Case No. D54/98

Profits tax – acquisition and sale of property – intention of purchaser at time of acquisition – burden of proof on purchaser – whether tax chargeable on the profits of sale – section 68(4) Inland Revenue Ordinance.

Panel: Ronny Tong Ka Wah SC (chairman), John Peter Victor Challen and Erwin A Hardy.

Date of hearing: 29 May 1998.
Date of decision: 7 July 1998.

The taxpayers were two private companies ("Company A" and "Company B") incorporated in Hong Kong. In 1991, Company B stated the nature of its business as 'property dealings'. It purchased two lots of property (Property 2 and Property 3) for HK$19,000,000 and HK$13,500,000 respectively.

An adjacent property (Property 5) was purchased by Company A at a consideration of HK$94,000,000, to be completed on 7 March 1994. Before completion, Company J approached Companies A and B and expressed interest in purchasing Properties 2, 3 and 5. By a provisional agreement dated 15 February 1994, Companies A and B jointly sold Properties 2, 3 and 5 for a consideration of HK$430,000,000.

On 18 December 1997, the Commissioner determined additional profits tax for the year of assessment 1994/95 raised on Company A to be HK$9,267,688 with a realized profit of HK$56,167,804 and profits tax raised on Company B to be HK$35,216,773 with a realised profit of HK$213,434,992. Company A and B appealed on the ground that the properties were purchased for long term investment and not for trading, therefore, they should not be liable for profits tax.

Held:

1. It was for the taxpayers to prove that the property was acquired as a long term investment. The stated intention of the taxpayers was not decisive but must be viewed in the light of all the facts presented to the Board (Marson v Morton[1986]1 WLR 1348, per Sir Nicholas Browne- Wilkinson V-C, Lionel Simmons Properties Ltd v CIR[1980]35 TC 461, per Lord Wilberforce and All Best Wishes Limited v CIR 3 HKTC 750, 771 per Mortimer J., followed);

2. Neither the Company accounts not the board minutes were conclusive evidence. That evidence must be weighed against other evidence available

(Shadford v H.Fairweather & Co. Ltd[1966]43 TC 291, 299 per Buckley J.). The self-declaration of intent must be borne out by the facts. It is equally important to test the declared intention of the Company by reference to its financial ability (D11/80, IRBRD, vol 1, 374,378, followed).

3. Upon considering the evidence as a whole, the Board was far from satisfied that the taxpayers had discharged their burden of proof under section of the 68(4) IRO. On the totality of the evidence, the intention was not of long-term investment but of developing the properties for resale. Hence the Commissioner's determination was a affirmed.

4. The Board was particularly concerned that some of the documents presented by the taxpayers in support of the appeal were apparently not genuine and this matter was referred to the Revenue for possible further action by the Department of Justice.

Appeal dismissed and a cost of $5,000 charged.

Cases referred to:

Marson v Morton [1986] 1 WLR 1348
Lionel Simmons Properties Ltd v CIR [1980] 35 TC 461
Sharkey v Wernher [1956] AC 58
All Best Wishes Ltd v CIR [1992] 3 HKTC 750
Shadford v H Fairweather & Co Ltd [1966] 43 TC 291
D11/80, IRBRD, vol 1, 374

Jennifer Chan for the Commissioner of Inland Revenue.
Paul Tang of Messrs Paul Tang & Co for the taxpayer.

Decision:

Background Facts

1. There are two appeals before us. One by Company A and another by Company B. By agreement of the parties, the two appeals were heard together.

2. The following facts are not in dispute between the parties:

(1) Company B was incorporated as a private company in Hong Kong on 1 May 1987. At all relevant times, its authorised and issued capital were $10,000 and $2 respectively.

(2) At all relevant times, the shareholders of Company B were Mr C and Mr D. Mr C became a director of Company B since 1 September 1988. Mr D became a director of Company B since 8 June 1992.

(3) Mr C and his wife were the shareholders of a group of companies known as Group E. Group E consists of a number of private companies.

(4) Mr C was also the controlling shareholder of Company F. On 7 October 1988, Company F became the registered owner of Property 1. Property 1 was used by Group E as headquarters during the period from November 1988 to February 1994.

(5) Mr C and Mr D were also shareholders and directors of Company A.

