Case No. D65/88(A)

Case stated – questions of law or fact – whether transcript of evidence can be attached to case – whether 'thinly disguised' questions of fact – section 69(1) of the Inland Revenue Ordinance.

Panel: Henry Litton QC (chairman), David B K Lam and Edwin Wong.

Dates of hearing: 30 June and 7 July 1989.
Date of decision: 14 July 1989.

This is a ruling by the Board of Review as a result of an application by the Commissioner for a case stated. The Commissioner applied for a case stated and cited ten questions to be answered by the court. Following correspondence the ten questions were amended in various ways. The matter then came before the Board on the argument by the taxpayer that the so called questions of law were in reality an attempt by the Commissioner to have the appeal reheard on its evidence. The Board of Review ruled that it was an attempt by the Commissioner to have the case reheard on its evidence and that there was no question of law to be stated.

The Board refused to state a case.

> [Editor's note: This ruling should be read together with D65/88 at page 71 of this Volume.]

Cases referred to:

> Milnes v Beam [1975] 50 TC 675
> CIR v Inland Revenue Board of Review and Aspiration Land Investment Ltd Inland Revenue Appeal No 1504 of [1988]

B W K Whaley for the Commissioner of Inland Revenue.
Robert G Kotewall instructed by Johnson, Stokes & Master for the taxpayer.

Ruling

Introduction

INLAND REVENUE BOARD OF REVIEW DECISIONS

1. This matter has caused us much anxiety. It arises out of an appeal by the Taxpayer Company ('the company') which we heard last year, under the provisions of section 68 of the Inland Revenue Ordinance. We determined the appeal in the company's favour and concluded that the profits in dispute arose from the sale of capital assets and hence not chargeable to profits tax.

2. The process of hearing, evaluation and ultimately of determination is one which Boards of Review perform day in and day out. There was nothing unusual about this appeal except, perhaps, that it lasted rather longer than the average. The conclusion reached by us – namely that the profits were not in the nature of trading profits – is undoubtedly a conclusion of law. Under the provisions of section 69(1) of the Ordinance the party dissatisfied (in this case the Commissioner) has the right of appeal, by applying to us within one month to state a case for the opinion of the High Court on a question of law. The Commissioner made his application in this case within the time limit. If his application, broadly construed, is one seeking to challenge our conclusion of law, then unquestionably we have the duty under section 69(1) to state a case for the opinion of the High Court. An application made by a dissatisfied party under section 69(1) should obviously not be viewed too narrowly; so long as a question of law can be identified, the Board's duty is clearly to state a case.

3. Equally clearly, the task of evaluating the evidence, assessing the credibility of witnesses and, pursuant to that process, making the findings of fact necessary for a proper decision on the issues, is one for the Board of Review, and for the Board of Review alone. This fact-finding function of the Hong Kong Board of Review is one perfectly familiar to the law and is no different from that of similar bodies in other jurisdictions having similar appellate processes as ours.

4. Normally speaking a tribunal like the Board of Review reaches its conclusion of law (for example, trade or no trade) by first making findings of fact and drawing inferences from the facts found. Normally this process of evaluating the facts and making findings thereon are set out in its written decision: perhaps not every fact of the evidence is set out since, often, the evidence is complex and it would not promote clarity of reasoning to have everything set out. So sometimes there are gaps (or interstices) in the findings: these gaps would, sometimes, be apparent on the face of the decision, and sometimes not.

5. When it comes to drawing up a case stated, the findings set out in the decision would normally form the main fabric of the case: supplemented sometimes by additional findings which upon the invitation of the parties the Board might make. It would, generally speaking, be a dangerous exercise for the Board of Review, months after the hearing has concluded, to go back to its record of the proceedings and scour the evidence to make additional findings of fact. This might sometimes be necessary, even without the invitation of the parties, or upon the invitation of only one of the parties. But such event would be rare. If there are no additional findings, then essentially the case stated is based on the Board's written decision – or such part of it as might be relevant to the particular question of law sought to be taken to the High Court on appeal. If there is any defect in the process of

reasoning on the part of the Board, it would normally be apparent on the face of the decision – and hence on the face of the stated case. Since the findings of fact cannot be challenged generally speaking on appeal, where the findings spring from the evaluation of evidence heard by the Board, it would rarely happen that transcripts of evidence would be annexed to the case stated: scouring the pages of the British Tax Cases reported over a period of more than a hundred years it would be difficult to find instances of such a practice. The reason is obvious. The weight which the Board might give to a particular aspect of the testimony of a particular witness is not something which the High Court has jurisdiction to review.

