All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750, Cheung Wah Keung v Commissioner of Inland Revenue [2002] 3 HKLRD 773. Indeed, as Tang J held in Yau Wah Yau v Commissioner of Inland Revenue [2006] 3 HKLRD 586 (at 607D-E), where a taxpayer presented a case which, if believed, would establish a prima facie case, the Board was not bound, even in the absence of contrary evidence from the Commissioner, to accept the taxpayer's case as proven.

12. It being the burden of the Appellant to satisfy us that the profits tax assessments by the Commissioner are excessive, she bears the onus of proving the facts that she wishes to establish in support of her appeal. By not giving oral evidence and not calling any witness, she has produced no evidence before us in support of her appeal, other than those documents which have been produced and which are uncontroverted, and the facts that have been agreed between the parties (as set out above).

13. In these circumstances, we are unable to accept the factual allegations made by the Appellant in the said Statement, on the ground that they are unsubstantiated by the evidence. In any event, those allegations of facts, are inherently improbable and indeed unbelievable when examined against the circumstantial evidence and the uncontroverted documentary evidence before this Board.

The law

14. Before we turn to the evidence and the discussion of the arguments raised by Mr H, representing the Appellant, we would briefly set out the applicable law relevant to the present appeal.

15. Section 14(1) of IRO provides that profits tax shall be charged on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong from such trade, profession or business (excluding profits arising from the sale of capital assets). Section 2 of IRO defines 'trade' as including 'every trade and manufacture, and every adventure and concern in the nature of trade'.

16. It is now well established that in deciding whether a taxpayer is carrying on a trade or business by acquiring an asset or property, the starting point of the inquiry is to ascertain his intention at the time of the acquisition of the asset or property in question. As Lord Wilberforce held in Simmons v Inland Revenue Commissioners [1980] 1 WLR 1196, at 1169:

> '*One must ask, first, what the commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock – and, I suppose, vice versa.*'

17. Intention is a matter of fact. The intention of the taxpayer is to be judged by considering all the circumstances, including things said and things done: *'Things said at the time, before and after, and things done at the time before and after'* (per Mortimer J (as he then was) in All Best Wishes Ltd v Commissioner of Inland Revenue [1992] 3 HKTC 750 at 771). Often, as Mortimer J observed, *'it is rightly said that actions speak louder than words'*.

18. We remind ourselves that it is possible for intention to change. Hence caution must be exercised particularly when examining the things said and done after the acquisition of the property. In ascertaining the intention of the taxpayer at the time of the acquisition of the property, it is necessary that we bear in mind the possibility that circumstances may intervene to cause a change of intention on the part of the taxpayer after the acquisition of the property in question. Whether there has been a change of intention is also a question of fact.

19. Obviously, merely because a gain is made upon disposal of a property by the taxpayer is not, in itself, proof of trading. A gain could be made on the disposal of a capital asset and such gains, which are capital in nature, are not profits 'derived from trade' as to be liable for profits tax.

Discussion

20. In the said Statement, the Appellant alleged that the fact that the other properties (which we understand her to refer to Property A, D, and E) had been held by her for more than 2 years showed that she was not a trader. We cannot accept this as a general point. Firstly, merely because Property A, D and E had been held by her for more than 2 years does not in itself prove that those properties were held by her as capital assets and not trading assets and, as Ms Leung (representing the Commissioner) pointed out, no concession has been made by the Commissioner that those other properties were capital assets. Whether Property A, D and E were held by the Appellant as capital assets or trading assets would depend on the circumstances relating to the acquisition of those properties – a matter which we do not need to decide in this appeal.

21. Secondly, even if Property A, D and E were held by the Appellant as capital assets, this does not necessarily mean that Property B and C were acquired by the Appellant

as capital investments. An investor may, when circumstances suit him, engage in an adventure of trade. Vice versa for a habitual trader who may decide to acquire a property for investment. Each transaction must therefore be examined according to its own circumstances. This is accepted by Mr H.

