Case No. D52/99

Profits tax - error or omission – change of intention from investment to trade – valuation – Inland Revenue Ordinance (' IRO'), section 70A.

Panel: Mathew Ho Chi Ming (chairman), Stephen Lau Man Lung and Christopher Henry Sherrin.

Dates of hearing: 4 February and 4 March 1999.
Date of decision: 26 August 2000.

The taxpayer acquired a shop (Property 1) in 1986 as a capital asset. In 1988, it was sub-divided into eighty-seven individual units. For the years of assessment 1989/90, 1990/91, 1991/92, seventy-three units were sold.

The Inland Revenue Department (' IRD') took the view that the conversion of Property 1 into eighty-seven units showed the taxpayer' s change of intention from investment to trade. Thus the rebuilding allowance claimed by and allowed to the taxpayer for the years of assessment 1989/90, 1990/91, 1991/92 and 1992/93 were added back into the taxable profits in the form of additional tax assessments for the years of assessment 1989/90 and 1991/92, revised loss computation for the years of assessment 1990/91 and tax assessments for the year of assessment 1992/93 issued in October 1994.

The taxpayer objected to these additional tax assessments, revised loss computation and tax assessments. The taxpayer further applied to correct the tax assessments made for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO on the ground that the profits derived from the sale of the units for the two years was capital gain not chargeable to tax.

On the other hand, the IRD raised additional tax assessment for the year of assessment 1990/91 to take into account the valuation of Property 1 as at 5 November 1988 as valued by IRD. The taxpayer had asserted that the value of Property 1 as at 5 November 1988 was $30,000,000. The IRD now asserted that the value of Property 1 as at 8 November 1988 was $16,000,000. Thus the taxable profits on the sale were correspondingly increased.

Held:

1. There was no error or omission in the two tax returns in question. Section 70A cannot be used to correct the accounting treatment of the sale of the forty-three and

the seventeen units in the respective tax returns and audited accounts for the years of assessment 1989/90 and 1991/92. (Extramoney Ltd v CIR applied)

2. The Board found there was a change of intention in respect of Property 1 from capital to trading asset and it was at the time when the vacant possession of Property 1 was recovered from the tenant on 5, 6, or 7 November 1988. The trading intention of the taxpayer did not change again throughout the periods under appeal.

3. It is open to the IRD to query the market value of Property 1 at any time until the tax assessments or amended assessments become final and conclusive under section 70 of the IRO unless there are special circumstances.

4. Having made adjustments to the comparables used in the valuation, the Board found the market value of Property 1 as at the date of change of intention on 5 November 1998 to be $25,500,000.

5. The taxpayer is liable to pay profits tax on the sale of the sub-divided units of Property 1 and not entitled to claim rebuilding allowances in respect thereof.

6. The additional profits tax for the years of assessment 1989/90 and 1991/92 and the profits tax for the years of assessment 1990/91 and 1992/93 will be remitted to the Commissioner of Inland Revenue to revise these assessments in the light of the findings of the Board.

Appeal dismissed.

Cases referred to:

Extramoney v CIR [1997] HKLRD 387

Ma Wai Fong for the Commissioner of Inland Revenue.
Lau Kam Cheuk of Messrs S Y Leung & Co for the taxpayer.

Decision:

1. This is an appeal by the Taxpayer against the determination (' **Determination**') of the Commissioner of Inland Revenue dated 31 August 1998 in respect of:

a. The assessor' s refusal to correct the profits tax assessments for the years of

assessment 1989/90 and 1991/92.

b. Additional profits tax assessments for the years of assessment 1989/90 and 1991/92.

c. Profits tax assessments for the years of assessment 1990/91 and 1992/93.

Facts

2. The facts contained in paragraph 1 (1) to (33) of the Determination are agreed between the parties with very minor and inconsequential disagreements on certain wordings in sub-paragraphs (2), (9) and (28). We set out below the salient facts from agreed the facts and from the testimony given at the hearing.

3. The Taxpayer has five directors: Mr A, Mr B, Mr C, Ms D and Mr E. Mr A and Mr B as directors of the Taxpayer gave evidence at the hearing. The Taxpayer also called its property valuer to support a valuation report on the property (hereinafter appearing) given in May 1989 and to comment on the valuation of the property put forward by the IRD. The IRD called a valuer from the Rating & Valuation Department (' R&V Dept') to give evidence on the value of the property.

4. The Taxpayer acquired a shop in District F (' Property 1') in 1986 at $9,800,000. The IRD agrees that, at the time of acquisition, Property 1 was acquired as a capital asset.

5. Property 1 has a floor area of 1,465.9 square metres and constitutes at least half of the entire floor at the level it is located. It was leased to Company G for three years as a snooker hall. Company G and the Taxpayer have common directors and shareholders. This lease expired on 30 May 1989. Due to the inability of the tenant to pay rent, the Taxpayer recovered vacant possession of Property 1 on or about 6 November 1988. It was not clear from Mr A' s or Mr B' s testimony when or whether a notice to quit was issued.

6. On 27 July 1988, the Taxpayer acquired a property (which is immediately adjoining Property 1) of only about 15.72 square metres known as Property 2 for $360,000. Mr B says this was to increase the frontage of Property 1.

7. On 20 August 1988, Company H (' Authorized Person'), as the authorized person acting for and on behalf of the Taxpayer, submitted to the Buildings and Lands Department an application for approval of building works and notice of appointment of authorized person. In this application, Mr I (who is hereinafter referred to inter-changeably with Company H as ' Authorized Person') was appointed as the authorized person. In the same application, one of the Taxpayer' s directors, Mr E was stated to be the authorized agent of the owner, i.e. Taxpayer. The building works so submitted related to the sub-division of Property 1 into 87 individual units named Units 01 to 87. The building works commenced sometime in 1988; the Taxpayer was unable to indicate to

this Board the exact date.

8. There are minutes of a board of directors meeting of the Taxpayer dated 5 November 1988 expressed to be attended by the five directors of the Taxpayer but signed by only four directors. Mr A and Mr B signed these minutes but Mr E, the appointed authorised agent of the Taxpayer in the Authorised Person' s Notice of Appointment submitted to the Building Authority, said to be present at this meeting did not sign the same. These minutes stated that ' the meeting was convened to discuss whether it is beneficial to construct/convert (Property 1) into small units, so that it would be easier to find tenants looking for shops.' The directors then resolved that ' the conversion into small units of shop, etc., would take place as soon as the existing tenants delivered vacant possession' and that ' the company' s housing property should be revalued by a Chartered Surveyor or Architect to update the present cost of this housing property.'