6. In many instances reported in the British Tax Cases, the 'question of law' for the opinion of the High Court is formulated along these lines:

> ' The question of law for the opinion of the High Court is whether, on the facts found, our decision was correct'.

7. In this particular case we were faced initially with an application to state a case which contained ten separate questions, some of which had sub-questions. These 'questions' contained comments on the evidence we heard: such as, 'in view of the gross improbability' of the evidence of a particular witness, or 'whether the Board erred in placing reliance on the self-serving evidence' of another witness etc. These 'questions' then changed shape in the course of correspondence between the parties; some were accepted by Counsel for the Commissioner as 'in reality heads of argument'. Later on, some 'questions' were abandoned, others re-formulated, and the 'questions' have undergone a bewildering variety of sea-changes, as we shall indicate in detail later. If, in truth, there are properly speaking 'questions of law' for the opinion of the High Court within the meaning of that term in section 69(1) of the Ordinance why, we ask ourselves, has the Commissioner found it so difficult to formulate them? The answer, according to Counsel for the company, is simple: there are in reality no 'questions of law' at all; the 'questions of law' are thinly disguised grounds of appeal against the Board's findings of fact; the entire application is according to Counsel for the company misconceived and an abuse of process.

8. With such a challenge on the table, we need to examine the matter more closely, which we now proceed to do.

Background

9. On 12, 13, 14, 15, 16, 20 and 21 December 1988 we heard an appeal by the company concerning a profits tax assessment for the year ending 31 March 1984. The issue, in essence, was whether the profits realised on the sale of flats and car-parking spaces effected by the company were profits on the sale of capital assets. In the course of the hearing we received in evidence a number of documents and heard the testimony of five witnesses called on behalf of the company in support of its case.

10. On 20 January 1989 we gave our decision in writing, allowing the appeal and discharging the profits tax assessment.

11. On 18 February 1989, the Commissioner of Inland Revenue made an application to us to state a case for the opinion of the High Court under the provisions of section 69 of the Ordinance. For the sake of convenience we annexe to this ruling (annexe 1) a copy of the application dated 18 February 1989.

12. In accordance with normal practice, the applicant was invited to prepare a draft of the case stated and to have the same agreed by the solicitors for the company.

13. On receipt of a copy of the Commissioner's application dated 18 February 1989, the solicitors for the company (in a letter dated 27 February) questioned whether any questions of law were raised by any of the questions posed in the Commissioner's application. The solicitors' letter of 27 February concluded by saying:

> ' At most, some of the questions posed as being of law are thinly disguised grounds of appeal against the Board's findings of fact. This, we would respectfully submit, is a misuse of the statutory procedure and we would invite you to reconsider your application and have the same withdrawn to obviate unnecessary expenditure of time and costs'.

14. There followed further correspondence between the parties which we need not set out here.

15. On 21 April 1989, Senior Crown Counsel on behalf of the Commissioner wrote to the Clerk to the Board of Review as follows:

> ' For the purpose of preparing the case stated on a question of law for the opinion of the High Court, I should be most grateful if you would let me have an official transcript of the proceedings'.

In the meanwhile, a draft case stated had been prepared on behalf of the Commissioner of Inland Revenue and sent to Messrs Johnson, Stokes & Master, solicitors for the company (though no copy was, at that stage, sent to the Clerk to the Board of Review).

16. On receipt of the draft case stated by Messrs Johnson, Stokes & Master, they wrote (on 25 April 1989) to the Commissioner objecting to the case stated. They said in part:

> ' As we had suspected and as indicated in our previous letters, you are endeavouring to turn the statutory procedure into a rehearing on selective items of the evidence adduced before the Board of Review ... Quite apart from the fact that no questions of law are disclosed in any of the questions posed, and we

> have made this point before, the whole format now proposed is completely contrary to authority and practice ...'

17. At about the time of the receipt of Messrs Johnson, Stokes & Master's letter of 25 April 1989, the Clerk to the Board of Review received a draft case stated prepared by Counsel for the Commissioner.

This draft case stated is a formidable document. It sets out, in effect, the entirety of our decision dated 20 January 1989 and proposes to have annexed to it:

(1) the Commissioner's determination;
(2) all the documentary exhibits;
(3) transcripts of all the testimony of all the witnesses.

