Case No. D74/01

Profits tax – real property – whether the gains arising from the disposal of properties were liable for profits tax – sections 2, 14(1) and 68(4) of the Inland Revenue Ordinance (' IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Erwin A Hardy and Patrick James Harvey.

Dates of hearing: 20 and 21 July 2001.
Date of decision: 6 September 2001.

The taxpayer, a company incorporated in Hong Kong, objected to additional profits tax assessment for the years of assessment 1992/93 and 1993/94 and profits tax assessment for the year of assessment 1994/95. At all relevant times, the taxpayer described the nature of its business as ' trading of motor vehicles and property investment' .

On divers dates the taxpayer entered into agreements with a developer to purchase a number of shops and a residential unit at Housing Estate B. In its profits tax return for the years of assessment 1992/93 and 1993/94, the taxpayer declared certain profits which were arrived at after deducting, inter alia, rebuilding allowances in respect of one or more shops. In its profits tax return for the year of assessment 1994/95, the taxpayer declared an adjusted loss. The profits on disposal of shops during the three years of assessment in question were treated in the accounts as extraordinary items and not offered for assessment.

After investigation the assessor formed the view that the shops were the taxpayer' s trading stock and that the profits on disposal were revenue in nature and should be assessable to tax. Additional profits tax for the first two years and revised assessment for the third year were raised.

A director of the taxpayer gave evidence. During the hearing, the representative of the taxpayer conceded that the taxpayer' s accounts were not contemporaneous.

Held:

The director' s testimony was not consistent with the assertion of the taxpayer' s representative. The taxpayer made no attempt to reconcile or explain the inconsistencies. It is incumbent on the parties to present intelligible materials to the Board. The taxpayer failed to prove that at the time of the acquisition its intention was to hold the shops on a long

term basis. Further, there was no evidence of the taxpayer's financial ability to complete the acquisition and to keep the shops on a long term basis.

Appeal dismissed.

Cases referred to:

Chinachem Investment Co Ltd v CIR [1987] 2 HKTC 261
D39/88, IRBRD, vol 3, 37
Jones v Leeming [1930] AC 415
Simmons v IRC [1980] 1 WLR 1196
CIR v Reinhold (1953) 34 TC 389
All Best Wishes Ltd v CIR [1992] 3 HKTC 750
Marson v Morton [1986] 1 WLR 1343

Yeung Siu Fai for the Commissioner of Inland Revenue.
Neil Thomson instructed by Messrs Herman H M Hui & Co, Solicitors, for the taxpayer.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 15 February 2001 whereby:

(a) Additional profits tax assessment for the year of assessment 1992/93 under charge number 1-5021091-93-8, dated 5 March 1999, showing additional assessable profits of $3,028,016 with tax payable thereon of $529,903 was increased to additional assessable profits of $3,044,624 with tax payable thereon of $532,810.

(b) Additional profits tax assessment for the year of assessment 1993/94 under charge number 1-5027203-94-0, dated 5 March 1999, showing additional assessable profits of $767,178 with tax payable thereon of $134,256 was increased to additional assessable profits of $773,065 with tax payable thereon of $135,286.

(c) Profits tax assessment for the year of assessment 1994/95 under charge number 1-5050669-95-0, dated 5 March 1999, showing assessable profits of $2,128,326 with tax payable thereon of $351,173 was reduced to assessable profits of $981,096 with tax payable thereon of $161,880.

The agreed facts

2. The following facts are agreed and we find them as facts.

3. The Taxpayer has objected to the additional profits tax assessments for the years of assessment 1992/93 and 1993/94 and profits tax assessment for the year of assessment 1994/95 raised on it. The Taxpayer claims that the profits derived by it from the sale of certain properties are capital in nature and should not be chargeable to tax.

4. The Taxpayer is a private company incorporated in Hong Kong on 4 June 1991. On 5 December 1991 the issued and paid up share capital of the Taxpayer was increased from $2 to $8,925. At all relevant times, the Taxpayer described the nature of its business as ' trading of motor vehicles and property investment' .