9. On 6 April 1989, the Taxpayer entered into a sale and purchase agreement to sell ten units in Property 1 to one buyer of which only five units had been assigned pursuant to that agreement. Throughout the relevant periods of assessment, a substantial number of the sub-divided units in Property 1 were sold by the Taxpayer.

Year of Assessment	**No of Units Sold**
1989/90	43
1990/91	8
1991/92	19
1992/93	3
Total :	73

As at 31 March 1993, the fourteen units left unsold were the following units: 07, 09, 10, 11, 26, 27, 29, 41, 62, 64, 78, 83, 84 and 86.

10. On 16 May 1989, Company J (' Taxpayer' s Valuer') issued a brief valuation report valuing Property 1 to be worth $30,000,000 as of 5 November 1988 (' Taxpayer' s Valuation Report'). The Taxpayer' s Valuation Report was a one page letter stating that a description report was annexed thereto. This annexure has been lost. The Taxpayer' s Valuation Report values the property as one single unit on an ' as is' basis with vacant possession. The comparable approach was used. No consideration of its potential as sub-divided units was taken into account. The Taxpayer' s Valuation Report stated that the instruction was to prepare a valuation of Property 1 as at 5 November 1988 ' *for internal account purpose*' .

11. In or around July 1989, the sub-division building works were completed. Although the Taxpayer' s witness could not remember the exact date, the Taxpayer' s representative had written to the IRD on 11 January 1994 stating that the date of completion was July 1989.

12. Throughout the following periods, the nature of business as described in the Taxpayer's returns and directors' reports in its annual audited financial statements were as follows:-

Year	Nature of business description in return
1986/87	Property holding for rental income.
1987/88	Property holding for rental income.
1988/89	Property holding for rental income and property re-development for resale (Note : same activities described in directors' report for the year).
1989/90	Property holding for rental income and property re-development for resale (Note : same activities described in directors' report for the year).
1990/91	Property holding for rental income and property for resale (Note : the activities described in the directors' report for the year was ' Property holding for rental income and property for sale').
1991/92	Property holding for rental income and property for sale (Note : same activities described in the directors' report for the year).
1992/93	Properties holding for rental income (Note : same activities described in the directors' report for the year).

13. The profits tax return for the year of assessment 1988/89 was submitted on 25 November 1989. The Taxpayer's financial statements for the year of assessment 1988/89 showed the following relevant facts:

a. The addition of $396,800 (being the newly acquired Property 2) to the balance sheet account ' Fixed assets - properties' . The revised notes to the balance sheet item of ' Fixed assets' stated that: '*the property (that is, Property 2) is now regarded to be held on long term.*'

b. The transfer of Property 1 from the ' Fixed assets - properties' account to a newly created balance sheet account called ' Property under re-development' . After this transfer, only Property 2 remained in the ' Fixed assets - properties' account. The revised notes to the ' Property under re-development' account stated: '*The Company's property, formerly held for rental income, has been converted into small shop units during the year under review. Such conversion is for resale purpose.*'

c. The creation of a new balance sheet capital reserve account of $20,200,000 which figure was derived by subtracting the purchase price of Property 1 ($9,800,000) from the Taxpayer's Valuer's valuation of $30,000,000. The

capital reserve account was described in the revised notes to account as '*This represents the surplus value of Property under re-development on valued by Company J, Chartered Valuation Surveyor on 5 November 1988.*'

d. The receipt of rental income in respect of Property 1 up to 6 November 1988.

e. The re-development costs of the sub-division of Property 1 were added in and increased the 'Property under re-development' account in the balance sheet.

14. Sometime between November 1988 to July 1989, Property 1 was subdivided into eighty-seven separate units. By an agreement dated 6 April 1989, the Taxpayer sold the first ten sub-divided units (units 30 to 39) to Company K of which only five units were completed.

15. The profits tax return for the year of assessment 1989/90 was submitted on 30 August 1990. The Taxpayer's financial statements for the period 1989/90 showed the following relevant changes from that of 1988/89:

a. The sale of the forty-three units in Property 1 as reflected in the profit and loss account under 'Sales of properties'.

b. The 'Fixed assets - property' account was renamed to 'Fixed assets - investment properties'. The transfer of three units in Property 1 (Units 07, 29 and 33) from the 'Property under re-development' account to the renamed 'Fixed assets - investment properties' account.

c. A new 'Current assets - properties for re-sale/letting' was created. Other than the forty-three sold units and three transferred units stated in sub-paragraphs (a) and (b) above, the balance unsold units (which were under the 'Property under re-development' account) were transferred to the new 'Current assets - properties for re-sale/letting' account.

d. As a result of sub-paragraphs (a), (b) and (c) above, the 'Property under re-development' account was reduced to nil.

e. The notes to the balance sheet under 'Fixed assets' stated that '*the investment properties are now regarded to be held on long term*'.

16. The profits tax return for the year of assessment 1990/91 was submitted on 3 October 1991. The financial statement for 1990/91 showed the following changes:

a. A new account of ' Fixed assets' was created in the balance sheet named ' Leasehold property' . Half of Property 2 known as Property 2-II was transferred from the ' Fixed assets - investment properties' account to this new ' Fixed assets - leasehold property' account.

b. Seven further units (11, 24, 25, 26, 27, 32 and 83) were transferred from ' Current assets - property for sale/letting' account to ' Fixed assets - investment property' account. Further, the Taxpayer claimed re-building allowance for these seven units.

c. The notes to accounts for ' Fixed assets' still stated that: ' *the properties are regarded as held on long term'* .

d. Eight units (14, 19, 38, 39, 76, 77, 79 and 87) were sold and reflected in the profit and loss account under ' Sales of property' .