The draft case stated then sets out at the end the 'questions of law' for the opinion of the High Court – in a form slightly different from the 'questions of law' in the original application of 18 February 1989.

18. In further correspondence between Counsel for the Commissioner and the solicitors for the company, the Commissioner conceded 'upon further reflection' that some of the 'questions' raised in the draft case stated were 'in reality heads of argument' and proposed therefore further changes to the formulation of those 'questions of law'. The order and content of some of the other questions of law were also proposed to be changed.

19. Pausing at this point, it should have been apparent to Counsel for the Commissioner that, with the best will in the world, no Board of Review could have been expected to state a case for the opinion of the High Court when the 'questions of law' were in such a confused state. But Counsel for the Commissioner pressed on undeterred.

20. In the meanwhile, hoping to reach a sensible resolution of the matter, the Clerk to the Board of Review, (in a letter dated 19 May 1989) wrote to Counsel for the Commissioner as follows:

> ' Looking at the matter ... broadly, it seems clear from your draft that there are no additional findings of fact which you say the Board should have made upon the evidence adduced before the Board at the hearing. In short, you seem to accept that the written decision of the Board dated 20 January 1989 sufficiently sets out all the facts necessary for a determination of the issue before the Board. What you seem to be saying in paragraphs 1 to 9 of your letter of 18 February 1989 is that, having regard to the findings of fact which the Board of Review made (as set out in its decision of 20 January 1989), the conclusion reached by the Board (namely, that the profits realised on the sale of the flats and car-parking spaces to X Limited were profits on the sale of capital assets) was, in law, unjustified.

> Is that not, in essence, what you are saying in paragraphs 1 to 9 of your application of 18 February 1989? And if this be correct, then observations on those findings (for example, the 'gross improbability' of Mr H's evidence being true; whether the Board was 'speculating' in the absence of any evidence from the accountants, whether Mr B's evidence was 'self-serving' etc.) are all matters of argument which you can raise in the High Court in seeking to impeach the findings of the Board: on the footing that the Board, in the light of the findings of fact they have made, could not have reached the conclusion they reached if they had properly directed themselves in law. On this question, it is wholly unnecessary to have the transcript, the exhibits or any of the evidence "annexed" to the case stated'.

21. In his reply (dated 28 June 1989) Counsel for the Commissioner said that the Commissioner did not 'accept the Board's findings of fact', and that the Commissioner was seeking to impugn the Board's findings of fact by the various 'questions' in the draft case.

22. It was with these matters by way of background, as we have summarised above, that we convened a hearing of the Board of Review to enable the parties to address the Board of Review on two matters:

(i) whether the Board could or should in law accede to the application dated 18 February 1989 to state a case for the opinion of the High Court;

(ii) if the answer to the above question be yes, the form (including the form of the 'questions of law') which the case stated should take.

The Hearing

23. Regrettably, when the parties appeared before us, on 30 June 1989, Counsel for the Commissioner did not set out on paper the 'questions of law' as finally formulated. These had to be gleaned from (a) the draft case stated; (b) the letter of 12 June 1989; and (c) Counsel's oral formulation at the hearing. For the sake of convenience, we set out in annexe 2 the 'questions of law' in their 'final' form upon which we were, at the hearing, asked by the Commissioner to state a case. We were unable to complete the hearing on 30 June 1989, and the matter was adjourned over to 7 July 1989 to enable Counsel for the Commissioner to make his reply. On 6 July 1989, Counsel sent to the Clerk to the Board of Review 'revised questions of law' which again differed from the previous 'final' version. We set these out in annexe 3. At the resumed hearing on 7 July 1989, we were handed yet another set of questions which we set out in annexe 4. (Question 6 has been changed, otherwise the questions remained the same as in annexe 3).

24. At the hearing on 7 July 1989, we were told that the case stated should now be drafted rather differently from the draft previously submitted, having regard to the re-formulated 'questions of law' (annexe 4): but in what way, we were not told. In particular, we were not told whether we should set out in the case stated some of our findings of fact, or

none of our findings of fact, or what.

Our Ruling

25. We have given this matter anxious consideration, realising that we are not the best judges of what constitutes error in the course of our determination of the tax appeal. Plainly, if there is any possibility that, in the course of our determination, we have made errors of law, the matter should proceed to the High Court.

