Case No. D39/97

Profit tax – purchase and sale of car parks – whether capital gain or taxable profit – management and consulting fee – sections 16 and 61 of the Inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum SC (chairman), Barry J Buttifant and David Wong Pui Hon.

Dates of hearing: 16 and 17 April 1997.
Date of decision: 25 July 1997.

The taxpayer is a finance company. It purchased car parks and resold the same after eight months. The taxpayer argued that at the time of purchase, based on the board minutes. Those car parks were held for long term investment without any intention of resale them in a short term. Taxpayer also paid management fee to another related company which assisted taxpayer to secure a new and good lease for the car parks. Furthermore, consulting fees were also given to other two companies as incentives for obtaining a higher price in the resale of car parks. The Inland Revenue Department alleged that the car parks had been purchased by taxpayer for the purpose of resale and the expenses so incurred were not genuine and non-productive to the taxpayer's profits.

Held:

The onus of proof is upon the taxpayer. The taxpayer did not satisfy the Board that the car parks were purchased with the intention for long term investment.

The management fee and consulting fees were disproportionate in light of the transactions and circumstances. Also there were no actual payment for these expenses. The Board are not satisfied that these expenses were truly incurred. The taxpayer did embark upon an adventure in the nature of trade. Costs of $1,000 were awarded against the taxpayer in the light of its cavalier approach.

Appeal dismissed with $1,000 awarded being costs of the Board.

Cases referred to:

Lionel Simmons Properties Limited v CIR 53 TC 461
All Best Wishes Ltd v CIR 3 HKTC 750
CIR v The Scottish Automobile and General Insurance Co Ltd 16 TC 381

Doris Lee for the Commissioner of Inland Revenue.
Ho Chi Ming instructed by Y C Lee & Pang for the taxpayer.

Decision:

The Background

1. The Taxpayer is a company incorporated on 18 December 1990. At all material times, its shareholders were Mr A, Mr B and Mr C.

2. By letter dated 24 January 1991, Company D, a finance company, gave instructions to its solicitors to prepare a first legal charge over 450 car parks ('the Car Parks') together with shops ('the Shops') in Building E as security for a loan of $40,500,000 extended by them in favour of the Taxpayer. The loan was for a term of 3 years. It was repayable in the first year on interest basis; on the second year at $416,000 per month on top of interest and on the third year at $583,000 per month on top of interest. Interest was fixed at 1.5% over Hong Kong Bank's prime rate which then stood at 10%. The loan was further secured by joint and several guarantees from Mr A, Mr B and Mr C. It was a condition of the lending that the proceeds of the loan be used for the purchase of the Car Parks and the Shops.

3. The Car Parks were at that juncture occupied by Company F, a parking company, under a tenancy dated 24 February 1987 ('the Old Lease') for a period of 5 years commencing from 1 March 1987. Under this Old Lease, the monthly rental for the first 3 years commencing 1 March 1987 was $320,000 and the monthly rental for the 2 years commencing 1 March 1990 was $368,000.

4. According to the minutes of a directors meeting of the Taxpayer attended by Mr A, Mr B and Mr C and dated 28 January 1991:

a. 'The Company had been looking for properties that would give the Company with good return of steady rental income as long-term investment, and the Company was aware that the properties located at Building E were offered for sale with existing tenancy. The existing owner was Company G while the existing tenant of the properties was Company F Property Limited. The current monthly rental was $368,000 and the monthly rental would be increased to $425,000 from 1 June 1991 onward, and the lease would expire in February 1992. An investment appraisal was tabled for discussion.'

b. It was resolved that the Taxpayer shall purchase the properties with existing tenancy.

c. It was further resolved that 'the company shall negotiate with the existing tenant, Company F Property Limited for renewal of a longer lease before the expiration of the existing lease in February 1992 so that the Company shall be able to secure higher return of rental income from the properties'.

5. In response to enquiries from the assessor as to why it was stated in the minutes that 'the monthly rental would be increased from $425,000 from 1 June 1991 onwards' when, at the date of the meeting [that is, 28 January 1991], the monthly rental was still $368,000 and the new lease had not been entered, the Taxpayer through its tax representatives informed the assessor that:

> 'During the course of bargaining & negotiation with the vendor through the property agent, our client was told that purchase of the properties at the asked price of $58,000,000 was a good investment because the monthly rental for the carparks could probably be increased to the prevailing market rent of around $425,000. This factor was considered favourable and the directors decided to incorporate the probable increase in rental income which they anticipated both in the investment appraisal and in the minutes of the meeting to evident that the decision to buy the properties at $58,000,000 was properly made.'