17. The profits tax return for the year of assessment 1991/92 was submitted on 13 November 1992. The 1991/92 financial statements showed the following new changes:

a. Nine more units (02, 09, 10, 41, 62, 64, 78, 84 and 86) were transferred from ' Current assets - properties for sale/letting' account to ' Fixed assets - investment properties' account. The result was that the ' Current assets - properties for sale/letting' account had been reduced to zero.

b. Nineteen units were sold. Out of these nineteen units, seventeen units were booked in the profit and loss account as ' Sale of properties' . The balance two units were booked as an extraordinary item in the profit and loss accounts showing a gain on disposal of investment properties of $208,733.17. This was queried by the IRD. The Taxpayer' s tax representative replied to this query in its letter dated 22 February 1993 by stating that they were the result of the disposal of units 25 and 33.

c. The Taxpayer claimed re-building allowance for fifteen units in Property 1 (02, 07, 09, 10, 11, 24, 26, 27, 29, 32, 62, 78, 83, 84 and 86).

18. The profit tax return for the year of assessment 1992/93 was submitted on 11 October 1993. The 1992/93 financial statements shows the capital gain on disposal of investment properties of three units (02, 24 and 32). The Taxpayer claimed re-building allowance for fourteen units in Property 1.

19. The various transfer of the various units between different accounts in the balance

sheet and the sale of these units during the five annual periods under appeal described above and the rebuilding allowances claimed are set out in Schedule titled ' Table of Transfer of Sub-Divided Units between Accounts' hereto annexed. Property 2 is also found in this Schedule but Property 2 is not relevant to this appeal (except as to whether it is the best comparable to use in the market valuation of Property 1) as the appeal concerns Property 1 and the eighty-seven units sub-divided therefrom.

20. The IRD made assessments on the Taxpayer for the years of assessment 1989/90, 1990/91 and 1991/92 based on the tax computations and the relevant audited financial statements as submitted by the Taxpayer.

21. Prior to the year of assessment 1991/92, none of the units transferred to the ' Fixed assets - investment properties' account had been sold. Sometime in early 1993, the IRD started making enquiries in respect of the accounts for the year of assessment 1991/92. The Taxpayer had sold two units in the ' Fixed assets - investment properties' account and claimed that it was not taxable as a capital gain. In the subsequent year of assessment 1992/93, three such units were further sold and claimed as a capital gain.

22. The IRD enquiries resulted in the IRD taking the view that the conversion of Property 1 into eighty-seven independent units signalled the Taxpayer' s change of intention in respect of Property 1 from that of investment to trading asset. Hence the rebuilding allowances claimed by and allowed to the Taxpayer for the years of assessment 1989/90, 1990/91, 1991/92 and 1992/93 were added back into the taxable profits in the form of additional tax assessments for the years of assessment 1989/90 and 1991/92, revised loss computation for the year of assessment 1990/91 and tax assessments for the year of assessment 1992/93 issued in October 1994.

23. On 31 October 1994, the Taxpayer objected to these additional tax assessments, revised loss computation and tax assessments. On 29 March 1996, the Taxpayer further applied to correct the tax assessments made for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO on the ground that the profit derived from the sale of the units for these two years (forty-three units in 1989/90 and seventeen units in 1991/92 not taking into account the two units from the ' Fixed assets - investment properties' account) was capital gain not chargeable to tax.

24. On 3 March 1997, the IRD raised tax assessment for the year of assessment 1990/91 (previously a revised loss computation) to take into account a new factor. This was the valuation of Property 1 as at 5 November 1988 as valued by the IRD. The Taxpayer had asserted through the audited accounts and the Taxpayer' s Valuation Report that the value of Property 1 as at 5 November 1988 was $30,000,000. The conversion of Property 1 from ' Fixed assets - properties' to ' Property under re-development' in the 1988/89 balance sheet was made on this basis. This valuation had not previously been disputed between the Taxpayer and the IRD. The IRD now asserted that the value of Property 1 as at 8 November 1988 was $16,000,000. In the

tax assessment for the year of assessment 1990/91, the IRD added back in the difference between the Taxpayer' s valuation $30,000,000 and the IRD' s valuation of $16,000,000. The result was that for the purpose of calculating the profits made on the sale of the sub-divided units, the initial values of the units sold were decreased and thus the taxable profits on their sale were correspondingly increased.

25. We note that this new factor (viz, IRD' s valuation) was new to the Taxpayer in 1997 but not to the IRD. In 1994, the IRD had commissioned the R&V Dept to value Property 1 on four different bases; firstly, the value of the whole property as at 5 November 1998; secondly, the values of the three units transferred from the ' Properties under re-development' account in the year of assessment 1989/90 and thirdly and fourthly the values of the seven and nine units transferred from the ' Current assets - Property for re-sale/letting' account in the respective years of assessment 1990/91 and 1991/92. The valuations were completed and the IRD was informed of the valuations by an inter-departmental memo dated 2 August 1994. We do not know why despite having known the R&V Dept valuations in August 1994, the IRD had not taken the valuation into account when it issued additional assessments, revised loss computation and tax assessments in October 1994.

26. On 7 March 1997, the Taxpayer objected to tax assessment for the year of assessment 1990/91.

27. On 11 April 1997, the IRD refused to correct the tax assessments for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO. On 14 April 1997, the Taxpayer objected to the refusal to correct.

28. Due to the revaluation of Property 1, the IRD made a second revision of the additional assessment for the years of assessment 1989/90 and 1991/92 which resulted in a substantial increase in the taxable profits for the forty-three and nineteen units sold respectively in these periods. Further, the tax assessment for the year of assessment 1992/93 was also revised according to the revised valuation in respect of three units sold in the year of assessment 1992/93. The Commissioner upheld these revisions in her Determination.