26. The 'core' of the Commissioner's argument, as it was first presented to us by Counsel for the Commissioner, was that Mr H's evidence was so 'inherently improbable' that no reasonable Board could or should have accepted that evidence; to appreciate this, it would be necessary to annexe a transcript not only of Mr H's evidence, but the evidence of other witnesses as well. When Counsel was invited to indicate in what respects Mr H's evidence had not been sufficiently set out in our written decision, or in his own draft case stated, Counsel was unable to so indicate and reiterated that, looking at Mr H's evidence on paper, it would be demonstrable that the tribunal erred in accepting his evidence: a full transcript of his testimony would show how 'evasive' he was in the witness box. This 'core' question seems now to have disappeared from annexe 4 – unless it is disguised in question 1.

27. It is unnecessary for us to set out all the matters adverted to in the course of argument except to say that Counsel for the company was plainly right when he said that, in essence, what the Commissioner wants the High Court to do is to conduct a rehearing of the tax appeal on all the evidence. There is more than a whiff of this when, in the course of the hearing, we were referred by Counsel for the Commissioner to a passage in Cross on Evidence (sixth edition) page 185 dealing with appeals to the Court of Appeal under the provisions of Order 59 of the Rules of the Supreme Court. This is an indication of how wholly misconceived the present application is before us: as if an appeal on a question of law under section 69 of the Inland Revenue Ordinance could be equated with an appeal by way of a rehearing under the provisions of Order 59 of the Rules of the Supreme Court.

28. The function of the High Court under the provisions of section 69 of the Ordinance is not the same as that of the Court of Appeal under Order 59. For example, the High Court under section 69 of the Inland Revenue Ordinance would not have the power to receive further evidence on questions of fact: contrast this with Order 50 R 10(2) of the Rules of the Supreme Court.

The credibility of witnesses, matters of impression, the weight to be given to any piece of evidence and the evidence in general are all matters of fact within the sole province of the Board of Review. It is apparent from the case stated as drafted by Counsel for the Commissioner that there was evidence before us on all the factual issues which we determined: the draft case stated followed virtually word for word our written decision, but set out the evidence reviewed in our written decision in a slightly different order. On what possible basis the Commissioner is saying (if that is what he is saying) that there was no

evidence for our findings we totally fail to understand. What the Commissioner is complaining of, in effect, is that we should have determined some evidential issues differently: having regard to the 'gross improbability' of the testimony of one or other of the witnesses being true, the 'self-serving' nature of the evidence of another witness etc. We cannot see how it could be proper to state a case upon such issues. The wholly erroneous nature of this application can be demonstrated by the desire of the Commissioner to have a transcript of evidence of all the witnesses 'annexed' to the case stated, together with all the documentary exhibits. And if it be proper to annexe to the case stated the entirety of the evidence, so that the High Court could review the matter afresh, then why set out any of the facts or our findings in the body of the draft case stated, as Counsel for the Commissioner has done? Why not simply forward all the evidence to the High Court without any reference to our findings and ask the High Court the simple question: upon all the evidence adduced before us, was our conclusion in law correct? It seems to us that what is proposed is to turn the case stated procedure on its head.

29. As regards question 8 in annexe 4, to state a case on such a question would mean in effect that every dissatisfied party would have the right in every case to require a case stated: if it were the taxpayer, he would say that the Board erred in finding that the taxpayer had not discharged the onus of proving that the assessment was incorrect. This is, in effect, to construe section 69(1) as if it conferred on the dissatisfied party a general right of appeal.

30. At the adjourned hearing before us on 7 July 1989, Counsel for the Commissioner seemed to be saying that, in view of the 'amended' questions of law set out in annexe 4, it was no longer necessary to annexe all the evidence (oral and documentary) to the case stated, but only some of the evidence: and yet, looking at question 1, we see that question referring to all the evidence 'given by the Taxpayer's witnesses', and question 7 addresses 'all the documentary evidence put before the Board'. Despite Counsel's protestations, we seem to be back where we started when we first attempted to seek clarification of the Commissioner's position: namely, that in order to deal with the 'questions of law' as formulated, we must annexe to the case stated the entirety of the evidence (both oral and documentary) and the Commissioner's determination as well. The Board is simply being used as vehicle for the material to be placed before the High Court. If such an approach be correct, what is the point of stating a case?

31. We were, at one time, inclined to take the application of 18 February 1989 as, in effect, an application to state a case in the form set out in the case of Milnes v Beam [1975] 50 TC 675 to this effect:

> ' The question of law for the opinion of the High Court is whether, on the facts found, our decision was correct.'

