Case No. D37/06

Case Stated – application for case stated – proper question of law.

Panel: Anna Chow Suk Han (chairman), Lawrence Lai Wai Chung and Wong Kwai Huen.

Stated Case, No hearing.
Date of decision: 25 August 2006.

The appellant applied to the Board to state and sign a case for the opinion of the Court of First Instance. There were 14 amended questions of law.

Held:

1. The 1st question was in effect a challenge to the Board's finding of facts. The 2nd – 5th questions were posed on the basis that some facts ought to have been found by the Board (the proved facts). The 6th – 11th were posed on the wrong premises that the Board had made a positive finding that the appellant's former tax representative had made an error or mistake or they were on the basis of the above proved facts. The 12th – 14th questions similarly posed the question on the basis of the proved facts. The 15th question was not understandable.

2. The Board found all of them not proper questions of law. (CIR v IRB of R & Anr applied; D26/05 considered).

Application dismissed.

Cases referred to:

Commissioner of Inland Revenue v Inland Revenue Board of Review and Another [1982] 2 HKLR 40
D26/05, IRBRD, vol 20, 174

Decision on application for Case Stated

The law

1. Section 69(1) of the Inland Revenue Ordinance ('IRO') provides as follows:

> *'69. Appeals to the Court of First Instance*
>
> *(1) The decision of the Board shall be final:*
>
> *Provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance. Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, together with a fee of [$640], within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, shall be the date of the communication by which the decision is notified to him.'*

2. Barnet J in Commissioner of Inland Revenue v Inland Revenue Board of Review and Another [1989] 2 HKLR 40, provided useful guidance on the law and practice of stating a case pursuant to section 69(1) of the IRO. The following guidelines have been laid down in that case:

(i) An applicant for case stated had to identify a question of law which was proper for the court to consider.
(ii) The Board of Review was under a statutory duty to state a case in respect of that question of law.
(iii) The Board had a power to scrutinize the question of law to ensure that it was one which was proper for the court to consider.
(iv) If the Board was of the view that the point of law was not proper, it might decline to state a case.
(v) If an applicant wished to attack findings of primary fact, he had to identify those findings.
(vi) Only in the most exceptional circumstances would a complete transcript of the evidence, and the documents produced before the Board, be attached to or incorporated in the case stated.

(vii) Both an applicant and the Board should be astute to use 'facts' and 'evidence' correctly.

3. We also find assistance from a recent decision of the Board on an application to state a case pursuant to section 69(1) of the IRO. In Case No D26/05, at 20 BORD 174, the Board examined from the basics the issue of law on the question of 'the threshold of arguability which has to be satisfied to constitute a proper question of law'. It concluded that (1) the Board should not accede to a request to state a case unless the applicant can show that a proper question of law can be identified, (2) a dissatisfied party has a right to appeal on a point of law under section 69. The Board hearing such an application should approach the matter with an open mind being aware of the fact that it may not be the best judge of whether its decision is wrong. On the other hand, the function of the Board is not simply to rubber stamp any application where a point of law can be formulated, and (3) the Board may decline an application to state a case under section 69 in the event that the point of law before it is plainly and obviously unarguable.

The application

4. A decision in case B/R 4/03 ('the Decision') was delivered by us on 16 January 2006.

5. By a notice to the Clerk to the Board dated 14 February 2006, Messrs A, Certified Public Accountants, ('the Representatives') acting on behalf of the Appellant, expressed dissatisfaction with the Decision as being erroneous in point of law and thereby, applied to us, in accordance with section 69(1) of the Inland Revenue Ordinance Chapter 112, ('IRO') to state and sign a case for the opinion of the Court of First Instance ('CFI').

6. By a letter of 21 March 2006, the Representatives were informed that the questions of law posed by them were not proper questions of law because they sought to re-open the factual issues determined by the Board and unless there were proper questions of law before it, the Board would be unable to entertain their application.

7. By a letter of 18 April 2006, the Representatives informed the Board that they would amend the questions of law for the Board's consideration.

8. Consequently on 27 April 2006, the Representatives served us with the amended questions of law, as contained in the Annexure hereto.

9. By a letter dated 24 May 2006, the Respondent responded to the Appellant's amended questions of law.

10. By a letter dated 10 July 2006, the Representatives responded to the Respondent's said letter dated 24 May 2006.

11. The amended questions of law as contained in the Annexure consist of fourteen questions.

The Fourteen Questions of Law Proposed by the Appellant

12. The Appellant's 1st question of law consists of 16 pages and 48 subparagraphs. The 48 subparagraphs relate to matters or evidence of which the Appellant asserted that the Board ought to have found them as primary facts. These matters or evidence are termed by the Appellant as 'Proved Facts' in the application. In the 1st question of law, the Appellant is in effect challenging the Board's findings of facts. Thus, we are of the view that it is not a proper question of law for the opinion of the CFI. As Barnet J said in CIR v Inland Revenue Board of Review and Another [1989] 2 HKLR 40 at page 58:

> *'…… the Board need only give a general indication of the evidence relied on in reaching any finding of primary fact. Assuming that the Board are able to indicate the existence of such evidence, that is the end of the matter. The Court is not permitted to revaluate that or any other evidence to see whether it might have made a different finding.'*

13. We take the same view in respect of the 2nd, 3rd, 4th and 5th questions of law. They are also not proper questions of law for the opinion of the CFI because those questions were posed on the basis that the Proved Facts were the facts of this case. As said previously, the Proved Facts are not the facts found by the Board upon which the Decision was reached. They are matters which, the Appellant believes, ought to have been found as facts by the Board.

14. The 6th, 7th, 8th, 9th, 10th and 11th questions relate to the application of section 70A of the IRO.

15. In the 6th question, the appellant stated that '…… notwithstanding the Board had satisfied that the Appellant's former tax representative has made an error or mistake in the Appellant's tax return on 31st July 1996 by submitting that the gain on the realization of Shop Premises and Office Premises was derived as a result of a change of intention to trading ('the Error').' It appears from this statement that the Appellant has taken an erroneous view that the Board has made a positive finding that the Appellant's former tax representative had made an error or mistake. What in fact was said is that 'the approach and attitude adopted by the Taxpayer do not lend credence to its claim of having received wrong advice from the Representatives by reason of which the sale proceeds were mistakenly offered for assessment.'

16. The 6th, 7th and 8th questions are posed by the Appellant on the wrong premises that the Board has made a positive finding that the Appellant's former tax representative had made an error or mistake. Thus, these questions are not proper questions of law.

17. Again, the 9th, 10th and 11th questions are posed on the basis of the Proved Facts, and are consequently not proper question of law for the opinion of CFI.

18. The 12th, 13th and 14th questions relate to the Project Management Fee and Bank Guarantee Fee.

19. In the 12th and 13th questions, the Appellant similarly posed the questions on the basis of the Proved Facts. We take the view that these questions seek to re-open the factual issues determined by the Board. Thus, we do not think that they are proper questions of law to be put to the CFI.