(6) Company A was incorporated as a private company in Hong Kong on 12 August 1993. At all relevant times, its authorised and issued capital were $10,000 and $2 respectively.

(7) Company B described the nature of its business as ‘property dealings and acting as commission agents’ in its directors’ reports for years 1987/88 to 1989/90 and as ‘properties dealings’ in its 1990/91 directors’ report. The profits derived from property trading transactions during the aforesaid years of assessment were offered for assessment while the losses incurred were claimed and allowed as deductions. From the year 1991/92 onwards, the Company B stated the nature of its business as ‘property investment and redevelopment’.

(8) By an agreement dated 8 August 1991, Company B purchased a property subject to and with the benefit of existing tenancies located at District G (‘Property 2’) at a consideration of $19,000,000. Property 2 consisted of a 6-storey building. The purchase of Property 2 was completed on 8 October 1991.

(9) By an agreement dated 30 September 1991, Company B purchased another property subject to and with the benefit of existing tenancies located at District G (‘Property 3’) at a consideration of $13,500,000. Property 3 consisted of a 6-storey building. The purchase of Property 3 was completed on 15 November 1991. Properties 2 and 3 had a total site area of 3,708 square feet.

(10) To finance the purchase of Properties 2 and 3, Company B obtained the following banking facilities from a bank (‘the Bank’):

Loan	**Date of borrowing**	**Fixed loan $**	**Overdraft facilities $**	**Security**
1	4-10-1991	9,000,000	3,000,000	Property 2

2	14-11-1991	5,000,000	1,000,000	Property 3
3	23-6-1992	7,000,000	3,000,000	Properties 2 & 3

(11) After it had completed the purchase of Properties 2 and 3, Company B obtained vacant possession of these properties by paying compensation to the tenants.

(12) In April 1992, Company B appointed Mr D's architect company ('the Authorised Person') to submit building plans for the redevelopment of Properties 2 and 3. Mr D was the principal of the Authorised Person.

(13) The building plans for redevelopment of Properties 2 and 3 were subsequently approved by the Buildings Department on 14 December 1992. The old buildings were subsequently demolished. During 1993, Company B made application to carry out piling work at the site. Consent to commence piling work was given in May 1993.

(14) On 1 May 1993, Mr C and Miss H, as directors of Company F resolved to purchase Property 4 at Building I for a consideration of $43,000,000.

(15) A formal agreement was entered into by Company F on 31 May 1993 to purchase Property 4. The purchase was completed on 1 November 1993. Property 4 was used by Group E as headquarters from February 1994 onwards.

(16) By two agreements dated 7 September 1993, Company A purchased a property adjacent to Property 2 and Property 3 at District G ('Property 5') subject to and with the benefit of existing tenancies at a consideration of $94,000,000 or $97,000,000 if the vendors were able to deliver vacant possession on completion. Property 5 was a 14-storey building and had a site area of 2,557 square feet. The purchase of Property 5 was to be completed on 7 March 1994.

(17) The down payments for the purchase of Property 5 amounting to 20% of the purchase price were financed by Company A's shareholders.

(18) Before the completion of the purchase of Property 5 and on 6 October 1993, the Authorised Person submitted building plans to redevelop Properties 2, 3 and 5.

(19) On 16 November 1993, Company J approached Company A and Company B at Property 4 and expressed interest in purchasing Properties 2, 3 and 5.

(20) By a letter dated 2 December 1993, the Buildings Department rejected the building plans in respect of Properties 2, 3 and 5.

(21) On 26 January 1994, the Authorised Person submitted a revised building plan.

(22) By a provisional agreement dated 15 February 1994, Company A and Company B jointly sold Properties 2, 3 and 5 for a consideration of $430,000,000.

(23) On 23 February 1994, the revised building plans submitted on 26 January 1994 in respect of the three properties were again rejected by the Buildings Department.

(24) On 7 March 1994, Company A completed the purchase of Property 5.

(25) On 30 July 1994, Company A and Company B completed the sale of Properties 2, 3 and 5. Loans from the Bank were fully repaid on 30 July 1994 upon completion of the sale of the three properties.