5. (a) On divers dates the Taxpayer entered into agreements with Company A (' the Developer') to purchase the following shops and a residential unit at Housing Estate B (collectively referred as ' the Housing Estate B Properties'):

	Date of agreement	**Purchase price**
		$
Flat C on 3/F (' Flat C')	1-8-1991	1,193,200
Shop 1 on G/F	9-9-1991	6,449,550
Shop 2 on G/F	9-9-1991	5,061,600
Shop 3 on G/F, 1/F and 2/F	9-9-1991	10,184,950
		22,889,300

At the time of purchase, Housing Estate B was still under construction. The expected date of completion of construction was 31 August 1992.

(b) To finance the purchase of Flat C, the Taxpayer obtained an equitable mortgage loan of $1,073,880 from Bank D. The loan was to be repaid by 180 monthly instalments of $11,376.28 each.

(c) The purchase agreements with the Developer regarding the shops provided that the Taxpayer had to pay certain deposit as part payment upon the signing of the agreements. Balance of the purchase price was to be paid within 30 days from the date of the issuance of the notice in writing by the Developer or the Developer's solicitors that the occupation permit has been issued. The Taxpayer also had to pay to the Developer an interest on the balance of the purchase price calculated at the rate of 1.5% per annum over and above the best

lending rate quoted by Bank E from 10 September 1991 to the date of final payment.

(d) The amount of deposits paid for the shops by the Taxpayer were as follows:

	Deposit paid
	$
Shop 1 on G/F	1,949,550
Shop 2 on G/F	1,481,600
Shop 3 on G/F, 1/F and 2/F	3,338,830
	6,769,980

6. (a) The Developer, at the request of the Taxpayer, obtained an approval from the Building Authority on 25 March 1992 to subdivide Shop 1 and Shop 2 into six and two smaller shops respectively. The shops were then re-numbered as follows:

Original shop number	**New shop number**
Shop 1	Shops 1 to 6
Shop 2	Shop 7 (' Shop 7') and Shop 8 (' Shop 8')
Shop 3	Shop 9 (' Shop 9')

(b) On 6 May 1992 the occupation permit of Housing Estate B was issued.

(c) By a supplemental agreement dated 29 June 1992 entered into by the Taxpayer and the Developer, the purchase price of $6,449,550 for the original Shop 1 was agreed to be apportioned as follows:

	$
Shop 1 on G/F, Housing Estate B (' Shop 1')	1,072,088
Shop 2 on G/F, Housing Estate B (' Shop 2')	1,436,259
Shop 3 on G/F, Housing Estate B (' Shop 3')	854,268
Shop 4 on G/F, Housing Estate B (' Shop 4')	684,095
Shop 5 on G/F, Housing Estate B (' Shop 5')	588,798
Shop 6 on G/F, Housing Estate B (' Shop 6')	1,814,042
	6,449,550

7. On 29 April 1992 the Taxpayer entered into a provisional sale and purchase agreement to sell Shop 4 at a consideration of $1,608,000. The sale was completed on 6 July 1992 when Shop 4 was assigned to the new purchaser by the Developer.

8. On 3 May 1992 the Taxpayer entered into a provisional sale and purchase agreement to sell Shop 3 at a consideration of $1,808,000. The sale was completed on 6 July 1992 when Shop 3 was assigned to the new purchaser by the Developer.

9. On 18 June 1992 the Taxpayer entered into a provisional sale and purchase agreement to sell Shop 2 at a consideration of $2,807,000. The sale was completed on 10 August 1992 when Shop 2 was assigned to the new purchaser by the Developer.

10. (a) The Taxpayer completed the purchase of the Housing Estate B Properties, other than Shops 2 to 4, on the following dates when the properties were assigned to it:

	Date of assignment
Shop 1	29-6-1992
Shop 5	29-6-1992
Shop 6	10-8-1992
Shops 7 and 8	17-8-1992
Shop 9	10-8-1992
Flat C	20-5-1992

(b) To finance the purchase of Shops 6 and 9, the Taxpayer obtained a mortgage loan of $8,000,000 from Bank F. The loan was to be repaid by 84 monthly instalments of $128,712.7 each.

