Case No. D35/96

Profits tax – sale of properties to an associated company – error in tax return – whether capital gain – intention of acquiring properties – section 70A of the Inland Revenue Ordinance.

Panel: Howard F G Hobson (chairman), Kenneth Ku Shu Kay and Norman Ngai Wai Yiu.

Dates of hearing: 6, 7 and 8 March 1996.
Date of decision: 13 August 1996.

The taxpayer appealed against three profits tax assessments: an estimated assessment; an additional assessment; and a second additional assessment.

The taxpayer derived profit from its sale of properties to an associated company. The Commissioner considered that the sale was in a nature of trade and liable to profits tax. The taxpayer made no objection to the estimated and first additional assessments within time limit under section 70 of the IRO but alleged that there had been an error and invoked section 70A of the IRO.

Held:

At the hearing, the taxpayer dropped the appeal against the estimated assessment. The Board then confirmed the estimated assessment.

The Board found that the price in the Sale Agreement was quite deliberate and not a mistake and that failure to classify the profit as a capital gain was not an error. The first additional assessment was confirmed accordingly.

Regarding the second additional assessment, the Board was not satisfied that the taxpayer held the properties as a long term investment. Accordingly, the second additional assessment was confirmed.

Appeal dismissed.

[Editor's note: the taxpayer has filed an appeal against this decision.**]**

Cases referred to:

Sharkey v Wernher 36 TC 275
Petrotim Securities Ltd v Ayres (H M Inspector of Taxes) 41 TC 389

Lionel Simmons Properties Ltd v IRC 53 TC 461
Richfield International Land and Investment Co Ltd v CIR 3 HKTC 167
D18/88, IRBRD, vol 3, 241
CIR v Scottish Automobile & General Insurance Co Ltd 16 TC 381
Rellim Ltd v Vise 32 TC 254

Ada Chung of the Legal Department for the Commissioner of Inland Revenue.
Denis Chang instructed by Ford Kwan & Company for the taxpayer.

Decision:

The decision is concerned with an appeal against three profits tax assessments for the year of assessment 1986/87, the first was an estimated assessment of profits of $2,000,000, the second an additional assessment (the first additional assessment) of $1,641,562 and the third was a second additional assessment which after revision endorsed by the Commissioner of Inland Revenue was reduced to net additional assessable profits of $60,950,000. The subject of the appeal is the profit derived from the Taxpayer's sale in January 1986 to an associated company, Company A, of a partially developed residential project, which on completion known as Property B, built on No. 1 (the Site) in Place C. The assessor took the view that sale was in the nature of a trade and the Commissioner upheld that view in his determination of 21 March 1992. The Taxpayer took no objection to the estimated and first additional assessments within the one month laid down by section 70 of the Inland Revenue Ordinance (IRO), but in its grounds of appeal the Taxpayer claimed there had been an 'error' and invoked section 70A which reads in relevant part as follows:

> *70A Powers of assessor to correct errors*
>
> *(1) Notwithstanding the provisions of section 70, [assessments final if objection not lodged in time] if, upon application made within 6 years after the end of a year of assessment …, it is established to the satisfaction of an assessor that the tax charged … is excessive by reason of an error or omission in any return or statement submitted in respect thereof, … the assessor shall correct such assessment:*

At the hearing the Taxpayer's Counsel, Mr Denis Chang, QC advised the Board that the appeal against the estimate was being dropped because the Taxpayer now accepted that as the estimate had been raised due to the Taxpayer's failure to file a tax return it was impossible for the Taxpayer to argue that there had been a mistake or error as contemplated by section 70A. We therefore hereby confirm the estimated assessment of $2,000,000 with tax thereon $370,000.

As Ada Chung, Assistant Principal Crown Counsel appeared for the Commissioner.

The Primary Facts

Save where otherwise mentioned the following is a recital of uncontested facts during the relevant period.

1.1 By 1976 a Hong Kong group of companies known as Group D was a developer of residential, commercial and industrial properties as well as the landlord of developed properties. That group was run and controlled by Mr E.

1.2 Many years ago, a property known as Property F was damaged. That property was owned by an investment company, Company G, which at all material times was a Group D company.

2. In 1976 No. 1 (which in its bare or partially completed state we shall refer to as **'the Site'** and in its fully developed state we shall call **'the Subject Property'**) was a bare plot of land in Place C close to a cemetery and Property H.

3. The following details are taken from Land Registry records, unchallenged correspondence and the text of various statutory accounts (none of the relevant conveyancing documents was produced to us): the information in square brackets is taken from the case stated in a tax appeal by an investment company, Company I of Group D.

[1972	draft prospectus for a Group D flotation referred to in the Company I tax appeal.]
20-8-1976	Agreement for the purchase of the Site from Company J by Mr E for $1,500,000.
23-8-1976	A surveying company, Company K, acting on behalf of Mr E, writes to the Building Authority with plans for the residential project, pointing out that the Site was outside the boundaries of Property H's 'Special Control Area'.
30-9-1976	Mr E nominates an investment company, Company L, a Group D company, as assignee of the Site and the Site is assigned to Company L which in turn executes a Declaration to the effect that Company L holds the Site in trust for Company G.
1976	Litigation arising from the damage of Property F is underway against Company G: the nature of this litigation was never explained to the Board but we were told it continued well into the 1980s.
Late 1976	The Building Authority reject the original development plans.

3-1-1977	Company L as trustee assigns the Site to the beneficiary, that is, Company G.
21-1-1977	Company G assigns the Site to the Taxpayer, which is then a subsidiary of Company G – though wrongly shown in the accounts as Company L (see 30 June 1977 below). The consideration shown in the assignment is one dollar ($1) but is shown in the Taxpayer's balance sheet for the year ended 30 June 1977 at cost of $1,541,805: $1,500,000 being the purchase price paid to Company J and $41,805 for expenses incurred by Company G on or after that purchase from Company J. There would be no stamp duty on the transfer. The $1,541,805 was financed by an interest free loan from the vendor, Company G. As at year ended 30 June 1977, the Site is the Taxpayer's only immovable property and appears under the rubric 'Property under development at cost'.
1977	Various revised plans are submitted by Company K to the Building Authority. After rejection the Taxpayer proceeds to appeal.
2-5-1978	Appeal Tribunal rules that as the Site is outside the said Special Control Area the height and other restrictions do not apply.
15-1-1979	Name changed from Company M to the present name of the Taxpayer.
2-3-1979	New plans are rejected. The Taxpayer appeals against the rejection.
28-3-1979	Taxpayer becomes the owner of No. 2 upon which the Taxpayer builds flatted factories known as Property N. The costs of acquisition is shown in the accounts as $12,000,000. This asset, plus the Site and a 2% interest in No. 3 are shown in the accounts for year ended 1979 under the slightly different heading 'Leasehold Properties at cost' in the next and following years the heading used is 'Leasehold Properties under Development at Cost'. It is clear from the Notes to the accounts that all of these properties were incurring development costs. In addition to the aforementioned three sites the Taxpayer had bought (presumably after 1 July 1978) a number of flats in Property O for resale and made a profit of $169,901 when they were all sold which profit was returned by the Taxpayer in the year of assessment 1979/80.