3. By a determination dated 18 December 1997, the Commissioner affirmed the additional profits tax assessment for the year of assessment 1994/95 raised on Company A as follows:

Additional Assessable Profits	$ 56,167,804
Tax Payable	$ 9,267,688

4. By another determination dated the same date, the Commissioner affirmed the profits tax assessment for the year of assessment 1994/95 raised on Company B as follows:

Assessable Profits	$ 213,434,992
Tax Payable	$ 35,216,773

5. Against these determinations Company A and Company B appealed.

The Case Of The Taxpayers

6. The case of the two companies is really quite simple. They contend that Properties 2, 3 and 5 were purchased for long term investment and not for trading and therefore they should not be liable for profits tax.

7. In support of their case, they relied on a number of documents: the minutes of the respective board of directors of the two companies which sated that Properties 2, 3 and 5 were purchased respectively for 'long term investment' and various cash flow projections allegedly prepared for the purposes of obtaining long term finance at the material time. Long term finance was not obtained but they claimed before this was approved by the Bank they received a good offer from the eventual purchaser. Besides, they were disappointed by the rejection by the Buildings Department of their proposed plans for the redevelopment of Properties 2, 3 and 5.

8. In addition, Mr C also gave evidence before us explaining the various documents and the circumstances surrounding the purchase of Properties 2, 3 and 5.

The Law

9. The relevant legal principles are not in dispute. The principle to be applied on the question of ascertaining intent is well settled and cannot be doubted. In Marson v Morton [1986] 1 WLR 1348, Sir Nicholas Browne-Wilkinson V-C said (at page 1348 of the report):

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

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

(a) Whether the transaction was a one-off transaction?

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

(c) What is the nature of the subject matter?

(d) What was the way in which the transaction was carried out?

(e) What was the source of finance of the transaction?

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

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

(h) What were the purchasers' intentions at the time of purchase? and

(i) Did the item provide enjoyment for the purchaser?

In approaching these question, common sense must be applied.

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

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

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

'The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of the acquisition of the land that it was for development is conclusive.

I am unable to accept that submission quite in its entirely. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute – was this an adventure and concern in the nature of trade? The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in

> *the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'*

13. It follows that the way in which a company keeps its accounts though admissible to show what, in the view of the company's directors and auditors at that time was the intention of the company, is not conclusive evidence by any means. That evidence must be weighed against other evidence available; see for example, Shadford v H Fairweather & Co Ltd [1966] 43 TC 291, at page 299 *per* BuckleyJ. If the financial statements of the company are by no means conclusive it must follow that board minutes are in no better position. One must look at all the circumstances to see if that self-declaration of intent is bore out by the facts.

14. Equally, it is of some importance to test the declared intention of the company by reference to its financial ability : was it within its power to hold a property for long term purposes? In Board of Review Decision D11/80, IRBRD, vol 1, 374 it was said (at page 378):

> *'when an owner of land exploits it by the development and construction of a multi-storey building and in the course of construction or shortly thereafter he sells units in the building, the inference that would be drawn is that the building was not erected for retention as an investment but for the purpose of resale. If the owner's case is that he intended to retain the property as a long term investment but supervening events outside his control forced him to dispose of the property, then before such a claim can succeed he must satisfy the Board that it was his intention to keep it as an investment or capital asset. ... "Intention" connotes an ability to carry it into effect. It is idle to speak of 'intention' if the person so intending did not have the means to bring it about or had made no arrangements or taken any steps to enable such intention to be implemented.'*

Taxpayers' Declared Intention

15. We were not at all impressed by Mr C's evidence. His explanation of the various documents was simply incredible. We were, however, more concerned with the reliability of some of the documents produced by the Taxpayers. The board minutes relating to the purchase of Properties 2, 3 and 5 are very good examples. These minutes were produced as documents created at the respective dates borne by the documents themselves. They, however, sit very oddly with the facts.

16. The minutes books of the two companies were never produced. All we have are documents purporting to be minutes prepared at the material times. There is no other independent evidence showing that this is so. There are altogether three sets of minutes: there are two sets of minutes from Company B in relation to the purchase of Properties 2 and 3 dated 7 June and 30 June 1991 respectively and then there is another set of minutes of Company A in relation to the purchase of Property 5 dated 7 August 1993. We asked Mr C specifically whether these minutes were separately prepared and Mr C assured us they were.

