Case No. D46/00

Profits tax – sale of property – trading or capital gain – alleged error in tax turn – correction under section 70A of the Inland Revenue Ordinance ('IRO') chapter 112 – section 68 of the IRO chapter 112.

Panel: Mathew Ho Chi Ming (chairman), Anthony So Chun Kung and Tse Tak Yin.

Dates of hearing: 15 and 16 June 2000.
Date of decision: 28 July 2000.

The taxpayer submitted a profits tax return for the year of assessment 1993/94 which showed a gain on disposal of property. The taxpayer was taxed based on this return. The taxpayer alleged an error in offering the gain as a trading gain. According to the taxpayer, it was a capital gain. The taxpayer asked to correct the error under section 70A of the IRO chapter 112. The Commissioner refused the application and was of the view that even if the error was corrected, the gain on disposal of the property was a trading gain. The taxpayer appealed against the Commissioner's determination.

There were two issues for the Board to determine:

1. Was the tax under appeal excessive by reason of an error in the taxpayer's tax return which could be rectified under section 70A?

2. What was the intention of the taxpayer at the time of acquisition of the property? Was the purchase of the property an adventure in the nature of trade? Or was the property purchased as an investment or as company quarters?

Held:

1. If the answer to the first issue is in the negative, the need to determine the second issue is obviated. Section 70 of the IRO would render the assessment made pursuant to the Tax Return final and conclusive for all purposes.

2. Section 68(4) of the IRO puts the onus of proof on the taxpayer in respect of both issues.

3. With respect to the first issue, the Board found that no ' error' under section 70A has occurred. The Board found that the Tax Return and the 94 Accounts have been properly prepared and the treatment of the gain on disposal of the property as a trading gain was a deliberate act by the taxpayer's old accounting manager who prepared it and the First Tax Representative who audited it. Not understanding the tax implications of a certain manner of presentation of the accounts has no direct bearing on the error issue. The taxpayer made the section 70A application as an after thought in an attempt to avoid payment of the profits tax. (D6/91 IRBRD, vol 5, 556, Extramoney Ltd v CIR 4 HKTC 394, Chinachem Investment Co Ltd v CIR 2 HKTC 261 at 282 and D26/93, IRBRD, vol 8, 183 at 186 considered).

4. The taxpayer has failed to discharge its burden of proof on the ' intention issue' . What matters is the intention at the time of acquisition. If it were a trading intention or an adventure in the nature of trade, the subsequent sale, willingly or forced, will result in a trading gain. If the asset was acquired as capital asset, its subsequent sale, willingly or forced, will result in a capital gain. The Board did not believe the allegation by the taxpayer that the property was acquired pursuant to a corporate quarter's policy. It was found that there was no systematic policy to provide quarters. Further, the Board did not believe that the taxpayer had the financial ability to purchase or hold on to the property along with its financial obligations in respect of its business and other assets. The purchase was more in the nature of an adventure in the nature of trade. (Lionel Simmons Properties Ltd v CIR (1980) 35 TC 461 at 491G, HL, per Lord Wilberforce and All Best Wishes Ltd v CIR (1992) 3 HKTC 750 considered).

Appeal dismissed.

Cases referred to:

D49/92, IRBRD, vol 8, 1
D62/87, IRBRD, vol 3, 43
D6/91, IRBRD, vol 5, 556
P H v Castle Hill Warehousing Co Ltd [1974] 1 WLR 1624
Extramoney Ltd v CIR 4 HKTC 394
Marson v Morton [1986] 1 WLR 1348
Lionel Simmons Properties Ltd v CIR (1980) 35 TC 461, HL
All Best Wishes Ltd v CIR (1992) 3 HKTC 750
Chinachem Investment Co Ltd v CIR 2 HKTC 261

D26/93, IRBRD, vol 8, 183

Fung Ka Leung for the Commissioner of Inland Revenue.
Carol Gaw of Messrs Baker & McKenzie for the taxpayer.

Decision:

Nature of appeal

1. The Taxpayer submitted a profits tax return for the year of assessment 1993/94 which showed a gain on disposal of property (' Tax Return'). The property was in District A (' Property 1'). The Taxpayer was taxed based on this return. The Taxpayer alleged an error in offering the gain as a trading gain. According to the Taxpayer, it was a capital gain. The Taxpayer asked to correct the error under section 70A of the IRO. The Revenue refused. The Taxpayer objected.

2. By a determination dated 1 December 1999, the Commissioner of Inland Revenue disagreed with the Taxpayer' s objections and refused to correct the error under section 70A. The Commissioner was of the view that even if the error was corrected, the gain on disposal of Property 1 was a trading gain. The Taxpayer now appeals against this determination.

3. We have received evidence and submissions from both sides. Aside from the documents submitted to us, there was a statement of agreed facts and we heard the oral testimonies of:-

a. the general manager of the group of companies to which the Taxpayer belonged and a director of the Taxpayer (' GM').

b. a director of Company B which is a corporate director of the Taxpayer, (' China Director').

c. The account manager of the Taxpayer and of the group of companies to which the Taxpayer belonged (' New AM').

Agreed facts

4. The agreed facts constitute part of our findings of fact. The salient parts of the agreed facts are set out below.

5. The Taxpayer was incorporated as a private company in Hong Kong on 3 September 1992. In the Tax Return (which covered the period from incorporation to 31 March 1994), the

Taxpayer described its nature of business as ‘ sales of investment property and there is no trading activity after 31 March 1994’ .

6. The Taxpayer is a member of a group of companies ultimately and beneficially owned by Company B. Company B is in turn ultimately and beneficially owned by Company C, a company incorporated in China. The group of companies directly and indirectly owned by Company B is collectively referred to as ‘ B Group’ . B Group is involved in the business of importing and exporting garment products. (The evidence adduced showed a slight difference to this agreed fact. It showed that Company B held 50% of the Taxpayer and Company C held the balance 50% of the Taxpayer through the GM. Company B was owned by an African company called Company D which is held by Company C.)

7. At all relevant times, the Taxpayer’ s authorized and issued capital was $10,000 and $2 respectively. Particulars of the Taxpayer’ s shareholders and directors were as follows:

(a) Shareholders

Name of shareholder	**No of shares held**	**Period of ownership**
Company B	1	1 December 1992 to present
GM	1	1 December 1992 to present

(b) Directors

Name of director	**Appointed on**	**Resigned on**
Company B	1 December 1992	--
GM	1 December 1992	3 December 1993
Mr E	3 December 1993	16 March 1998
Company F	16 March 1998	22 October 1999
New AM	22 October 1999	--

Sale and purchase agreement to purchase Property 1

8. By a preliminary agreement dated 5 July 1993, the Taxpayer agreed to purchase Property 1 at a consideration of $24,800,000 with the following payment terms:

Initial deposit	$1,000,000
Due on signing of agreement for sale and purchase or on or before 20 July 1993	$6,440,000
Due within 14 days from the issue of completion after the issuance of the occupation permit	$17,360,000
	$24,800,000

At the time of purchase, Property 1 was still under construction and it was expected that the occupation permit would be issued in November 1993.