[1-4-1979 – 31-3-1980	Company I sell 18 units to an associate.]
22-6-1979	Appeal upheld and the plan is approved.
30-6-1979	The Taxpayer's accounts for this year end were not produced to the Board, we understand they could not be located.
[1979	Company I involved in group reorganization.]
1979	Development of the Site commences (see later 13 May 1988 re Occupation Permit).
[Mid 1980	Company I assessed to profits tax for the year of assessment 1979/80 which on objection was upheld by the Commissioner whereupon Company I appealed to the Board of Review.]
1980/81	Property N completed. Sale of units began before completion of Property N and continued after completion. The Taxpayer's profits from these sales were offered for assessment from the years of assessment 1981/82 to 1986/87. It is not disputed that No. 2 was intended for sale of units on completion.
[Early 1985	Company I Board or Review Decision confirming the Commissioner's determination so Company I appealed to the High Court.]
Mid 1985	Mr E began consultations with professional advisers concerning flotation of some part of Group D.
28-1-1986	The Site is the subject of an Agreement for Sale by the Taxpayer to Company A at $29,050,000. Prior to this Company A did not own any property. (See 23 September 1989 for the Assignment.)
[Mid 1986	Company I High Court appeal judgment rejecting the appeal from the Board's decision. Company I then appeal to the Court of Appeal.]
Early 1987	The Taxpayer is given notice under section 51(1) requiring the filing of a profits tax return.
	[Company I Court of Appeal judgment rejecting Company I's appeal.]
30-5-1987	Taxpayer asserts that a Group D clerk, Mr P, prepares draft accounts for the year ending 30 June 1986, the draft is seen by

	the group Chief Accountant (witness Mr Q) and is then passed to Company R, who, we were told throughout the material time the group's auditors and tax representative, however the first accounts were audited by Company S.
22-7-1987	Estimated assessment issued.
5-8-1987	Audited accounts, which included Company R's tax computation, are signed by the Taxpayer's two directors and signed off by Company R on the same day.
6-8-1987	The Taxpayer files its profits tax return for the year of assessment 1986/87 along with the said accounts and tax computation of $3,641,562 being the total of profits from the sale of two units in Property N as well from the transfer of the subject Site to Company A. The return was signed by Mr E, the accounts by Mr E and Mr T.
(23-9-1987 20-11-1987)	Company U writes to the Hong Kong Stock Exchange concerning proposed flotation and reservation of dates.
30-12-1987	First additional assessment, based on the 6 August 1987 return, issued.
1-4-1988 – 31-3-1989	Company A acquires No. 4 which in its accounts for the year ending 31 March 1989 while under development was classed as Properties under development at cost. This year ended 31 March 1989 is the same year in which Subject Property was completed. (See May 1988)
1988	Printed Prospectus for the flotation of a Country V company: this document does not show when in 1988 this draft was prepared but as it refers to 8 July 1988 as the date of incorporation of the Country V company we assume the print was after that date.
13-5-1988	Occupation Permit issued.
May 1988	The development of the Subject Property was completed, and in Company A's accounts for year ended 30 June 1988 the Subject Property appears under the rubric 'Fixed Assets'.
30-6-1988	Bank W write to the Stock Exchange indicating new (postponed) floatation dates.

July 1988	Units in the Subject Property advertised in a newspapers as being available for rent.
6-7-1988	Stock Exchange letter indicating that no postponements of the stages dates (13 September 1988 – 3 October 1988) will be entertained.
6-7-1988	Second additional assessment issued.
29-7-1988	Company R file notice of objection to the second additional assessment and invoke section 70A regarding the estimated assessment and the first additional assessment.
9-11-1988	$90,000,000 professional valuation of the Site (as of 28 January 1986) obtained by the Taxpayer which persuaded the assessor to agree to lower his own estimate of $125,000,000.
23-9-1989	The Subject Property assigned by the Taxpayer to Company A. No explanation was offered to the Board for the three years and eight months delay before assigning title to the Subject Property.
Early 1992	Determination issued confirming the estimated assessment and the first additional assessment and reducing the second additional assessment due to a reduction in the retrospective valuation of the site as at the time of its transfer to Company A.
Early 1992	Appeal to Board of Review lodged. The correspondence suggests the long delay was largely due to the Taxpayer's lack of action, but the Taxpayer does not accept that that was the case.

4.1 The first two directors of the Taxpayer were Mr T and Mr X, both were then Group D employees. For reasons not made known to us Mr E did not become a director until March 1980 whereupon Mr X resigned. Mr T said Mr X left the Group in 1980 and attempts to trace him for this appeal were unsuccessful.

4.2 According to the Taxpayer's financial statements – the basis periods of which for each year was 1 July to the following 30 June – the ultimate holding company and the paid up capital of the Taxpayer for the following year-end periods were:

30-6-1977:	Paid up capital $20, that is, 20 shares of $1 each. Company L is shown as the holding company but Mr Q said this entry was wrong – it should have been Company G: a discrepancy which in our opinion the auditors should have picked up.

30-6-1978: No financial statement was produced to the Board.

30-6-1979: Paid up capital $1,000. Due to the issue of shares Company Y became the parent. [The amount of shares shown to be issued to Company Y is 998, however as there were 20 shares already in issue that figure or the paid up capital figure must be wrong. Nothing turns on this except perhaps the poor quality of the auditing.]

30-6-1980: Paid up capital $1,000 and Company Y continues as parent.

30-6-1981: Paid up capital $1,000 and Company Y continues as parent.

30-6-1982: Paid up capital $1,000. Company Y is shown as the holding company but there is a note to the effect that after the year end 199,000 shares were issued to Company Z accordingly the ultimate holding company became Company Z's parent, namely Company AA.