20. As to the 14th question, we are unable to put it to the CFI for an opinion because we have difficulty in understanding it as it now stands.

21. We bear in mind the principles laid down in the aforesaid cases. Such as, the function of the Board is not to rubber stamp any application where a point of law can be formulated, and where the questions posed in an application to state a case are not proper questions of law, the proper course for the Board to take is to decline the application. Presently, we find the questions posed by the Appellant are not proper questions of law in that they seek to re-open the factual issues of the case. If the Appellant is dissatisfied with our refusal to state the case, it is up to the Appellant to decide whether to take further action and if so, what action to take.

Annexure

A copy of the said Decision is annexed to this notice.

We, on behalf of the above-named Appellant, formally express dissatisfaction with the Decision as being erroneous in point of law and hereby apply to, in accordance with Section 69(1) of the Inland Revenue Ordinance Cap. 112, the Board who determined the appeal to state and sign a Case for the opinion of the Court of First Instance on the following questions, for which application we enclose the sum of $640 in payment.

Primary Facts

1) Whether, as a matter of law, and on the evidence before the Board and the burden of proof, in determining the issues, namely whether the Appellant's intention in developing the [Plaza B] was for trading purpose; whether the Appellant's sale of the Shop Premises and Office Premises was embarked as adventure in the nature of trade; whether the Appellant had deliberately and unconscientiously made the error in submitting her 1995/96 tax return that the profit upon the sale of Shop Premises and Office Premises was derived as a result of change in intention from long-term investment to trading; and whether the management fee and bank guarantee fee was not deductible under section 16(1) of the Cap. 112, the Board shall have properly found the following relevant facts as primary facts ("Proved Facts") in addition to the Agreed Facts, saved that the facts 1 to 4, 7, 8, 10, 11, 41 and 46 as referred herein have been relied on by the Board, as she did in her Decision.

(1) In about March 1991 and April 1991 the development of [Plaza B] ("Redevelopment Project") was proposed by [Company C] on 18/3/1991 (D/App.E1/p.109) which was then accepted by [Company D] on 3/4/1991 (D/App.E2/p.110) and [Company E] on 18/11/1991 (D/App.F/p.111). In the said proposal it clearly pointed out that the redevelopment of the [Plaza B] was for long-term investment partly as operating offices in Hong Kong and partly for letting in generating rental income. It also pointed out that the redevelopment funding shall be arranged by [Company D] and member companies of the Ministry [D/p109].

(a) [Company D] in accepting and supporting the said proposal added that the said proposal has been reported to the Ministry who has been asked to provide the necessary financial support. Further, [Company D] pointed out that where the Ministry has difficulties in providing the finance, [Company D] shall provide the necessary finance to redevelop the [Plaza B] [D/App.E2/p110].

(b) [Company E] also indicated that the development of [Plaza B] not only is advantaged in establishing the [Ministry's] image, but also increases the fame of the Ministry in Hong Kong, or at the meantime after retaining parts of the premises for her own use, the remaining parts can be let out to generate rental income [D/App.F/p.111].

(2) On about 27/1/1992 the Redevelopment Project proposal to redevelop the [Plaza B] as its production and operating office building was further discussed and jointly proposed by [Company F], [Company E] and [Company D] ("Redevelopment Proposal") [D/p.112-113]. They proposed, in particular, the 2nd option

(a) By acquiring the land at [Address G] and jointly developed with the 2 pieces of lands owned by [Company H] and [Company F];

(b) The feasibility and financial viability analysis in terms of cost and yield has provisionally reflected that the return would be at about 13.3%;

(c) Regarding the funding, [Company H] and [Company F] shall provide HK$8M in addition to borrowing from bank for $90M whereas [Company D] shall borrow the sum of about HK$500M from on the collateral of the 2 pieces of lands owned by [Company F] and [Company H], and finance HK$100M itself;

(d) In event [Company D] has financial difficulties in acquiring the land at [Address G], construction member companies and supplying member companies of Ministry are invited to invest by cash whereby on completion of the Redevelopment Project, interests in the [Plaza B]will be apportioned in accordance with the amount of contribution;

(e) The name of the building on completion is called [Plaza B] subject to the final approval of the Ministry. On completion of the Redevelopment Project, the Ministry will have her own building in Hong Kong. The [Plaza B] will represent a single entity to the public regardless its interests or property right will be apportioned internally among the partners in proportion to the area and their investment fund.

(3) Followed the Ministry's support and pursuant to the Redevelopment Proposal [D/p.112-113], the Appellant acquired the land at [Address G] on 28/2/1992. On about 20/3/1992, [Company C], [Company H] and [Company F] convened a meeting in which the following resolutions were passed [D/ZZM-1/p001-p002]:

(a) Clause #1, the [Plaza B] is the 1st composite commercial building of [XXXX] in Hong Kong. The 3 partners should be co-operate and work together.

(b) Clause #2, in order to speed up the completion of the Redevelopment Project, all 3 partners agreed to set up a limited corporation (i.e. [the Appellant]) in Hong Kong, of which share capital shall be issued to each partner in accordance with the area of lands injected. Each shareholder will also bear the risk and benefit based on such ratio.

(c) Clause #3, all partners agree that borrowing from bank will be made in the name of the new company, i.e. [the Appellant]. In event the funding is not sufficient, [Company C] will be responsible for financing the deficit. Upon completion of the construction of the [Plaza B] each partner should be liable for its own shared principle and interest which would be repaid from the operating income derived in the part of the [Plaza B] each owned.

(d) Clause #4, the relocation of staff incurred by [Company F] in sum of about HK$30M will be assisted by [Company C] in obtaining the finance at the favourable conditions.

(e) Clause #5, the limited corporation i.e. [the Appellant] being set up will maintain its independent records and each partner shall bear the development costs starting from the demolition stage in proportion to their share capital.

(f) Clause #7, the 3 partners agree that this Redevelopment Project shall be undertaken and managed under the principle of "Hong Kong matters shall be executed in Hong Kong manner". Separate agreement will be signed by the 3 partners at the approved solicitor's office.

(4) On 15/4/1992, the Ministry approved the Redevelopment Proposal ("Ministry's Approval") [D/App. L/p141-p142], which was issued by the Treasury Department and copies were addressed to [an Authority in Mainland] too. The Ministry's Approval contains the following terms:

(a) Clause 1, in principle the Redevelopment Proposal is agreed. Regarding the funding for the demolition and redevelopment, (the partners) are asked to proceed as soon as possible and approach the

appropriate bankers for the borrowings as proposed in accordance with the prescribed requirements.

(b) Clause 2, the Redevelopment Project not only can resolve the [operating offices and staff quarter problems] but also serves as development channel for the Ministry. Its meaning is very essential. Hence, the Redevelopment Project must be completed in time better early completion. Every departments, units, directors, officers, staffs within the Ministry must support and provide assistance as necessary towards the [Plaza B] ensuring the Redevelopment Project is undergone smoothly.

