

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D52/04

Profits tax – paintings hang on the walls of barristers’ chambers – whether ‘plant’ for the purposes of producing profits in the practice at the Bar – section 39B of the Inland Revenue Ordinance (‘IRO’).

Panel: Anthony Ho Yiu Wah (chairman), Richard Anthony Glofcheski and Donald Liu Tit Shing.

Date of hearing: 4 June 2004.

Date of decision: 11 October 2004.

In his determination, the Acting Deputy Commissioner confirmed the additional tax assessments for the years 1996/97 to 2000/01 raised on the appellant who was a practicing barrister and decided that the cost of provision of paintings hang on the walls of the appellant’s chambers (the ‘Relevant Paintings’) should not be allowed when computing the amount of his deductible chamber management fees.

The appellant appealed.

Held:

1. At issue for the Board to decide is whether the Relevant Paintings were ‘Plant’ purchased for the purpose of the appellant’s trade which was to provide an atmosphere or ambience for the purposes of producing profit or promotion of the appellant’s practice as a barrister.
2. Having considered all the facts and evidence of the case, the Board was not convinced and the appellant failed to discharge his burden of showing that in his trade and practice as a barrister:
 - 2.1 ‘Ambience’ does make a difference in terms of attracting quality clients or otherwise promoting the appellant’s practice;
 - 2.2 The Relevant Paintings had been useful in promoting the appellant’s practice;

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- 2.3 It is the convention for practicing senior barristers to spend on paintings and decorations for the purpose of attracting clients and promoting profitability.

Appeal dismissed.

Cases referred to:

Yarmouth v France (1887) 19 QB 647
J Lyons & Company Limited v Attorney General [1944] 1 ch 281
Jarrold (Inspector of Taxes) v John Good & Sons Ltd [1963] 1 WLR 214
CIR v Scottish & Newcastle Breweries Ltd [1981] 1 WLR 322
Wimpy International Ltd v Warland 61 Tax Cases 51
All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750

Tsui Siu Fong for the Commissioner of Inland Revenue.

Jane Lo Counsel instructed by Messrs W M Sum & Co CPA for the taxpayer.

Decision:

1 Background

1.1 This is an appeal against the determination of the Acting Deputy Commissioner of Inland Revenue dated 23 October 2003. In that determination, the Acting Deputy Commissioner decided that the Appellant should not be allowed the cost of provision of paintings hang on the walls of his chambers (the 'Relevant Paintings') when computing the amount of his deductible chamber management fees. The Acting Deputy Commissioner therefore confirmed the additional profits tax assessments raised on the Appellant for the years 1996/97 to 2000/01 (the 'Relevant Years'). The costs of provisions of the paintings, as agreed to between the Revenue and the Appellant was the amount equivalent to the depreciation allowances in respect of the capital expenditure on the Relevant Paintings plus a mark-up of 12.5%. In other words, the amounts in question were not in dispute, what is at issue is its deductibility.

1.2 In his notice of appeal dated 21 November 2003, the Appellant contended that the Relevant Paintings were purchased for the decoration of the walls of his chambers in the Relevant Years and had been so used since. The Appellant's case is that, notwithstanding and contrary to the evidence adduced by him, the Commissioner erred in making the following findings or conclusions:

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- (a) that the cost of purchase of the paintings was not directly attributable to providing services in the Appellant's practice at the Bar;
- (b) that the paintings were bought and used for the Appellant's personal enjoyment and well being;
- (c) that the nexus between the paintings and the production of profit of the Appellant's practice is too remote;
- (d) that the provision of atmosphere or ambience forms no part of the Appellant's legal practice.

In the above premises, the Appellant contended that the cost of providing the paintings should be allowed for deduction from his assessable profits under sections 16(1) and 17(1)(b) of the Inland Revenue Ordinance, (Chapter 112) ('IRO').

1.3 Further or alternatively, the Appellant contended that the Commissioner misdirected himself in law in holding that the paintings were not plant functioning in the course of his practice and that allowance should have been granted under section 39B of the IRO.