30-6-1983: Paid up capital $1,000. Again Company Y is shown as the holding company because, as is noted, the said 199,000 shares were forfeited on 18 November 1982 for non-payment. Paid up capital reverts to $1,000.

30-6-1984: Company Y & $1,000.

30-6-1985: Company Y & $1,000.

30-6-1986: $200,000 paid up capital, shares have been issued on 14 January 1988 and the holding company becomes Company BB through Company A.

4.3 Until 28 January 1986 when it was assigned to Company A, the Subject Property had been developed in the name and for the account of the Taxpayer. Thereafter Company A took over the development and proceeded with it down to completion when it was ready for occupation about five months after the Occupation Permit. The Subject Property is shown in Company A's accounts for years ended 31 March 1986 as 'Properties under development at cost' and for the year ended 30 June 1988 (after Occupation Permit but before rentable completion) as 'Fixed Assets'.

5. It is not disputed that:

(a) Company A still owns Property B and all the flats and car parks therein continue to be let out; and

(b) a majority of the tenants during the initial letting were expatriates or companies or firms which commonly employ expatriates and there is no suggestion that that situation does not still prevail.

6. The Taxpayer was shown as the owner of 2% of No. 3 in the accounts for years ending 30 June 1979 and 30 June 1980, but not in the following accounts, because the interest it represented was sold and the profit therefrom was submitted for taxation.

Assessments

1. We have confirmed the estimated assessment of $2,000,000.

2. The first additional assessment made on 30 December 1987 related to profits of $1,641,562 which formed part of the $3,641,562 in the Taxpayer's tax return for the year of assessment 1986/87 (the other $2,000,000 having already been assessed in the earlier estimated assessment) submitted on 5 August 1987 (the alleged erroneous return). The Taxpayer took no objection to this within the requisite one month because, so we were told by Mr Q, it was based on its own return. The Taxpayer later claimed the return was erroneous in as much as it included profits on the transfer of the Site, and invoked section 70A. The first additional assessment was made pending the results of further enquiries by the assessor.

3. As a result of these enquiries the assessor learnt that Company A was related to the Taxpayer, he therefore felt that the principles in Sharkey v Wernher (36 TC 275) ('in-house' transfer of a trading asset) and Petrotim Securities Ltd v Ayres 41 TC 389 (sale at an undervalue of trading stock and the substitution of market value for the undervalue) were relevant. Therefore on 6 July 1988 he raised a second additional profits assessment of $95,950,000, to which the Taxpayer timeously objected. The figure of $95,950,000 was arrived at by using an estimated market value of the Site at the time of the transfer to Company A of $125,000,000 from which was deducted the sale price of $29,050,000. However before the objection was heard the assessor accepted the valuation of $90,000,000 referred to at 9 November 1988 above which after deducting the said $29,050,000 resulted in $60,950,000 which profit assessment figure was confirmed by the Commissioner.

4. It is not in dispute that returned profits of $3,641,562 were made up as to:

		$
• profits on sale of units in Property N		
- unit a	$389,973.15	

	- unit b	$155,169.31	545,142.46
•	profits on transfer of the site	($29,050,000 - $27,385,232.84)	1,664,767.16
•	interest, rental and		2,209,909.62
•	sundry income		1,583,968.77
•	less expenses		152,334.25
			3,641,544.14
			=========

Witnesses

Two witnesses appeared for the Taxpayer and both gave viva voce testimony on oath or affirmation. They were Mr Q, who had been the Chief Accountant of Group D, and Mr CC who had had a rather vague position with Group D involving some management of its properties. In addition a notarially attested statement of Mr T was tendered, under protest by Ms Chung. The Board allowed the statement to be admitted and will comment later on as to its evidential quality.

Mr Q:

He joined Group D as an (unqualified) accountant – bookkeeper in 1976 after a short spell with Group DD where he was also involved in the capacity of an internal accountant and became familiar with accounting requirements of listed companies. He left Group D in 1992. He was quite categorical that Mr E bought the site as a long term investment. Very shortly after Mr E had bought the Site (which we take to mean entered into the Agreement on 20 August 1976) he told Mr Q that he reckoned he had got it cheaply and intended to build residential towers for letting out to expatriates because locals would not be inclined to buy due to the poor fung shui resulting from the adjacent cemetery but expatriates, who generally preferred to rent than buy their accommodation and were attracted to that area were less inclined to be sensitive.

Mr E, who made decisions quickly based on confidence in his own judgment and rapid calculations of expected returns, asked him to verify Mr E's own rough estimates of rental returns, which Mr Q did with the help of the group's rental department, and the verification was satisfactory. The Taxpayer was acquired as an off-the-shelf company.

Mr Q explained that in the balance sheet group companies properties that were under development would be categorized under the heading 'Leasehold Properties under Development' or 'Leasehold Properties at cost', but on completion the property concerned would be reclassified as 'Fixed Assets' if it was intended for renting out or 'Current Assets' if it was intended to be sold. The Site was categorized as 'Leasehold Property at Cost' in first balance sheet then as 'Leasehold Property under Development' in the subsequent balance sheets to 1986 when the Site was sold and was so shown (after acquisition) in Company A's balance sheets for years ended 30 March 1986 to 1987 but in 1988 the completed property was reclassified as a Fixed Asset. Mr Q's testimony as to group practice is not entirely in keeping with the classification to be found in the Company I Stated Case.

Mr Q told us that about January 1986 Mr E directed that the Site be transferred out of the Taxpayer's ownership because his idea was to include it in a public flotation of some entities within Group D, about which discussions had begun with merchant bankers. In Mr Q's written proof of evidence – he said Mr E wanted the Site 'transferred at its book, and not market value' and asked him to supply acquisition and development costs. But Mr Q did not have the most up-to-date costs because some liabilities not settled or constructors' bills not yet received. However he gave Mr E a calculation from the vouchers he did have and gave it to Mr E 'who subsequently told him that he [Mr E] estimated the book value at $29,050,000.' Mr Q 'accordingly advised the solicitors of this figure to put in the Agreement.'

Mr Q gave us his version of how the section 70A 'error' came about. About May 1987 he asked Mr P, one of his book-keeping assistants, to prepare draft accounts for the year ended 30 June 1986 [which would cover the 28 January 1986 Agreement for the said transfer to Company A.] We were shown Mr P's hand-written draft accounts (the Mr P draft) which comprised a balance sheet, a P&L account and a note ('Note I') containing details of the costs of the Site as at 31 January 1986 which came to $27,385,232.84. Another note ('Note II') showed details of the sale of Property N units – the gross profit on which was $545,142.46 (there were some other items, interest, rentals, sundries and overheads none of which need concern us). The P&L account shows the gross proceeds of all sales as $30,241,496.06 but does not specifically apportion this between the subject Site and the Property N sales, nevertheless by deducting the proceeds of sale of the latter shown in Note II as $1,191,496.06 from the said $30,241,496.06 the resultant $29,050,000 must relate to the subject Site.