17. All three sets of minutes were in completely identical wordings claiming that the property concerned was 'purchased used (*sic*) as Company's Head Quarter and treated as long term investment of the company'.

18. It will be seen immediately that in that one phrase which is found in all three sets of minutes there are a number of common errors:

(a) There is the grammatical error in use of the verb 'used' after the word 'purchased';

(b) The word 'Company' in each case refers to a different company and in any event Mr C told us that the head quarter was really the head quarter of Group E rather than the individual companies; and

(c) The minutes had used the word 'Company' in the capital 'C' to refer to the company concerned, and yet at the end of that sentence the writer of the minutes had inadvertently used the word 'company' in the small letter 'c' to refer to the company concerned.

19. There is another common error found in all three sets of minutes: in paragraph 2 in each of these minutes the writer had used the capital 'P' in the verb 'Purchase'.

20. If these minutes were really prepared some two years apart we find it very unlikely that the same mistakes should be made in the preparation of these minutes. We think it more likely that these minutes were prepared at the same time which means that they were quite possibly prepared not at the time when Properties 2 and 3 were purchased but at a time after Property 5 was purchased in August 1993.

Group's Head Office

21. There is another difficulty. In May 1993, some three months before the purchase of Property 5, Group E through Company F had purchased Property 4 at a not insubstantial sum of $43,000,000 to be used as head office of Group E. In fact, Mr C told us Group E moved into these premises soon after the purchase as a special favour by the vendor and has been using these offices ever since. Mr C sought to explain the apparent inconsistency by suggesting that Group E's business had 'expanded rapidly' and so they needed extra space, hence the intention to develop Properties 2, 3 and 5 into a commercial building to house the group's head office. This is very hard to believe.

22. In September 1994, Mr C did an affirmation in a High Court Action ('the Affirmation'). In paragraph 11 thereof, Mr C said:

> 'Several floors at the nearby Building I were on sale and were considered very suitable to be the Group's head office because of its bigger size, location, immediate availability and a separate entrance to the units. On 31-10-1993 the Group (through Company F) bought shops on the Lower Ground Floor (about 2,000 square feet), First Floor (5,500 square feet), Second Floor (5,500 square feet) and Third Floor (3,000 square feet) of Building I and moved the head office to Building I in February 1994 occupying about 8,000 square feet and renting out the rest.'

23. This is further confirmed by the minutes of Company F which recited at paragraph 2 (b) thereof:

> 'The property will be partly used as office by Group E and partly offered for long term lease.'

24. The position between May 1993 and February 1994 was therefore that even disregarding the shop area of about 2,000 square feet, Group E had available to them office space in the area of some 14,000 square feet of which they only utilised about 8,000 square feet. The fact that Group E is still using Property 4 as their head office is very strong testimony that despite the alleged rapid expansion of their business, they did not outgrow the office area available to them in Property 4.

25. Finally on this point, Mr C produced a cash flow projection which he claimed was sent to the Bank on 10 August 1993 in support of an application for long term finance. We will consider this application in more detail below but for the moment it is instructive to observe that both in the letter itself and on page three of that cash flow projection Company A and Company B were representing to the Bank that the new building would be wholly let out.

26. In our view, these minutes insofar as suggesting that the Taxpayers had intended to purchase Properties 2, 3 and 5 for use as head quarter of the group and hence for long term investment are not reliable.

The Taxpayers' Business

27. It is significant to note that prior to the purchase of Properties 2 and 3, the business of Company B was admittedly property dealing. This is how the company described itself in its directors' reports. This is also clear from its accounts for 1990. Profits tax was paid.

28. Soon after the purchase of Properties 2 and 3, Company B prepared two feasibility reports in September and October 1991 respectively for the purpose of obtaining finance from the Bank. In both these reports, Company B set out the projected sale profits of the development. Mr C sought to explain this by saying that first, this was 'required by the Bank'. Secondly, he said, it was 'too early' to consider seeking finance for long term investment. We find his explanation far from convincing. If there was a fixed intention to hold the development for long term investment there was no reason why the Bank should not be told about it. Why should the property be mortgaged twice at extra costs at different stages if there was an intention to hold the development for long term investment right from the start? In any event, finance *was* obtained on what he now says to be a false premise. If what Mr C now says were true, then the short term loans obtained by Company B from the Bank were obtained by fraud.