2 The agreed facts

2.1 We had before us an agreed statement of facts filed by the parties, the gist of which is summarized below:

- (a) The Appellant has been practising law as a barrister in Hong Kong since 1988. Between 1990 and mid-1999, the Appellant's chambers were at Address A in Hong Kong. In late 1999, the Appellant left the set of chambers at Address A and joined another set then located at Address B in Hong Kong. In around September 2002, that set moved to Address C in Hong Kong.
- (b) The Appellant has engaged Company D to provide chambers management services to the Appellant's barrister practice. At all relevant times, the Appellant was one of the two directors of Company D.
- (c) On divers dates, the Appellant submitted his 1996/97 to 2000/01 individual tax returns declaring in respect of his legal practice assessable profits which were arrived at after deducting chambers management fees ('CM Fees') paid to Company D as shown below:

Assessable profits

\$

CM fees

\$

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1996/97	1,713,290	1,884,036
1997/98	2,708,853	1,597,863
1998/99	3,210,402	1,890,395
1999/2000	1,923,031	1,268,918
2000/01	2,915,334	1,409,935

- (d) After a series of correspondences between the assessor and the Appellant's tax representatives, Messrs W M Sum & Co ('the Representatives'), the issue between the parties was narrowed down to the deductibility of depreciation allowances on the following paintings acquired by Company D and hang on the walls of the Appellant's chambers:

	Title	Artist	Year of purchase	Purchase cost \$
(i)	Painting 1	Artist E	1996/97	} 12,200
(ii)	Painting 2	Artist E	1996/97	
(iii)	Painting 3	Artist F	1998/99	170,500
(iv)	Painting 4	Artist G	2000/01	32,482

- (e) The parties have agreed that the amount of profits in dispute as regards the paintings per sub-paragraph (d) above (which form part of the CM fees charged by Company D) are as follows:

	\$
1996/97	9,333
1997/98	877
1998/99	131,134
1999/2000	12,838
2000/01	35,119

- (f) Since the amount of the profits in dispute have been agreed, the only issue before us is the deductibility thereof.

3 The evidence

3.1 At the hearing before the Board, the Appellant was represented by Counsel, Ms Jane Lo, while the Respondent was represented by Miss Tsui Siu Fung, senior assessor and Ms Lai Wing Man, assessor. Written statements of Mr H (a solicitor) and the Appellant have been submitted. Mr H and the Appellant gave evidence for the Appellant and were cross-examined by the Respondent's representatives.

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3.2 Mr H is a solicitor practising in Hong Kong. At all material times, he has been an equity partner in the firm of Messrs I, specializing in litigation. The important parts of the evidence in chief of Mr H can be summarized as follows:

- (a) He has known the Appellant since around 1996.
- (b) He and his partners have instructed the Appellant to represent Messrs I's clients in various disputes.
- (c) Messrs I looks to the Appellant for his advocacy skills, clear advice, and pleasant manner.
- (d) In recent years, the Appellant has moved into a larger, better appointed, more comfortable and prestigiously decorated room and set of chambers. This is useful for document and witness intensive cases. As a result thereof, he has tended to instruct the Appellant more often, particularly when large conference facilities are likely to be necessary.
- (e) His clients have been similarly appreciative and he recalled more than one client complimenting the Appellant on the quality of his chambers and being greatly impressed by the pictures displayed in his chambers.
- (f) He holds the view that the Appellant's chambers have been decorated and adorned with art works which properly reflect the Appellant's position as one of Hong Kong's leading junior barristers and afford to him the comfort of knowing that his clients will be accommodated and given legal advice in surroundings consistent with their own expectations and standing in industry.

3.3 During his cross-examination, Mr H explained that he had retained the Appellant and visited the Appellant's chambers, from time to time, depending on the nature of the ongoing work he had at the time. He considered the Appellant to be a very aggressive litigator and a tenacious cross-examiner, which isn't suitable for every case, but for those cases which he considered the Appellant to be the best barrister, he would retain the Appellant. Mr H further elaborated that he would retain the Appellant in trial situations and for advice on large scale interlocutory matters. As example, Mr H mentioned a case involving a large multi-jurisdictional fraud, which involved 13 jurisdictions and there were representatives of client and legal advisors from different parts of the world coming to the Appellant's chambers and they had to link up with other people around the world as well.

3.4 When asked whether the aforesaid case was a rare case and that there might not have been so many occasions of contacts between the Appellant (as a barrister) with the lay clients, Mr

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H answered: 'Not really. One of my areas of practice is international fraud so that is not uncommon.'

3.5 When asked how many times during the subject years, that is the period between April 96 and March 2001, lay clients would contact the Appellant in his chambers, Mr H replied that lay clients would never contact the Appellant in his chambers, lay clients would come with Mr H, as the solicitor, to the Appellant's chambers. In terms of numbers, Mr H said: 'I couldn't tell you offhand, I would have to check, and even then I would have some difficulty in checking because we have been engaging in quite a number of cases over the years. But, on many occasions.'