Mr Q said he saw the Mr P draft before sending it on 30 May to Company R, but because he was particularly busy at that time he 'did not spot the error'. He maintains that showing the sales prices at $29,050,000 instead of the total costs of $27,385,232.84 was a mistake and the fault was not Mr P's, it was his own fault for not checking the draft properly and for failing to recognize what had happened even when he received back the audited accounts. In his proof he expressed it this way 'I believed the consideration for the transfer which was a book value should be equal to the Subject Property's costs. I did not realize however that there was in fact a difference [in Mr P's draft and the P&L a/c] (which difference we refer to in our deliberations as the "incorrect book value.") which was wrongly treated not as a capital gain but as a trading profit … I believed the profits in the P&L account were profits' from Property N sales. After fairly leading questions he said on seeing the profits of $2,209,909.62 shown in the audited accounts he must have assumed that that profits related entirely to the Property N sales: it is a long time ago and he is unsure of details. In fact the figure of $2,209,909.62 appears under the heading 'Profit on sales of flats and leasehold property' whereas in previous years the heading was 'Profit on sales of flats'. The profit for that year was $159,478.92 and is shown in the usual manner for comparison in the 1986 accounts; the contrast is stark.

If we understand Mr Q's version correctly the $29,050,000 figure was Mr E's own estimate of the likely total of the purchase price and costs incurred since buying the Site and because it was Mr E's figure it was put into the 28 January 1986 Agreement. Company A's balance sheet for 31 March 1986 shows No. 1 at $29,050,000 [and about $3,000,000 development expenditure, presumably incurred since 28 January 1986].

Mr Q said he was the person who on completion of developed properties reclassified them either as current assets or as fixed assets depending upon his understanding of Mr E's leasing or selling intentions for the property concerned.

Mr Q said that the transfer of the Site to Company A was a prelude to the flotation because there was an expectation of including Property B but not including the Property N units because they were trading properties.

The draft prospectus refers to Property EE (commercial), Property B (that is, the Subject Property), Property F (residential), Property FF (commercial), Property GG (commercial/residential), Property HH (commercial/residential). Property B is described therein as though it were completed and refers to '… units were let under various tenancies … is expected to provide an annual rental income of $... when fully let.' It also refers to Property N, which is inconsistent with his earlier statement, however Mr Q explained that the draft prospectus had not reached a settled state. He said he thought the floatation was abandoned in or after 1988 due to the 1987 stock market débâcle, that however does not seem probable since there is correspondence in July 1988 suggesting the flotation was still a live issue.

Mr Q's attention was drawn by Mr Chang to the accounts of both Company A and another Group D company, Company I I, and he confirmed that both companies had held some properties for sale at the same time as holding properties for investment and that the Revenue had accepted that Property FF (owned by Company I I) was an investment property. Similarly Company A owned No. 4 upon which Property JJ has been built and Mr Q said the Revenue never questioned its status (as an investment property) even though Company A had held some properties specifically for sale the profits of which had been returned for profits tax.

In answer to questions from the Board, Mr Q said that inter-group transfers of properties (of which he thought there may have been about seven) were not be done at cost (meaning they were normally and should be done at market value) and that property under development for investment would never be transferred inter-group before completion but acknowledged the transfer of the Site to Company A was an exception to both these stipulations. He also maintained that Group D companies never mortgaged properties held for trading, they only mortgaged investment properties. In support he referred to the Taxpayer's own accounts showing that the Site was mortgaged but not Property N, and the same was apparent in the Company G accounts where Property F but not its trading properties were mortgaged and the same was apparent in the Company I I accounts.

When we come to examine the reported tax appeals of Company I v CIR (the 'Company I Stated Case' or 'Company I High Court Report' or 'Company I Court of Appeal Report') it will be seen that Mr Q's evidence on the treatment of accounts differs in certain respects from that mentioned in the Company I Stated Case.

Mr T:

His evidence was given by way of an affidavit sworn in Country KK on 4 March 1986. In it he said he emigrated in Country KK six years ago and that he was unable to attend the hearing in March 1986 because of business commitments. In this regard we note that this case was originally set down for hearing in July 1992 but adjourned – it is said to suit Counsel's diary – and not brought to a head until August 1995 when it was to be set down for hearing in October/November 1995 but on 18 September 1995 the present appeal dates were set yet Mr T's affidavit was only sworn to two days before the hearing. Mr T said he ceased any connections with Group D when he emigrated. He said he was a co-director of the Taxpayer first with Mr X then from 1 March 1980 with Mr E. He did not say whether he was a shareholder but we believe he was not nor do we think he had any power as a director. Mr CC, whose evidence we will refer to later, told us that Mr T was a senior staff employee who worked in the group's leasing department and that Mr E was in the habit of appointing employees to directorships. Mr CC also told us whenever Mr E gave instructions Mr T and Mr X when he was a director, would 'just follow suit', which suggests Mr T had no autonomy. The amount of tax involved is ample justification for prevailing on Mr T to so arrange his affairs to make himself available to the Board. In this case particularly we think the inability to cross-examine him, for instance on the reason for the absence of board minutes, renders the affidavit of doubtful value, even in a corroborative role, consequently we propose to place no reliance on its substantive statements.

Mr CC:

Mr CC jointed Group D in 1976 ostensibly as a company secretary but within a short time he ended up acting from time to time as assistant to Mr and Mrs E, as well as undertaking management of some properties. He left the group in August 1995. He remembered well being told by Mr E very shortly after the purchase that the Site had been bought for development as a long-term investment for rental purposes because the conversation happened soon after he joined. He said Mr E had a quick temper and once he had made up his mind, which he did very quickly, he was not easily deflected or persuaded by argument. He said Mr E was very angry that the original plan had been rejected and he told us that Mr E told him that he would fight for approval 'all the way'. His evidence as to why the developed property would be rented out rather than sold was very similar to that given by Mr Q. He said during and after construction at the Site he dealt with the complaints from the neighbourhood about the nuisances caused by the building work, and therefore became involved in management affairs concerning the physical aspects of construction and after completion he continued to be the person responsible for the building management. This was only one of many buildings of which he was the manager, other colleagues managed other buildings.