(c) Clause 3, a leader organization is set up to supervise, oversee and coordinate the progress and construction during the redevelopment. The 3 partners shall discuss themselves and submit the proposal to the Ministry for approval in due course.

(d) Clause 4, in the course of redevelopment and construction, [Company F], [Company H] and [Company D] must work for the best interest of the Ministry as a whole. Regarding the interests in [Plaza B] upon completion, the partners shall discuss themselves and submit the proposal to the Ministry for approval in due course.

(e) Clause 5, regarding the issue of the Ministry's development in Hong Kong, and the manner of management and other problems associated with the [Plaza B] upon completion are subject to further study and discussion.

(5) Pursuant to the Ministry's Approval, in about April 1992, the Appellant approached [Bank I] for a bridging loan in the sum of $175M for financing part of land cost at [Address G] ("April Loan") in which [Company C] acted the guarantor [D/App.J1/p114-p115; App.J2/p116-p130].

(6) Pursuant to the April Loan agreement, [Company J], a property valuer, was arranged to appraise the valuation of the [Plaza B]. On about 30/6/1992 the property valuation report addressed to the banker was prepared [D/App.N/p144-p164].

(7) On about 28/5/1992 the public was reported that the [Plaza B] was redeveloped by [Company D] and was used as the Ministry's headquarter in Hong Kong. Further the [Plaza B] would not be sold in short term [D/App.M/p.143].

(8) On about 9/8/1992 the Minister, deputy director of Ministry Planning department, [Company C], [Company E] and [Company F] convened a meeting in which Minister [Mr K] specifically pointed out the following [D/App.P/p.165 & 166]:

(a) Clause 1, the [Plaza B] must be redeveloped in compliance with the principles of greatest, speediest and best i.e. (i) the property development plot ratio shall be derived at its greatest limitation; (ii) the redevelopment and construction must be undertaken at its greatest speed; and (iii) the [Plaza B] must be guaranteed with both best design and best quality.

(b) Clause 2, the share capital in association of the [Plaza B] shall be settled and divided in proportion among the partners. Except for the shop premises of the [Plaza B], each partner's shared interests must not be sold to the public. Unless any partner by reasons of the necessity for commercial development has to realize its shared interests, the partner must sell to the members within the Ministry in accordance with existing economy regulation.

(c) Clause 3, pursuant to the Ministry's Approval, a management committee shall be set up quickly to oversee the development of the [Plaza B]. Internally [Company D] is the organizer whereas regarding the external needs [Mr L] is in-charging. The management of the development and construction of the project can be worked under the rule of the Project Manager Responsibility.

(d) Clause 4, to guarantee the Redevelopment Project is undertaken smoothly, partners in the said project are limited to the 3 partners who must act for the interest of the Ministry as a whole, for the purpose of completing the [Plaza B] in Hong Kong as soon as possible.

(9) Regarding the Appellant's right in selling the shop premises to the public, it is [Mr L's] evidence that shortly subsequent to the 9/8/1992 meeting, Minister [Mr K] had firmly pointed out that the restriction in selling the [Plaza B] to the public was also applied to the shop premises, and so in all circumstances, without the Ministry's approval, it is not open to the Appellant to sell the [Plaza B] or any part of it including the shop premises to the public.

(10) On about 3/9/1992 the Appellant with a view to financing the land costs and redevelopment costs of the [Plaza B] arranged with the bankers for a bank

with a maximum limit of HK$510M ("Construction Loan") of which HK$260M was granted for land costs and HK$250M was granted for construction costs whereby the Appellant, inter alia, was contractually obliged to the mandatory repayment of HK$80M payable on or before 31/10/1993 and 30/4/1994 respectively [D/App.R/p.174-p180]. It is the evidence of [Mr L], [Madam M] and [Mr N] that about HK$250M of the Construction Loan had been subsequently applied to repay the bridging loan aforesaid in paragraph (13) [D/App.J4/p.134-p.136; D/App.A1].

(11) On about the same date the Appellant also arranged with the banker for a bank loan in the sum of HK$110M of which HK$90M was granted for land costs and HK$20M was granted for interests [D/App.Q/p167-p173], which according to undisputed evidence given by [Mr L], [Madam M] and [Mr J] the said loan was not used in the Redevelopment Project.

(12) On about 27/10/1992 the Appellant had arranged to extend the repayment date of the April Loan to 31/12/1992 [D/p131-p133].

(13) On about 20/12/1992 the Appellant had asked the banker to increase the April Loan by HK$30M to HK$205M ("Bridging Loan") [D/App.J4/p.134-p.136; D/App.A1].

(14) It is not disputed on [Mr L's] evidence that since the end of 1992, following the implementation of AEP which the Appellant have adduced documentary evidence exhibited in [D/ZZM-3; D/ZZM-3a; D/ZZM-3b], the Appellant had started to face a severe financial difficulties in obtaining finance from [Company D] and the Ministry in the Redevelopment Project and repayment of bank loan. Nonetheless, on about 26/2/1993 instead of providing fund to the Appellant and [Company C], the [Company D] asked the Appellant and [Company C] to cut down the investment in the [Plaza B] and remit back about HK$20M to ensure the [Hotel O] project could be smoothly undertaken [D/App.S/p.181].

(15) On about 28/5/1993, in view of the impact of AEP, it is not disputed on [Mr L's] evidence that for contingency purpose had arranged [Company C] staff to prepare a feasibility report [D/p032-p039] purportedly proposed to Ministry for the disposal of Shop Premises. Given the feasibility report was prepared only for contingency purpose, it had not been submitted to the Ministry in the sense that the Appellant still had legitimate and reasonable belief that the Ministry and [Company D] would continue to finance the Redevelopment Project whenever required.

(16) It is not disputed on [Mr L's] evidence and the supporting circulars from State and the Ministry, the Redevelopment Project became un-approved project that in about July and August of 1993 owing to the impact of AEP, the Ministry had ordered that the Ministry's finance on un-approved projects including the Redevelopment Project should be stopped or suspended [D/ZZM-3/005, 008 & 009; D/ZZM-3a/015, 017 & 019; D/ZZM-3b/025]. It is [Mr L's] evidence that at the time, the Appellant's expected financial reliance on the Ministry was nearly terminated.

(17) Pursuant to the Ministry's Approval Clause 4 [D/App.L/p.141], on about 11/8/1993 by taking into consideration of the respective advantages gained by each partner on the property plot ratio in the [Plaza B], the apportionment of the [Plaza B] interests among the 3 partners in terms of areas are settled down [D/ZZM-4/029-030].