Receivership

9. Subsequent to the preliminary agreement, a writ of summon dated 5 August 1993 was issued by the Supreme Court of Hong Kong against the GM and various companies of the B Group. The writ of summons was issued in Hong Kong at the instance of a receiver of Country G of the bankrupt estate of the GM because, back in 1989, the GM had been declared bankrupt by a court in Country G following his failure to perform certain contracts entered into in Country G by the GM personally. As a result, the receiver of Country G had been appointed by the Court in Country G as trustee and receiver for all of the GM' s assets and properties wherever situated. In the Hong Kong Court, the receiver of Country G alleged that the GM was the beneficial owner of at least 50% of the shares of Company B (and indirectly of the companies of the B Group). Consequently, the plaintiff was seeking judgment from the Supreme Court in Hong Kong that it was entitled to seize and dispose of the said shares and in satisfaction of the decision of the Court in Country G in its favour.

10. By an order of the Supreme Court dated 16 December 1993, the Taxpayer and 22 other companies in the B Group were put into receivership and Mr H (the ' Receiver') of a CPA firm was appointed as the Receiver and Manager of these companies.

11. As soon as the Taxpayer was put into receivership, the directors and management of the Taxpayer lost control over the business of the Taxpayer as per the order of the Supreme Court of Hong Kong.

Completion of purchase of Property 1

12. The principal duty of the Receiver was to identify and secure the assets of the B Group at the least possible cost to the B Group. As more fully described in a report filed by the Receiver on 12 January 1994 (the 'First Receiver Report'), the Receiver concluded that it was appropriate for him to complete the purchase of Property 1 because, at that time, the B Group had already made a deposit of $7,440,000 which would otherwise have been forfeited and the Receiver had determined that the estimated market value of Property 1 exceeded the purchase price. The First Receiver Report stated specifically on this issue:

> ' In the week following my appointment, I completed the sale of Property 2 on behalf of Company B. The sale enabled all of the Group's debts to Bank I to be cleared and its charges over two other properties to be released. The surplus funds held at that time by Bank I also enabled me to complete the purchase of a duplex (Property 3) by and on behalf of Company J. It was necessary to complete this latter purchase as the Group had made a deposit of $7,000,000 (funded by Company B) which would otherwise have been forfeited. The estimated market value of the property exceeded the purchase price.'

13. The total cost of acquisition of Property 1 was $28,726,678 and was financed as follows:

	$
1. Bank K	14,800,000
2. Company B	9,086,678
3. Company L	4,840,000
	28,726,678

Company B owned 19% of the total issued capital in Company L at all relevant times. The loan of $14,800,000 from Bank K was repayable by 120 equal monthly instalments of $181,526.44 each.

Sale of various properties of the B Group

14. In order to meet claims of creditors of the B Group, the Receiver took the decision to dispose of a number of properties of the B Group which were, in the view of the Receiver, surplus to the Group's requirements. The Receiver explained in detail his actions and the reasons therefor in a report dated 8 February 1994 (the 'Second Receiver Report'). With respect to Property 1, the second Receiver Report states as follows:

> '18. Property 1 was intended as a residence for GM, the Group's general manager. The property was not purchased for the purposes of generating revenue. Accordingly, this property was considered surplus to the Group's needs and it was advertised for sale. On 20 January 1994, a provisional agreement was signed for the sale of Property 1 for $40,000,000, the Court having authorized the

sale of the property for not less than $39,000,000. Although the primary purpose of the sale was to generate working capital, the sale will crystallise a profit for Company J of $15,200,000 less costs. An initial deposit of $2,000,000 was received on that date. A further deposit of $6,000,000 was received on 2 February 1994. Completion is due on 15 March 1994.'

Profits tax return for year of assessment 1993/94

15. On 9 May 1995, the Taxpayer, through the First Tax Representative, filed its profits tax return for the year of assessment 1993/94 which was supported by audited accounts for the year ended 31 March 1994 and a proposed tax computation. The Taxpayer's accounts showed, inter alia, that the 'gain on disposal of investment property' was $11,273,322. In the return, the Taxpayer offered the profit on the sale of Property 1 for assessment.

16. On 20 July 1995, the assessor raised on the Taxpayer the following profits tax assessment for the year of assessment 1993/94:

Profits per return	$10,807,607
Tax payable thereon	$1,891,331

The Taxpayer did not object to this assessment.

Section 70A claim

17. On 19 January 1996, the Second Tax Representative, on behalf of the Taxpayer, applied for correction of the profits tax assessment for the year of assessment 1993/94 pursuant to section 70A of the IRO in the following terms:

> ' On reviewing the background of this case we discovered that the profit on disposal of [Property 1] should not be subject to Hong Kong profits tax ...
>
> To support the application we would advice that [Property 1] was purchased in July 1993 by our client with the intention of holding it for long-term investment purposes. However, as a result of a legal dispute which involved a director of the company, our client was put into receivership and was forced by the receivers to dispose of [Property 1] in January 1994 and the proceeds from the disposal was placed (as a blocked deposit) with a bank in Hong Kong as guarantee for the court case.
>
> In this circumstances, we are of the opinion that notwithstanding the short period of ownership, the gain on disposal should not be taxable as the sale was a forced sale and that it was not our client's intention to sell [Property 1].'

18. In correspondence with the assessor, the Second Tax Representative provided the following information and contentions:

a. Property 1 was acquired with the intention to use it as quarters provided to the GM. In view of such usage, no feasibility study had been conducted.

b. Minutes of directors' meetings authorized the acquisition of Property 1 were not available.

c. The legal dispute referred to above originated in Country G in January 1989. It concerned certain contracts entered into by the GM in his personal capacity. GM was adjudicated bankrupt by the Court of Country G in 1989. The Taxpayer was involved in the lawsuit because the Receivers of the bankrupt estate of the GM claimed against GM's interest in the Taxpayer and various related companies. All the companies concerned were put under receivership according to the court order dated 16 December 1993.

d. The management of the B Group was not aware of the GM's involvement in the lawsuit in Hong Kong and it was not until 5 August 1993 when the Taxpayer received notice from Hong Kong court.

e. Property 1 had not been used by the GM as quarters as the Receiver put up Property 1 for sale shortly after the completion of the purchase.