11. On 4 May 1993 the Taxpayer entered into a provisional sale and purchase agreement to sell Shop 1 at a consideration of $1,973,810. The sale was completed on 21 May 1993.

12. On 10 November 1994 the Taxpayer entered into a provisional sale and purchase agreement to sell Shop 5 at a consideration of $2,800,000. The sale was completed on 12 December 1994.

13. In its profits tax return for the year of assessment 1992/93, the Taxpayer declared a profit of $984,388 which was arrived at after deducting, inter alia, rebuilding allowance of $16,608 in respect of Shops 1 and 5. The profit on disposal of Shops 2 to 4 amounting to $3,028,016 was treated in the accounts as an extraordinary item and not offered for assessment.

14. In its profits tax return for the year of assessment 1993/94, the Taxpayer declared a profit of $320,130 which was arrived at after deducting, inter alia, rebuilding allowance of $5,887 in respect of Shop 5. The profit on disposal of Shop 1 of $767,178 was treated in the accounts as an extraordinary item and not offered for assessment.

15. In its profits tax return for the year of assessment 1994/95, the Taxpayer declared and adjusted loss of $1,005,524. The profit on disposal of Shop 5 of $2,128,326 was treated in the accounts as an extraordinary item and not offered for assessment.

16. The assessor issued to the Taxpayer the following profits tax assessments for the years of assessment 1992/93 and 1993/94:

Year of assessment 1992/93	$
Profit per return	984,388
Tax payable thereon	172,267

Year of assessment 1993/94	$
Profit per return	320,130
Tax payable thereon	56,022

The Taxpayer did not object against the above assessments.

17. Upon investigation of the Taxpayer's business affairs, the assessor issued to the Taxpayer the following additional profits tax assessments for the years of assessment 1992/93 and 1993/94 and loss computation for the year of assessment 1994/95:

Year of assessment 1992/93 (additional)	$
Additional assessable profits	134,109
Tax payable thereon	23,469

Year of assessment 1993/94 (additional)	$
Additional assessable profits	206,558
Tax payable thereon	36,148

Year of assessment 1994/95	$
Loss per return	(1,005,524)
Less: Capital exchange gain	141,706
Loss for the year carried forward	(1,147,230)

The Taxpayer did not object against the additional profits tax assessments for the years of assessment 1992/93 and 1993/94.

The determination

18. The assessor was of the opinion that Shops 1 to 5 were the Taxpayer' s trading stock and that the profits on disposal were revenue in nature and should be assessable to tax. She raised on the Taxpayer the following profits tax assessments for the years of assessment 1992/93 to 1994/95:

Year of assessment 1992/93 (second additional)	$
Profit on disposal of Shops 2 to 4 (paragraph 13)	3,028,016
Tax payable thereon	529,903

Year of assessment 1993/94 (second additional)	$
Profit on disposal of Shop 1 (paragraph 14)	767,178
Tax payable thereon	134,256

Year of assessment 1994/95	$
Profit on disposal of Shop 5 (paragraph 15)	2,128,326
Tax payable thereon	351,173

19. Messrs Tai Kong & Co, certified public accountants, objected on behalf of the Taxpayer against these assessments on the following grounds that:

> ' …the original intention of purchasing (the Housing Estate B Properties) by (the Taxpayer) is definitely NOT for trading, and hence, the gain on disposal should not be regarded as revenue nature' ;

and pointed out that the Taxpayer' s loss of $1,147,230 for the year of assessment 1994/95 (see paragraph 17) had not been taken into account in the assessment.