6. The investment appraisal referred to in those minutes proceeded on the basis that:

a. the total investment amounted to $60,058,000 comprising of $57,200,000 by way of purchase consideration, $570,000 reserved for decoration and $2,288,000 for legal charge and stamp duty.

b. under the 'Existing Tenancy':

   i. Monthly rental up to 31 May 1991 amounted to $368,000 and

   ii. Monthly rental from 1 June 1991 to the end of the lease on 29 February 1992 amounted to $425,000.

c. the 'Expected Rental Income' would allow for 30% increase every 2 years and

d. the expected pay back period is less than 8 years.

7. By a formal agreement of sub-sale and sub-purchase dated 28 January 1991, the Taxpayer acquired the Car Parks and the Shops for $58,000,000. This purchase was duly completed on 9 March 1991. The consideration of $58,000,000 was financed as follows:

a. $17,500,000 was advanced by the Taxpayer's shareholders and parties related to them.

Date	Advanced by	Amount $

8-1-1991	Mr A	2,000,000
24-1-1991	Company H	1,500,000
24-1-1991	Mr C	3,000,000
7-3-1991	Mr C	2,000,000
8-3-1991	Mr A, Mr B, Mr I and Mr J	4,000,000
9-3-1991	Company K, an investment company	5,065,125
	Total:	17,565,125
	Less: Amount kept by solicitors for payment of legal fees	65,125
		17,500,000

i. These advances were non-interest bearing:

ii. Company H was a company controlled by Mr C.

iii. Mr I and Mr J were partners of Mr B.

iv. Company K was controlled by Mr B.

b. The $40,500,000 loan from Company D referred to in paragraph 2 above.

8. There is placed before us a bundle of 'Official Receipt' from one Company L, an investment company, to the Taxpayer. Those receipts were all sent by Company L to the Taxpayer 'c/o' a firm of solicitors and were for the attention of 'Accounts Department'. The receipts were said to be in respect of management fees at the rate of $410,000 per month. There are altogether 8 monthly receipts covering the period between 9 March 1991 to 8 November 1991 and for a total sum of $3,280,000. At all material times, the shareholders and directors of Company L were Mr A and Mr B. They each held 50% of Company L's issued share capital.

9. According to the minutes of a directors meeting of the Taxpayer dated 1 June 1991, Mr A, Mr B and Mr C approved the terms of a draft lease over the Car Parks in favour of Company F. On 8 July 1991, the Taxpayer and Company F executed 2 documents:

a. A Deed of Surrender whereby Company F surrendered the residue of their 5 years terms under their Old Lease.

b. A new lease for 5 years and 9 months commencing on 1 June 1991 at the following monthly rental:

Period	**Monthly Rental** **$**
1-6-1991 to 29-2-1992	425,000
1-3-1992 to 28-2-1994	800,000
1-3-1994 to 29-2-1996	900,000
1-3-1996 to 28-2-1997	950,000

10. Various renovations works in respect of the Car Parks were then executed:

a. By letter dated 7 June 1991, Company M, an engineering company, submitted to the Taxpayer a quotation for lighting installations in the Car Parks. That quotation was sent to the Taxpayer at Address N. Company M revised their quotation on 24 July 1991. The revised quotation was likewise sent by Company M to the Taxpayer at the Address N.

b. A firm called Company O, a decoration company, was engaged in July 1991 to repaint the Car Parks. Company F certified at various intervals acceptance of such painting works.

c. The Taxpayer confirmed these and other proposed improvement (closed circuit television system) with Company F by letter dated 30 September 1991.

11. By letter dated 6 August 1991, Company P, a firm of real estate consultants, enquired of the Taxpayer whether the Car Parks were for sale.

12. By a sale and purchase agreement dated 28 September 1991, the Taxpayer sold the Car Parks with existing tenancy for $82,000,000. The sale and purchase was completed on 9 November 1991. By minutes dated 9 November 1991, Mr A, Mr B and Mr C, as directors of the Taxpayer approved such sale.