22. We shall deal with Property B and C separately.

Property B

23. The Appellant contracted to purchase Property A on 20 August 2004. In about a month's time (that is, on 22 September 2004) the Appellant signed a provisional agreement to purchase Property B. Property B was a unit in an uncompleted building. On 15 December 2004, and before she completed her own purchase of the property, the Appellant entered into a provisional agreement dated 15 December 2004 to sell the Property B to a Mr G as a confirmor. Accordingly, the Appellant had only held Property B for less than 3 months before she disposed of the same as a confirmor.

24. The shortness of time that the Appellant held the property is prima facie inconsistent with her allegation that she acquired the property for self-use, or as a long-term investment. In the said Statement attached to her Notice of Appeal (and also in correspondence with the Commissioner), the Appellant had sought to provide an explanation (for details see paragraph 7 above), which we shall not repeat again.

25. The explanation is nothing but bare allegations. There is no credible evidence of the same. Neither the Appellant, nor her mother or sister (and for that matter anyone else), has given evidence in support of the allegations. We are unable to accept the explanation as any evidence of the Appellant's intention in the acquisition of Property B.

26. In any event, the explanation put forward is unbelievable. Quite apart from the fact that there is no evidence at all regarding the health of the Appellant's mother (claimed by the Appellant to be the reason which prevented her mother from coming to Hong Kong – and it should not have been difficult for the Appellant to put before this Board relevant medical evidence to prove that her mother had undergone a heart surgery, as she alleged), it is difficult to see why the Appellant should rush into the purchase of Property B after purportedly learning that her mother was not going to come to Hong Kong to live. On the face of the documents before us, the Appellant is not a Hong Kong resident. It is not clear where the Appellant lived around the time when Property B was purchased (the Appellant has not provided any evidence or information of her residential address at the relevant time). In any event, wherever the Appellant was living at the time, there is no suggestion, and no explanation given, as to why it was necessary for her to purchase Property B so urgently after learning that her mother was not going to come to live in Hong Kong with herself and her sister. This is particularly strange if, as suggested by Mr H (a suggestion which was not supported by any evidence), the Appellant could not afford buying both properties (that is, Property A and B) at the same time and needed to dispose of one of the two. Moreover, unless her mother's health problem arose suddenly (and there is no evidence at all of this), it

is difficult to see why the Appellant would have failed to take that matter into consideration when she purchased Property A in August 2004.

27. The Appellant's story is even more incredible when one bears in mind the fact that when Property B was purchased, it was still under construction. If the Appellant had any urgency to buy a property at that time for her own residence (even though her mother and sister would not be coming to live with her), Property B would not serve the purpose at all. As can be seen from the land search records, it was not until February 2006 that Mr G (the purchaser who purchased Property B from the Appellant) completed the purchase of Property B. If the Appellant needed the property urgently, there was no reason why she would want to buy a property that was still under construction and not ready for occupation. If she did not need the property urgently, why did she purchase Property B before she disposed of Property A, thereby committing herself to a situation when she might be required to complete the purchase of 2 properties – a matter which she allegedly could not afford?

28. The allegation that the Appellant was somehow forced by the circumstances to dispose of Property B shortly after its purchase is incredible. The Appellant claimed that she could not afford to complete the purchase of both Property A and B, yet she continued to purchase other properties (namely, Property C, D and E) in early 2005 and had had no problem in funding the payment of the relevant initial and further deposits. Property C, D and E were all due to be completed in the course of 2005. As has been noted above, because Property B was a unit in an uncompleted building, completion of Property B was not due until after construction of the building was completed. As the land record shows, that did not take place until sometime in February 2006. We do not see, and there is no evidence to show why, if the Appellant truly could not afford completing the purchase of Property B (having committed to buy Property A), she was nonetheless able to afford the purchase of the other properties in 2005.

29. It is to be noted that Property C, D and E are not residential properties. No explanation has been offered as to why, if the Appellant truly required a residential property for her own occupation, she would choose to buy commercial rather than residential properties when she entered the market again in 2005 to purchase Property C, D and E.