Mr CC said when sites were developed for selling the units in the completed building would be advertised by the group's sales department: the only advertising done for Property B was a sign board erected at the Site shortly before completion indicating that flats were available for rent and later newspapers notices (samples of which were produced to the Board) advertising the flats for rent. A rent roll was produced for the first year of leasing which tends to bear out occupancy by a large number of expatriates or corporations who employ expatriates.

In answer to Ms Chung, he told us that the group had occasionally developed property then let it out and then sold the units subject to the tenancies, however he emphasised that that was never done with domestic flats. We note that this important piece of evidence conflicts with the evidence in Company I case where all the properties concerned were let when sold and some of them were domestic premises.

He acknowledged that there were no written minutes or any documents contemporaneous with Mr E's purchase of the Site or its transfer to the Taxpayer supporting the alleged long term investment intentions of Mr E.

Mr CC believed the delay between the Occupation Permit on 13 May 1988 and the first letting in April 1989 was due to fitting out and furnishing prior to letting.

Submissions

The Revenue's arguments:

Ms Chung for the Revenue reminded us that the onus of proving an assessment is incorrect or excessive falls upon the Taxpayer (section 68(4)) and maintained that it must be particularly heavy where an appellant had a history of trading. She referred to the proposition, accepted by Mr Chang and the Board that whether an asset was held as trading stock or as capital is determined by the holder's intention at the time of acquisition (Lionel Simmons Properties Ltd v IRC 53 TC 461). She note that the Taxpayer had not suggested that there was any change in intention.

As to the facts she submits that there is no direct documentary evidence to support the testimonies of Mr Q and Mr CC as to Mr E's intention, which testimonies she argued should be treated as unreliable hearsay on matters now 20 years old. Certainly no minutes whatever were produced and in the Company I proceedings evidence was given that Mr E was not accustomed to committing decisions to minutes. She dismisses the evidence regarding Company A's lettings of flats in the Subject Property and the fact that they are still being let out by Company A, on the grounds that it is not Company A's intention which is material, it is the intention of the Taxpayer back in 1977 when Company G assigned the Site to the Taxpayer. We do not share Ms Chung's view that how Company A treated the Subject Property after acquisition be disregarded when deciding the

Taxpayer's original intention. We think because Company A was just as much a Group D company as the Taxpayer. Company A's treatment can be looked at but that does not mean that such treatment is ipso facto persuasively indicative of what the Taxpayer would have done if it had not sold to Company A, indeed an inter-group transfer may mark a change of intention. She also went on to say that even if Mr E initially did have renting out in mind that did not rule out an ultimate intention to sell, that is, he was waiting for a favourable opportunity to sell and merely turning the property to good account in the meantime (this echoed the view of the Commissioner reported in the Company I Stated Case and approved by the Judge in the Company I High Court Report). She submits that it is only the financial statements of the Taxpayer that are material, the accounts of other group companies including those of Company A, Company I I and Company G to which we were referred, were irrelevant: for the reasons given we do not agree with this submission. She said she could see no difference in the treatment of the subject Site and the admittedly trading properties (Property N and Property O) in the financial statements of the Taxpayer.

Ms Chung referred to the trading activities of the Taxpayer, namely the sale of eight units in Property O and the development and sale of units in Property N, and she quoted the following passage from the judgment of Lord Jauncey in the Privy Council case of Richfield International Land and Investment Co Ltd v CIR (3 HKTC 167) who, after noting that Richfield sold properties (previously let out) which were shown in its accounts as capital transactions but the profits from which were subjected, without objection, to profits tax, said:

> *'Indeed the accounting treatment of the sale of property with a consequent tax liability points strongly against those in charge of the company having treated Kellett Heights as a fixed asset. As the Court of Appeal pointed out the Company had no business to submit to a substantial assessment to profits tax if such assessment was on the facts unjustified. In their Lordships' view the inescapable inference from the way in which the company treated the sale of the units in Kellett Heights is that it regarded them as trading stock.*
>
> *There was no finding by the Board that the company had sought to treat any of the seven Hong Kong properties acquired by them in a different manner so far as investment was concerned. In these circumstances, having concluded that the company was content to be taxed on the profits accruing from the sales of the Tai On shop and Lungcheong Villa as on the sale of trading stock and that the company had effectively invited taxation on that basis in relation to the profits accruing from the sale of Kellett Heights, it was but a short step to reach the conclusion that the sale of Gardena Court was undertaken on the same basis.'*

As regards the section 70A claim Ms Chung drew attention to an 'obiter' remark in D18/88, IRBRD, vol 3, 241 at 243 to the effect that if a taxpayer has taken a new different view of its liability to tax on the known facts from that held at the time the return was submitted the Board doubted that such a change of opinion would constitute an error within section 70A. We think that remark is in keeping with the reasoning about the specific retrospective referred to in the proviso to section 70A and is therefore likely to be correct – at least in general terms. With the help of that obiter remark and the aid of section 51(5) and the declaration contained in the return Ms Chung argued that if the director signing the return cannot rebut the inference that he knew the facts relating to the acquisition, development and subsequent transfer, that is, the facts which gave rise to the disputed profits being returned then the Taxpayer has failed to establish a section 70A error. This is a particularly subtle argument and it is not easy to see how it squares with section 70A, however as a consequence of the conclusion we have reached regarding section 70A we need offer no further comment.

She took us through the principles derived the judgments in Sharkey v Wernher and Petrotim.

Ms Chung agreed that if the Board finds that the Site was capital in nature then that is the end of the matter so far as profits tax is concerned.

Taxpayer's Arguments

At the risk of oversimplification Mr Chang's submissions may be summarized, with our comments, as follows:

(1) We accept the proposition that expatriates were less likely to be put off by the presence of the cemetery and were more inclined to lease than to buy their residences and that those factors would lend some support to Mr Q's tale of Mr E's motives for buying and intention to hold long term if that tale is to be believed.

(2) The Taxpayer had access to financial resources to complete the construction and to hold it as a long term asset to rent out. We agree that the fact that Company A completed and still holds the Subject Property supports this submission.

(3) There is ample authority to the effect that a property company can at one and the same time hold properties on capital account as well as on revenue account. The accounts of Company I I, Company G and Company A are common in that respect. Mr Chang said that their investment properties have been 'accepted as such' by the Revenue. Of course until those companies come to sell the properties presently claimed as investments the Revenue is in no position to take a view one way or the other nor would the Revenue have grounds for challenging claims to capital allowances.