19. On 29 May 1997, the assessor issued a notice of refusal to correct the profits tax assessment for the year of assessment 1993/94. On 3 July 1997, the Second Tax Representative, on behalf of the Taxpayer, lodged an objection against the assessor's notice of appeal to correct the profits tax assessment for the year of assessment 1993/94.

20. The assessor has since ascertained that the GM declared in his Tax Return for the year of assessment 1993/94 that he received salary of $360,000 from Company B and that no quarters had been provided to him by Company B for the year ended 31 March 1994. In the employer's return of remuneration and pensions of the year ended 31 March 1994 furnished by Company B in respect of the GM, Company B reported that no quarters were provided to the GM.

Issues

21. There are two issues in this appeal:

a. Was the tax under appeal excessive by reason of an error in the Taxpayer's tax return which could be rectified under section 70A?

b. What was the intention of the Taxpayer at the time of acquisition of Property 1? Was the purchase of Property 1 an adventure in the nature of trade? Or was Property 1 purchased as an investment or as company quarters?

22. If the answer to the first issue is in the negative, the need to determine the second issue is obviated. Section 70 of the IRO would render the assessment made pursuant to the Tax Return final and conclusive for all purposes.

The law on section 70A

23. On the first issue, section 70A of the IRO stipulates that '*if ... it is established to the satisfaction of an assessor that the tax charged for that year of assessment is excessive by reason of an error or omission in any return or statement in respect thereof, or by reason of any arithmetical error or omission in the calculation of the amount of the net assessable value ... assessable income or profits assessed or in the amount of the tax charged, the assessor shall correct such assessment.*'

24. The Taxpayer cited three Board of Review decisions relating to section 70A: D49/92, IRBRD, vol 8, 1, D62/87, IRBRD, vol 3, 43 and D6/91, IRBRD, vol 5, 556.

25. D62/87 was not a case which concerned section 70A although it is related to a dispute on whether a payment was capital or revenue in nature. The Board there applied the three elements test of Megarry J in P H v Castle Hill Warehousing Co Ltd [1974] 1 WLR 1624 at 1629 to conclude that the payment was revenue in nature. The inclusion of the payment under appeal in the accounts of the taxpayer as additions to fixed assets (to support the Revenue's intention that the payment was capital in nature) had, in that Board's view, little or no weight because the facts showed that the payment was not additions to fixed assets. D62/87 does not assist the Taxpayer on the interpretation of section 70A. Section 70A was not even considered. D62/87 would assist the Taxpayer on the 'intention' issue. In our view, the presentation of certain transactions in a taxpayer's accounts or audited financial statements is one of the surrounding facts which we should take into consideration when deciding on the intention of a taxpayer. More on this follows under the 'Accounting treatment' section below.

26. D6/91 is instructive because the 'error' was similar to the error in this appeal. D6/91 does not set out the relevant facts but did mention at page 560 that '*the tax return stated the Taxpayer was subject to tax on these profits whereas in reality it was not.*' The taxpayer in that case argued that the previous tax representative formed an opinion which was genuine and bona fide but which was erroneous and that there could be different views of the same facts. What worried that Board was whether a different point of view can be an error or omission. The Board then said at page 561:

> '*Having given very careful thought and consideration to the question before us we have come to the decision that there is no limit on the meaning of section*

70A as suggested by the representative for the Commissioner in this case. We have decided that there is no limitation on the application of section 70A to factual errors or omissions as opposed to legal errors or omissions. With regard to whether or not a change or difference of opinion can be an error or omission we make no general ruling or application to all cases. In our opinion each case must be heard and decided on its own merits. If the same facts are capable of two different interpretations both of which can be correct and are opinions only then there would in our opinion be no error or omission. If on the other hand there is only one true and correct interpretation then it is not a matter of opinion. In the case now before us it would appear to us that whether or not the profits arose in or were derived from Hong Kong and whether or not the Taxpayer has carrying on business in Hong Kong is a matter of fact and legal interpretation which can have one answer only. That answer is clearly yes or no. The Taxpayer has been assessed to tax and paid tax on the basis that the answer is affirmative. If however, having heard the case and all of the evidence, we were to decide that the answer should be negative then clearly an error has been made in the tax return and the matter is capable of being rectified under section 70A of the Inland Revenue Ordinance. ‘

27. In 1993, D49/92 allowed an error to be corrected based on the evidence presented to and accepted by that Board. The error in the tax return was the valuation of land at cost as capital asset instead of valuation of the land as at the date when it became a trading asset upon a change of intention. After considering the evidence (including testimony from the finance manager who prepared the draft accounts and did the tax computation in which the error arose), the Board decided that there was an error in the tax computation.

28. In contrast to the Taxpayer’ s three authorities, the Revenue cited to us a 1997 High Court decision. In 1997, the High Court decided on the interpretation of section 70A in Extramoney Ltd v CIR 4 HKTC 394. D6/91 was one of the cases considered in this High Court appeal. In the Extramoney case, P Chan J gave a detailed analysis of the purpose of section 70A and the interpretation of the words ‘ errors or omissions’ which are directly applicable to the first issue in this appeal. The purpose of section 70A is to avoid possible hardships arising from mistakes made by either the taxpayer or assessor. Section 70 draws a distinction between two types of errors; arithmetical and non-arithmetical. In the present appeal, the error or omission is not the arithmetical type. As for non-arithmetical errors or omissions, P Chan J wisely refused to attempt a comprehensive definition, he stated as follows:

‘ *I think it would be unwise to attempt to give a comprehensive definition of what is or is not an error or omission which can cater for all situations. It would be easier to identify cases in which it is not.*

> *In my view, for the purpose of section 70A, the meaning of "error" given in the Oxford English Dictionary (page 277) would be appropriate, that is, "something incorrectly done through ignorance or inadvertence; a mistake". I do not think that a deliberate act in the sense of a conscientious choice of one out of two or more courses which subsequently turns out to be less than advantageous or which does not give the desired effect as previously hoped for can be regarded as an error within section 70A. It is even worse if the deliberate act is motivated by fraud or dishonesty. But the question of fraud or dishonesty need not arise.*
>
> *Hence, in the context of the present case, if there is a change of opinion of the auditors or accountants in respect of the accounts, the first opinion cannot be regarded as an error or omission within the section. Similarly if there is a change of mind of the directors of the company in connection with how any part of the accounts should be made up, the previous decision will not be regarded as an error or omission. Nor is it an error or omission if it is merely a difference in the treatment of certain items in the accounts by those preparing or approving the accounts. If this were permitted, the director or officer of a company, will be tempted at a later stage to try and "improve" the company's accounts or change his own decisions if this is to his advantage. This would be contrary to the spirit of the Ordinance that there should be finality in taxation matters. The whole statutory scheme provided in the Ordinance simply cannot work.*'