3.6 When asked how many clients had actually complimented on the Appellant's chambers and the pictures as referred to by him in his witness statement, Mr H mentioned two instances, one was a German client by the name of Mr J back in the days when the Appellant was in his chambers in Address A, which were nowhere near as smart as they (the chambers in Address C) are now. Mr H believed that Mr J had some interest at art and at that time he (Mr H) had very little interest in art at all. The other instance of a client commenting on the Appellant's chambers and the pictures was a gentleman from Country K who was in town on the international fraud case referred to in paragraph 3.3 above.

3.7 When asked whether he had ever talked with the Appellant about the Appellant's paintings and who initiated such conversations, Mr H said

- 'We speak on a number of different aspects of his chambers from time to time. In the past I have commented on the bits and pieces he has around. ... I would merely comment on things. At the conclusion of a conference, you tend to make small talk.'
- 'It would probably be me (who initiated such conversations). We would be there to discuss matters of law and at the conclusion, the small talk, I would probably lead the small talk.'
- 'We wouldn't specifically stop and analyze and discuss a painting. I would probably merely comment upon it.'
- 'I remember he (the Appellant) used to have one of those big valve radio style amplifiers, which of itself was very odd looking and would attract attention, so I made comment upon that.'

3.8 When asked whether he found the Appellant fond of collecting paintings, Mr H said: 'he has a number of interesting items in his chambers, which includes a number of paintings, yes.'

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3.9 In his re-examination by Ms Lo, Mr H elaborated that apart from the Appellant's competence, he had retained the Appellant because '(the Appellant) has now reached a level in his career where he is suitable to act on behalf of my firm for high value and high status clients and, as such, we do use him (the Appellant) from time to time, as I have indicated. He has commodious chambers which are more suitable to the standard of client we are bringing to him.'

3.10 The Appellant is a barrister. The important parts of the evidence in chief of the Appellant can be summarized as follows:

- (a) He first commenced practice as a barrister in Country L in November 1977. In August 1983, he came to Hong Kong to join the Attorney-General's Chambers of the Hong Kong Government. In 1988, he left the Attorney-General's Chambers and began to practise law as a barrister in the private sector in Hong Kong.
- (b) Although in his early years of practice, he was instructed to appear in a number of criminal proceedings, since 1988 his practice has been very much focused on civil litigation.
- (c) Whenever he was instructed to advise upon or have conduct of any matter by instructing solicitors, to assist his preparation in drafting documents, giving advice and/or attending hearings as instructed, he frequently had to hold conference in his chambers with his instructing solicitors and/or lay clients.
- (d) It is a long established convention within the Bar and in particular civil practitioners that better barristers would generally have more comfortable chambers and would spend more on their surroundings to promote their practice in order to promote greater profits. Furthermore, more senior and successful barristers would be expected to take up bigger and better-appointed rooms within chambers for conferences with more senior and important clients and to deal with papers which become more voluminous.
- (e) Over the years from 1988 to 2002, following the convention mentioned in (d) above, his chambers and room have grown and improved in their decorations, commensurate with the growth and improvements in his practice. He started in a tiny triangular room in a poor set at Address M. In 1990, he moved to a larger room in Chambers N at Address A, when he secured a large and well-remunerated compensation trial which put his Hong Kong private practice on a sound, specialist footing. Over time, that practice improved and matured. In 1999, he was invited to join a better set of Chambers (with three silks) at Address B, with an even bigger and better, modern room in which to continue his practice.

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- (f) The aforesaid convention of the Bar is not just known within the Bar but is recognised by professional and lay clients too. Solicitors are well aware of this tradition and expect it to be followed as barristers increase in seniority and success. It is the Appellant's understanding that when choosing counsel, solicitors look for competence and success, which is generally reflected in a more comfortable and prestigious looking room and chambers. A comfortable and prestigious looking room would therefore reassure the solicitor that this particular barrister is better and more renowned than others with inferior rooms and chambers. When choosing between two barristers otherwise equal in competence, the ability to hold a large conference in congenial surroundings may tip the balance in favour of one barrister rather than another. Lay clients are more comfortable in such (commodious and congenial) surroundings.
- (g) Following the above tradition and convention of the Bar, he had (through Company D) established, fitted out and decorated the various rooms he had occupied in various chambers. Over time, he had (through Company D) decorated the various rooms with, inter alia, an increasing number of paintings so as to create a more comfortable, congenial and prestigious working environment. He was encouraged to do so by eminent Silks with whom he worked on bigger cases and whose own rooms exhibited excellent paintings, including by Artist G.
- (h) Prior to acquiring the paintings at issue in this case, he caused Company D to buy an oil painting by Artist G from the Gallery O. This took pride of place on his chambers wall in Address A. It was favourably commented on by all who visited his room, including at conferences. Those comments encouraged him further to decorate his room in this way.
- (i) In or about late May 1996, whilst he was still practising from Address A, to create a more comfortable and congenial working environment, he acquired the 'Painting 1' and the 'Painting 2' by Artist E from an exhibition for the modest price of HK\$12,000. He hung them in his room in chambers.
- (j) In or about mid-May 1998, his practice had continued to improve and he had space on his walls for another, better picture, albeit a small one. Upon the advice of Gallery O, he purchased the 'Painting 3' by Artist F for a price of HK\$170,500 (USD22,000) to hang in his room. This picture also provoked favourable comment.
- (k) In or around May 2000, soon after he moved into his bigger, new room in Address B, finding some of the bare walls in his new room inappropriate and