29. But this was not the only occasion the company had projected sales profits. In a letter dated 2 July 1993, Company B wrote to what Mr C said was an agent for a possible lender in an attempt to raise finance. In that letter, Mr C said:

> 'As you are fully aware that the prices of the Hong Kong property market has maintained its upward movement since the beginning of this year, the use of Year 1992 Statistics should make our estimates reasonably conservative. Along with the present market values, we also show the projected market values on completion by the end of 1994 based on a minor 10% increase from the average prices of 1992.
>
> By using the lowest present market value of $293,500,000 shown in Exhibit 1 together with the construction cost given in Exhibit 5 and the interest incurred during construction and prior to pre-sale, Exhibit 4 shows the market value of the site at $253,000,000 including the profit element upon completion of the proposed building. We think this market value may be useful for your consideration.'

30. The letter also enclosed market price projection of the development (at that time only consisting of Properties 2 and 3) and the average prices of comparable properties and the property market generally. Mr C also sought to explain this document in much the same way as he did in relation to the two feasibility reports referred to above. But the whole tenor of the letter was in the nature of an application for short term finance for a sum of US$25,000,000. One must remember that this is a two dollar company with no other asset other than Properties 2 and 3 fully mortgaged at the time with another $20,000,000 owing to its shareholders. It is difficult to see how in these circumstances, Company B would be able to raise long term finance without the shareholders willing to inject more assets into the company.

31. The position of Company A was equally precarious. It was also a two-dollar company with no asset. It was apparently incorporated or acquired solely for the purpose of

purchasing Property 5. In paragraph 5 of the Affirmation, Mr C admitted that '[Company A] was never intended' to be a one project company. This admission is completely at odds with the alleged intention that Property 5 was acquired for the purpose of redevelopment in order to house the group's head quarter and long term holding. Mr C admitted that he was an experienced developer. His partner, Mr D, of course, is an architect and the principal in his architect company, the architect of the development. They plainly knew very well the danger of using a company holding the head office premises of the Group as a vehicle for other development projects. Mr C admitted in an answer to a question put to him by us that it was not appropriate to use Company A for other projects if the intention was that it should hold the new development for long term purposes.

32. There is another very important point. This development is a joint development between Company A and Company B each holding separate properties. It is difficult if not impossible to see how these two companies could hold different intentions as to the nature of the holding of the new building. If Company B never had any intention to hold Properties 2 and 3 for long term investment purposes, they would, upon completion of the new building, seek to dispose of their holding. That means the new building has to be sold. We do not see how in these circumstances Company A could insist holding onto the new building. The two companies are of course in the same group so that it makes no sense for Company B to sell to Company A its share of the new building. Substantial stamp duties would be involved. Besides, there was never anything to suggest that the two companies were of different minds as to what they wanted to do with the new building. There was never any steps taken to address this potential problem.

Financial Arrangements

33. As we have pointed out above, it is idle for someone to speak of his intention to hold a property long term if no arrangement was made to sustain that holding. It is thus necessary to test the declared intention of these two companies against what financial arrangement they had made to carry out that alleged intention.

34. Mr C admitted in evidence that the purchase of Properties 2 and 3 was financed by three loans from the Bank and another $20,000,000 loan from the shareholders. We have already referred to the two feasibility reports prepared for that purpose. Apart from the minutes which said that 'certain general banking' (*sic*) repayable in seven years on the security of a mortgage of the property concerned would be arranged, Mr C produced no other document to show what kind of facility was in fact obtained from the Bank. We find it surprising that he did not even produce the mortgage deeds. The Revenue had to write to the Bank and obtain various documents relating to these loans. These documents show that the three loans were advanced as overdrafts in the nature of short term call loans. In other words, no long term finance was arranged.

35. Mr C pointed to a number of documents to support his contention that long term finance was in the process of being arranged when they were approached by the eventual buyer of Properties 2, 3 and 5. First, he pointed to a letter dated 26 June 1993 which purports to be an application for a loan of US$25,000,000 over a term of 15 years.