29. Both the Board decisions in <u>D49/92</u> and <u>D6/91</u> pre-date the <u>Extramoney</u> judgment. At first, there appears to be an apparent conflict between the two Board decisions and the High Court judgment. If there was, we consider ourselves bound by the subsequent <u>Extramoney</u> judgment which clarifies interpretation of what constituted an 'error' under section 70A. However, we are of the view that the Board decisions and the High Court case can be reconciled. First, each case must be looked at individually without having any comprehensive definition of 'error' in mind. In <u>D6/91</u>, the Board in effect said that: '*each case must be heard and decided on its own merits.*' In <u>Extramoney</u>, the High Court refused to give a comprehensive definition of 'error'. Secondly, each case should be decided by looking at individually and we should consider the evidence submitted in respect of each 'error'. The High Court refused to disturb the Board's finding that there was an error in the inclusion of the profits in question under section 70A. P Chan J stated (at 431): '*In any event, in the absence of any explanation from the person who had made the decision to compile the taxpayer's accounts in the way they were, and in the absence of any evidence showing that the profits should have been attributed to any particular company within the group, I think the Board was entitled to conclude that the taxpayer had not discharged the onus of proving that there was an error within the meaning of section 70A. I would even say that that was probably the only reasonable conclusion.*' In contrast to this lack of evidence, in <u>D49/92</u>, three directors of related companies of the taxpayer, the finance manager who prepared the accounts and the tax computation in question and the tax

representative who submitted the tax return in question were called as witnesses. Their evidence was accepted which led the Board to accept that there was a section 70A error.

30. Our approach to the ‘ error’ issue is therefore this: We will consider all the evidence relating to how the error arose and its surrounding circumstances. It may well be that there will be overlap of the evidence relevant to the ‘ error’ issue and the evidence relevant to the ‘ intention’ issue. We bear in mind that there is no comprehensive definition of ‘ error’ . But we also bear in mind and seek guidance from the passages of P Chan J as quoted above in Extramoney Ltd v CIR.

The law on intention

31. The principle to be applied on the question of ascertaining intent is well settled. In Marson v Morton [1986] 1 WLR 1348, Sir Nicholas Browne-Wilkinson V-C said (at page 1348):

> ‘ *It is clear that the question whether or not there has been adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another.* ‘

32. The learned Judge then went on to list out (at pages 1348 to 1349 of the report) some of these features or badges, which are of course by no means exhaustive:

a. Whether the transaction was a one-off transaction?

b. Was the transaction related to the trade which the taxpayer otherwise carries on?

c. What is the nature of the subject matter?

d. What was the way in which the transaction was carried out?

e. What was the source of finance of the transaction?

f. Was work done to the item purchased before it was resold?

g. Was the item resold in one lot or broken down into saleable lots?

h. What were the purchasers’ intentions at the time of purchase? and

i. Did the item provide enjoyment for the purchasers?

In approaching these questions, common sense must be applied.

33. In Lionel Simmons Properties Ltd v CIR (1980) 35 TC 461, HL, Lord Wilberforce said (at page 491G):

> ' *Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock - and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and possibly, a liability of Tax (cf. Sharkey v Wernher [1956] AC 58). What I think is not possible if for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status - neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.'*

34. Mortimer J (as he then was) in All Best Wishes Ltd v CIR (1992) 3 HKTC 750 summed up the position as follows (at page 771):

> ' *This is a decision of fact and the fact to be decided is defined by the Statue - was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the*

time, before and after. Often it is rightly said that actions speak louder than words.'

Onus of proof

35. Section 68(4) of the IRO puts the onus of proof on the Taxpayer in respect of both issues.

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

The error

36. The 'error' issue is distinct and separate from the 'intention' issue. The Taxpayer argues that in the context of this appeal, the two issues are interrelated presenting us with the proverbial chicken-egg dilemma. According to the Taxpayer's argument, the error was the treatment of the gain on disposal of Property 1 as trading income and hence trading intention. This treatment did not accord with the actual intention of the Taxpayer which was to use Property 1 as quarters and thus any gain from its disposal was capital gain. If this argument is correct, then in order to decide whether there is an 'error', the Board will have to look at all the evidence to come to a conclusion of what was the actual intention of the Taxpayer. If the conclusion was that Property 1 was intended as quarters or long term investment, then there was an error in the classification of the gain under appeal as trading income. If we conclude that the intention was trading, there would be no error.

37. The Revenue's argument is that there was merely a change of opinion in respect of the Tax Return and the relevant audited financial statements of the Taxpayer. This was not an error within section 70A. A change of mind or a difference in the treatment of accounting entries are not section 70A errors.

38. The facts relating to how the error could have arisen are the relevant facts which we must consider when deciding whether a section 70A error has occurred. We do not think that there is any chicken-egg dilemma. In the consideration of the evidence relating to the question of 'error' in this appeal, such evidence may (and do in the present case) overlap with the evidence relevant to the question of intention. The evidence relating to whether there was an error and how it has allegedly arisen are merely part of the overall and other evidence which we have to consider when we direct our minds on the question of intention. We have already indicated our approach and interpretation of the law on the 'error' issue in the above which we will not repeat here. We will first address two preliminary matters and findings as background and then consider the evidence on the 'error' issue.

Directing minds

39. The Taxpayer, as a corporate entity, could not have an intention in that it had no mind of its own. The directors were the directing minds. Prior to and at the time of acquisition of Property 1 on 5 July 1993, the Taxpayer had two directors: the GM and Company B. Both directors (Company B through the China Director) gave evidence before us. As general manager and director, the GM was responsible for the Taxpayer. His particular talent was in sales and he procured and maintained relationships with customers of the B Group. The China Director was stationed in China and visited Hong Kong on an irregular basis. He was employed by Company C to supervise the B Group on behalf of Company C. When he was in Hong Kong, he kept himself appraised by speaking with the Old AM (see paragraph 45) regarding financing matters and other department heads in respect of other aspects of the business of the B Group. We find that at the time of acquisition of Property 1 in early July 1993, the GM and the China Director were the directing minds of the Taxpayer and the B Group.

Group structure

40. Company C held ultimately the entire beneficial interests of the B Group. 50% of the shares of the Taxpayer were held in the name of the GM as nominee for Company C. The balance 50% was held by Company B. Company B itself was 100% beneficially owned by Company C. It is therefore not technically correct to say that the Taxpayer was ultimately owned by Company B as was agreed in the agreed facts. Both Company B and its underlying B Group which included the Taxpayer were in fact ultimately owned by Company C. The B Group was one of the many businesses of Company C. The B Group would procure buyers in the garment business. Company C would fill these orders through its other businesses by selling garment to the B Group on credit who would sell the garments to its buyers.