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unattractive, he acquired another picture titled 'Painting 4' by Artist G for a modest price of HK\$32,482 (GBP2,500) which he hung in his new room.

- (l) In each case, when acquiring each picture it was intended to hang in his room in Chambers to provide a comfortable, congenial and impressive working environment for himself and solicitors and lay clients visiting chambers.
- (m) Along with his other prints and certificates, these paintings were at all material times hung on the walls of his room in chambers although from time to time he had taken down the small Artist E items and stored them at home before returning them to the walls in chambers.
- (n) The Relevant Paintings were bought by him (through Company D) for his chambers, they weren't bought to hang at home. At the time of purchase they were bought specifically for his room with the intention of providing congenial surroundings, for the carrying on and the promotion and development of his practice.
- (o) The Relevant Paintings did help with the promotion of his practice. Mr H had kindly come and given evidence before the Board. But, Mr H was only one example of the Appellant's professional clients. His professional clients consist principally of solicitors. But, now he tended to be instructed also by surveyors, because he had an expertise in valuation law on matters of rating and valuation, and also by accountants. It was his invariable experience that when other members of his chambers have had somebody come to chambers for a conference and they stuck their head in his room they would comment favourably on the decorations and pictures, particularly the big Artist G. His own clients, and professional clients, had commented on these pictures. It was a little awkward to ask somebody to come and give evidence to the fact. That was why he just had Mr H.

3.11 During his cross-examination, the Appellant was asked whether during the Relevant Period, Company D had provided chambers management services to other barristers. The Appellant replied that he was the only customer of Company D insofar as chambers management services were concerned but Company D had a genuine shareholder and ownership structure and did carry on other business. It was not merely a look-through company.

3.12 When asked about the approximate percentage of time the Relevant Pictures were hung in the chambers, the Appellant replied that the Artist F and the Artist G had always been hung in his chambers and had never been hung at home, but he had moved chambers during the Relevant Period and these two pictures had been packed for a short period. That was why he put in a conservative figure of 90% hung at chambers. As to the two Artist E, he had hung the same at

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home for about three weeks whilst he was moving other pictures around. But all four pictures were bought for and predominantly served the purpose of his chambers. He didn't, however, keep a log book or other contemporaneous records showing the exact times during which the Relevant Paintings were hung in his chambers.

3.13 When asked whether he selected and purchased the Relevant Paintings himself, the Appellant emphasized that he was one of the two directors of Company D. The Relevant Paintings were purchased by him as director of Company D on behalf of Company D, with the permission of Miss P, the other director of Company D.

3.14 When asked how did he find the Relevant Paintings, the Appellant replied:

‘I am glad you asked, Miss Tsui. XXXX, Senior Counsel, is a friend as well as a respected colleague. XXXX has more [Artist G] in her room, lying around on the floor, hung on the walls, and piled generally around the place, than anybody I have ever seen. YYYY, you may know YYYY, is a good friend of XXXX. Before [Artist G] came to Hong Kong she knew of him and she encouraged him to come here to paint. He came, YYYY bought some, and put him up at home. XXXX bought some. ZZZZ, Senior Counsel, bought some. And they encouraged me to buy them. I thought about it. I had my big cases, I had some very big cases in the late 90s. The practice was growing. I wanted to continue with the growth of the practice. I wanted a practice like theirs. So, I followed their example. I hope that helps, Miss Tsui. XXXX suggested that I buy from [Gallery O][Artist G] pictures.’

3.15 When asked whether the Appellant found Artist G's pictures attractive, the Appellant at first declined to answer as he considered the question to be irrelevant. After indication by a Board member that he would also like to know the answer to this question, the Appellant gave the following answer:

‘Do I like them? Do I like the pictures? Yes, but they are not absolutely the ones I would have chosen if I was buying for pleasure. If I was buying for pleasure, there would be a big motor car painting in there, a big racing car painting, Miss Tsui. These are bought to suit the needs of the room and I can't hang big racing car paintings in my room in chambers. It is just not appropriate. So, I hang [Artist G].’