20. The assessor then formed the view that the second additional profits tax assessments for the years of assessment 1992/93 and 1993/94 and the profits tax assessment for the year of assessment 1994/95 should be revised as follows:

Year of assessment 1992/93 (second additional)	$
Profit on disposal of Shops 2 to 4	3,028,016
Add: Rebuilding allowance on Shops 1 and 5	16,608
Revised additional assessable profits	3,044,624

Tax payable thereon	532,810
Year of assessment 1993/94 (second additional)	$
Profits on disposal of Shop 1	767,178
Add: Rebuilding allowance on Shop 5	5,887
Revised additional assessable profits	773,065
Tax payable thereon	135,286
Year of assessment 1994/95	$
Loss per computation (paragraph 17)	(1,147,230)
Add: Profit on disposal of Shop 5	2,128,326
Revised assessable profits	981,096
Tax payable thereon	161,880

21. By her determination, the Commissioner agreed with the assessor.

The appeal hearing

22. By notice of appeal dated 14 March 2001 filed by Messrs Tai Kong & Co on its behalf, the Taxpayer appealed on the grounds that:

> ' ..in making his [*sic*] determination, the Commissioner
>
> (a) wrongly rejected the representations and documentary evidence of the taxpayer showing that Shops 1 to 5 of Housing Estate B ("the Properties") were acquired with the intention that they would form part of the capital assets of the taxpayer.
>
> (b) wrongly concluded that the Properties were trading stock of the taxpayer and that the proceeds of disposal of the Properties formed part of the trading receipts of the taxpayer.
>
> (c) wrongly withdraw [*sic*] commercial building allowances in respect of Shop 1 and Shop 5.'

23. At the hearing of the appeal, the Taxpayer was represented by Mr Neil Thomson, instructed by Messrs Herman H M Hui & Co, solicitors, and assisted by Messrs Tai Kong & Co. The Respondent was represented by Mr Yeung Siu-fai, assessor.

24. The Taxpayer called Mr G, a shareholder and director of the Taxpayer, to give oral evidence. The Respondent adduced no oral evidence.

25. Mr Neil Thomson cited Chinachem Investment Co Ltd v CIR [1987] 2 HKTC 261, D39/88, IRBRD, vol 3, 37, Jones v Leeming [1930] AC 415, Simmons v IRC [1980] 1 WLR 1196 and CIR v Reinhold (1953) 34 TC 389.

26. Mr Yeung Siu-fai cited All Best Wishes Ltd v CIR [1992] 3 HKTC 750.

Our decision

27. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant. Section 2 defines ' trade' as including *'every trade and manufacture, and every adventure and concern in the nature of trade'*. Section 14(1) excludes profits arising from the sale of capital assets.

28. We remind ourselves of what Sir Nicholas Browne-Wilkinson VC said in Marson v Morton [1986] 1 WLR 1343 at pages 1347 to 1349 and [1986] STC 463 at pages 470 to 471; what Lord Wilberforce authoritatively stated in Simmons v IRC [1980] 1 WLR 1196 at page 1199 and (1980) 53 Tax Cases 461 at pages 491 to 492; and the statement of the law by Orr L J at pages 488 and 489 of the report in Tax Cases, which was approved by Lord Wilberforce as a generally correct statement (WLR at page 1202 and Tax Cases at page 495).

29. In All Best Wishes Limited v CIR (1992) 3 HKTC 750 at page 770 and page 771, Mortimer J, as he then was, was reported to have said:

> ' *Reference to cases where analogous facts are decided, is of limited value unless the principle behind those analogous facts can be clearly identified.'* (at page 770)
>
> ' *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 entirety. 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. Having said that, I do not intend in any way to minimize the difficulties which sometimes arise in drawing the line in cases such as this, between trading and investment.' (at page 771)

30. What the judges said in Chinachem Investment Co Ltd v CIR [1987] 2 HKTC 261 on taxpayer' s accounts must be read in context:

(a) The judgment of Macdougall J began at page 276 and at pages 301 and 302, the learned judge said:

'*Since Mrs Wang had testified that the appellant's policy as to the retention of certain properties for investment purposes was well known to all its staff, the book-keeper's alleged mistake in classification of the properties and the consequent failure to claim depreciation called for a clear and cogent explanation. None was forthcoming.*

Counsel for the appellant sought to dismiss the wrong classification in the properties in the accounts as being of no consequence.