41. The Taxpayer's sole business was related to Property 1. It appears to be single asset company utilized by the B Group for the sole purpose of acquiring Property 1.

Evidence relating to section 70A error

42. Our consideration of the evidence on the section 70A error are as follows.

43. The Tax Return offered the gain under appeal as assessable for tax purpose. In the Tax Return, the nature of business of the Taxpayer was described as 'sales of investment property and there is no trading activity after 31 March 1994'. The word 'investment property' was used and indicated treatment of Property 1 as capital. However, the use of the 'sales' and implication of trading activities prior to 31 March 1994 by the B Group indicate the opposite.

44. The Tax Return was supported by the audited financial statements of the Taxpayer from 3 September 1992 to 31 March 1994 ('94 Accounts') and tax computation tables. It is clear and agreed that the gain on disposal of Property 1 was presented as a trading income rather than as a capital gain.

45. The 94 Accounts were prepared by a former employee of Company B, the Old AM. The Old AM had been employed by the B Group during the relevant period under appeal. The Old AM was the person who signed the preliminary sale and purchase agreement purchasing Property 1 on behalf of the Taxpayer on 5 July 1993. He was responsible for the overall accounting system and administrative matters of the B Group. He left in March 1995 just after the finalization and signing of the 94 Accounts. The 94 Accounts were signed on 13 March 1995.

46. The 94 Accounts were audited by the First Tax Representative and signed by Mr E and the China Director (on behalf of Company B) as directors of the Taxpayer. The First Tax Representative was appointed representative of the Taxpayer in the Tax Return.

47. The China Director testified that when the 94 Accounts were submitted to him and Mr E for signature, they did not review it in detail as both were deeply involved in the litigation brought by the receiver of Country G and the China Director was new to Hong Kong with less than complete understanding of the tax implications. The China Director said that he had implicitly trusted the Old AM and signed the 94 Accounts. There was no evidence on whether Mr E signed the Tax Return under similar situation nor was there any evidence as to whether the GM had an opportunity to go through the 94 Accounts and the Tax Return before they were signed.

48. The Old AM left in March 1995. The New AM replaced him. But the New AM was, at that time, inexperienced in accounting matters. When the Taxpayer received the tax assessment issued pursuant to the Tax Return on 20 July 1995, the New AM testified that he attempted to confirm the circumstances relating to the assessment. According to him, he had only one junior clerk left in his department and there was very little documentation. It is unclear to us, from the evidence, whether and when the First Tax Representative was directly consulted by the New AM, the GM or the China Director about the tax assessment. According to the New AM, the First Tax Representative refused to cooperate due to the failure of Taxpayer to pay arrears of professional fees. The Second Tax Representative was consulted on the tax assessment soon after the tax assessment was received. The Second Tax Representative wrote on 19 January 1996 to correct the error in the Tax Return.

49. The Tax Return and the audited financial statements of the Taxpayer for the following tax period of the year of assessment 1994/95 ('95 Accounts') was produced. The 95 Accounts was signed on 22 December 1995 by the GM and Mr E. The First Tax Representative remained as auditor and signed the auditor's report for the 95 Accounts. We find difficulty in reconciling the explanation of the First Tax Representative refusing to cooperate with the Taxpayer to confirm the

tax assessment under appeal with the fact that the First Tax Representative was still the auditor of the Taxpayer for the subsequent year of assessment.

50. The Old AM, who prepared the 94 Accounts and thus the person who allegedly made the error was not called as a witness. The reason given was that he refused to be involved in the affairs of his previous employer. From what we have been told, he was more than an accounting manager. The China Director testified that the Old AM was responsible for account policy, he was in charge of human resources, he was responsible for general administrative affairs of the B Group. He signed the preliminary purchase agreement for Property 1 and, according to the China Director, probably other preliminary agreements as well. He had prepared the tax return and financial statements of Company B before his departure from the B Group. He signed the Tax Return of Company B for the year of assessment 1992/93 as 'manager' which showed Company B as importers and exporters of garment goods and investors in real estate. He signed the employer's return of remuneration and pension of Company B for the year of assessment 1993/94 as the 'administrative manager'. He was a man who was more than an account manager and who was very much involved in the administration of the B Group. It is difficult for us to believe the Taxpayer's assertion that he did not know the purpose of acquiring Property 1.

51. Looking at the Tax Return of Company B for the year of assessment 1992/93 and its supporting documentation to this Tax Return, there is clear presentation of other properties as capital assets with rebuilding allowance claims. For example, Property 3 (Block B Workshops) were stated as having been 'acquired as capital assets ... and are used as warehouses'. While the Block A Workshops were stated as having been 'acquired as capital assets for long term investments for rental income purpose'. In the notes to the disposal of the office premises and directors quarters, the office in District M was described as having been 'acquired as capital assets for long term investments and were used as "office premises" of the company since acquisition'. Property 4 was described as having been acquired as capital assets for long term investment and was used as "directors quarters" of the company'.

52. In contrast, in the tax return of Company B signed by the GM for the year of assessment 1991/92 and its supporting documentation, the profits earned from disposal of a the property in District M, two uncompleted residential units in Housing Estate N and the Housing Estate O were treated as assessable profits.

53. The accounting treatment of the properties of Company B indicates to us that the Old AM knew exactly what he was doing. It is significant that he refused to give evidence on whether an error has been made to the Tax Return and the 94 Accounts.

54. Equally significant is the absence of evidence from the First Tax Representative who were also the auditors of the 94 Accounts and the 95 Accounts. The reason advanced to us was their refusal to cooperate due to the non-payment of their outstanding professional fees. If an error was made and this error could have been 'rectified' through the normal audit process, the non-

payment of their outstanding professional fees would be the least of obstacles if the opportunity to rectify the error presented itself. Not only was there no rectification by the First Tax Representative, the ‘error’ was repeated again in the 95 Accounts. They continued to be the auditors of the Taxpayer for the year of assessment 1994/95. The 95 Accounts were signed on 22 December 1995. By this time, the Taxpayer had already consulted the Second Tax Representative on the tax assessment under appeal. According to the New AM, an accounting clerk spoke to the First Tax Representative about the error. The First Tax Representative’s reply to the accounting clerk was that there was no error. The 95 Accounts could have rectified the error. If the First Tax Representative was unwilling to rectify the error, it was open to the Taxpayer to find another auditor for the 95 Accounts to rectify the error.