It seemed to us at one point that such a formulation would deal with all the matters the Commissioner wished to ventilate in the High Court. Take for example question

2 in annexe 4. In our decision paragraph 4.2(ii) (reproduced as paragraphs 14.3 and 14.4 in the draft case stated) we said:

> ‘ (ii) In the minutes of the company’s directors’ meeting dated 4 October 1983, concerning the cancellation of the X Limited agreement and the forfeiture of the deposits paid by X Limited, the chairman’s report (in referring to the remaining units left in the company’s hands) said: “owing to the unfavourable market condition, the company has decided to let out the 43 residential flats left”. This led Mr Whaley to argue that, but for the “unfavourable market conditions” the company would most probably have found another buyer and sold the remaining units.
>
> 4.3 It seems to us that point (ii) above constitutes scant evidence of what the company intended in September 1978 when the Y Limited agreement was made. By the time of the meeting (4 October 1983), the company had, of course, decided to sell the units: it could hardly have entered into the X Limited transaction without intending to sell. A reference in the chairman’s report to the conditions which led X Limited to renege on its agreement to buy could hardly constitute real evidence of what the company intended a few years before, when the Y Limited agreement was made.’

Counsel’s point is this: our conclusion (to the effect that the minutes of 4 October 1983 constituted ‘scant’ evidence of what the company intended in September 1978) was ‘unreasonable’ or ‘irrational’, and likewise our later finding that the reference in the chairman’s report in 1983 could ‘hardly constitute real evidence of what the company intended a few years before’.

32. It is not for us to judge whether our conclusion was ‘reasonable’ or ‘unreasonable’ (we obviously considered it reasonable, otherwise we would not have drawn the conclusion). But, we ask: why, in terms of section 69 of the Inland Revenue Ordinance, should we not simply set out our findings in precisely the way formulated in our decision, with all its imperfections, irrationality (as Counsel for the Commissioner contends), warts and all, and let the High Court decide whether, on the basis of our findings, our conclusion of law was correct?

However, Counsel for the Commissioner would not accept our suggested formulation of the question, and insisted that such a formulation would not enable him to argue the real points of his case. We should add in parenthesis that Counsel for the company also submitted that, in view of the terms of the letter dated 18 February 1989, the suggested formulation is not open to us. With such an unanimous view expressed, we did not pursue the matter further.

33. We confess to harbouring a sense of bewilderment through the various transformations of the ‘questions of law’ presented to us by the Commissioner. These

changes reinforced the conviction that, in reality, the Commissioner is expressing his dissatisfaction with our findings of fact, and hopes to persuade the High Court to come to different findings on the evidence. This is beyond the scope of the procedure laid down in section 69(1).

34. Throughout the hearings on 30 June 1989 and 7 July 1989 we entertained the uncomfortable feeling that what the Commissioner is attempting to do in effect is to by-pass the decision of the High Court in CIR v Inland Revenue Board of Review and Aspiration Land Investment Ltd [Inland Revenue Appeal No 1504 of 1988] and to formulate questions which would not appear to be mere challenges to findings of fact on the evidence. Indeed, at one stage, the proposal was that we should adjourn the matter until the appeal against Mr Justice Barnett's decision has been disposed of by the Court of Appeal in November. It is pointless for Counsel for the Commissioner to repeat the incantation that there was 'no evidence' to support the various findings he now seeks to challenge when, on the face of the case as he himself has drafted, there plainly was evidence.

35. In our view, this application for a case stated is misconceived and must be refused.

ANNEXE 1

18 February 1989

Clerk to the Board of Review,
Queensway Government Offices,
First floor, Low Block,
66 Queensway,
HONG KONG

Dear Sir,

X Limited

Decision of the Board of Review
dated 20 January 1989

In accordance with section 69 of the Inland Revenue Ordinance the Commissioner of Inland Revenue hereby makes an application requiring the Board of Review to state a case for the opinion of the High Court on the following questions of law –

(1) Whether the Board erred as a matter of law in finding that the Taxpayer had discharged the onus upon it, in view of:

(a) the fundamental conflict between the Taxpayer's case as presented to the Commissioner by its accountants by letter dated 10 January 1985, and the case presented to the Board; and

(b) the Taxpayer's failure to lead any evidence from the accountants to explain how such conflict arose; and

(c) the minutes of the directors' meeting dated 4 October 1983.