13. By receipt no 08003 dated 11 November 1991, Company Q acknowledged receipt from the Taxpayer a sum of $1,500,000 said to be ‘Consulting fees for sale negotiation’. This sum was calculated at 15% of the difference between the sums of $82,000,000 and $72,000,000.

a. The shareholders of Company Q were Mr A and Company R.

b. The directors of Company Q were Mr A, Company R and Madam S.

14. By another receipt also dated 11 November 1991, Company U likewise acknowledged payment from the Taxpayer of another sum of $1,500,000 for the same purpose and calculated on the same basis as the payment to Company Q.

a. The shareholders of Company U were:

Shareholder	Up to 1-8-1990	As from 1-8-1990
Mr B	5,000 shares	-
Mrs B	5,000 shares	-
Mr B Senior (Father of Mr B)	-	5,000 shares
Mr T (Brother of Mrs B)	-	5,000 shares

b. The directors of Company U were Mr B and Mr T.

15. On 1 November 1992, the directors of the Taxpayer approved its accounts for the period between 18 December 1990 and 30 April 1992. The Car Parks wee classified under 'Fixed Assets' in those accounts. The total rental income for that period amounted to $3,373,048 which was barely sufficient to cover the interest expenses incurred.

16. The issues before us are:

a. Whether the profits arising from the disposal of the Car Parks by the Taxpayer are taxable or not. The Taxpayer contends that such profits arose from disposal of a capital asset and are therefore not taxable.

b. If such profits are revenue in nature, whether the Taxpayer is entitled to deduct therefrom:

i. the management fees allegedly paid to Company L and

ii. the consulting fees allegedly paid to Company Q and Company U.

THE EXPLANATIONS GIVEN BY THE TAXPAYER PRIOR TO THE HEARING OF THIS APPEAL

17. **In relation to the sale of the Car Parks** – The Taxpayer maintained that its sale of a fixed asset is supported by the following evidence:

a. The Taxpayer had, at all material time, classified the property as fixed assets in the accounts and balance sheets.

b. The property was a long-term investment for the provision of rental income to the Taxpayer. The rate of return and pay-back period for the investment are attractive and the repayment of interest on mortgage loan was well covered by the rental income.

c. The Taxpayer's intention for the acquisition of the asset as a long-term investment is also supported by the fact that the property was acquired by the Taxpayer with existing tenancy and the Taxpayer was not required to take effort to secure rental income.

d. In order to secure steady rental income, the Taxpayer did not wait until the expiration of the original lease in February 1992, but proceeded to renew the lease with tenant for a five-year and nine-month lease for the period from 1 June 1991 to 28 February 1997 with an option to renew for a further 2 years. The early renewal of the lease for another long lease shows that the Taxpayer was intended to hold the property for long term purposes.

e. The Taxpayer's nature of business is property investment and this is supported by their holding of the Shops for long period.

18. **In relation to the management fees allegedly paid to Company L** – It was said that:

a. 'The services were performed by [Mr A] … The terms of the services were not documented in writing … The monthly fee of $410,000 was agreed between [Company L] and [the Taxpayer] after negotiation … The fee was paid monthly.'

b. 'The reason for [the Taxpayer] to engage the service of [Company L] when [the Taxpayer's] director could perform the services himself is a result of the different composition of the shareholdings in these two companies. [Mr A and B] each held 15% of the shares in [the Taxpayer], but they each held 50% of the shares in [Company L].'

c. 'As the shareholdings in these two companies are different, the shareholders and directors of [the Taxpayer] agreed that the services performed by [Company L] should be separately remunerated.'

d. 'Each month, [Company L] issued a debit note to [the Taxpayer] in the amount of $410,000. As both [Mr A and B] were both directors and shareholders of [Company L] and [the Taxpayer], and they had made an advance of down payment to [the Taxpayer] for the purchase of the property, [the Taxpayer] wished to simplify the account records by including the management fee payable as an account payable to these two shareholders. Thus, no cash or cheques were directly paid to [Company L].'