(18) It is not disputed on [Mr L's] evidence that, pursuant to the Construction Loan agreement [D/p.176], Appellant was contractually obliged to repay its first mandatory loan payment of HK$80M on or before 31/10/1993, a meeting with [Company F] and [Company E] was convened in about September 1993 in which [Company D] agreed to assist the Appellant in overcoming the immediate financial problem by paying off the said loan payment on or before 31/10/1993 and thenafter [Company C] and the Appellant are left to solve the finance problems themselves. Eventually on about 30/10/1993 [Company D] had arranged to remit HK$80M to [Company C] [D/ZZM-16/p.080-p081]. Further in the same meeting the Ministry had also promised to provide extra HK$50M – HK$100M [D/App.U/p188] in the Redevelopment Project before [Company C] and the Appellant completely took over the financial burden.

(19) Following the said meeting, in spite of the Ministry would provide extra HK$50M – HK$100M [D/App.U/p.188], in the light that the total outstanding bank loan at that time was about HK$400M which was also the finance burden rested on [Company C] and the Appellant, the Appellant therefore reinstated the idea of disposing the Shop Premises to the public ("Shop Disposal Proposal") on the grounds that

(1) The realization of the Shop Premise was estimated to generate cash of about HK$300M, which would, albeit still sufficient, partly solved the 3 partners' financial predicament.

(2) Disposing the Shop Premises would get rid of the problems in respect of the composite management and interest apportionment associated with the Shop Premises.

(20) Since the implementation of the AEP starting at the end of 1992, the Appellant has started to fall into severe financial predicament, and in the light of the Shop Disposal Proposal, in about October 1993, with reference to meeting held on 1/11/1993 [see minute dated 1.11.1993 at D/031 & 031a], the Appellant attempted to sell the shop premises had asked Vice Minister [Mr P] and Financial Secretary of the Ministry to conduct the investigation. Following the investigation, the Appellant was restricted from selling the entire shop premises but was suggested to retain part of the shop premises for its own use – marketing the products [of the Ministry] or letting out [D/031 & 031a].

(21) On about 1/11/1993 a meeting among [Company E], [Company F] and [Company C] was convened and resolved to sell the Shop Premises (to the public) by engaging sale agent and continued to persuade the Ministry for approval in selling the entire Shop Premises (to the public). In the same meeting they resolved that they should try to seek the permission from the Ministry in selling the entire shop premises, pending for the said permission. [D/ZZM-5/p.031 & 031a].

(22) Pursuant to the resolution of meeting as aforesaid in paragraph (21), [Company Q] was appointed as the sole sale agent for part of the Shop Premises by adopting the tender method in marketing the Shop Premises. Tender was however set to last for one month (tendering proposed to expire on 31/12/1993 but eventually was set on 10/12/1993) so that necessary fund would be available on time.
[D/ZZM-7/p.040-p052].

(23) Further, following the investigation undertaken by Vice Minister [Mr P] and the Financial Secretary of Ministry aforesaid in paragraph (20), on about 2/11/1993, the Ministry granted the Appellant the authority to sell the [Plaza B] (including both Shop Premises and Office Premises) subject to the condition that whilst only part of the [Plaza B] is sold the sale must be made upon the necessity of repaying debts and the sale must be offered first within the Ministry then to the public. The remaining part of the [Plaza B] in principle shall be mutually managed and operated by the 3 partners.
[D/ZZM-8/p053-p058, clause 7].

(24) It is not disputed on [Mr L's] evidence that the sales proceeds from the Shop Premises might be insufficient in solving the financial predicament and the Appellant was not optimistic that the Shop Premises could be realized in a short time, coupled with the fact that the Ministry had granted the Appellant the authority to dispose of the Office Premises on the necessity of repaying debts, on about 5/11/1993 the Appellant arranged [Company Q] to furnish a proposal for the sale and rent of office premises whereby car parks of [Plaza B] were solely for renting not for sale.
[D/App.T/p182-187].

(25) On about 6/11/1993 the shares of interests in the [Plaza B] upon completion among the 3 partners in term of areas was settled down.
[D/ZZM-9/p059-p061].

(26) All the majority terms including the sale of the Shop Premises, bank loan application and the manner of sharing interest in the [Plaza B] were transcribed into the Redevelopment Agreement.
[D/App.B/p.086-p.094].

(27) It is undisputed fact that at the relevant time the total outstanding bank loan owed by the Appellant was about HK$400M whereas the 2nd mandatory loan repayment in the sum of HK$80M was payable on 30/4/1994 [D/App.R/p.176]. It is not disputed on [Mr L's]evidence that given the Shop Premises had already been launched in market, at the beginning the Appellant was not anxious to realize the Office Premises in the sense that whilst the realization of Shop Premises might partly reduce the Appellant's financial burden the Appellant still had an expectation that the Ministry and [Company D] might meet their promises by remitting the extra HK$50M – HK$100M [D/App.U/p.188] which singly or collectively might sufficiently overcome the [Company C] and Appellant 2nd financial hurdle. However on about 18/11/1993, when [Company D] notified [Company C] and the Appellant that the Ministry was incapable of remitting the promised sum as she also was requiring HK$200M in financing the [Hotel O] project and in satisfying the request of the branch companies too. Further, [Company C] and the Appellant were instructed to find the necessary fund themselves so as to repay the bank loan, or otherwise [Company C] and the Appellant were suggested to realize the Shop Premises [D/App.U/p.188]. Upon receipt of this notice, the Appellant was certain that they could no longer rely on [Company D] and the Ministry but themselves for finance. Hence on about 19/11/1993 the Appellant immediately signed the agency agreement purportedly engaged [Company Q] to proceed with the sale of the Office Premises to the public as well [D/p.187].

(28) While closed to the expiry date of tenders i.e. 10/12/1993, the tender response in respect of the Shop Premises was reported very poor – in fact no tender was found on date of tender opening and the offers for the Office Premises were piecemeal and mainly asked for those marketable marvelous upper floors. The Appellant/[Company C] therefore convened a committee meeting and resolved that the Shop Premises shall be sold whenever offering price reached the level of HK$320M without seeking for the highest price so that the sale of the Shop Premises could be speeded up [D/ZZm-10/p.062], the said standing instruction was immediately transmitted to the sale agent.

(29) It is undisputed [Mr L's] evidence of fact that at about mid of December 1993 a gentleman claimed to represent [Company R] arranged and came to the Appellant's office for a meeting in offering for the purchase of 10 those highly marketable (upper floors) of the office premises of the [Plaza B] at a price fallen within the prescribed level albeit not the highest. Given that the Ministry had instructed to reserve some upper floors for them coupled that in event if the Office Premises were sold piecemeal the Appellant might not obtain forthwith sufficient fund in solving the company's financial problems, hence the Appellant without attempt to seek for highest price or wait for other better offers from the sale agent, persuaded him to purchase the 10 floors in basket comprised of 6-8/F, 11-12/F, 16-19/F and 22/F. In consideration of the counteroffer for different floors of [Plaza B], the buyer acting on behalf of [Company R] asked to buy about 26 car parks or failing to sell the car parks the deal might be turned down. Regardless the Appellant was bound not to sell the car parks, in view of necessity in solving the partners' immediate financial predicament in short time along with the risk and uncertainty in finding other possible buyers for the Office Premises, the Appellant inevitably accepted for the sale of 26 car parks to [Company R] in the same deal [D/ZZM-12/p.065-067, 67a; D/ZZm-13/p.068-p069; D/ZZM-14/p070].