(4) We accept that the headings 'Property under development at cost', 'Leasehold Properties at cost' or 'Leasehold Properties under development at cost' provide no adverse guide in this case to Mr E's original intention, but conversely for reasons given later they are not persuasive.

(5) Group accounts classification was consistent progressing from ‘under development’ to ‘current assets’ or ‘fixed assets’ on completion depending on whether the asset was for sale of leasing out. We accept that such is the case with the accounts of Company A, Company G, Company I I and of course the Site was transferred before the need for post-completion classification arose. We also accept that when the Subject Property was completed in Company A’s hand it was reclassified, as ‘Fixed Assets’ at least in the 31 March 1986 accounts and no longer appears in Company A’s 31 March 1989 accounts as ‘Property under development’ (the intervening accounts and balance sheets are missing). Nevertheless the findings in the Company I case suggest that such classification was not consistent throughout the group. We also note that in one of the Reports of the Directors (three of which are missing) accompanying the Taxpayer’s accounts the principal activities failed to include trading though the only profits in that year came from trading. Neither of these reservations is of particular significance, but they are another indication of laxity (see 4.2 at 30 June 1977 and 30 June 1979) by the group’s accounts department and its auditors, so where we are invited to draw inferences from classifications the suggested inference is diluted, because of the unexplained exceptions to the claimed consistency.

(6) The Site was held for nine and a half years without any attempt to sell. As it was a large uncompleted Site and as there were many delays due to the Building Authority appeals and drainage problems, we do not think the period of holding confounds one of the Revenue’s suggestions namely the idea was to sell after completion. We note that all of the Company I properties had been leased out, two for 15 years, and many for 8 years before being sold.

(7) When the Subject Property was taken over and completed by Company A there is no evidence nor any suggestion of attempts to sell the apartments, on the contrary the evidence is that from the outset Company A advertised the apartments for letting only and that situation has continued up today. Ms Chung however argues that Company A should not be looked upon as the alter ego of the Taxpayer, meaning the actions to Company A should not be ascribed to the Taxpayer.

(8) Mr E was a forceful character who, in the words of Mr Chang would give instructions which had to be followed by his employees and he was not a person who could be easily deflected and evidence of his tenacity is afforded by the considerable trouble he went to to overturn on two occasions the decisions of the Building Authority. We accept this evidence.

(9) The Site was only transferred to Company A in anticipation of a flotation which Mr Q said was in order to isolate it from the Property N sales activities. However as mentioned the prospectus (which we realize was produced a couple of years later and then only in draft form) includes Property N, also the owners of Property F and Property FF held trading properties as well as

investment properties, which weakens the credibility of Mr Q's suggestion that the trading and investment properties were separated for the purposes of the flotation.

Mr Chang then goes on to say that 'Mr E told Mr Q he wanted the Subject Property to be transferred at its book value. Unchallenged evidence was that Mr E would give instructions which had to be followed by his employees. Mr Q worked out the development costs as then shown in the books and gave this figure to Mr E. Mr E then estimated the book value at $29,050,000. This figure was then put into the Sale and Purchase Agreement dated 28 January 1986'. This comes close to being a submission (and, by extension, perhaps an admission) that Mr E made a mistake because he overestimated the costs.

(10) Mr Chang suggests that because the Mr P draft accounts only showed the costs of the Site at $27,385,232.84 it was understandable that Mr Q should not realize that this would give rise to a profit. This is to infer that at that time Mr Q had quite forgotten the conversation about book value and Mr E's estimate 16 months' earlier yet he remembered it well enough for the Board some 20 years later.

(11) Mr Chang distinguishes the Richfield case because it was primarily concerned with a change of intention, which does not apply here. Granted there is no evidence to suggest that there was a change of intention so far as the Taxpayer itself is concerned and in that respect the distinction exists but that does not eliminate the possibility of a change of intention by Mr E for the Site on its changing hands within the group.

(12) Mr Chang then addressed the Commissioner's determination in which respect he remarked that 'one has to remember that we are dealing with an appeal from a determination of the Commissioner, so the Board is obviously somewhat bound by findings of fact …'. We respectfully disagree because the Board's findings may be different because either it has information which was not before the Commissioner or it draws dissimilar inferences from the same facts. We think our task is to make our own findings of fact, which may or may not be based upon facts agreed by the parties which in turn may have been derived from the determination under appeal, save for that qualification we have to address the evidence de novo and certainly not through the eyes of the Commissioner. We consider there is no need to repeat here Mr Chang's arguments in relation to the Commissioner's reasons.

We need not deal further with Mr Chang's submissions because they are subsumed in our deliberations and conclusions.

Deliberations and Conclusions

We have now to reach decisions regarding the alleged error and the original intention.

Section 70A

We remind ourselves of the comment to be found in the Company I Stated Case – which paraphrases the same sentiment by the Commissioner – approved by the Judge in the Company I High Court report:

> *'If a taxpayer wishes to challenge the accuracy of its own audited statements and tax declarations made by a director... Evidence to substantiate the mistake must be given in the strongest terms.'*

Next neither Counsel has suggested that we need concern ourselves with that part of section 70A which refers to arithmetical errors or with any omissions from a return or with any practice contemplated by the proviso to 70A.

Identifying the error:

The grounds of appeal to this Board do not identify the alleged error. In correspondence with the assessor Company R in effect alleged the error was the inclusion of the gain on the sale of a capital asset in the operating profits: we assume that if it were a capital gain then it should (in those days) have been segregated as an exceptional capital gain item. We will call this alleged error an 'incorrect attribution'. Understandably the Commissioner's decision deals with the subject on the basis that the Taxpayer is maintaining there was an incorrect attribution. On the other hand Mr Q's evidence suggests the error was an incorrect book value. As mentioned when dealing with Mr Chang's submissions this is to imply the mistake was Mr E's. The conclusion we have reached as to the incorrect book value is that there was no incorrect book value in the Taxpayer's profit tax return and accounts because the accounts correctly reflected the consideration shown in the Agreement for sale to Company A. The error, if in truth there was one, was that Mr E was woefully wrong in his estimate of development costs. But how could Mr E have genuinely believed that the $29,050,000, which he directed be put in the Sale Agreement, would accurately represent the book value when (as Mr Q told us) some construction bills were still not available? Furthermore it is of course a little unreal to suppose that the book value would work out to a neatly rounded figure. If there really had been a wish to sell at book value then the Sale Agreement could have left the consideration to be fixed when all development costs up to 28 January 1986 had been established, such consideration to be recorded in a supplementary agreement.