3.16 When asked whether the Appellant had other paintings or pictures other than those set out in the list submitted by him to the Board, the Appellant replied that Company D had no other paintings or pictures but he himself had some other paintings or pictures, but none of those paintings or pictures that he hang at home were as costly or of the same nature as the Artist F or the Artist G or the Artist E which form the subject of this appeal. The two most expensive pictures he had ever bought, or Company D had ever bought at his direction, were hung in his chambers. The Appellant further opined that it was a different thing to buy pictures for home for pleasure.

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3.17 When questioned on the relevance of the passages from the book *Bleak House* written by Charles Dickens quoted by the Appellant in his witness statement since the book was just a fiction, the Appellant gave the following reply:

‘Miss Tsui, it is a work of fiction but, like all fiction, it is solidly grounded in fact and metaphor. Dickens depicted in 1853 the classic and the caricature barrister. His depiction of chambers is still good today if you go to the Temple. Poor barristers scabble about in dirty chambers. I started out in my second set at the top of a very narrow, nasty staircase with lots and lots of barristers crammed into one room with no room to put their papers. As my practice grew here and as I was lucky enough to join better chambers, I too became able to have a nice room with paintings and pictures of judges on the walls, just like VVVV and just like WWWW. My work became my own and I gave work away to other barristers, just as VVVV gave to WWWW. There is a lot of fact in this book, Miss Tsui.’

4 The issue before the Board

4.1 In the notice of appeal dated 21 November 2003, the Appellant challenged the tax assessment on the grounds of sections 16(1), 17(1)(b) and 39B of the IRO. At the hearing before us, the Appellant’s Counsel indicated after hearing of the evidence that the Appellant is not pursuing the challenge on the grounds of sections 16(1) and 17(1)(b) and will base his challenge on section 39B only. Therefore, the only issue to be decided by the Board in this Appeal is whether the Relevant Paintings were ‘plant’ for the purposes of producing profit in the Appellant’s practice thereby justifying the allowance of the cost of provision of the Relevant Paintings when computing the amount of the Appellant’s deductible chamber management fees under section 39B of the Ordinance.

5 The law

5.1 Section 39B of the IRO provides for the granting of depreciation allowances on machinery or plant as follows:

‘(1) Where a person carrying on a trade, profession or business incurs capital expenditure on the provision of machinery or plant for the purposes of producing profits chargeable to tax under Part IV then, except where such expenditure is expenditure of a kind described in section 16B(1)(b) or 16G, there shall be made to him, for the year of assessment in the basis period for which the expenditure is incurred, an allowance, to be known as an “initial allowance”.

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(1A) *For the purposes of subsection (1), the initial allowance shall be equal to the following percentages of the expenditure referred to in that subsection -*

(a) ...

(b) ...

(c) *for any year of assessment commencing on or after 1 April 1989, 60%.*

(2) *Where during the basis period for any year of assessment or during the basis period for any earlier year of assessment a person owns or has owned and has in use or has had in use any machinery or plant for the purposes of producing profits chargeable to tax under part IV, there shall be made to him in respect of each class of machinery or plant for that year of assessment an allowance, to be known as an “annual allowance”, for depreciation by wear and tear of such machinery or plant.*

(3) *The annual allowance shall be calculated at the rates of depreciation prescribed by the Board of Inland Revenue and shall be computed on the reducing value of each class of machinery or plant.’*

5.2 Section 68(4) of the IRO puts the burden of proof on the Appellant as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

5.3 Authorities cited to us included the following cases:

Yarmouth v France (1887) 19 QB 647

J Lyons & Company Limited v Attorney General [1944] 1 ch 281

Jarrold (Inspector of Taxes) v John Good & Sons Ltd [1963] 1 WLR 214

CIR v Scottish & Newcastle Breweries Ltd [1981] 1 WLR 322

Wimpy International Ltd v Warland 61 Tax Cases 51

5.4 In Yarmouth v France (1887) 19 QB 647, Lindley LJ said:

‘There is no definition of plant in the Act: but, in its ordinary sense, it includes whatever apparatus is used by a business man for carrying on his business, - not his stock-in-trade which he buys or makes for sale; but all goods and chattels, fixed or moveable, live or dead, which he keeps for permanent employment in his business.’