(30) It is not disputed on [Mr L's] evidence of fact that notwithstanding the realization of the Office Premises had substantially relieved the financial burden of the Appellant and [Company C], the Appellant had not stopped or withdrawn the Shop Disposal Proposal on the grounds that

(1) [Company S] who also owned substantial interests in the Shop Premises at relevant time had requested and insisted to realize its share in order to repay its bank loan and meet its relocation costs. Where if the Shop Premises were not sold, [Company C] and the Appellant were required to provide the necessary finance for [Company S] of

which the Appellant and [Company C] were incapable of satisfying after applying almost all of the sale proceeds of the Office Premises in paying-off the bank loans [P/p.034].

(2) It was about one week shortly after the sale of the Office Premises, on about 24/12/1993, provisional sale and purchase agreement for the sale of the Shop Premises in pursuance with the standing instruction as aforesaid in paragraph(s) was entered and signed [D/ZZM-11/p.063, D/p.192-200].

(31) It is undisputed fact that the Office Premises (including car parks) were sold to [Company R] and its related companies on about 17/12/1993 [D/p64-p67] and the Shop Premises were sold to [Company T] on about 24/12/1993 [D/p192-200].

(32) Subsequent to the realization of the Shop Premises and Offices Premises the Appellant had applied most of the sale proceeds in repaying the bank loans.

(33) On about 23/2/1994 the Appellant appointed [Company Q] as the lease agent for the remaining offices except 28/F of [Plaza B] [D/App. X/Bp274-280]. The remaining unsold premises at 28/F were provided to [Company E] as headquarter whereas unsold carparks and unsold premises at 21/F and 23/F were rented out. Insofar none of the remaining office units or car parks of the [Plaza B] is sold.

(34) The Appellant also filed a copy of the audited accounts [BOR/p098-104] in which the construction costs of the [Plaza B] were recorded as property under development and fixed assets.

(35) The Appellant did not lodge objection to the Assessable Profits demanded on 26/9/1996 and the Appellant paid forthwith the first instalment in the sum of $32,024,970 on 13/11/1996. [BOR/p043, (3)(3)]

(36) It is undisputed evidence of facts that [Mr L], [Madam M] and [Mr N] were assigned by the Ministry to work in the [Appellant]. [Mr L] left on 12/1995. Both [Madam M] and [Mr N] did not have personal knowledge on the Appellant's intention or on the matters leading to the sale of the properties in question.

(37) It is not disputed on [Mr L's] evidence of fact that.

(1) The Ministry recruited about 3,000,000 staff. It owned a lot of infrastructure, factories and restaurants, offices etc. It has its own courts and police force.

(2) At the material times the [Company C] had deposited about US$70M with the [Bank U] and [Bank I] and about US$40M advance payments on the government projects.

(38) It is undisputed fact that the Ministry and [Company D] has provided the funds of HK$315M in total (P/p.043, P/App.H/p.81, P/App.I/p.82, P/App.O2/p.135), about 40% of the total redevelopment costs of about HK$762M [D/p.107] in the Redevelopment Project.

(39) With reference to summary of the bank loan exhibited marked Appendix D was prepared by the former tax representative, it is not until the day 2 of the hearing (i.e. 18/2/2004) that the Board commented that the said summary failed to disclose the date of loan agreement and thus the Board had requested the Appellant to provide loan agreement date. Pursuant to the Board's request, prior to the adjourned hearing started on 17/5/2004, the Appellant had looked up their source documents. In the course of gathering the loan agreements, Appellant revealed that the original Appendix D was incorrect and so revised the bank summary exhibited marked A1. The Board has been explained about the background of the amendment at the beginning of the adjourned hearing. Both witnesses [Madam M] and [Mr N] then informed about the amendment. [Madam M] and [Mr N] explained in cross-examination that they had checked over the sources documents and asked for amendment to their witness statements regarding the bank loans.

(40) It is not disputed on [Mr L's] evidence that at time when the Appellant was approved to sell part of the [Plaza B], [Mr L] had attempted to retain the upper level of [Plaza B] for the Ministry's group and further the naming right of the [Plaza B] could be retained by the Ministry's group. Where the Shop Premises and Office premises were realized, [Mr L] was satisfied because more than 50% of the office premises and car parks, and the naming right were retained for the Ministry's group.

(41) It is undisputed [Madam M's] evidence of fact that the Project Management Fee and Bank Guarantee Fee had been recorded and credited in the current account with [Company C] in the Appellant's book likewise the same figures had been recorded correspondingly as taxable income in the book of [Company C]. Both the corresponding project management fee and bank

guarantee fee recorded as taxable income in book of [Company C] had been chargeable for the Hong Kong Profits Tax.

(42) It is undisputed [Mr L's] evidence that at all material times he had to follow with the policies, regulations and requirements laid down by [Company D] and Ministry. Whenever he had difficulties in following with the policies, regulations and requirements laid down by [Company D] and Ministry, he had to obtain instructions from [Company D] and/or Ministry before he could vary or disobey. He would be penalized or blamed like demoted, suspended or reprimanded if he failed to follow or meet the requirement.

(43) It is undisputed on [Mr L's] evidence that the [Plaza B] Redevelopment Project was approved budget project as long as it was forwarded to the Budgeting Department and was regarded as financially committed when it was prepared and issued by the Treasury Department.

(44) It is undisputed [Mr L's] evidence that different from the government projects handled by [Company C], the Redevelopment Project was a redevelopment project to establish the [Plaza B] as the Ministry's 1st building in Hong Kong. Unlike the government projects, this Redevelopment Project was not contracted with government or any existing customer.

(45) It is undisputed evidence of [Mr L] that the [Company C] had been engaging in the property development projects for nearly 10 years and had good standing and relationship with its banker, namely [Bank I] who was also the then loan provider.

(46) It is undisputed evidence of [Mr L] that in consequence to the bank loan applications in connection with the Redevelopment Project by the Appellant, [Company C] had to bear the liability and risk not only to the banker as a result of acting the corporate guarantor but also the indemnity given to [Company F] and [Company E] in consequence to pledging their properties.

(47) It is undisputed evidence of [Mr L] that by apportioning interests in the [Plaza B] in term of areas had given additional advantage to the Appellant.

(48) Regarding the [Mr L's] signature on the bank facilities letters, it is [Mr L's] evidence that saved [Mr L] had been assigned to execute the negotiation of the banking facilities, he had not been given any information of sale forecast nor any authority to discuss sale forecast with the bank. [Mr L's] evidence was that the penalty associated with the early repayment clause was insisted

by the Bankers in securing their interests and the Appellant was not entitled to object.