19. **In relation to the consulting fees paid to Company Q** – It was said that:

a. 'The services were performed by [Mr A] … The terms of the services were not documented in writing … The fee of $1,500,000 was agreed between [Company Q] and [the Taxpayer] after negotiation… The fee was paid on 11 November 1991…'

b. 'The reason for [the Taxpayer] to engage the services of [Company Q] when [the Taxpayer's] director, [Mr A], could perform the services himself is a result of the different composition of the shareholders in these two companies. [Mr A] held 99.99% of [Company Q] but he held only 15% of the shares in [the Taxpayer]…'

c. 'As the services performed were mainly derived from [Mr A] in the capacity of a director of [Company Q], and the shareholdings in these companies were different, the shareholders and directors of [the Taxpayer] agreed that the services should be separately remunerated in the form of consultancy fee.'

d. 'The payment of $1,500,000 was made on 11 November 1991. As [Mr A] was the major shareholder and a director of [Company Q], and there would be a distribution of dividend derived from the capital profit arising from the sale of the property concerned to [Mr A] in the capacity of [the Taxpayer's] shareholder, both [the Taxpayer] and [Company Q] wished to simplify the payment procedure and agreed to include the consultancy fee in the future sum payable to [Mr A]. Thus, the consultancy fee was treated as settled by [the Taxpayer] on 11 November 1991, and a receipt for the amount was received from [Company Q].'

20. **In relation to the consulting fees paid to Company U** – It was said that:

a. 'The services were performed by [Mr B] … The terms of the services were not documented in writing … The fee of $1,500,000 was agreed between Company U and [the Taxpayer] after negotiation… The fee was paid on 11 November 1991…'

b. 'The reason for [the Taxpayer] to engage the services of [Company U] when [the Taxpayer's] director, [Mr B], could perform the services himself is a result of the different composition of the shareholders in these two companies…'

c. 'As the shareholdings in these two companies are different, and the services performed were carried out by [Mr B] in the capacity of the director of [Company U], the shareholders and directors of [the Taxpayer] agreed that the services should be separately remunerated in the form of consultancy fee'.

d. 'The services performed by Mr B were similar to those performed by [Mr A]. The purpose was that [the Taxpayer] wished to obtain a second and joint

opinion on the negotiation of the sale of the property with [the agent of the purchaser]. Thus, a better price could be bargained during the course of negotiation.'

e. 'The payment of $1,500,000 was made on 11 November 1991. As [Mr B] was a director of [Company U], and there would be a distribution of dividend derived from the capital profit arising from the sale of the property concerned to [Mr B] in the capacity of [the Taxpayer's] shareholder, both [the Taxpayer] and [Company U] wished to simplify the payment procedure and agreed to include the consultancy fee in the future sum payable to [Mr B]. Thus, the consultancy fee was treated as settled by [the Taxpayer] on 11 November 1991, and a receipt for that amount was received from [Company U].'

THE ORAL EVIDENCE ON BEHALF OF THE TAXPAYER

21. The Taxpayer called Mr A. He is a qualified engineer engaged in real estate and China trade businesses. He is also the Chairman of a listed company then known as Company V.

22. There is a singular lack of clarity in the evidence that he gave. Set out hereunder is what we managed to distil through strenuous efforts on our part.

23. During 1990/91, he handled China trade through Company Q. He admitted that Company Q is a company wholly owned by him.

24. The Car Parks and the Shops were previously held by a subsidiary of Group W. Company X, a real estate company, brought these units to their attention.

25. The Taxpayer is a company owned as to 70% by Mr C, 15% by each of Mr B and himself. It was formed for the purpose of holding the Car Parks and the Shops. The Taxpayer had no employee. Its directors handled all its daily operations. As Mr C focused his attention on China Trade, Mr A and Mr B looked after the major operations of the Taxpayer.

26. Before the purchase, Mr A and Mr B discussed with a Mr Y of Company F:

> 'To get more, find out for the tenancy details and also how they manage and also what is the business, is it good or not and this issue is going to determine us. Once when [Company F] not going to stay as a tenancy, if we are going to have another tenant there must be survival. So, all this information we are going to collect and also the income, whether it is enough in case we have some other tenants who wanted to renew the contract or renew the tenancy with the existing tenants. We know what position about our bargaining power, bargaining position with the tenant'.

27. There was no discussion at the first few meetings with Company F about increase in rental. Some indications were subsequently given to Company F. Company F was complaining about the state of the premises. Company F was asked whether they would be prepared to renew the tenancy if works were done to upgrade the Car Parks. Company F expressed willingness to renew on that footing. '… we got the indication from the tenant they are willing to renew and increasing the rent'. The minutes of the Taxpayer's board of directors dated 28 January 1991 therefore reflected this agreement between the parties. In cross examination, Mr A said this:

> 'Before the completion of the transaction the Taxpayer will try to understand the general situation and then in order to get an overall picture of the situation, and then they would temporarily agree on certain conditions and then upon purchase they would get into negotiations about terms of tenancy, at the final stage and the final terms'.