(2) Whether the Board erred in law in failing to draw an adverse inference from the Taxpayer's failure to lead evidence as aforesaid.

(3) Whether the Board misdirected itself and erred as a matter of law in accepting as true Mr H's evidence in view of the gross improbability thereof, that he 'simply assumed' the facts with which he instructed the accountants, without any independent knowledge thereof and without consulting any of the Taxpayer's other directors.

(4) Whether the Board misdirected itself and erred in law, in speculating, in the absence of any evidence from the accountants, as to what the accountants' state of mind might have been in respect of Mr H's instructions.

(5) (a) Whether the Board misdirected itself and erred as a matter of law in finding that the Commissioner was wrong in looking at the Taxpayer's repurchase of some of the flats and car-parking spaces from Y Limited as a distinct transaction from the sale of the P Building property to Y Limited.

(b) Whether the Board misdirected itself and erred in law in finding that the Commissioner's contention was that the Taxpayer's repurchase of the flats and car-parking spaces as aforesaid was ipso facto evidence of the company's intention to embark upon an adventure in the nature of trade.

(6) (a) Whether the Board misdirected itself and erred in law in finding that the minutes of the Taxpayer's directors' meeting dated 4 October 1983 could not constitute real evidence of what the company's state of mind was when it had purchased the flats in 1978, and/or at any time in the period intervening between September 1978 and the sale of the flats to X Limited in May 1983.

(b) Whether the Board erred in law in failing to find that the aforesaid minutes of 4 October 1983 were inconsistent with the Taxpayer's contention before the Board that prior to the offer from X Limited it had never intended to sell the flats and car-parking spaces.

(7) (a) Whether the Board misdirected itself and erred in law in finding that the Y Limited price list dated August 1979 constituted 'fairly strong evidence' or any reliable evidence that the case put forward on behalf of the company was correct.

(b) Whether the Board erred in law in failing to find that the aforesaid price list, since it was issued by Y Limited, was neutral evidence as to the Taxpayer's intentions in respect of the flats which were omitted therefrom.

(8) Whether the Board misdirected itself and erred in law in finding that the minutes of the director's meeting of 5 September 1978 were consistent with Mr B's evidence that the Taxpayer's intention was to retain the flats as an investment for rental income.

(9) Whether the Board erred in law in placing reliance upon the self-serving evidence of Mr B and upon the self-serving and hearsay evidence of Messrs C, F and G as to the Taxpayer's intentions in respect of the flats.

(10) Whether on all the evidence before the Board the true and only reasonable conclusion contradicts the conclusion of the Board that the profits realized on sale of the flats and car-parking spaces to X Limited were profits on the sale of capital assets.

2. A fee of $400 accompanies this application.

Yours faithfully,

(Anthony AU-YEUNG)
Commissioner of Inland Revenue

ANNEXE 2

Questions of law for the opinion of the High Court

1. Whether the Board erred in law in finding as a fact that the Taxpayer's explanation for the conflict between its case as presented to the Commissioner by its accountants and its case as presented to the Board, was true.

2. Whether the Board erred as a matter of law in finding that the Taxpayer had discharged the onus upon it of proving that the assessment appealed against was incorrect.

3. (a) Whether the Board misdirected itself and erred in law in finding that the minutes of the Taxpayer's directors meeting dated 4 October 1983 could not constitute (real) evidence of what the company's state of mind was when it had purchased the flats in 1978, and/or at any time in the period intervening between September 1978 and the sale of the flats to X Limited in May 1983.

   (b) Whether the Board misdirected itself and erred in law in failing to find that the aforesaid minutes of 4 October 1983 were inconsistent with the Taxpayer's contention before the Board that prior to the offer from X Limited it had never intended to sell the flats and car-parking spaces.

4. Whether the Board misdirected itself and erred in law in its findings in respect of the severability of the sale of the old P Building from the repurchase of some of the flats and car-parking spaces by the Taxpayer, and the relevance thereof as evidence of the company's intention to embark upon an adventure in the nature of trade or otherwise.

5. (a) Whether the Board misdirected itself and erred as a matter of law in finding that the Commissioner was wrong in looking at the Taxpayer's 'repurchase' of some of the flats and car-parking spaces from Y Limited as a distinct transaction from the sale of all the flats and car-parking spaces to Y Limited.