Taxpayer' s case

29. The Taxpayer' s case is summarized as follows:

a. This Board should overrule the IRD' s refusal to correct the tax assessments for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO. The reason advanced as to why section 70A of the IRO applies in the circumstances of this case was that the IRD had agreed that Property 1 was capital asset.

b. The IRD could not impose another valuation of $16,000,000 and make additional assessments under section 60 of the IRO. The reason was that the IRD had accepted the Taxpayer' s valuation of $30,000,000 by raising the initial tax assessments based on the tax returns submitted by the Taxpayer and not raising any queries on the Taxpayer' s valuation within a reasonable period. The IRD was estopped from denying that it had agreed and accepted the valuation of the Taxpayer' s Valuer. According to the Taxpayer, the valuation report of the Taxpayer' s Valuer had been submitted to the IRD on 25 November 1989.

c. The Taxpayer' s valuation of $30,000,000 was the fair and open market. The R&V Dept valuation of $16,000,000 should not be taken into account as the valuation report submitted at the appeal was made in January 1999 and the R&V Dept valuer giving evidence was not the original valuer who reported on the value of the property in the inter-departmental memo dated 2 August 1994. The valuation of the Taxpayer' s Valuer is five years earlier and contains more information than the 2 August 1994 inter-departmental memo. The Taxpayer' s Valuer also gave his professional opinion on the R&V Dept $30,000,000 valuation. His view was that the only necessary adjustment to the best comparable used in the R&V Dept valuation was a 30% increase time adjustment. This would have made the valuation of Property 1 at $29,000,000 (at $19,797 per square metre). Property 2 (which was the third and last comparable in the R&V Dept valuation) should be used as it is adjacent to Property 1 and closer in time. The net adjustments (+18.37% for time and -33% for efficiency) to Property 2 would have resulted in a value of $21,306 per square metre rendering Property 1 at $31,230,000.

d. All the nineteen units transferred to the ' Fixed assets - investment properties' account (three units from the ' Property under re-development' account in 1989/90, seven and nine units from ' Current assets - property for re-sale/letting' respectively in the years of assessment 1990/91 and 1991/92) were capital assets and eligible for rebuilding allowance. Five of these nineteen units which were sold (two in 1991/92 and three in 1992/93) were realizations of capital asset and the gain in the sale was non-taxable capital gain. Property 1 was acquired in 1986 as capital asset. It was rented out until vacant possession was recovered in November 1988. The Taxpayer maintained that when Property 1 was sub-divided into eighty-seven units in 1988, the eighty-seven units were available for selling and letting purposes. The Taxpayer' s board of directors meeting minutes dated 5 November 1988 which decided the sub-division of Property 1 showed this. There was no change of intention from capital to trading asset at the time. Aside from the

five units classified under the ' Fixed assets - investment properties' account, all the other sixty-eight units sold (forty-three units from the ' Property under re-development' account in 1989/90, eight and seventeen units from the ' Current assets - property for re-sale/letting' account respectively in 1990/91 and 1991/92) were also sale of capital assets. Hence the previous error of counting the sale of these sixty-eight units as sale of current assets must be corrected under section 70A of the IRO (no correction being required for the year of assessment 1990/91 as a loss was initially reported and no tax assessment was raised for that period).

IRD' s case

30. The IRD' s case remained the same as that set out in the determination. The IRD agreed that Property 1 was acquired as a capital asset in 1986. But its nature changed to that of trading asset on 5 November 1988 when vacant possession was recovered and the Taxpayer commenced sub-division works. The IRD pointed to the appointment of sales agent, price list, advertisements, appointment of Authorized Person and the substantial time and sums expended for the re-development to show a profit making scheme amounting to an adventure in trade rather than mere realization of capital asset. The audited financial statements of the Taxpayer indicated that the sub-division of Property 1 was for resale purpose. Even prior to the completion of the sub-division work, ten units had been sold. The sale of each sub-divided unit after 5 November 1988 were sale of trading stock. During the periods under appeal, the Taxpayer had sold seventy-three units out of eighty-seven units. The flexible approach of selling and renting indicated that the Taxpayer was not firmly committed to holding any of the units for long term investment. The Taxpayer had not taken steps to let out the units. Out of the seven units rented out, five units have been sold with tenancies.

31. The valuation of Property 1 as at the change of intention on 5 November 1988 was $16,000,000 which the IRD maintained is the more appropriate valuation and preferable to the Taxpayer' s $30,000,000 valuation. The valuation of the Taxpayer' s Valuer did not provide comparables used or detailed calculations. In contrast, the R&V Dept valuation took into account differences in time, location and specific qualities between Property 1 and the comparables used.

32. On the correction of the tax assessments for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO, the IRD submitted that the burden is on the Taxpayer to show that the tax assessments were excessive or incorrect. Extramoney v CIR 1997 HKLRD 387 was cited to support the contention that evidence to substantiate the mistake must be given in the strongest term and that ' errors or omissions' is something incorrectly done through ignorance or inadvertence or a mistake. Any deliberate act or conscientious choice which subsequently became less advantageous or desirous cannot be regarded as an error or omission within section 70A.

The issues

33. The issues to be decided are:

a. Is the IRD entitled to refuse to correct the tax assessments for the years of assessment 1989/90 and 1991/92 under section 70A of the IRO.

b. Was there a change of intention (from capital to trading) when the Taxpayer sub-divided Property 1 into eighty-seven units? If yes, when did this change of intention take place?

c. If there had been a change of intention in the sub-division of Property 1, was there a second change of intention (from trading to capital) when the Taxpayer decided to consider as investment asset those sub-divided units which could not be sold or which were rented out? If yes, when did this/these second change(s) of intention take place?

34. The determination of whether rebuilding allowance is allowed for the various units during the period under appeal follows as a matter of course once the main issue of change(s) of intention and the time of such change (if any) are determined. Those units which are capital assets should be given the rebuilding allowances while denied for units which are trading assets.

Refusal to correct tax assessment under section 70A

35. 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 (underline added) 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 (underline added), the assessor shall correct such assessment.*'

36. P Chan J in *Extramoney Ltd v CIR* gave a detailed analysis of the purpose of section 70A and the interpretation of the words ' errors or omissions' which are directly applicable to this issue. 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 to cater to all situations, instead, he stated as follows:

> ' *In my view, for the purpose of S.70A, the meaning of "error" given in the Oxford English Dictionary (p.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 S.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.'

37. In the tax returns for the years of assessment 1989/90 and 1991/92 submitted by the Taxpayer, the Taxpayer had offered for taxation the profit earned in the sale of the forty-three units of the sub-divided Property 1 in the year of assessment 1989/90 and the seventeen units in the year of assessment 1991/92 booked in the accounts as 'sale of properties'. The Taxpayer had changed the description of the nature of its business in its tax returns from that of 'Property holding for rental income' in the tax return for the year of assessment 1987/88 to 'Property holding for rental income and property redevelopment for re-sale' in its tax return for the year of assessment 1989/90 and a similar description in its tax return for the year of assessment 1991/92. The financial statements of these two periods showed clearly that these respective forty-three and seventeen units were treated trading assets. In the 1989/90 balance sheet, Property 1 was re-classified to 'Property under development' which was noted as a conversion of Property 1 formerly held for rental income purpose to resale purpose. In the 1991/92 balance sheet, the seventeen units sold (and the profits of which were offered for tax) had been classified as 'Current assets - property for re-sale/letting'. It is obvious that these forty-three and seventeen units sold were treated in the tax returns and the accounts as current assets or trading stock.