The final terms included the rent for the new tenancy. Those details were finalised on 8 July 1991. In re-examination, Mr A told us that the 1st of June date was also mentioned in his discussion with the general manager of Company F.

28. The Taxpayer considered obtaining a loan from Bank 1 and Bank 2 to support the purchase. Those banks were however reluctant to finance the purchase of a car park. Group W was prepared to extend finance through its subsidiary Company D leaving 30% of the price to be funded by the shareholders. The shareholders of the Taxpayer were not concerned that the loan from Company D was merely for a period of 3 years. They could obtain alternative finance or they themselves could contribute towards the balance.

29. Both Mr A and Mr B were in the real estate business. They did not have any problem raising their respective contributions. In March/April 1993, Mr A utilised $100,000,000 in acquiring the majority interest in Company V. Mr C was also very rich with his China trade business through many companies.

30. The shareholders decided that it's a good investment as the rental income can cover the repayments. The board of the Taxpayer decided to effect the purchase at a meeting. The decision was made at the end of December 1992/early January 1993. Mr A could not recall the precise venue for that meeting. He indicated that the Board of the Taxpayer held their meetings in restaurants and in the office.

31. When the Taxpayer decided to purchase the property, its intention was:

> 'to hold it long term property otherwise we are not going to negotiate and upgrading the property and then we negotiate the tenancy agreement is long-term negotiations, six years, something like that, five or six years, quite a long-term.'

32. When the Taxpayer decided to purchase the property, no written appraisal was prepared. A simple calculation was done comparing the amount injected by the

shareholders ($18,000,000) with the rental income. He cannot recall when the written appraisal referred to in the minutes of the 28 January 1991 directors' meeting of the Taxpayer was prepared. He also cannot recall whether it was him or Mr B who prepared this written appraisal. However he reckoned that the figures in the written appraisal corresponded to the ones they adopted in their simple calculation. The figure of $425,000 referred to as rental income from 1 June 1991 was included on the basis of indication he obtained from Company F. He further explained that the written appraisal did not take interest expenses into consideration as rental was sufficient to cover such interest. The written appraisal merely compared the rental income with the cost of investment. There was no attempt to compare the profit against the cost of investment.

33. A provisional agreement was signed with Group W on 4 January 1991.

34. After completion of the purchase, Mr A negotiated with Company F leading to the new tenancy commencing on 1 June 1991.

35. Decorations of the Car Parks allegedly commenced in about March 1991 and were completed in around August/September that year.

36. Company L was going to upgrade the Car Parks and to negotiate with Company F. Company L is a company owned by Mr A and Mr B. It did not have any employees. Mr A, Mr B and their respective employees performed various services for the Taxpayer on behalf of Company L. They looked after the daily decorations; took calls from the contractors and various Government departments and ensured compliance with applicable regulations. The management fees so generated allegedly went towards discharge of rental due from Company L towards Mr A and Mr B in respect of Company L's occupation of various premises owned by Mr A and Mr B. The receipts in were signed by Mr A's secretary. Apart from making relevant book entries, there was no actual receipt of money.

37. After securing the new tenancy from Company F, various estate agents started calling on the Taxpayer on behalf of interested purchasers. This included the unsolicited letter from Company P dated 8 August 1991. At first no price was mentioned by Company P. After some prompting, an initial offer of $72,000,000 was made. This did not appeal to the Board of the Taxpayer. At a meeting in August/September 1991, the shareholders decided to assign Mr A and Mr B to further negotiate with the intended purchaser. As an incentive to secure a better price, Mr A and Mr B were each promised 15% of any amount over and above the initial offer of $72,000,000. Mr A cannot recall where this meeting was held.

38. Company Q was a company controlled by him. It had 5-6 employees in 1991. They negotiated with the intended purchasers; they introduced the Car Parks to those purchasers and they took the purchasers to view the premises. Company U played a role similar to that of Company Q. At no time did they meet the eventual purchaser. All the negotiations were conducted through Company P who was paid a commission of $820,000. Company Q and Company U succeeded in securing an offer of $82,000,000 from Company

Z, an insurance company. Company Q and Company U were not paid the sum of $1,500,000 when they issued their respective receipts dated 11 November 1991. The money was given to them when the Taxpayer distributed its profits to its shareholders.