Then again, when the real book value came in or (if some credence is to be given to Mr Q's story about not noticing the consequence of the draft or audited accounts) on arrival of the second additional assessment, why was the opportunity not taken to correct the consideration in the Sale Agreement?

Alternatively Mr Q was not telling us the truth and in reality Mr E had simply laid down a price at which the Site was to be transferred and how and why Mr E selected $29,050,000 is a matter of conjecture and therefore may have had nothing to do with matching a book value. It does seem strange that only 14 days before the transfer the Taxpayer's share capital was raised from $1,000 to $200,000 which a note to the accounts says was to increase the working capital. We are left in the dark as to what the Taxpayer did with the monies which came to it from the profit on the sale of the Site and the increase in capital but no evidence was led to suggest that the Taxpayer used it to buy another investment. What really matters is that we believe the $29,050,000 was a consequence not of something Mr Q had done but rather a decision for which Mr E himself was entirely responsible. There were no evidence about Mr E's reaction on learning of the second additional assessment but we imagine that if it had been Mr Q's fault the reaction of the forceful quick tempered Mr E would, understandably, have been severe and that would be worth recounting to the Board.

Mr Q was asked by Mr Chang what he did when he received the second additional assessment, he replied that he checked to see what had happened and he 'discovered that I put the investment profit into the trading profit.' This is an intriguing reply because not only does it suggest that Mr Q was well aware that the sale of the Site would produce a profit but that he personally caused it to be combined with the Property N profits, it is also inconsistent with alleged intention for the consideration to be at book value.

Even if we are wrong to look upon the $29,050,000 as consideration which was not deliberately intended to reflect book value there still remains the conclusion that the working hypothesis of an incorrect book value is not to be found in the accounts. The accounts are in our opinion supposed to represent the financial consequences of transactions carried out by a company and that is precisely what the accounts in question did with accuracy. As we have said the error (if there was one, which we do not accept) lies in the figure put in the Sale Agreement. In our opinion that kind of mistake is not one at which the correction mechanism of section 70A is aimed, particularly as it would be possible to remedy it in a document supplement to the Sale Agreement or in the Assignment itself, which remained unexecuted for an unexplained period of three and a half years. Though neither the Agreement nor the Assignment were produced (so we do not know if Mr E was a signatory) we think it is safe to assume that if they had been amended or supplemented that evidence would not have been overlooked. That disposes of the incorrect book value.

The incorrect attribution theory implies either that Mr E was indifferent to matching costs or that the failure to achieve a match did not matter because the excess over book value would be a capital gain or the shortfall from book value would be a capital loss. Either way the theory depends on believing Mr Q missed the wrong attribution, there are however some valid reasons for being sceptical of Mr Q's evidence concerning the alleged error. He was the Chief Accountant of a very large concern and he had been an accountant with a listed company. Both his position and his experience suggest that he would be especially conscious of the scrutiny which the accounts of Company A and probably of the Taxpayer would receive prior to a flotation. It is therefore less than believable that Mr Q would, as he said, merely glance at the audited accounts, the schedule to which showed a profit on the sale of the Site and would not notice the costs in Note II to Mr P's draft and if he did see that note that he would fail to realize the costs did not correspond with the $29,050,000 he had passed on to the Taxpayer's solicitors back in January 1986; if he realized that then he would have recognized the need to show the profit as a capital gain. These lapses he would have us believe occurred in a transaction which he said was exceptional on two counts, namely transfer before completion and not at market value.

Again as a responsible and experienced accountant we do not think Mr Q can really have expected the profit on sales in the audited accounts to be wholly due to the sale of Property N units – which he must have known were only two in that year. The only time in the accounts produced to us that the gross profit on the Property N sales exceeded $1,000,000 was in the year ended 30 June 1984 when 24 units and 2 car parks were sold. The difference of $1,660,000 (as readily noticed by a layman as by an experienced accountant) between the $545,142.46 (being the actual gross profit from the two units) and the returned profit of $2,209,909.62 is so large that to overlook it stretches credibility, particularly bearing in mind the attention we would expect it to receive for the reasons mentioned above.

Finally Mr Q as group Chief Accountant must have been aware of the criticism implicit in the Company I BOR Decision which focused on Company I's accounts and another alleged mistake.

We do not therefore accept in incorrect attribution error. We find as a fact that the price in the Sale Agreement was quite deliberate and not a mistake and that failure to classify the profit as a capital gain was not an error. We therefore find against the Taxpayer on the issue of there being an error in the accounts and hereby confirm the first additional assessment of $1,641,562.

Original Intention

Our finding against the Taxpayer on the section 70A issue does not close this appeal. We still have to make a ruling on the paramount question of whether on the balance of probabilities the original intention was to develop the Site as a long-term investment.

The test here, as it was in the Company I case, is – what was the subjective intention of the Taxpayer at the time the Site was acquired, that intention being viewed in the light of the objective circumstances?

First we should say that we do not agree with Ms Chung's suggestion that the treatment of the Subject Property in the accounts of Company A should be ignored as it has no bearing on the Taxpayer's intention at the time of its acquisition that matters. We think the Taxpayer's Counsel is entitled to invite us to draw the inference that if the Taxpayer had continued to hold the Site then on completion it would have been classified as a fixed asset – whether we think such an inference is justified is a different matter. Similarly Ms Chung is entitled to point to the Company I case and recommend that certain inferences be imputed to the Taxpayer as a consequence of conclusions to be found (and upheld on appeal) in the Company I Stated Case. Clearly, the grounds for Mr Chang's invitation and Ms Chung's recommendation are the same, namely Mr E was the controlling power throughout: it does not follow from this that we should expect his original intention to remain inflexible throughout the various changes of inter-group ownership (Company L, Company G and the Taxpayer), for such a change may itself be a mark of a change of his intention. There are several indicia that suggest a flexible approach on Mr E's part, for example, the number of floors for the Subject Property (the various changes in the number of storeys of apartments over the number of floors of car parks), the various changes in the ultimate holing company of the Taxpayer and reversal of Company Z's position in that respect, placing title in Company L but beneficial ownership in Company G then title in Company G then transfer to the Taxpayer. The only reason for this last mentioned transfer was merely hinted at by Mr Q but we were given the impression that it was done to distance the valuable Site (which by then had been held by Group D for five months) from a damages claim against Company G in relation to the latter's ownership of Property F. The transfer to Company A is explained and that explanation is supposed to be evidence of investment consistency, however taken alone it is just as reasonably evidence of a change from dealing by the Taxpayer to investment by Company A. But the latter's subsequent trading of No. 4 contradicts Mr Q's testimony about segregation as does the inclusion of Property N in the draft prospectus.