30. For reasons mentioned above, we reject the Appellant's allegations as being unsupported by evidence and as being inherently incredible when viewed together with the uncontrovertible documentary evidence. The Appellant has not discharged her burden in showing that the profits tax assessment in relation to Property B is either wrong or excessive.

Property C

31. Property C was purchased on 7 January 2005 by the Appellant and she contracted to sell the same on 25 January 2005 as a confirmor, that is, barely 18 days after she agreed to purchase the property. That she would choose to sell the property within so short a time is, prima facie, inconsistent with her claim that she intended to acquire the

property as a long-term investment. We agree with Ms Leung that such a short period of interim ownership, unless satisfactorily explained, is a strong indicator of trading.

32. As pointed out above, in the said Statement, the Appellant claimed that a few days after the signing of the provisional agreement to purchase Property C, she called various banks to arrange for mortgage and was told that the mortgage loan would only be about 50-60% of the valuation of the purchase price, and not 70% as expected. This allegation is again unsupported by any evidence. The only documentary evidence that we have before us is a letter dated 20 November 2006 issued by Bank F which stated as follows:

> ' Re: [Property C]
>
> As your request, we confirm that you applied the mortgage loan for amount of HKD3,101,000.00 secured by the above property on 2nd March 2005. Our bank approved the mortgage loan amount HKD2,658,000.00 and finally the loan has not been drawn by you.'

33. It appears from this letter that the request made to Bank F for a mortgage loan was made on 2 March 2005. This is curious as by that time the Appellant had already contracted to sell Property C by entering into a provisional agreement dated 25 January 2005. Mr H claimed during the submission that at that time there was a fear on the part of the Appellant that the purchaser might not complete the sale and purchase, as the purchaser was seeking for a reduction of the purchase price after the signing of the relevant provisional agreement. Whether that is so we do not know – for there is no evidence before us – but it does not matter for this appeal.

34. There is no evidence before us that the Appellant was told by the banks that she could only obtain a mortgage loan of 50-60% (instead of 70% as she expected) of the value of the property in accordance with the bank's valuation. We cannot accept bare allegations as evidence.

35. In any event, the allegations of the Appellant concerning Property C are incredible.

36. As can be seen from the letter of Bank F referred to above, Bank F was prepared to extend a mortgage loan of $2,658,000 to the Appellant (representing 60% of the agreed purchase price of $4,430,000). It is also clear from the letter that the mortgage loan that she applied for was a mortgage loan representing 70% of the purchase price. The difference between a 60% and a 70% mortgage loan was $443,000 only. Accordingly, if the Appellant had proceeded to complete the sale and purchase of Property C (instead of selling it), she was only required to put up additional funds to the extent of $443,000 only.

37. We cannot believe that such a small difference could have been a reason for her decision to sell Property C within 18 days after it was purchased. We cannot believe that because of this small shortfall in the amount of the mortgage loan, the Appellant was thereby rendered financially incapable of completing the purchase of the property, as she alleged.

38. As rightly pointed out by Ms Leung, contrary to her claim of financial difficulty, the Appellant committed herself to purchase Property D and Property E at a total consideration of $12,830,000. The relevant provisional and formal agreements for sale and purchase relating to Property D and E shows that the Appellant was required to pay an initial deposit of $390,000 on 24 January 2005 and a further deposit of $410,000 on 16 February 2005 in respect of Property D; and an initial deposit of $240,000 on 15 March 2005 and a further deposit of $243,000 on 8 April 2005 in respect of Property E. These payments had grossly exceeded the shortfall in the mortgage loan mentioned above, and yet the Appellant had seemingly had no problem at all to meet these payment obligations. Moreover, Property D and Property E were due to be completed in August and July 2005 respectively, and would have involved a financial commitment much larger than that required by the completion of Property C.

39. The Appellant's allegations are thus incredible and we have no hesitation in rejecting the same.

40. For reasons mentioned above, we hold that the Appellant has not discharged her burden in showing that the profits tax assessment in relation to Property C is either wrong or excessive.

Decision

41. The appeal is accordingly dismissed.