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5.5 In J Lyons & Company Limited v Attorney General [1944] 1 ch 281, Uthwatt J adopted Lindley LJ's definition of plant and held that electric lamps and fittings in a tea-shop were not 'plant' used for carrying on the business but were part of the setting in which the business was carried on. Uthwatt J said (at page 286): *'If these are plant, it can only be by reason that they are found on premises exclusively devoted to trade purposes. Trade plant alone need be considered ... I am content to accept the general description in Yarmouth v France ... Whether any particular article more properly falls within "plant" as thus understood or in some other category depends on all the circumstances of the case ... The lamps and their fittings are owned by a caterer and used in premises exclusively devoted to catering purposes, but the presence of lamps in this building is **not dictated by the nature of the particular trade there carried on** or by the fact that it is for trade purposes that the building is used. Lamps are required to enable the building to be used where natural light is insufficient. The actual lamps themselves so far as the evidence goes, present no special feature either in construction purpose or position, ... In my opinion, these lamps are not, in these circumstances, properly described as "plant", but are part of the general setting in which the business is carried on ...'* (Emphasis added).

5.6 In Jarrold (Inspector of Taxes) v John Good & Sons Ltd [1963] 1 WLR 214, the movable partitions were held to be plant on the grounds that they were *'something more than a mere setting for the carrying out of the trade and that the setting and plant were not mutually exclusive conceptions'* and were in fact *'used in the carrying out of the company's trade or business'*. It was also held that: *'All that the Income Tax Acts require in this context is that the plant shall have been provided **for the purpose of the "trade", an expression wide enough to cover assets which play a passive as well as an active role in the accomplishment of that purpose.**'* (Emphasis added)

5.7 In CIR v Scottish & Newcastle Breweries Ltd [1981] 1 WLR 322, it was held that electric light fittings, plaques, tapestries, pictures and metal sculptures in hotel and public houses were plant. Lord Wilberforce at page 325 said *'There is **no universal formula** which can solve these puzzles. In the end each case must be resolved, in my opinion, **by considering carefully the nature of the particular trade being carried on, and the relation of the expenditure to the promotion of the trade.... It seems to me, on the Commissioners' findings, which are clear and emphatic, that the Respondents' trade includes, and is intended to be furthered by, the provision of what may be called "atmosphere" or "ambience", which (rightly or wrongly) they think may attract customers.** Such intangibles may in a very real and concrete sense be part of what the trader sets out, and spends money, to achieve. A good example might be a private clinic or hospital, where quiet and seclusion are provided, and charged for accordingly. One can well apply the "setting" test to these situations. The amenities and decoration in such a case as the present are not, by contrast with the Lyons case, the setting in which the trade carries on his business, but the setting which he offers to his customers for them to resort to and enjoy.'* At page 331 Lord Lowry said: *'... **one of the trade functions of an hotelier is to make the interior attractive***

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to customers: why then should one deny that the items used for this purpose are plant?
(Emphasis added)

5.8 In Wimpy International Ltd v Warland 61 Tax Cases 51, the taxpayers owned and operated fast-food restaurants and Pizzaland restaurants. It was the findings of the Special Commissioners that atmosphere was an ingredient in the product which the taxpayer offered to its customers. It thus followed from the Newcastle Breweries case that apparatus which served to create that atmosphere might be plant. On that basis, the Special Commissioners disallowed certain claims but allowed those in respect of certain decorative items, such as murals, decorative brickwork and wall panels, as being embellishments not part of the premises within the scope of the Newcastle Breweries case. The Revenue did not appeal on this decision. The taxpayers, however, appealed contending all the items were installed to improve the ambience of the restaurants and to attract customers and were thus plant. In the Chancery Division of the High Court, certain light fittings were allowed as plant. Hoffmann J said at page 88: *'This (the Light Fittings) is the only item on which I think the Commissioners were wrong. They accepted the light fittings as being, like the lamps in J Lyons & Co Ltd v Attorney-General, chattel fixtures and not integral parts of the building. The premises test was therefore satisfied and the Commissioners had to apply the business use test, as in the J Lyons & Co Ltd case itself. In their view the light fittings failed this test because they provided "general illumination". But their conclusion that the fittings were not used for the purpose of carrying on the business is in my judgment inconsistent with their findings of fact. They found that Wimpy considered the volume of light important for the purposes of their business and that it had been progressively increased for business reasons: "The object is to create an atmosphere of brightness and efficiency, suitable to the service and consumption of fast food meals and attractive to potential customers looking in from outside". This is in my view a finding that the provision of lighting was specific to the trade.* But the Commissioners say: *"General illumination of this kind cannot in our opinion be classed as apparatus used in the particular trade of, in this case, preparing and serving meals. It is no more than a necessary feature of the setting in which that trade is conducted". These two sentences are in my judgment mutually contradictory. If the provision of such lighting is a necessary feature of the setting for the trade of preparing and serving meals, the light fittings must be apparatus used in that trade.* The findings of the Commissioners are quite different from those of Uthwatt J in the J Lyons & Co Ltd case, in which he said that the lighting in the Lyons tea shop was no different from what it would have been had there been any different trade or even if the premises were not used for trade purposes at all. The same is true of the lighting in Cole Bros Ltd v Phillips 55 TC 188: see Oliver LJ at page 217C. *In my judgment the only reasonable conclusion from the findings of the Commissioners was that the fittings were plant.'* (Emphasis added)