Consequently we do not think Company A's behaviour towards the Subject Property should be taken as a manifestation of what the Taxpayer's attitude would have been if it had retained the Subject Property.

Company I Case

The facts of that case and its reports largely overlap with the events concerning the purchase and sale of the Site. The Board Decision, dismissing Company I's appeal and Judgment on the appeal to the High Court against Company I were well before the transfer to Company A. The Court of Appeal decision against Company I was given about some weeks before Mr P's draft accounts and some months before the audited accounts. It is inconceivable that the tenor of those findings would not be brought home to Mr E and Mr Q.

On 1 August 1980 the assessor raised a tax assessment for the year of assessment 1979/80 on the profits of about $65,000,000 generated by Company I's sale of 18 properties (some residential, some commercial and some industrial) to associated companies: the extra tax involved was about $11,000,000. The assessor also invoked the Petrotim approach, which the Commissioner endorsed, but the Board did not consider that the sale consideration was substantially below market. Nonetheless that principle is not one which would have come as a surprise to the Taxpayer when the second additional assessment was issued. All of the Company I properties had been let (which would include the residential ones) some for short periods and some for long lets, in two cases they had been held for over 13 years. All 18 properties had been shown in Company I's balance sheets under the heading 'Current Assets'. The Commissioner was influenced by Company I's history of property trading, the said classification in its accounts and that there was authority to show that the letting of properties of rental income pending an opportune time for sale can be part and parcel of a course of trading in properties. Company I claimed the properties had been held as long term investments and that their inter-group sales were part of group reorganization. Evidence was given before the Board by Mrs E about a policy of retaining one tenth in value of domestic and commercial premises for investment purposes and one third in value of industrial premises for investment purposes and the way pricing was decided – the Board did not believe this and other material evidence. There was a suggestion that there was a mistake (presumably as to putting the 18 flats under current assets) but it seems that as no testimony was offered on the point that suggestion was dismissed. There is reference in the determination to a letter by Company I's tax representative about the possibility of a change of intention which we think should be kept in mind.

The first thing we found striking about the Company I Stated Case Report is that what was said there about the classification of assets and mortgaging of them is contrary to the evidence given by Mr Q. Certainly the findings in that case are disconcerting, leading us to wonder how far the testimony before us was dictated by expediency rather than frankness.

The prospect of a reorganization and flotation back in 1972 (not the same flotation to which we were referred) was also advanced in the Company I case as the reason for the transfer of the 18 properties. The Board in the Company I case was critical because the Taxpayer's own in-house accountant and its outside auditors (Company R) were not called. In our case the group Chief Accountant did appear, but no one from Company R appeared to confirm or refute whether their auditing supported the suggestion of an intention to transfer at book value or the suggestion that the profit was an exceptional item and what evidence as auditors they would rely on in the absence of minutes and in the face of the signed Agreement for sale of the Site. That Company I, unlike Company A's tax returns, made no claim to depreciation allowances, is a distinguishing feature of the Company I case.

The main interest of the Company I Stated Case for us lies in deeper implication arising from the fact that that Board did not believe one of Group D's senior personnel, namely Mrs E, and we have ourselves concluded that Mr Q's account of his error is not to be trusted. Though we do not propose that Mr Q's testimony on the matter of Mr E's original intention should be dismissed out of hand as another example of a group preference for expediency over frankness, we do think we should view such testimony with extreme caution and expect a high standard of corroboration. We have however been unable to find such corroboration.

Mr Chang argued that Mrs E was not a suitable witness to explain Company I's accounts but as we have said it was not her explanation of the accounts that was the reason the Board disbelieved her – it was her tale of the long term retention and pricing policies.

We have some strong reservations concerning Mr CC's evidence. Within a very short time of joining the group. Mr E takes Mr CC into his confidence as to the intentions for the Site, but over the next twenty years the only other time Mr E again confides in him is regarding holding Property FF for investments. He was quite emphatic about the group never selling domestic flats that had been let, yet the Company I report sow he was quite wrong.

In a letter to the Revenue in February 1982 Company R as Company I's tax representative, said in relation to the classification of the 18 properties as current assets, 'The accountant of the company had never seriously attempted to make a proper classification of the units in the balance sheet… everything was put under current assets to save the tedious work of segregating those rental units from those held for sale.' With this and our doubts concerning Mr Q's evidence in mind we do not think any reliance should be placed on the 'current assets/fixed assets' classification. We are conscious that whether an item is held as capital or as stock-in-trade is not concluded by the way in which it has been treated in the owner's books of account (CIR v Scottish Automobile & General Insurance Co Ltd 16 TC 381 at 390) or by the Revenue in the past years (Rellim Ltd v Vise 32 TC 254)', extracted from page 488 of the judgment of Orr L J at the Court of Appeal stage of the Lionel Simmons case.

The Assignment by the Taxpayer to Company A was not executed until three years eight months after the Agreement. In the absence of any contrary explanation we think it is reasonable to deduce that Company A wanted to keep its options open in case it should decide to resell outside the group in which case stamp duty would be saved if the Subject Property were conveyed directly from the Taxpayer to the ultimate buyer, Company A joining in merely as confirmor.

Having reached the point where we have concluded that the proposition that the transfer to Company A was done for pre-flotation separation reasons does not hold up, that the draft prospectus is not persuasive even of Company A's dedication to long term strategy, that little reliance can be placed on the evidence of Mr Q and Mr CC, that there is a complete absence of Board Minutes, that bearing in mind Company I's findings the consistency in classification in the accounts produced to us tends to be too selective and therefore not convincing, the Taxpayer's case is reduced to consideration of the circumstances prevailing at the date of purchase in 1976. Which is to say do we believe that the fung shui location was such that in Mr E's eyes its only potential lay in developing for renting? In the light of Mr E's propensity for flexibility (of which the failure to transfer title for so long seems to be an example) and evidence of changes in his attitude towards group properties we are not satisfied on the balances of probabilities that Mr E bought and put the title to the Site in the Taxpayer's name with the firm intention that the Taxpayer company should hold it as a long term investment.

Accordingly we find against the Taxpayer on this aspect also and therefore confirm the second additional assessment.

This appeal is dismissed.