39. The Car Parks were eventually sold by an agreement for sale and purchase dated 28 September 1991.

THE CREDIBILITY OF MR A

40. Mr A is a witness of convenience but not of truth. He repeatedly failed to tackle directly simple questions put to him in chief and in cross examination. We formed a distinct impression that he was deliberately vague in his answers as he was fully aware of the difficulties surrounding the Taxpayer's case.

41. We are of the clear view that we should be extremely cautious in accepting any part of Mr A's testimony.

THE RELEVANT PROVISIONS IN THE INLAND REVENUE ORDINANCE (IRO) CHAPTER 112

42. Section 14 of the IRO provides:

> '*(1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.*'

43. Section 16 of the IRO provides:

> '*(1) In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax...*'

44. Section 61A of the IRO contains various provisions in relation to transactions designed to avoid liability for tax.

45. Section 68 of the IRO provides:

> '*(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant*'.

THE REVENUE'S RELIANCE ON SECTION 61A

46. Section 61A of the IRO was first referred to in the closing submissions on behalf of the Commissioner.

47. Section 61A is a draconian measure. A taxpayer should have ample notice of the Revenue's intention to invoke that section in order to properly prepare his case.

48. We are of the view that it would be unjust to allow the Commissioner to invoke these provisions well after conclusion of evidence. We therefore place no reliance on that section.

DISPOSAL OF A CAPITAL ASSET?

49. The Taxpayer and the Commissioner agreed that the starting point is the speech of Lord Wilberforce in Lionel Simmons Properties Limited v CIR 53 TC 461 at 491 as followed by Mortimer J in All Best Wishes Ltd v CIR 3 HKTC 750

> *'Trading requires an intention to trade. Normally the question to be asked is whether this intention existed at the time of the acquisition of the asset'.*

50. The Car Parks were acquired on 4 January 1991 when the provisional agreement was signed. This was followed by the initial payments of Mr A and others commencing from 8 January 1991. What we have to ascertain is the intention of the Taxpayer at that juncture.

51. The Taxpayer's case relies heavily on the minutes of 28 January 1991 and the written appraisal referred to by those minutes. The Taxpayer failed to satisfy us that these 2 documents were contemporaneous:

a. There is no satisfactory explanation as to why those minutes should refer to 'the monthly rental would be increased to $425,000 from 1 June 1991 onward.' The initial explanation from the Taxpayer's tax representatives was that the figure came via the property agent during the course of bargaining and negotiation. Mr A vaguely suggested that an understanding was reached with Company F when he met representatives from Company F before the Taxpayer's acquisition. Apart from the fact that his evidence on this aspect is unclear and contradictory, he failed to give a convincing explanation as to why, given such alleged understanding, it took the Taxpayer nearly 4 months between 9 March 1991 (completion of purchase of the Car Parks) and 8 July 1991 (execution of the deed of surrender and new lease) to conclude the deal with Company F. We also find it surprising that if such understanding be true, the same was not reflected in any document passing between the Taxpayer and Company F during this period.

b. Given that the purchase on 4 January 1991 was for the Car Parks and the Shops at $58,000,000, there is no convincing reason why the minutes and the written

appraisal should confine its assessment on the potential of the Car Parks with $57,200,000 designated as the purchase consideration for those Car Parks.

c. Mr A's inability to recall the provenance of the written appraisal adds to our concern.

For these reasons we place no reliance on the minutes of 28 January 1991 and the written appraisal. The Taxpayer had further failed to satisfy us that as at the date of purchase, there was any understanding with Company F that the lease would be renewed at an increased rate.

52. We agree with the submission of the Commissioner that the accounting classification of the Car Parks as 'Fixed Assets' is not conclusive. The accounts were prepared well after the sale. Furthermore, as indicated by CIR v The Scottish Automobile and General Insurance Co Ltd 16 TC 381 at 391, one must look at the substance instead of the manner in which the account is stated.