   (b) Whether the Board misdirected itself and erred in law in finding that the Commissioner's contention was that the Taxpayer's repurchase of the flats and car-parking spaces as aforesaid was ipso facto evidence of the company's intention to embark upon an adventure in the nature of trade.

6. Whether the Board misdirected itself and erred in law in finding that the Y Limited price list dated August 1979 constituted fairly strong evidence that the case put forward on behalf of the company was correct.

7. Whether the Board misdirected itself and erred in finding that the minutes of the directors' meeting of 5 September 1978 were consistent with Mr B's evidence that the Taxpayer's intention was to retain the flats as an investment for rental income.

8. Whether the Board erred in law in placing reliance upon the self-serving evidence of Mr B and upon the self-serving and hearsay evidence of Messrs C, F and G as to the Taxpayer's intentions in respect of the flats.

9. Whether the Board erred in law in finding that testimony of Messrs B and C was consistent with all the documentary evidence put before the Board.

10. Whether upon all the facts which ought to have been found by the Board the true and only reasonable conclusion contradicts the determination of the Board.

ANNEXE 3

The Questions of Law

(1) Whether there was evidence upon which the Board could reasonably find that the explanation for the conflict between the Taxpayer's case as presented to the Commissioner by its accountants and its case as presented to the Board, was that given by the Taxpayer's witnesses in evidence.

(2) Whether the Board misdirected itself and erred in law in finding that the minutes of the meeting of 4 October 1983 could not constitute evidence of what the Taxpayer's state of mind had been in 1978 or at any other relevant time prior to such meeting.

(3) Whether the Board misdirected itself and erred in law in finding that:

   (a) the Commissioner was wrong in treating the buy-back of certain flats and car-parking spaces under the agreement of 13 September 1978 as severable from the sale of the P Building property; and

   (b) the transactions should not be severed.

(4) Whether the Board misdirected itself and erred in finding that the Y Limited price list constituted fairly strong evidence that the case put forward on behalf of the Taxpayer was correct.

(5) Whether the Board misdirected itself and erred in law in finding that the minutes of the directors' meeting of 5 September 1978 were consistent with Mr B's evidence that the company's intentions were to retain the flats as an investment for rental income.

(6) Whether the Board erred in law in placing reliance upon the evidence of Messrs C, F and G as to the Taxpayer's intentions in respect of the flats in question.

(7) Whether the Board misdirected itself and erred in law in finding that the testimony of Messrs B and C was consistent with all the documentary evidence put before the Board.

(8) Whether the Board erred in law in concluding that the Taxpayer had discharged the onus upon it of proving that the assessment was incorrect.

(9) Whether on all of the facts which ought to have been found by the Board the true and only reasonable conclusion contradicts the determination of the Board.

ANNEXE 4

The Questions of Law

(1) Whether there was evidence upon which the Board could reasonably find that the explanation for the conflict between the Taxpayer's case as presented by the Commissioner by its accountants and its case as presented to the Board, was that given by Taxpayer's witnesses in evidence.

(2) Whether the Board misdirected itself and erred in law in finding that the minutes of the meeting of 4 October 1983 could not constitute evidence of what the Taxpayer's state of mind had been in 1978 or at any other relevant time prior to such meeting.

(3) Whether the Board misdirected itself and erred in law in finding that:

(a) the Commissioner was wrong in treating the buy-back of certain flats and car-parking spaces under the agreement of 13 September 1978 as severable from the sale of the P Building property; and

(b) the transactions should not be severed.

(4) Whether the Board misdirected itself and erred in finding that the Y Limited price list constituted fairly strong evidence that the case put forward on behalf of the Taxpayer was correct.

(5) Whether the Board misdirected itself and erred in law in finding that the minutes of the directors' meeting of 5 September 1978 were consistent with Mr B's evidence that the company's intentions were to retain the flats as an investment for rental income.

(6) Whether there was evidence upon which the Board could reasonably conclude that prior to the sale to X Limited, the Taxpayer had intended to retain the flats and car-parking spaces for rental income.

(7) Whether the Board misdirected itself and erred in law in finding that the testimony of Messrs B and C was consistent with all the documentary evidence put before the Board.

(8) Whether the Board erred in law in concluding that the Taxpayer had discharged the onus upon it of proving that the assessment was incorrect.

(9) Whether on all of the facts which ought to have been found by the Board the true and only reasonable conclusion contradicts the determination of the Board.