5.9 Apart from the authorities cited to us, we also find guidance from the judgment of Mortimer J in the well-known case of All Best Wishes Ltd v Commissioner of Inland Revenue 3

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HKTC 750, a case in which the intention of the taxpayer at the time of acquisition of an asset was at issue. Mortimer J said at page 771:

‘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 common place 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 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.’

6 Analysis of the case

6.1 Counsel for the Appellant has submitted to us that for the purposes of determining whether the Relevant Paintings fall within the definition of ‘Plant’, we should take into account the following:

- (1) ‘Plant’ is a term that includes chattels that are kept by businessman for **permanent employment of his business** – that is, kept by the Appellant for permanent employment of his barrister's practice;
- (2) Chattels which decorate, furnish or otherwise embellish the interior of premises where the premises are used for the purposes of trade **can be a ‘Plant’**;
- (3) Whether the chattel in question (that is, the Relevant Paintings) is a ‘Plant’ depends upon the **nature of the particular trade** being carried on (that is, the Appellant’s practice as a barrister), and the **relation of the expenditure to the promotion of the trade** (that is, whether the expenditure made over the purchase of the Relevant Paintings promoted the Appellant’s practice as a barrister).

6.2 We agree basically with the aforesaid propositions by the Counsel for the Appellant. After considering the facts of the case and the evidence before us, we agree that the Relevant Paintings were decorative items which embellish the interior of the Appellant’s chambers. What remains at issue is whether the Relevant Paintings were purchased for the purpose of the Appellant's trade as submitted by the Appellant’s Counsel or whether they were purchased for the

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purpose of the Appellant's personal pride and enjoyment as contended by the Respondent's representatives. To succeed in this appeal, therefore, the Appellant would need to pass a further test, namely, whether the Relevant Paintings were purchased to provide an atmosphere or ambience for the purposes of producing profit or promotion of the Appellant's practice.

6.3 In relation to the aforesaid test whether the Relevant Paintings were purchased for the purposes of producing profit or promotion of the Appellant's practice, Counsel for the Appellant submitted that it is a long established convention of the bar that 'better barristers generally have more comfortable chambers and more is spent on their surroundings to promote their practice in order to produce great profits'. Counsel for the Appellant further submitted that this long established convention is well documented and well supported by the evidence given by the Appellant before the Board which was endorsed by Mr H. To convince us that before a barrister can be successful, he has to show he is successful (by having bigger and better appointed chambers), Counsel for the Appellant shared with us the saying: *'To be successful, you have to project success'* from the film, American Beauty. The learned Counsel also referred us to the passage in the book Bleak House by Mr Charles Dickens in which Mr Charles Dickens purportedly saw a difference or thought that a barrister with a better appointed room must be doing better and, hence, of better quality than the one who was living in a small, poorly decorated room.

6.4 In his evidence before us, the Appellant himself also emphasized that the work of Mr Charles Dickens was solidly grounded in fact and metaphor and that his depiction in 1853 of barrister chambers would still be good today if you go to the Temple (see paragraph 3.17 of this decision).

6.5 With due respect to the Appellant and his Counsel, we don't think that the extracts from film scripts or passages from classic literary works cited to us would be assistance to us in this case. We don't need any convincing that in certain trade like restaurants and hotels, 'ambience' does make a difference in terms of attraction of customers. We also don't need convincing that in general more senior and well established barristers usually have better appointed chambers. What we need convincing is that in the Appellant's practice as a barrister, 'ambience' does make a difference and the Relevant Paintings were purchased for the purposes of attracting quality clients or otherwise promoting the Appellant's practice.