53. The purchase by the Taxpayer involved 2 classes of properties: the Car Parks and the Shops. Mr A admitted that the Taxpayer failed to secure finance from 2 respectable banks as those banks had no experience dealing with Car Parks. This suggests that the Car Parks were hardly ideal for long term investment. There is some doubt as to the title pertaining to the 2 shops. In the absence of a full explanation from the Taxpayer, we cannot attach much weight to the continued holding of those Shops by the Taxpayer. Finance for 3 years was eventually obtained from a subsidiary connected with the vendor Group W. This would provide the back up for a quick realisation for profit.

54. We find that the negotiations with Company F did not commence until well after completion of the purchase on 9 March 1991. The lease and the surrender were approved by minutes of the Directors' meeting dated 1 June 1991. The quotations from Company M and Company O did not materialise until June/July 1991. Quotations for closed circuit television was still outstanding by 30 September 1991. The electrical works did not commence until October 1991. All these lead us to the conclusion that the new lease was really part of the efforts of the Taxpayer to render the Car Parks more appealing to potential buyers in the market. With the new lease in place, the approach by Company P (even assuming that it was unsolicited) was not unexpected. The sale was then effected within a short period of about 9 months after the purchase.

55. For these reasons, we are of the view that the Taxpayer has not discharged its onus of satisfying us that its intention as at 4 January 1991 was to purchase the Car Parks for long term investment.

THE MANAGEMENT FEES IN FAVOUR OF COMPANY L

56. We are not satisfied that these fees amounting in total to $3,280,000 were actually incurred in the production of profits which the Taxpayer is chargeable to profits tax.

57. It is said that the fees were referable in part to the role played by Company L in negotiating with Company F for a new lease:

a. It is the Taxpayer's case that an understanding was reached with Company F prior to completion of the purchase. If that be the case, we can see little justification for Company L's involvement in this respect.

b. It is an inherent in such case of the Taxpayer that its directors were well capable of negotiating with Company F. We therefore see no justification for Company L's involvement.

58. It is also said that such fees were referrable to Company L's supervision of the renovation works:

a. Renovations did not commence until June/July 1991. This therefore does not provide justification of management fees for the preceding months.

b. The quotation from Company M was sent to the Taxpayer at Address N. Company L was not involved.

c. Company F issued certificates of satisfaction in respect of the works of Company O. We see little room for Company L's involvement.

d. The management fees were wholly disproportionate to the sums incurred in relation to such renovations.

59. There was no actual payment against each of the receipts which was sent to Company L's registered office at a firm of solicitors. There is nothing to support the view that these receipts were contemporaneous documents in relation to expenses truly incurred.

60. We are not satisfied that any part of the alleged management fees claimed was truly incurred. No question of apportionment arises.

THE CONSULTING FEES IN FAVOUR OF COMPANY Q AND COMPANY U

61. The principal justification put forward in correspondence by the Taxpayer through its tax representatives was that these sums were incurred as Mr A and Mr B had different interests in the Taxpayer, Company Q and Company U. There was no suggestion that these sums were incentives to Mr A and Mr B to secure a price higher than the initial offer of $72,000,000.

62. No money changed hand on 11 November 1991. There is no evidence to persuade us that the 2 sums were actually incurred between September/November 1991.

63. We recognise that some work had to be done in order to conclude the sale on 28 September 1991. Save for the 2 receipts and the 'say-so' of Mr A, there is nothing to suggest that those services were not rendered by Mr A and Mr B as directors of the Taxpayer. The Taxpayer's tax representative relied on separate corporate personalty at the point when the fees were allegedly incurred. Such distinction was not maintained when profits were allegedly distributed amongst Mr A, Mr B and Mr C.

64. For these reasons, we are not satisfied that the so called consulting fees were truly incurred.

OUR CONCLUSION

65. We have no hesitation whatsoever to dismiss this appeal.

66. We further order the Taxpayer to pay costs in the sum of $1,000. The Board of Review is not a fun place for the rich or the famous. We wholly disapprove the cavalier attitude of the Taxpayer as displayed by Mr A.

67. We wish to emphasis that our disapproval does not extend to Mr Ho Chi Ming, Counsel on behalf of the Taxpayer. A firm of solicitors acted for the Taxpayer right up to a day or two before the hearing of this appeal. That firm was dismissed a day before the hearing. Mr Ho Chi Ming was instructed shortly afterwards. He discharged the onerous tasks on him in strict accordance with the tradition of the Bar.