Findings on section 70A

55. After having considered the above evidence available to us regarding the circumstances relating to the ‘error’, we have come to the view that no ‘error’ under section 70A has occurred. The Taxpayer has not proved to us that, on a balance of probabilities, an error was made. We find that the Tax Return and the 94 Accounts have been properly prepared and the treatment of the gain on disposal of Property 1 as a trading gain was a deliberate act by the Old AM who prepared it and the First Tax Representative who audited it. They knew what they were doing. We are not sure whether the China Director or Mr E had merely signed the 94 Accounts without going through its contents and trusting the judgment of the Old AM. If they did, they had relied on the knowledge and expertise of the Old AM and the First Tax Representative and have chosen to sign the Tax Return and 95 Accounts blindly. Not understanding the tax implications of a certain manner of presentation of the accounts has no direct bearing on the error issue. The Taxpayer made the section 70A application as an after thought in an attempt to avoid payment of the profits tax.

56. We do not find it particularly helpful to classify whether an error is an error of fact or of law or of opinion in the circumstances of this appeal. We are, however, guided by the decision in Extramoney Ltd and D6/91. If we were wrong in not considering the additional evidence presented to us on the ‘intention’ issue when considering the ‘error’ issue or if we were wrong in concluding that there was no error, we now consider the evidence and give our findings on the ‘intention’ issue.

Accounting treatment

57. One important consideration on intention is the accounting treatment of the gain on disposal of Property 1 in the 94 Accounts. The Taxpayer claims an error in the treatment. We have already dealt with the evidence and made our findings in respect of this error which we shall not repeat here.

58. The Revenue argued that the burden of the Taxpayer in challenging the accuracy of its own accounts is heavy. We were quoted, from Chinachem Investment Co Ltd v CIR 2 HKTC 261 at 282:

> '*If a taxpayer wishes to challenge the accuracy of its own audited statements and tax declarations made by a director, it is not sufficient merely to say that ... a mistake was made ... Evidence to substitute the mistake must be given in the strongest terms.*' - per Macdougall J.

59. The Taxpayer submitted that accounting presentation is of itself inconclusive in determining the true nature of a transaction. We were quoted, from a Board decision in D26/93, IRBRD, vol 8, 183 at 186:

> '*Here we accept ... that the accounting presentation is, of itself, inconclusive in deciding the true nature of a transaction. In Shadford v H Fairweather & Co Ltd 43 TC 291, Buckley J stated at 299:*
>
> *For however genuinely the accounts may have been framed by those responsible for them, and however carefully they may have been studied by those responsible for auditing them, the other evidence may show that in fact they do not truly indicate the nature of the relevant provisions.*'

60. Both passages are right and are accepted. If an error is alleged, cogent and convincing evidence must be present to prove the error. If such evidence is accepted then the accounting treatment (that is the error) will be ignored. In respect of the 'intention' issue, we take into account the accounting treatment of the sale proceeds of Property 1 in the 94 Accounts. We have come to the view that no error in accounting treatment was made.

Sale

61. The Property was purchased prior to the appointment of the Receiver. The Receiver chose to proceed with the formal sale and purchase agreement. The purchase was completed by the Receiver as failure to complete would have resulted in forfeiture of the deposit paid. At the time of the First Receiver Report in January 1994, the Receiver already had in mind selling Property 1 (and all other properties, except the head office of B Group) as he considered them to be surplus to the B Group's operating requirements. It is clear that Property 1 was not sold in execution of a plan to trade Property 1. The sale was not typical of a trading transaction. The sale had nothing to do with the intention of the Taxpayer at the time of acquisition and is a factor which we must take into consideration. It is apparently paradoxical that there can be trading if the subsequent sale was forced upon the taxpayer. However, what matters is the intention at the time of acquisition. If it were a trading intention or an adventure in the nature of trade, the subsequent sale, willingly or

forced, will result in a trading gain. If the asset was acquired as capital asset, its subsequent sale, willingly or forced, will result in a capital gain.

Receiver's reports

62. The Taxpayer relied on the two Receiver Reports in relation to the circumstances relating to the forced sale of Property 1. In the Second Receiver Report, the Receiver has stated in paragraph 18 that: 'Property 1 was intended on a residence for ... the Group's general manager. The property was not purchased for the purpose of generating revenue.' When the Receiver was asked for the basis of this statement, he replied on 16 June 1999 that it was long time ago and all records had been returned to the Taxpayer and that the information must have been provided by the officers of the Taxpayer.

63. Aside from the above, the other wordings of the Second Receiver Report provide some assistance. In paragraph 7: 'The lack of working capital appeared to have resulted from the Group's funds having been tied up in certain seemingly speculative investments in the property market.' In paragraph 8, the Receiver mentioned that both the Taxpayer and a fellow subsidiary had entered in property sale and purchase agreements. The Receiver commented: 'the properties owned by these companies had been purchased for speculation or residential purposes only.' In paragraph 22, the Receiver set out nine further properties purchased by the B Group out of which five were empty and the Receiver noted: 'as can be seen from the above summary, the group owns a number of properties which are unoccupied and do not generate revenue.' Lastly, in paragraph 40, mention is made to the total debt of $8,100,000 (as at 30 November 1993) due to Ms P (wife of GM and owner of Company L), 'Ms P has apparently funded the Group's working capital shortfall on occasions. The Group's reliance on such forms arose, I suspect, from its use of working capital to fund property speculation.'

64. The observations of the Receiver in the Second Receiver Report should be viewed as that of a disinterested third party with expert knowledge in accounting and bookkeeping who had the benefit of the papers and files available to him and who has by the time of his Second Receiver Report been running the B Group (or most of it) for a little less than two months.

Company quarter's policy

65. An important aspect of the Taxpayer's case is the company quarters' policy ('Policy'). The GM and China Director testified that it was Company C's Policy to provide quarters for key employees and directors. The purchase of Property 1 was said to be in accordance with this Policy. We heard from the China Director that this Policy was confined to non-Hong Kong resident staff and that in the early 1990's, Company C made two important strategic decisions. First, the B Group were to move its office from a district in Kowloon to a more upscale district on Hong Kong Island. Secondly, its residential property holdings were to be upgraded to provide quarters for key employees and directors because (a) of more visits to Hong

Kong from the employees and directors of Company C; and (b) the need to raise the group's profile of which home entertainment was believed to be an important aspect. It was also asserted that as part of the Policy as soon as a property ceased to be used for the purpose of providing accommodation to directors or employees or for the business premises of the B Group, the property would be disposed of as soon as possible.