38. Thus, we find that there was no error or omission in the two tax returns in question which were clearly prepared on the basis of the two corresponding audited financial statements. Section 70A cannot be used to correct the accounting treatment of the sale of the forty-three and seventeen units in the respective tax returns and audited accounts for the years of assessment 1989/90 and 1991/92. The Taxpayer had made a deliberate choice in the accounting treatment and in submitting the profits made on the sale of the forty-three and seventeen units for taxation. This cannot be regarded as an error or omission under section 70A of the IRO. The Taxpayer's

appeal under section 70A(2) of the IRO is dismissed.

Evaluation of evidence on changes of intention

39. On the issues of whether there was a change of intention in the sub-division of Property 1 and whether there were subsequent further change(s) of intention when unsold sub-divided units were transferred to investment or fixed assets, our evaluation of the evidence is as follows.

40. Two of the Taxpayer' s directors, Mr A and Mr B, gave oral testimony at the hearing on the issues of changes of intention. We were not impressed with their evidence. There were gaping holes in their recollection of the course of events and we find their responses, even to the questions of the Taxpayer' s representative, evasive. It was difficult to extract meaningful answers from them.

41. It is clear from their testimony that the Taxpayer had planned to sub-divide Property 1 into eighty-seven units in 1988. The Authorized Person was appointed and an application for approval of the sub-division plans was made to the Building Authority under the Buildings Ordinance on 20 August 1988. The appointment of the Authorized Person and the plans necessary for the sub-division logically pre-dates 20 August 1988. Mr A was unable to offer much assistance in his testimony as he could not recall dates for many events. Further, according to Mr A, the sub-division project was carried out under another director, Mr E, who did not give evidence. However, the fact of the sub-division of Property 1 alone does not indicate whether there is any change of intention. If the sub-division was to facilitate letting out, then clearly there is no change of intention.

42. There were references in the documentary and oral evidence to the exchange of correspondence between November 1988 and May 1989 relating to modification of the lease conditions for the sub-division work. Again such evidence is inconclusive as to whether there is a change of intention since the sub-division units could have been for rental purpose only. Further there were also references to Property 2 and its sub-division to Property 2-I and Property 2-II. Again nothing turns on these other than the fact that the purchase of Property 2 in 1988 is one of the comparables used in the R&V Dept valuation and is heavily relied on by the Taxpayer' s valuation.

43. The Taxpayer produced a directors meeting minutes dated 5 November 1988. The date of these minutes appears to tie in with the approximate date when the Taxpayer recovered vacant possession of Property 1 from Company G. The minutes stated as follows:

> '*2. Matters discussing:*
>
> *Being notified by the existing tenant – Company G that they had difficulty in paying the rental and it is unlikely to find a reliable new*

tenant to occupy the 10,000-square-feet premises. The Chairman reported that the meeting was convened to discuss whether it is beneficial to construct/convert into small units, so that it would be easier to find tenants looking for shops.

3. *Conversion of small units of shops, etc*

It was resolved that the conversion into small units of shop, etc., would take place as soon as the existing tenants (sic) delivered vacant possession.

It was further resolved that the company's housing property should be revalued by a Chartered Surveyors or Architect to update the present cost of this housing property.'

The scheme as expressed in this directors meeting was to divide Property 1 into smaller units so that it would be easier to find tenants. In contrast, both Mr A and Mr B testified that the sub-division plan was to enable the Taxpayer to both sell and let out the smaller units. Further, at this directors' meeting, the board resolved that a valuation be done '*to update the present cost of this housing project*'. This is contrary to what Mr A testified to this Board when he mentioned that the valuation was for the purpose of fixing the resale price.

44. We do not believe that the 5 November 1988 directors meeting minutes was a document created contemporaneously. It is an obviously self serving document. The Taxpayer had, through their common directors with Company G, already known of the tenant's difficulty in meeting rental payments. Mr A had testified that Company G had notified the Taxpayer about the termination of the tenancy half a year before the termination (which would be May 1988). The Authorized Person submitted the building plans for the sub-division works in August 1988. He must have been instructed to draft the plans even earlier than that. Having known that Company G cannot pay rent in May and having prepared for the submission of building plans for the sub-division works in August or earlier, it is strange that the directors would meet in November to discuss the notification from the tenant that it could not pay rent and whether it was beneficial to sub-divide Property 1. We are of the view that the 5 November 1988 directors meeting minutes was dated 5 November 1988 so that this date tied in with date at which the value of Property 1 was valued in the Taxpayer's Valuation Report and/or the date of recovery of vacant possession of Property 1. For these reasons, we attach little or no weight to the 5 November 1988 minutes.

45. We attach considerable weight to the tax returns and the audited financial statements and the treatment of Property 1 and the sub-divided units that is evident from these documents. They were contemporaneous documents. It would take considerably more evidence to persuade this Board that despite what these contemporaneous documents state, they did not reflect the facts as reflected from these documents. In 1988/89, Property 1 was deliberately re-classified as

' Property under development' which was noted as property '*formerly held for rental income*' being converted into small shops '*for resale purpose*' . This reflects the Taxpayer' s intention to sell the sub-divided units in Property 1.

46. From the balance sheets of the Taxpayer after March 1990, the addition of new asset accounts and the various transfers of sub-divided units between them commenced. This continued throughout the subsequent periods under appeal. The various transfers are summarized in the Schedule attached. There were the two new fixed asset accounts (called ' Fixed assets - investment properties' and ' Fixed assets - leasehold properties') in Columns C and E of the Schedule. There seems to be no particular reason why the original Column A account' s name needed to be changed to the Column C name or why a new account in Column E should be required. There was the new current asset account (called ' Current account - property for resale or letting') in Column F of the Schedule. This classification could point to the Taxpayer' s intention to sale the sub-divided units with or without tenancies. We find these new accounts in the balance sheet and the transfers made between them confusing and hard to comprehend.

