INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/03

Profits tax – real property – whether profits were capital in nature and were not assessable to profits tax – sections 2, 14, 61, 61A and 68(4) of the Inland Revenue Ordinance ('IRO') – sections 26 and 28(3) of the Buildings Ordinance ('BO') – costs – appeal obviously unsustainable – section 68(9) of the IRO.

Panel: Kenneth Kwok Hing Wai SC (chairman), Patrick James Harvey and Anthony So Chun Kung.

Dates of hearing: 29 June, 2, 3, 10 and 11 July 2002.
Date of decision: 26 September 2003.

This appeal was heard together with D55/03 and two other appeals.

The appellant company in this case ('A2') and that in D55/03 ('A1'), D57/03 ('A3') and D58/03 ('A4') were incorporated in Hong Kong. The issued share capital of each of the appellant companies has remained at $2 each since incorporation. Between July 1988 and April 1993, the appellant companies, either by themselves or through trustees, acquired a total of nine blocks of properties, six of which were with existing tenancies. The acquisitions of six of the nine blocks were respectively financed partly by a loan from the Bank and one block by interest-bearing loan from the Holding Company of A1 and A2. At least two blocks were purchased subject to orders imposed by the Building Authority under sections 26 and 28(3) of the BO. The appellant companies and their trustees sold all the nine blocks by agreement dated 11 August 1993 and the sale proceeds were divided among the four appellant companies.

The grounds of appeal of the four appellant companies were that 'the profits referred to in the determination were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive'. A3 and A4 also appealed against the assessments on the ground that they 'should have been granted rebuilding allowances'.

On the first day of hearing, the Board drew the parties' attention to D30/01 and D11/02.

Counsel for the appellant companies submitted that:

(a) the burden was on the respondent;

(b) the burden cast on the appellant companies by section 68(4) was no more than to provide sufficient evidence to show that the respondent's conclusion that the appellant companies were trading was wrong;

(c) there was no evidence that the appellant companies were trading; and

(d) there was no or no sufficient evidence that the appellant companies' activities were caught by section 14.

Held:

1. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant companies. In Mok Tsze Fung, Mills Owens J said: *'… It was for the appellant to adduce evidence before the Board of Review in order to discharge the onus resting upon him, and on his failure to do so the Board was entitled, indeed bound, to reject his appeal'*. The burden still rests on the taxpayer even in respect of the anti-avoidance provision, that is, sections 61 and 61A. The Board was bound to reject the submission of counsel for the appellant companies on burden of proof.

2. The stated intention in these four appeals is to redevelop for rental income. The stated intention, according to the oral evidence of the Surviving Shareholder of A1, was that they would lease it first and then they would buy all of them and then rebuild it and lease it. Whether the stated intention was in fact the intention is a question of fact. The Board decided against the appellant companies on this factual issue. If the stated intention was in fact the intention, there is no reason why the appellant companies should have put forward so many different stories in the past. As in D30/01 and D11/02, the significance of the evidence in these appeals lies in what the Board has **not** been told. There was **no** evidence on what was thought at the time the stated intention was said to have been formed to be the prospects of acquiring the last three blocks; the time it would take to evict all occupiers; and the time it would take to construct the proposed new building(s). There was **no** evidence on the financial worth or net worth as at July 1988 of any of the ultimate beneficial owners of the shares in the appellant companies; the appellant companies' financial ability to service the proposed new building(s) and to pay off the instalment loan; and what was thought to be the occupancy rate of the proposed new building(s) or the unit rental. The appellant companies have not proved that the 'stated intention' was in fact held, not to mention genuinely held, realistic or realisable.

3. The Board was of the opinion that all four appeals were obviously unsustainable. All four appellant companies should have realised that their appeals were hopeless after D30/01 and D11/02 had been drawn to their attention. Pursuant to section 68(9) of the IRO, each of the appellant companies was ordered to pay the sum of $5,000 as costs of the Board.

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

Case referred to:

D55/03, IRBRD, vol 18, 591

Anselmo Reyes SC instructed by Department of Justice for the Commissioner of Inland Revenue.
Benjamin Chain Counsel instructed by Messrs Tsang Chau & Shuen for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 26 February 1999 whereby the profits tax assessment for the year of assessment 1994/95 under charge number 1-5026520-95-0, dated 21 November 1996, showing net assessable profits of $211,233,078 (after set-off of loss brought forward of $5,083,365) with tax payable thereon of $34,853,457 was confirmed.

2. This appeal was heard together with D55/03, IRBRD, vol 18, 591 and two other appeals.

3. For reasons given in the decision D55/03, we confirm the assessment appealed against in this case as confirmed by the Commissioner and we order the Appellant in this appeal to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.