2) Whether, as a matter of law, having regard to the Proved Facts in particular fact 37 and the Agreed Facts, the Board shall have properly found the following facts as relevant facts:

(1) All the Appellant and the other partners, namely [Company S] and [Company V], are regarded as Stated-owned enterprises under the direct control of the Ministry.

(2) The Ministry has the pre-requisite financial capability in providing sufficient finance to develop the [Plaza B].

Intention in developing the [Plaza B]

3) Whether, as a matter of law, on the true construction of Cap. 112 in particular s. 14, and after taken into accounts of the Proved Facts in particular the facts 14 to 33, it was open to the Board to hold, as she did in paragraph 45 of her Decision, that the primary intention of the Appellant to develop the [Plaza B] was for trading purpose as opposed to long-term investment, and, as she did in paragraphs 44 of her Decision, that the Appellant's intention to sell the [Plaza B] for trading purpose existed from the beginning when the Appellant acquired the land at [Address G], or so the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it. Further, the Board is asked to state the case in respect of the following questions of law:

(1) Whether, as a matter of law, on the true construction of Cap. 112 in particular s. 14 and after taken into accounts the Proved Facts in particular the facts 14 to 33 and the decision in All Best Wishes Limited v CIR, the Board had misdirected herself in law in considering the whole of the surrounding circumstances regarding the things done and said at time of the Shop Premises and Office Premises were sold in determining whether the intention of the Appellant in developing the [Plaza B] was for trading purpose as opposed for long-term investment purpose.

(2) Whether, having regard to the Proved Facts in particular the facts 14 to 33, 37 and 38, the Board was correct in law in findings of facts which were perverse in supporting her in concluding that, when the Appellant acquired the land at [Address G], the Appellant did so with the intention to sell the [Plaza B] for trading purpose.

(3) Whether there was any evidence on which the Board could find as facts in supporting her in concluding that the Appellant had embarked in an adventure in the nature of trade in selling the Shop Premises and Office Premises after taken into accounts of the Proved Facts in particular the facts 14 to 33, 37 and 38.

(4) Whether, having regard to the Proved Facts in particular the facts 14 to 33, 37 and 38 and the Agreed Facts, the only true and reasonable conclusion contradicts the Board's conclusion that the Appellant had carried on a trade or adventure in the nature of a trade in that the Appellant's intention was to develop the [Plaza B] for trading purposes as opposed to long-term investment and the Appellant's intention to sell for trading purpose existed from the beginning when the Appellant acquired the land at [Address G].

4) Whether, as a matter of law, on the true construction of Cap. 112 in particular s. 14, and having regard to the Proved Facts in particular the facts 14 to 33, 37 and 38, the Board was correct in law in holding that the disposal of Shop Premises and Office Premises was rendered by way of trade or embarked on an adventure in the nature of trade, or such an intention was the true and only reasonable conclusion the Board could have reached.

5) Whether, as a matter of law, and upon the Proved Facts in particular the facts 14 to 33, 37, 38, 40 and the Agreed Facts, in determining the issues whether the Appellant's intention in developing the [Plaza B] was for trading purpose and the Appellant's intention to sell the [Plaza B] existed from the beginning, it was open to the Board to conclude that the Appellant's intention in developing the [Plaza B] was for trading purpose as opposed to the long-term investment, and the Appellant's intention to sell the [Plaza B] existed from the beginning when the Appellant acquired the land at [Address G], and such that an intention was the true and only reasonable conclusion the Board could have reached, and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it. The Board is requested to state the case in respect of the following questions of law:

(a) Whether, as a matter of law and having regard to the Proved Facts in particular the facts 1 to 5, 7 to 9, 14, 19 to 27, 40 and the Agreed Facts, the Board should have found that the Appellant's intention to develop the [Plaza B] was the intention of Ministry.

(b) Whether, as a matter of law, and having regard to the Proved Facts and the Agreed Facts, there was any evidence on which the Board could properly find the following facts, or such findings of fact by the Board are speculation or findings as facts, or the conclusions thereon made by the Board are the true and only reasonable conclusions the Board could have reached:

(1) Whether, having regard to the Proved Facts in particular 2, 4, 5, 10, 14, 18, 27 and 38, the Board was correct in law in findings as fact which was perverse in supporting her in holding, as she did in paragraph 39 of her Decision, that she was unable to find any record or hint of the Ministry's commitment or pledge of financial support to the development project, or the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached.

(2) Whether, having regard to the Proved Facts in particular the facts 14 to 33, 37, 38, 40 and upon the burden of proof, there was any evidence on which the Board could properly find as facts, as she did in paragraph 42 of her Decision, that the sales forecast in the feasibility report of January 27, 1992, was adopted instead of the rental forecast; and whether the Board erred in law in concluding, as she did in the same paragraph, that this chosen option also supported an intention to sell, or the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(3) Whether, having regard to the Proved Facts in particular the facts 2, 4, 5, 10, 14, 18, 27 and 38 and upon the burden of proof, the Board was correct in law in finding of facts which were perverse in supporting her in concluding, as she did in paragraph 39 of her Decision, that no evidence was adduced [by the Appellant] to show direct commitment made by the Ministry to [Company D] nor [Company D] to the Taxpayer or [Company C]. Consequently, on the basis of the aforesaid evidence [the Board] had not been able to find the financial support or commitment allegedly given by the Ministry from the documents produced or from [Mr L's] oral evidence. Apart from a mere assertion of financial support from the Ministry or [Company D], no evidence was produced [by the Appellant] to support this allegation of financial support nor evidence produced to show the Ministry's or [Company D's] own financial ability to make this alleged commitment of financial support viable, or the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(4) Whether, after taken into accounts of the Proved Facts in particular the facts, 7, 8, 14 to 33, 37, 38 and 40 and upon the burden of proof, the Board was correct in law in holding, as she did in paragraph 40 of the Decision, that the aforesaid conditions for repayment, partial reassignment and repayment [contained in the facility letters dated 3/9/1992] are strong indicators of an intention [of the Appellant] to sell, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(5) Whether, after taken into accounts of the Proved Facts in particular the facts 7 to 9, 14 to 33, 37, 38 and 40 and upon the burden of proof, the Board was correct in law in drawing the inferences or the final conclusion, as she did in paragraph 40 of her Decision, that if indeed sale was not contemplated, why would there be an amendment to the condition on repayment since whether 45% or 50% of the G.F.A. was to be sold would be of no consequence and the amendment would have been superfluous. The aforesaid terms in the facility letters strongly indicated that as from the beginning, sale of [Plaza B] was contemplated. This intention to sell was further strengthened by the amendment made to the percentage of the G.F.A. to be sold in that unless the intention to sell was in mind, the amendment would not have been made, or the conclusions thereon made by the Board was the true and only reasonable conclusions the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(6) Whether, having regard to the Proved Facts in particular the facts 7 to 9, 14 to 33, 37, 38 and 40, and upon the burden of proof, there was any evidence on which the Board could properly find as facts in supporting her in holding, as she did in paragraph 41 of her Decision, that this document [the minute dated 9/8/1992] showed that external sale of the Shop Premises was permitted, although [Mr L] in cross-examination asserted that this part of the minutes was a mistake, and that even the Shop Premises were not permitted to be sold externally, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such conclusion had been correct, would have been consistent with it.