47. One would have expected the Taxpayer to claim the rebuilding allowance for all of the units transferred either from the ' Property under re-development' account or ' Current assets - property for re-sale/letting' account to the ' Fixed assets - investment properties' account. This would have been in line with the Taxpayer' s contention that those units transferred to the ' Fixed assets - investment properties' account evidences the intention of holding such units as investment assets. The Taxpayer had not done so. Of the three units so transferred to the ' Fixed assets - investment properties' in 1989/90, the Taxpayer claimed the rebuilding allowance for one such unit (leaving out Units 29 and 33). Of the ten units remaining on the ' Fixed assets - investment properties' account in 1990/91, the rebuilding allowance of only seven was claimed (leaving out Units 2, 4, 25 and 26). Similarly, of the seventeen units so remaining in the 1991/92 balance sheet, only the rebuilding allowance of only fifteen were claimed (leaving out Units 41 and 64). For the 1992/93, the units in which rebuilding allowance was claimed finally synchronizes with the remaining units in the ' Fixed assets - investment properties' account. This can be seen from a comparison of Columns C and G of the Schedule attached hereto. The impression is that even the Taxpayer or at least its directors did not know which units were treated as investment assets and which were trading assets.

48. The changes in the description of the business of the Taxpayer throughout the periods under appeal in the audited financial statements and tax returns from that of ' rental income' to that of ' rental income and property re-development for resale' is inconclusive in reflecting the intention of the Taxpayer. It does not support either party' s case.

49. There was evidence of advertisement having been placed in the Sing Tao Newspapers in respect of the sale and rental of the sub-divided units. The evidence on this was in the form of receipts for advertisement placed in the Sing Tao Newspaper in 1990 and 1991 and Mr A' s answers to the questions on these receipts. From these receipts, there were seven

advertisement placements for the sale of property, four for property rental and twelve for classified ads. We have no idea whether the advertisements in the classified section were for sale or for rental of property. In any event, this evidence supports neither party' s case in this appeal and has neutral effect in deciding the intention issue. Further, the fact that Mr A was the sole proprietor of the estate agent company engaged to either sell or rent the sub-divided units is also irrelevant to the issue of intention. Mr A has testified that his estate agent business was both selling and renting out the sub-divided units.

50. Other than the advertisements to market the sub-divided units, there is evidence that marketing brochures and price lists were printed by Mr A' s estate agent business. Mr A was unable to satisfactorily explain why only a price list for the sale of the sub-divided units was printed. Further, the estate agent was stated in the price list as the sales agent and a sale office address was given. No reference is made to the rental of the units. Mr A' s explanation was that once a sale price was fixed, a calculation of the rent can be achieved. This is an incredible way of marketing the sub-divided units for rental purpose. A prospective tenant will have to do his own calculations from the price list to see what the rent is and no formula is stated in the price list to show how this calculation is done. Alternatively, a prospective tenant is somehow expected to know that the sub-divided units were for rental as well as for sale and hence would ask the estate agent what the asking rental of the units were. From the price list, another contemporaneous document to which we have attached considerable weight, one can ascertain that the manifest intention of the Taxpayer was for the sale of the subdivided units and that this intention had not changed.

51. To the credit of the representative of the IRD, a handwritten table (together with a photocopy of some pages of a printed brochure) was also shown to Mr A in cross examination which shows thirty-six sub-divided units with a price list and asking rent. Mr A was unable to offer any cogent explanation on this evidence. According to the IRD' s representative in this appeal, this was a document which was obtained from R&V Dept by the IRD. It is hard to believe that this handwritten table of sales and rental price of only thirty-six units was distributed to potential buyers and tenants in the light of the printed brochures and price list. What it does show is that by the time this document was created, the Taxpayer may have the intention of both selling and renting out the unsold units. What it does not show is whether the Taxpayer would sell both untenanted and tenanted units.

52. After the whole Property was transferred to the ' Property under development' account for resale purpose in the 1988/89 balance sheet or subsequently to the ' Current asset - property for resale or letting' account in the subsequent balance sheet of the Taxpayer, nineteen units (' Transferred Units') were subsequently transferred from such ' Property under development' account and such ' Current asset - property for resale or letting' account to the ' Fixed asset - investment properties' account as follows:

Units	**No of Units**	**Period of Transfer**

07, 29, 33	3	1989/90
11, 24, 25, 26, 27, 32, 83	7	1990/91
02, 09, 10, 41, 62, 64, 78, 84, 86	9	1991/92
	19	

53. All these nineteen Transferred Units had been rented out. Out of these nineteen Transferred Units, the letting out of seventeen of such units were recorded in directors meeting minutes of the Taxpayer. The letting out of the three Transferred Units which were transferred in the 1989/90 period was not recorded in any directors meeting minutes. At the hearing of this appeal, Mr A produced fifteen separate directors meeting minutes of various dates from 1 November 1990 to 31 March 1992 which stated, more or less, as follows:

> ' *The Chairman reported that it has been the Company' s policy to classify the letting properties as long term investment asset when properties begin to let or occupied by tenant(s).*
> *He further reported that Unit* (identification of sub-divided unit) *was let and tenancy commenced on* (date).
> *It was resolved that the aforesaid unit be held for rental income and classified as investment property and an amount representing the cost value of this unit be transferred to Investment Properties and such transfer be incorporated in the Company' s books and accounts.*'

54. On the issue of change of intention, we attach very little weight to these fifteen directors meeting minutes for the following reasons:

a. Firstly, on the change of intention from capital to trading when Property 1 was sub-divided, it was part of the Taxpayer' s case that there was no change of intention (viz Property 1 had been acquired as capital asset and even when it was sub-divided, there was no change of intention). If there had been no change of intention, we find the wording of the above directors meeting minutes relating to the Transferred Units peculiar in having to resolve that the Transferred Units be classified as investment property. Further peculiarity is found in the directors finding the necessity to transfer the Transferred Units from the prima facie current asset accounts of the Taxpayer' s balance sheet (viz the ' Property under development' account and ' Current asset - property for resale or letting' account above mentioned) to a prima facie fixed asset account (viz the ' Fixed asset - investment properties' account). We are of the view that these directors meeting minutes were worded in the manner that they were worded because the directors had already considered that the intention had already changed from capital to investment when the sub-division of Property 1 was decided and carried out. Hence, these

directors meeting minutes, for what they are worth, actually contradicts the Taxpayer' s assertion that there has been no first change of intention from capital to investment when Property 1 was sub-divided.