66. It is difficult for us to conclude that the Policy existed. The list of properties supplied by the GM as evidence of the Policy is incomplete without knowing the dates of acquisition and sale (and reason for sale) of the properties. This list does not show the Policy in action. The China Director who immigrated to the United States and was stationed in China had the benefit of housing in both countries. We do not know which was his normal country of residence. If his normal home was in the United States, why was it necessary to provide him in the United States with quarters under the Policy? Two residential units in China are stated in the list to be for the residence of the quality controllers. Who are these quality controllers and where was their normal place of residence? Further, the Second Receiver Report stated in paragraph 22 therein that these two units in China were empty and unoccupied. These two units were part of the five empty units mentioned above. In terms of quarters in Hong Kong, the GM was the major beneficiary of the Policy. The GM testified that the quarters were provided to him under his employment contract.

67. The Second Tax Representative has supplied the following residence of the GM in its correspondence with the Revenue:

Period	Property	Owner
May 1990 to June 1991	Property 5	Company B
June 1991 to November 1991	Property 4	Company B
November 1991 to April 1994	Property 6	Company B

After law suit, the B Group stopped providing quarters to the GM. In the individual tax return of the GM for the year of assessment 1993/94, the GM did not report the provision of company quarters. Neither did Company B reported this to the Revenue in its employer's return of remuneration and pension.

68. Company B had purchased and sold three residential properties in the year of assessment 1991/92 and the gain from their disposal was treated as trading income. These are the same properties mentioned in paragraph 52 above. The GM testified that these units were all originally intended as company quarters for him. He testified as follows. The 900 square feet flat at Housing Estate O was intended for him but he subsequently decided to purchase the 2,100 square feet Property 4 instead. Property 4 was too noisy as it was a low floor. There was noise from a road nearby and drivers on the ground level of the building. Therefore, a flat at Housing Estate N was purchased. Then another flat at Housing Estate N was purchased to replace the first flat. This

second flat at Housing Estate N was also sold when he decided to remain at the housing estate of Property 4 when Property 6 was acquired for his quarters.

69. We have not been supplied with the dates of the acquisition and sale of the said three residential units. We are thus unable to see the sequence of the purchase and sale of these units although they took place within one year of assessment. However, we find the explanation offered on these three residential units incredible. The size of the 900 square feet flat at Housing Estate O was too small in relation to the other quarters said to be provided to the GM. The China Director said that this flat at Housing Estate O was for ‘middle management’ but he was unable to pinpoint who exactly was middle management. The Old AM was not qualified for housing. He had asked for housing and was denied as he was local staff. The flats at Housing Estate N were incomplete developments and at the time of purchase still under construction. One would have expected the GM to want to move to an existing development to get away from the noise. The rapid switch from one unit at Housing Estate N to a higher floor is in itself remarkable as is the fact that incomplete units would be purchased for staff quarters. The policy of immediate disposal of units not required as quarters or office seems contradictory to buying incomplete units and waiting for construction to complete before use. The China Director remembered that both units at Housing Estate N were purchased within a very short period time from each other. We find the claim that the three residential units were for staff quarters unbelievable. It has confirmed our belief that the accounting treatment of these three units together with an office floor as trading assets in the tax return for year of assessment 1991/92 of Company B when the Old AM was in charge of its preparation was the correct accounting treatment (see paragraphs 52 and 53 above).

70. Taking the above into consideration, we do not believe that the Policy existed. We are unable to see it in action. The explanations of purchase and sale of the three residential properties of Company B in year of assessment 1991/92 are too incredible. Any housing provided to employees were provided on an ad hoc basis. Even if the Policy did exist, this did not preclude the Taxpayer or the B Group from engaging in property trading activities in respect of properties not intended for company quarters or offices.

Financial ability

71. The Taxpayer asserts it had the financial ability to purchase and hold Property 1. The various accounts presented as evidence to this Board related only to Company B itself and the Taxpayer. The accounts of the Taxpayer does not assist since it was capitalized at two dollars and entirely dependent on outside financial support.

72. The China Director testified that the B Group had in the year 1993 a turnover of $200,000,000 and profit of $24,000,000. But the 1992/93 profits and loss account of Company B showed a profit of $935,734 (which would have been a loss if not for the profit earned from the sale of the four properties mentioned in paragraph 69 above) and a turnover of $106,805,167 for the year ended 31 March 1992. For the year ended 31 March 1993, a loss of $3,803,293.68 on

a turnover of $85,987,411.96 was shown. The China Director correctly pointed out that the profits and loss of Company B did not show the profits and loss of the B Group as a Group. The profits and loss of only one other B Group company was submitted in evidence, that of Company Q for the year ended 31 March 1992. We saw that for the year ended 31 March 1992, Company Q had a turnover of $23,236,400 and a loss of $6,042,213 (after taking into consideration forex trading losses of $5,839,629) and that for the year ended 31 March 1993, its turnover was $131,934,321 and profit was $11,460,269. Without the profits and loss of other B Group companies, the China Director' s bare recollection of Group' s profit and turnover for the year ended 31 March 1993 could not be verified by the documentary evidence. Other tools of financial analysis such as consolidated cash flow statements and consolidated profit and loss statements were also not presented in evidence.

73. The China Director asserted that parent support from Company C was expected and should be considered as a financial source for the B Group to acquire and hold properties. The US$3,000,000 to $4,000,000 which he considered was the amount that Company C had in the B Group turned out not to be cash or working capital but they were stock (for the garment trading). Company C sold garment to the B Group on credit and does not receive payment until the ultimate purchasers have paid.

74. If parent company support was present, we do not see the need to borrow money from Company L or Ms P. Company L can hardly be described as part of the B Group. Only 19% of Company L shareholdings are held by the B Group. Ms P, the wife of the GM, is the beneficial owner of Company L.

75. We have already noted the Receiver' s comments on the lack of working capital as funds were ' tied up in certain seemingly speculative investments in the property market' and on Ms P' s funding of the Group' s working capital shortfall. Without a loan from Company L of $4,840,000, the B Group and the Taxpayer would not have been able to complete the purchase of Property 1. There was no legal obligation on Company L or Ms P to continue to fund the B Group or not to seek immediate repayment of the outstanding loan.

76. We do not believe that the Taxpayer or the B Group had the financial ability to purchase or hold on to Property 1 along with its financial obligations in respect of its garment business and other assets. We have not seen any evidence of financial support from the parent company group in respect of the purchase of properties.