6.6 Mr H was called as a witness by the Appellant and in his witness statement, Mr H did say that after the Appellant had moved into a larger set of better appointed, more comfortable and prestigiously decorated chambers, he tended to instruct the Appellant more often. But from his cross-examination, we got a very clear impression that what Mr H found to be important were the Appellant's commodious chambers with excellent conference facilities. The Relevant Paintings were in Mr H's view, bits and pieces to comment on during small talk at the end of a conference. Mr H also said that he had attended conference with clients at the Appellant's chambers many times during the subject years, that is the period between April 96 and March 2001, and during such attendances a German client had complimented on the Relevant Paintings. Another instance

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was a recent multi-jurisdictional case attended by representatives of clients and legal advisors from different parts of the world and a gentleman from Country K commented on the Relevant Paintings. As Mr H (a frequent visitor to the Appellant's chambers) had only been able to identify two isolated occasions on which compliments had been made on the Relevant Paintings by his clients, we were inclined to agree with the Respondent's representatives that such compliments were incidental in nature. Therefore, we were not convinced that the Relevant Paintings had been useful in promoting the practice of the Appellant.

6.7 Counsel for the Appellant further submitted that the Appellant bought the Relevant Paintings subjectively for the purpose of promoting his practice, whether objectively he succeeded was irrelevant. The onus, however, is on the Appellant to show that he did have the intention of promoting his practice when the Relevant Paintings were purchased. Following the principle enunciated in *Re: All Best Wishes Ltd*, the stated intention of the Appellant cannot be decisive and the actual intention can only be determined by considering all the surrounding circumstances, including things said at the time, before and after and things done at the time, before and after.

6.8 Counsel for the Appellant submitted that it was reasonable for the Appellant to have the intention of promoting his practice when the Relevant Paintings were purchased bearing in mind the convention of the bar (that better barristers would generally have more comfortable chambers and would spend more on their surroundings to promote their practice in order to generate greater profits). Whilst we have no problem with the contention of the Appellant's Counsel that better and more senior barristers would generally have more comfortable and better appointed chambers, we needed more convincing on the second part of the contention by the Appellant's Counsel that it is the convention for senior barristers to spend on paintings and decorations in order to promote their practice and to generate greater profits. Despite heroic efforts on the part of the Appellant's Counsel, we were not convinced of the existence of such a convention.

6.9 We further note that apart from the assertion by the Appellant himself, there was no evidence before us that supported this purported convention of the bar. In fact, in the evidence given by the Appellant himself, mention was made to a number of eminent Silks and public figures who purportedly encouraged the Appellant to purchase paintings and pictures. To the credit of the Appellant, he did not suggest or impute that these dignitaries had purchased paintings and pictures for the purpose of attracting clients or generating profits. Nor did the Appellant suggest that these eminent Silks told him that quality paintings and pictures would help him to attract or impress quality clients. Indeed, according to the Appellant, one such dignitary has Artist G 'lying around the floor, hung on the walls and piled generally around the place' (see paragraph 3.14 of this decision). This clearly showed that the Artist G owned by that person were not there to impress or attract clients. So whilst it might have been a tradition and convention for senior members of the bar to indulge in art collection, there was no evidence before us that such art collection hobby was for the purpose of attracting clients and promoting profitability. In this regard, we also observe that there had not been any contemporaneous record of the Appellant's said intention when the Relevant Paintings were purchased by Company D. In his testimony, the Appellant emphasized that the Relevant

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Paintings, although selected by himself, were purchased by him as director of Company D with the permission of his-co-director (see paragraph 3.13 of this decision) but no board resolutions had been submitted as evidence. Since the Appellant had been so meticulous on the subject of securing the permission of his co-director before the Relevant Paintings were purchased, we would have expected that Company D must have proper board resolutions passed contemporaneously at the times of purchase and there would have been ample opportunity for the Appellant to document his purported intention in such board resolutions. To avoid any misunderstanding, we hasten to add that existence of such a board resolution would not be conclusive of the stated intention of the taxpayer, it would still be necessary to consider other surrounding circumstances but absence of such a board resolution would surely be a factor negating the existence of such an intention.

6.10 For the reasons set out above, we agree with the Respondent's representatives that the Newcastle Breweries case and the Wimpy case do not assist the Appellant's case. The former two cases were decided on their own facts and there were clear findings (a) that the assets concerned were specially designed and installed having regard to the type of clientele it was desired to attract; (b) that an important trade function of the taxpayer running a hotel or restaurant was to make the interior and create an atmosphere attractive to customers; and (c) that atmosphere was an ingredient of the product offered to customers. In this case, however, we are not convinced that the Relevant Paintings would have the same effect in relation to the trade of the Appellant which is significantly different in nature from that of a hotelier or restaurateur.

7 Conclusion

7.1 Having considered all the evidence and the facts before us, we find that the Appellant has not discharged the burden of showing that the Relevant Paintings were 'plant' for the purposes of promoting the Appellant's practice as a barrister and/or for the purposes of generating profits. We therefore dismiss this appeal and confirm the determination of the Acting Deputy Commissioner.