b. Secondly, on the second change of intention relating to the Transferred Units which had been let out, we do not believe that the Taxpayer had a consistent policy of classifying sub-divided units which have been rented out as long term investment. Not all of the nineteen Transferred Units had directors meeting minutes to support the decision to clarify such units as investment property and to transfer such units to investment property. Out of these nineteen Transferred Units, five Transferred Units had been sold with existing tenancy, despite the stated intention in the directors meeting minutes that such units were long term investments. The sale of these five Transferred Units represented over one quarter of the units transferred to the ' Current asset - investment properties' account. Although the Taxpayer had commissioned a valuation report of Property 1 when vacant possession was obtained (the evidence of which is analysed in the next paragraph) for the purpose of calculating the profit on resale of the sub-divided units, no valuation was done by the Taxpayer for the Transferred Units which would have been necessary for tax on the notional profit earned when the intention of the Taxpayer in respect of such Transferred Units was transferred from trading to investment.

55. The evidence as presented by the Taxpayer on the purpose of commissioning the Taxpayer' s Valuation Report in 1989 is unsatisfactorily. Its purpose could not have been to assess the resale value of sub-divided units as Mr A alleged (or even their rental value) since the valuation was made on Property 1 as a single undivided unit. Its purpose also could not have been merely to update the costs of Property 1 as stated on the 5 November 1988 directors meeting minutes. There was no purpose to updating the value of Property 1 as at 5 November 1988. This valuation does not affect the decision to sub-divide Property 1 or the sub-division works. The Taxpayer' s Valuation Report stated that the instructions was to prepare the valuation for ' internal accounting purpose' . This we find is the true purpose of the valuation; the internal accounting purpose being to use the $30,000,000 value to calculate the capital reserve account newly created in the 1988/89 balance sheet of the Taxpayer and so that on a resale of the sub-divided units, the taxable gain on disposal of the sub-divided units can be ascertained. This reflects the intention of the Taxpayer to sub-divide Property 1 and to sell the sub-divided units.

Findings on changes of intention

56. Based on the evidence presented to this Board and our evaluation of such evidence, we have come to the view that the Taxpayer has failed to discharge its burden of proof under section 68(4) of the IRO. We reject the oral testimony of Mr A, who was the main witness of the Taxpayer. His evidence was unclear and evasive. He does not remember many important facts.

Mr B, the other director who gave evidence, simply could not give sufficient meaningful evidence as he also does not remember many events or he was not involved in certain areas. We are not satisfied that the various directors meeting minutes produced by the Taxpayer reflected the true intention of the Taxpayer or that these minutes were contemporaneous documents. We attach little or no weight to them. In contrast, we attach more weight to the tax returns, the audited financial statements, appointment of Authorised Person, the Taxpayer' s Valuation Report, the property brochure, the price list, the receipts for advertisement placements and other contemporaneous documents produced to this Board. The accounting treatment, the audited accounts, the various directors meeting minutes, the Taxpayer' s Valuation Report were all instruments used by the Taxpayer for tax planning. This is legitimate as a taxpayer is entitled to make use of the best tax planning available to him. The Taxpayer had decided on a scheme, that of conversion of the whole Property 1 into trading asset by subdividing the Property 1 and selling the sub-divided units. The Taxpayer then subsequently embarked on a second scheme to convert those unsold sub-divided units back to investment assets. The second subsequent scheme was executed in a haphazard manner which resulted in confusion. This was probably due to the inability to clearly commit or identify which unsold units in any given year should be transferred back to investment assets. Some units which were so converted were sold even though they were supposedly investment assets from which the Taxpayer was to derive rental income only.

57. From the confusion of the evidence and testimonies presented to this Board, we find that true intention of the Taxpayer was to convert Property 1 to smaller units which would then be sold. Hence there was a change of intention in respect of the entire Property 1 from capital to trading asset. The date of change of this intention is mentioned below. This trading intention of the Taxpayer did not change again throughout the periods under appeal. Unsold units were rented out but not for long term investment purpose. Such rented out units were available for sale (and some were, indeed, sold) and continued to be trading assets. The second subsequent scheme was a total failure and reflects how contrived schemes which are created solely for tax purpose and contrary to actual facts or true intent must fail.

Date of change of intention

58. Based on the circumstances and our evaluation of the evidence, we are of the view that the date of the change of intention from investment to trading was at the time when vacant possession of Property 1 was recovered from the tenant. This took place either on 5, 6 or 7 November 1988. The exact date when this occurred is not clear from the evidence but an exact date is not required so long as it is sometime in November 1988.

59. The reason for using this milestone was really for lack of a better date based on the evidence presented. The change of intention definitely took place during the 1988/89 period. It could have been the date when the decision to sub-divide Property 1 for resale was made by board of directors of the Taxpayer on 5 November 1988. We have the self-serving directors meeting minutes dated 5 November 1988 to which we have attached little or no weight. It could have been

the date when the Authorized Person submitted the building plans for the sub-division works to the Building Authority on 20 August 1988 or the prior date when the Authorized Person was instructed to draft the required sub-division plans (on which we have no evidence) or the date when the Building Authority approved the plans (on which we also have no evidence). It could have been the date when the sub-division work was actually completed in July 1989 or the date when the first sub-divided units were sold on 6 April 1989 to Company K. It could also have been the date appearing in the ledgers of books of the Taxpayer showing the date when Property 1 was transferred from the 'Fixed asset - property' account to the 'Property under development' account (on which we have no evidence) 31 March 1989 or the date up to which the 1988/89 audited financial statements was made up when the difference in accounting treatment of Property 1 appeared.

60. We have come to the view that 5 November 1988 is the date of change of intention as that is the approximate date when vacant possession was recovered and thus the date when the sub-division and resale plan can actually and realistically be commenced and implemented. This was the date when the intention crystallized. The directors certainly thought so as they had even commissioned a valuation of Property 1 as of that date.