(7) Whether, having regard to the Proved Facts in particular 1 to 5, 7 to 9, 14, 18 to 27, 40 and upon the burden of proof, the Board was correct in law in findings of facts which were perverse in supporting her in drawing the inference or the final conclusion, as she did in paragraph 41 of her Decision, that from both the oral and documentary evidence, it was accepted that the 3 joint-venture partners were all under one and the same control and authority of [the Ministry], but it was also clear that among themselves they were actually separate legal entities, having their own operations assets and liabilities which were meant to be dealt with and were dealt with at arm's length between them. Thus whether the properties in question were permitted to be sold externally to the public or internally to the entities under the control of the Ministry, the intention to sell whether internally or externally was present and cannot be ignored, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(8) Whether, after taken into accounts of the Proved Facts in particular the facts 8, 9, 14 to 33 and upon the burden of proof, the Board was correct in law in finding of fact which was perverse, as she did in paragraph 41 of her Decision, that there was no evidence to support the claim that it was a mistake in the minutes when it recorded that "each party's shared properties are not to be sold externally (save the shop premises)."

(9) Whether, after taken into accounts of the Proved Facts in particular the facts 8, 9, 14 to 33, the Board was correct in law in drawing the inference or the final conclusion, as she did in paragraph 42 of her Decision, that [Mr L] claimed that [Mr W] of the Ministry did actually complain about the mistake. However, as is shown on the minutes produced, this minutes was signed by three persons and yet if indeed a mistake was made, could it have been overlooked by all of them, especially when the mistake was on a matter of such importance, or the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached and that the subsequent conducts of Appellant, if such conclusion had been correct, would have been consistent with it.

(10) Whether, after taken into accounts the Proved Facts in particular the facts 8, 9, 14 to 33, the Board was correct in law in finding of fact

which was perverse in supporting her to hold, as she did in paragraph 42 of her Decision, that although evidence was given that [Plaza B] was initially intended to be sold internally, there was however no evidence to show that any attempts to sell internally were ever made before approval from the Ministry was sought to sell externally, or the conclusion thereon made by the Board was the true and only reasonable conclusions the Board could have reached.

(11) Whether, after taken into accounts of the Proved Facts in particular the facts 8, 9, 14 to 33, the Board was correct in law in finding of facts which were perverse in supporting her in drawing the inference or the final conclusion, as she did in paragraph 43 of her Decision, that the Appellant's claim of no intention to sell was also negated by the facts that notwithstanding the sale proceeds of the Office Premises and car parks in question were sufficient to repay the bank loans, the Shop Premises were similarly sold, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such conclusion had been correct, would have been consistent with it.

(12) Whether, having regard to the Proved Facts in particular facts 2, 3 and 30 and upon the burden of proof, the Board was correct in law in finding of facts which were perverse in supporting her in holding, as she did in paragraph 43 of her Decision, that the Appellant's claim that the Shop Premises were sold because the other two partners required fund to meet their financial obligations and also the sale served to resolve the future management and interests sharing problem arising out of the joint ownership of the Shop Premises among the partners. However, this was only an assertion on the part of the Appellant. No evidence was adduced to show the financial needs of the other two partners.

(13) Whether, after taken into accounts of the Proved Facts in particular the facts 8, 9, 14 to 33 and upon the burden of proof, the Board was correct in law in drawing the inference or the final conclusion, as she did in paragraph 43 of her Decision, that the [Appellant's] claim that sale of the Shop Premises would resolve the management and interest sharing problem which was another reason for the sale was also not convincing, because if indeed the matters of management and interest sharing did pose a problem, this problem would have existed right from the beginning. Thus the claim that it was another

reason for the sale of the Shop Premises, was not reliable, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(14) Whether, after taken into accounts of the Proved Facts in particular the facts 14 to 33 and upon the burden of proof, the Board was correct in law in concluding, as she did in paragraph 44 of her Decision, that, [the Board] found that the Appellant had failed to discharge the burden rested upon it to prove that [Address G], were acquired by it for investment purpose. [The Board] had reached the aforesaid conclusion notwithstanding that the newspapers [dated 28/5/1992] reported that [Plaza B] was intended to be the flagship and headquarter of the Ministry and The subsequent use of 28/F as [Company E] office and the letting of the carparks and 21/F and 23/F allocated to the Appellant did not assist the Appellant's case since these factors did not necessarily preclude an intention to sell which [the Board] found to have existed since the outset, or the conclusion thereon made by the Board was the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such conclusion had been correct, would have been consistent with it.

(15) Whether, after taken into accounts of the Proved Facts in particular the facts 4, 7 to 9, 14 to 33 and upon burden of proof, the Board was correct in law in concluding, as she did in paragraph 44 of her Decision, that, there was cogent evidence showing the intention [of the Appellant] to sell existed from the beginning, or the conclusion thereon made by the Board is the true and only reasonable conclusion the Board could have reached and that the subsequent conducts of Appellant, if such intention had been taken, would have been consistent with it.

(c) Whether, as a matter of law, and after taken into accounts of the Proved Facts in particular the facts 4, 7 to 9, 14 to 33, the Board should have reached a conclusion that the conditions posed on 9/8/1992 (date the Ministry approved the 3 joint-partners to sell their share interests within the Ministry) or 2/11/1993 (date the Ministry approved the disposal of part of [Plaza B] to the public) were such that the decisions by the Ministry on such dates to forbid the [Plaza B] to account by way of trade would have been true and only reasonable conclusion and that the conducts of Appellant after those

dates, as long as such decisions had been taken, would have been consistent with them.

(d) Whether, as a matter of law, the Board was correct in law in misdirecting herself in holding, as she did in paragraph 39 of her Decision, that the commitment by the Ministry and [Company D] in providing finance to develop the [Plaza B] had to be firm and direct commitment or otherwise even moral commitment was disregarded as admitted commitment.

(e) Whether, as a matter of law and upon the burden of proof, there was any evidence upon which the Board could properly find in supporting her to reach the determination, as she did in paragraph 40 of her Decision, that the signature of [Mr X] shown next to the amendment of the figure "45%" of the G.F.A. of the "Repayment" in the Construction Loan facility letter dated 3/9/1992 was regarded as pre-sale, and the true and only reasonable conclusion contradicted with her such determination.

Application of s.70A – Errors or omission

6) Whether, as a matter of law and on the true construction of Cap. 112 in particular s.70A, the Board was correct in law in holding, as she did in paragraph 45 of her Decision, that the Appellant was not entitled to invoke section 70A of the Inland Revenue Ordinance, Cap. 112 notwithstanding the Board had satisfied that the Appellant's former tax representative has made an error or mistake in the Appellant's tax return on 31/7/1996 by submitting that the gain on the realization of Shop Premises and Office Premises was derived as a result of a change of intention to trading ("the Error").