Company L loan

77. Part of the deposit $6,440,000 required to be paid on 20 July 1993 upon the signing of the formal sale and purchase agreement for Property 1 was financed by Company L. The amount borrowed was alleged to be $4,840,000. The evidence presented to show how this loan was made is peculiar. Two different ledgers were shown to us. First, a current account ledger of the

Taxpayer was produced showing a credit of $4,840,000 'building cost at 53/F, 54/F' to Company L on 18 July 1993. This same ledger showed three repayments of this loan all on 25 March 1994. But we are told, in fact, one of the repayment entries was wrong because this particular payment was originally intended to be the purchase price due from Ms P to purchase back the 19% of Company L owned by the B Group. Despite the GM and the China Director's assertions of having repaid the $4,840,000 loan to Company L, the New AM asserted that a sum of $1,340,000 remained outstanding. Secondly, the current account ledger of Company B with Ms P was also used to show the $4,840,000 loan in addition to the above mentioned Company L current account ledger of the Taxpayer. If the loan was from Company L to the Taxpayer, what does Ms P and Company B have to do with the $4,840,000? The three items in the Company B current account ledger with Ms P said to comprise of the $4,840,000 does add up to $4,963,883. The description of these three items were:

Date	Description	Amount $
5 July 1993	TSF FM GM FOR Company J	2,715,883
28 July 1993	FM Ms P TO COVER O.D. (Ms P)	1,248,000
30 July 1993	AFUD ADV FM Ms P	1,000,000

The dates do not even match the date of payment of the deposit for Property 1 and the description of the 28th and 30th July transactions suggested transactions unrelated to the Taxpayer or Property 1.

78. The Second Receiver Report throws further confusion into this loan. Paragraph 52 of the report states: 'Mr R has advised that Company L lent $4,840,000 to Company S which is apparently a shareholder, together with Company T, of a company called Company U. Company U apparently paid the funds directly to the solicitors acting for Company J in the purchase of Property 1. It is not clear why the loan was not entered into the books of Company J. The balance of the deposit was paid with a loan from Company B. The amount recorded as due from Company J to Company B at 30 November 1993 was $5,126,000. The discrepancy in these amounts has not yet been reconciled or explained.'

79. Another evidence presented for the $4,840,000 loan is the loan agreement dated 15 July 1993 ('**Loan Agreement**'). Its a one page agreement between three parties: Company L as Party A, the Taxpayer as Party B and Company B as Party C. Its operative provisions are sufficiently short to be set out in full as follows:

' Whereas:

Party A agree to advance a loan to Party B in a sum of $4,840,000 on or before 20 July 1993 for purchase of Property 1 and Party C hereby declare a guarantee for the above said loan advance. Both parties hereby confirm and declare either one of the following terms:

1) 2% interest per month on $4,840,000 basis should be made payable to Party A by Party B OR

2) 50% of the total profit share in relation to the above said property to the Party A.'

80. The GM asserts that the Loan Agreement was hastily prepared on 17 December 1995 right after the Receiver stepped in and the GM backdated it to 15 July 1993 and that its purpose was to protect the Group. The China Director had neither seen nor approved it and he thought that it was more for the protection of Company L. The GM claimed that it was done in a hurry when asked on the peculiarity of the 2% per month interest rate and the sharing of 50% of the profit on sale of Property 1. According to the Receiver, five days after the preliminary agreement to sell Property 1, ' on 25 January 1994, my staff were informed by Ms P of Company L that Company L had financed 50% of the purchase of the Property 1 and were entitled to 50% of the capital profit pursuant to the (Loan Agreement)' - see paragraph 51 therein. If the Loan Agreement was executed on 15 July 1993 just before the payment of the deposit, the inclusion of profit sharing of sale proceeds was indicative of the possibility of sale at or near the time of acquisition. If the Loan Agreement was created later and backdated and allegedly for the benefit of the B Group, the credibility of the GM's testimony is destroyed.

81. The relationship of Company L and its owner, Ms P, wife of the GM, with the B Group is inexplicable from the evidence presented. Ms P appeared to operate closely with the B Group and at times also appeared to be an employee of the B Group. Her Company L had no staff and shares the offices and staff of the B Group. She and Company L were somehow connected to Company S to whom there was an inexplicable payment of US$350,000 according to paragraph 49 of the Second Receiver Report. The B Group owned 19% of the shareholding of Company L. A proposed sale of the 19% from the B Group to Ms P indirectly recorded in the Taxpayer's current account ledger with Company L could be cancelled or reversed. No documentation in respect of the loans made by Company L or Ms P to the B Group was shown to us with the exception of the Loan Agreement.

Findings on intention

82. After consideration of the evidence relating to intention, we have reached the following findings of facts on the 'intention' issue. These findings would also be relevant to the 'error' issue should our approach to the error issue be wrong in that we must reach a finding on intention before deciding on whether the error in accounting treatment is an error at all.

83. The directing minds of the Taxpayer and the B Group at the time of acquisition of Property 1 were the GM and the China Director. The Taxpayer was a single asset company which did nothing but purchased and sold Property 1. The Taxpayer was part of the B Group. The B Group was the garment sales arm of Company C. The GM was the key man of the B Group in the sense that he was important to the sales of garments. The B Group's main business was garment trading. However, the B Group was not adverse to pursue any other business opportunity. It did so in forex through Company Q in the year of assessment 1991/92 ended 31 March 1992 and it traded in the two flats in Housing Estate N, the flat in Housing Estate O and the flat in District M through Company B in the year of assessment 1991/92. There was no systematic policy to provide quarters. The B Group did provide quarters to the GM and purchase its own offices; not according to any direction or policies of Company C or any grand design, but on an ad hoc basis. The purchase of Property 1 which was still under redevelopment was not in accordance with any policy and it was not for the purpose of providing any quarters. The purchase was more in the nature of an adventure in the nature of trade similar to the flats in Housing Estate N. The B Group did not have the financial resources to purchase Property 1. It had to borrow from Company L or the wife of the GM. The financial statements of Company B presented to us in evidence, the 94 Accounts and the 95 Accounts have been professionally and properly prepared or directed by the Old AM and audited. They were prepared not in ignorance but in a deliberate manner. We find no error. The sale of Property 1 was not caused by the Taxpayer. It was a forced sale by the Receiver. The B Group would welcome the sale as the sale proceeds contributed to the $20,000,000 deposit that was paid by the B Group which resulted in the removal of the Receiver in early 1995. But in the circumstances of this appeal, this forced sale was insufficient to outweigh our other considerations in coming to the trading intention of the Taxpayer at the time of acquisition of Property 1. The Taxpayer has failed to discharge its burden of proof on the 'intention' issue.

84. In the circumstances, we find that the purchase and sale of Property 1 was an adventure in the nature of trade and the intention of the Taxpayer at the time of acquisition of Property 1 was for trading purpose. We find that there was no error in the Tax Return and the 94 Accounts. Accordingly, this appeal is dismissed and the determination is confirmed. We thank the representatives of both parties for their able assistance and especially that of the Taxpayer's representatives for their submissions on the 'error' issue.