Valuation of the property

61. We do not agree with the Taxpayer's contention that the IRD could not come to its own valuation of the market value of Property 1. The IRD had never agreed to the Taxpayer's valuation nor could the IRD have been estopped from denying the Taxpayer's valuation. The initial tax assessments were made bona fides by the IRD based on the tax returns and information supplied by the Taxpayer. It was the Taxpayer who has misled the IRD in allegations of second changes of intention in respect of the Transferred Units. It is open to the IRD to query the market value of Property 1 at any time until the tax assessments or amended tax assessments become final and conclusive under section 70 of the IRO unless there are special circumstances. It is also open to this Board to make findings on the date of change of intention (hence the date at which Property 1 is to be valued) and the value to be attached to Property 1.

62. Other than a bare assertion in oral testimony that the value of Property 1 as of 5 November 1988 was $30,000,000, the Taxpayer's Valuer was unable to provide any evidence to support his valuation. Only a one-page letter dated 16 May 1989 remains. His working file has been lost as was the descriptive report which was said to have been attached to the said one page letter. Despite the loss of the working file, the Taxpayer's Valuer could have been instructed to make a fresh valuation of Property 1 as of 5 November 1988 for the purpose of this appeal. He would then have been able to support his $30,000,000 valuation. Unfortunately, this was not done. Therefore, the Taxpayer's Valuer evidence was of no assistance to this Board in so far as his valuation dated 16 May 1989 was concerned save and except the assertion that the value was $30,000,000.

63. The Taxpayer' s Valuer, however, did give valuable comments on the R&V Dept' s valuation report and offered alternative views on the R&V' s valuation, the comparables used and the adjustments made.

64. The R&V Dept' s valuation and its report dated January 1999 was presented to this Board through the oral testimony of a valuation surveyor of the R&V Dept to whom we are indebted for his assistance. The comparables and calculations used by the R&V Dept to reach the $16,000,000 valuation was subject to examination by the Taxpayer' s representative and this Board. This valuation forms the basis upon which we make our finding on the value of Property 1 as at 5 November 1988. The comparables used by the R&V Dept to reach its valuation were as follows:

Comparable	Transaction date	Area (m^2)	Price $ per m^2	Adjustments	Adjusted rate $ per m^2
1. Large unit at Plaza L	27 April 1988	1,344.4	15,918	Time : +10% Location : -30% Design etc. : -10%	11,142
2. A Shop at Plaza M	8 August 1988	47.1	16,985	Time : ± 7.5% Quantum : -40%	11,464
3. Property 2	27 June 1988	13.4	26,866	Time : ±7.5% Quantum : -60%	12,761

65. We disregard the complaints from the Taxpayer that the R&V Dept valuation was not done more or less closer in time to the date at which Property 1 is valued, that the valuation of the Taxpayer' s Valuer was closer in time to the valuation date, that there had been an initial valuation done by the R&V Dept which resulted in the inter-department memo dated 2 August 1994. These are, in our view, irrelevant matters on the issue of the determination of what is the market value of Property 1 as at 5 November 1988. We are to look at whatever evidence that is available to this Board for us to reach a determination on this issue.

66. We note the comments of the Taxpayer' s Valuer on the R&V Dept valuation and we take into consideration the testimony given by the R&V Dept valuation surveyor. We do not fully agree with adjustments made to the three comparables used by the R&V Dept. We would make the following adjustments to the comparable as follows:

Comparable	Adjustment	Adjusted rate $ per m^2
1. Large unit at Plaza L	Time : + 20% Location : -30%	14,326

		Design/F : 0%	
2.	A Shop at Plaza M	Time : +7.5% Quantum : -20%	14,862
3.	Property 2	Time : +16% Quantum : -30%	23,105

67. The time adjustments used by the R&V Dept valuation is based on the rental and price indices set out in a R&V Dept report. These indices were specified to be applicable to premises designed for retail trade with street frontage and for urban area. Hence they do not directly apply to Property 1. For lack of better evidence, we used it as a basis for our determination. The increase of the price index from the second quarter to the fourth quarter was a 24.68% increase and from the third quarter to the fourth quarter was 7.65%. We have used 20%, 7.5% and 16% respectively for the three comparables.

68. We do not agree that there should be any design/finishing adjustment. Hence this adjustment for the first comparable is reduced to zero.

69. We do not agree that the amount of the quantum allowance or in other words the adjustment for the difference in floor area (or size efficiency) for the second, third comparables. Saleable floor area will be lost in the sub-divided units of Property 1. According to the R&V Dept, one-third of the area will be lost to corridors and circulation/commercial areas. However, one must also consider that there is undoubtedly a difference in the price per square metre between large and small units, all else being equal. Smaller units will have a higher unit price. We reduce the R&V Dept quantum allowances by half to 20% and 30% for the second and third comparables.

70. Based on the adjusted price per square metre of the three comparables, the weight average of the resultant adjusted unit price is $17,431per square metre. Multiply this with the floor area of Property 1 of 1,465.9 square metres results in a valuation of Property 1 at a round figure of $25,500,000. We find the market value of Property 1 as of 5 November 1988 to be $25,500,000.

Conclusion

71. For the avoidance of doubt, we set out a summary of our findings on the change of intention issues as follows:

a. Property 1 was initially acquired by the Taxpayer as capital/investment asset.

b. On or around 5 November 1988, which was the time that vacant possession of Property 1 was obtained, the Taxpayer changed its intention regarding this property from capital/investment to trading.

c. Thereafter, the sub-divided units of Property 1 were sold with or without tenancies. There were no further changes of intention regarding the sub-divided units in Property 1.

d. The market value of Property 1 as at the date of change of intention on 5 November 1988 is $25,500,000.

72. The appeal against the refusal to correct the assessments for years of assessment 1989/90 and 1991/92 under section 70A is dismissed.

73. The Taxpayer is liable to pay profits tax on the sale of the sub-divided units of Property 1 and not entitled to claim rebuilding allowances in respect thereof. Insofar as the appeals against the objection to the additional profits tax for the years of assessment 1989/90 and 1991/92 and the profits tax for the years of assessment 1990/91 and 1992/93 are concerned, the case is remitted to the Commissioner for Inland Revenue to revise these assessments for the relevant periods in light of the findings of this Board on the change of intention, the date of the change of intention and the market value of Property 1. There is liberty for the parties to apply to this Board for further directions to give effect to this decision.