7) Whether, as a matter of law and on the true construction of section 70A of Cap. 112, the Board was correct in law in holding, as she did in paragraph 45 of her decision, that the approach and attitude adopted by the Appellant in the case did not qualify the Appellant's claim that the Error was an error or mistake fallen within the meaning of Section 70A of the Inland Revenue Ordinance, Cap. 112.

8) Whether, as a matter of law and on the true construction of section 70A of Cap. 112, the Board was correct in law in holding, as she did in paragraph 45 of the Decision, that it was not open for the Board to correct the Error under the section 70A of the Inland Revenue Ordinance, Cap. 112 even if the Board had satisfied the Appellant's claim that the Appellant's former tax representative has made the Error and the Error was an error or mistake fallen within the meaning of Section 70A.

9) Whether, as a matter of law, and having regard to the Proved Facts in particular the facts 34, 36 and the Agreed Facts, in determining whether the Appellant had deliberately and

unconscientiously made the Error in submitting her 1995/96 tax return, there was any evidence on which the Board could properly find as facts, as she did in paragraph 45 of her Decision, or such findings of fact by the Board are speculations or findings as facts, or the conclusions thereon made by the Board were the true and only reasonable conclusions the Board could have reached. The following questions the Board is asked to state the case:

(a) Whether, as a matter of law, there was any evidence on which the Board could properly find as fact, as she did in paragraph 45 of her Decision, that a mistake was made on the admission of trading stock.

(b) Whether, as a matter of law, on the true construction of section 70A of Cap. 112, the Board was correct in law in findings of facts which were perverse in supporting her in holding, as she did in paragraph 45, that had it been necessary for the Board to do so (i.e. to consider the issue on Section 70A of the Ordinance as to whether or not to re-open the 95/96 assessment on the ground that a mistake was made on the admission of trading stock in the event that the intention was found to be for long-term investment as set out in paragraph 21 of her Decision), the Board was of the view that it was not open for her to do so.

(c) Whether, as a matter of law, having regard to the Proved Facts in particular the facts 34, 36 and Agreed Facts and upon the burden of proof, and having satisfied that the Error was error or mistake fallen within the meaning of s.70A, the Board was correct in law in finding of facts which were perverse in supporting her in holding, as she did in paragraph 45 of her Decision, that the Appellant had failed to adduce satisfactory evidence or indeed any evidence to substantiate the claim of wrong advice given by the Representatives. Rather, [Mr N] gave evidence that upon discovery of the wrong advice allegedly given by the Representatives, the Appellant did not think the matter was important enough for it to make a complaint to the Representatives. Furthermore, for the purpose of this hearing, the Appellant did not see fit to call the Representatives to give evidence on its behalf, on the alleged wrong advice or at the very least to produce a letter from them to explain how the mistake made by the Appellant came about. Thus… here was an assertion on the part of the Appellant.

(d) Whether, as a matter of law, after taken into accounts of the Prove Facts in particular the facts 34, 36 and Agreed Facts and upon the burden of proof, the Board was correct in law in concluding, as she did in paragraph 38 of her Decision, that, the aforesaid facts differed from the picture painted by the witnesses.

10) Whether, as a matter of law, after taken into accounts of the Proved Facts in particular the facts 34, 36 and Agreed Facts and upon the burden of proof, there was any evidence on which the Board could properly find as fact in supporting her in holding, as she did in paragraph 45 of her Decision, that the Error was deliberately and conscientiously made a decision to submit items of profits for assessment in its tax return.

11) Whether, as a matter of law, after taken into accounts of the Proved Facts in particular the facts 34, 36 and the Agreed Facts and upon the burden of proof, it was open for the Board to go further than establishing that the decision to submit its tax return carried with the Error on 31/7/1996 were such that a decision by the Appellant on that date had been deliberately and conscientiously made would have been a reasonable decision and that the conduct of the Appellant after that date, if such a decision had been taken, would have been consistent with it.

Project Management Fee and Bank Guarantee Fee

12) Where profit derived upon the sale of the Shop Premises and Office Premises was held to be chargeable for the Hong Kong Profits Tax save the Appellant has objected, whether, as a matter of law, on the true construction of Cap. 112 in particular ss. 16(1) and 17(1) thereof and having regard to the Proved Facts and the Agreed Facts, and upon the burden of proof, the Board was correct in law in holding that the Project Management Fee ($22,500,000) and the Bank Guarantee Fee ($8,850,000) were not deductible.

13) Whether, as a matter of law and having regard to the Proved Facts and the Agreed Facts, in determining whether the Project Management Fee and Bank Guarantee Fee were not deductible under sections 16(1) and 17(1) of the Cap. 112, there was any evidence to support the following findings of facts made by the Board, or such findings of fact by the Board are speculations or findings as facts, or the conclusions thereon made by the Board are the true and only reasonable conclusions the Board could have reached:

(a) Whether, having regard to the Proved facts in particular the facts 41, 43 to 46 and upon the burden of proof, the Board was correct in law in findings of fact which was perverse in supporting her to hold, as she did in paragraph 46 of her Decision, that it was the Appellant's case that these sums had been settled by the Appellant, and yet the Appellant was unable to produce receipts, bank statements, or confirmation from the recipients or any other relevant third parties to substantiate the actual payments of the same.

(b) Whether, after taken into accounts of the Proved Facts and Agreed Facts and upon the burden of proof, the Board was correct in law in findings of facts which were perverse in supporting her to conclude, as she did in paragraph 46 of her Decision, that no evidence was adduced nor explanation given [by the Appellant] on such arrangements whereby the Appellant's

alleged payments were compensated or offset by its larger share of the interests in [Plaza B].

(c) Whether, after taken into accounts of the Proved Facts in particular the facts 41, 43 to 46 and upon the burden of proof, the Board was correct in law in finding of fact which was perverse in supporting her in holding, as she did in paragraph 46 of her Decision, that they [the project management agreement of June 6, 1992 and the minutes in respect of the bank guarantee fee] were not sufficient to prove that these sums (i.e. the Project Management Fee ($22,500,000) and the Bank Guarantee Fee ($8,850,000)) were actually incurred and paid out by the Appellant.

14) Whether, as a matter of law, upon the true construction of Cap. 112 in particular ss. 16(1) and 17(1) thereof and the burden of proof, the Board was correct in law in holding, as she did in paragraph 46 of her Decision, that the Project Management Fee ($22,500,000) and the Bank Guarantee Fee ($8,850,000) had to be actually incurred or paid out by the Appellant before they were deductible under the section 16(1) of the Inland Revenue Ordinance, Cap. 112.

Yours truly,

For and on behalf of
[Messrs A]
Certified Public Accountants

_____
XXXXXX

c.c. *Client*
Commissioner of Inland Revenue (Ref: IRA/X/XXXX)
Department of Justice (Ref: MIS XXX/XX)