Attached to it, he said, was a cash flow projection setting out the rental income of the new building for the next 15 years. When tested by the question that the letter did not refer to any enclosure he relented to say the cash flow projection might not be attached to the letter.

36. Mr C admitted that this cash flow projection basing on projected rental income was the first such projection prepared. This is quite surprising given the alleged intention right from the beginning that this new development was to be held for long term investment.

37. The letter is in any event a very curious document. It was addressed to a Company K of Country L but with no address or the name of the person addressed to. There is no indication that this document was indeed sent. We were not told anything about this company or indeed it did exist or its financial position. US$25,000,000 is a very large sum on any view. And yet, the letter made no mention of any security offered other than Company B's own 'guarantee'. In other words, the only security the intended lender would have was the debtor's own guarantee, a two-dollar company with no other asset other than Properties 2 and 3 which at the time was fully mortgaged to the Bank. There was of course also the $20,000,000 loan from the shareholders. The company had no immediate income and was already engaged in piling works of the project.

38. There was no explanation why Company A needed as much as US$25,000,000 for the project. The feasibility reports put the total development cost of the project at $42,000,000 and $68,000,000 respectively. Mr C himself in evidence put the total cost at $80,000,000, a fraction of US$25,000,000.

39. As the Revenue pointed out, the cash flow projection that was alleged to have been attached to this letter was wholly unrealistic. It made no allowance for change of the market. It assumed, for example, a constant rate of interest and fixed amount of expenses throughout while at the same time a steady increase of rental income at 100% occupancy. In our view, no serious financial institution will be impressed by this document let alone a financial institution about to lend US$25,000,000.

40. This letter was in any event contradicted by the letter of 2 July 1993 which we have already referred to. That subsequent letter was addressed to a Company M in Hong Kong which was said to be the agent of Company K. We have already pointed out that the cash flow projection enclosed in this later document was prepared for the purpose of obtaining short term financing envisaging a projected pre-sale of the project.

41. Mr C next sought to rely on an application dated 10 August 1993 by *both* Company A and Company B to the Bank for a long term loan of $150,000,000. This is an even more suspicious document. To start with, as Mr C himself admitted in paragraph 5 of the Affirmation, Company A was not even incorporated until 12 August 1993. The Bank never received this letter. The cash flow projection allegedly attached to the letter referred to the new building which incorporated Property 5 before the latter was even bought.

42. When asked as to how he was able to include in the cash flow projection the new design of the enlarged building encompassing Property 5 at a time before it was

bought, he gave various conflicting answers. First he said the new plans were prepared at the time of the purchase of Property 5. Then he said these plans were prepared one or two weeks before the purchase. Then he said provisional agreements were entered into some two weeks before the actual date of purchase agreed to be on 7 September 1993. He agreed there was no need to prepare building plans for a property which had not yet been bought but eventually insisted the plans and cash flow projection were prepared before 10 August 1993. He later produced documents to show that formal approach for the purchase of Property 5 was made on 17 August 1993. No provisional agreements were produced.

43. All this was apparently happening while piling works on the old design involving simply Properties 2 and 3 were proceeding in earnest.

44. The cash flow projection attached to this letter suffered the same flaws as the one alleged to have been attached to the letter to Company K in June. Indeed, it is likely that the same person prepared this new cash flow projection.

45. We are not persuaded that this letter to the Bank is necessarily a genuine document. In any event, it is common ground that no long term finance was obtained from the Bank by the Taxpayers.

Our Determination

46. On these facts, we are far from satisfied that the Taxpayers had properly discharged their burden under section 68 (4) of the Inland Revenue Ordinance, chapter 112 in demonstrating that Properties 2, 3 and 5 were acquired for the purpose of long term investment. Quite the contrary, we find that on the totality of the evidence, the intention of Company A and Company B at the time of the purchase of Properties 2, 3 and 5 respectively was to develop these properties for resale.

47. The appeal must be dismissed and the determination affirmed. We order that the Taxpayers do pay to the Revenue costs in the sum of $5,000. Finally, we feel bound to say that we are seriously concerned by the fact that a number of documents had been put forward by the Taxpayers in support of the appeal which are apparently not genuine. We wonder whether this is a proper case for the Revenue to consider referring this matter to the Department of Justice.