…

I entirely accept that the matter is not concluded by the way in which it has been treated in the taxpayer's books of accounts, but it seems to me that the way in which the properties have been treated in the accounts is by no means an insignificant factor to be taken into consideration, particularly where there has also been no attempt to claim depreciation in respect of those properties.

…

The Board, therefore, had before them a witness in Mrs Wang whom they did not believe, no evidence in the form of company minutes or resolutions to support her evidence, accounts which classified the properties as current assets, no claims for depreciation, no real explanation from Mrs Wang as to the misclassification of the properties

or the failure to claim depreciation, and finally no evidence from any of the persons who could reasonably be expected to shed light on these matters. Bearing in mind that the burden lay on the taxpayer to establish that the Commissioner's assessment was wrong, it is hardly surprising that the Board came to the decision which they did. They were entitled to disbelieve Mrs Wang and had ample reason to do so.'

(b) The case went on appeal, and Sir Alan Huggins VP gave the leading judgment in the Court of Appeal. The leading judgment began at page 303, and at page 308, the learned judge said (emphasis added):

'It is accepted by the Commissioner that the accounts are not conclusive evidence of the matter in issue, and obviously that is rightly accepted. ***Nevertheless the accounts must remain important and call for credible explanation, because they are contemporaneous evidence of the Company's intention****. Yet no other member of its staff – not even the accountant – was called to explain how the "mistake" came to be made. It was unfortunate that the Board appears to have been itself confused when it said that the explanations given by Mrs Wang and by counsel regarding the failure of the accountant to give evidence were confusing. The witness and counsel were in truth speaking about different persons. However, the point is a very minor one. The main contention on behalf of the Company is that the Board attached undue weight to the accounts and, in effect, did regard them as conclusive.* ***I agree with the judge that "the way in which the properties have been treated in the accounts is by no means an insignificant factor" and I am not persuaded that the Board regarded them as conclusive****.'*

(c) Put in proper context, Chinachem was a case where in view of Mrs Wang's testimony that the appellant's policy as to the retention of certain properties for investment purposes was well known to all its staff, the book-keeper's alleged mistake in classification of the properties called for a clear and cogent explanation but none was forthcoming. It was a case where the company's **previous inconsistent** treatment in the accounts cried out for an explanation but none was forthcoming.

(d) In any event, the importance of the accounts lies in the accounts being **contemporaneous** evidence of the company's intention. As Mr Neil Thomson conceded, the Taxpayer's accounts were not contemporaneous.

31. On the question of intention, Mr G claimed in his evidence in chief that:

' Q When you decided amongst yourselves to purchase the property, what was your intention? What did you intend to do with the premises?

A The first and second floors would be used as a Chinese-style restaurant and Shops 7 and 8 would be used as a Western-style restaurant, and there would be one shop used as a magazine store and another would be used as a laundry shop.

…

In the meeting we decided to divide Shop 1 into six shops. We used Shop 6 for an expansion of the entrance of the Chinese restaurant and used Shop 5 as a magazine store. We actually leave Shops 1 and 4 as the laundry shop. That is how we divide Shop 1 into six parts.'

32. We reject Mr G' s testimony on intention.

(a) Mr G' s testimony is not consistent with the assertion by Messrs Tai Kong & Co in their letter dated 29 April 1998 that:

' 1.3 The ground floor of the properties was acquired to house the motor trading business of the company and any excess floor areas were leased out for earning long term rental income purposes. For the first and second floors, the company had intended to use as a restaurant and considered to employ a manager to run the restaurant. However, this was not successful and no shareholders had experience to run a restaurant without an experienced manager' s assistance. As such, the plan was pulled out ..'.

(b) Mr G' s testimony is not consistent with WSK-6, a document which he claimed came into existence ' before acquisition of the property' . This is an undated document in Chinese purporting to be a proposal to change the design in respect of the Housing Estate B ' Properties' . The English translation produced by the Taxpayer is as follows:

' 1. Change of Design Objectives

As the current purchase of the properties include

Shop No 1 1896 feet,

Shop No 2 641 feet,

Shop No 3	670 feet,
Shop No 4	6218 feet (1st and 2nd floors)

We envisage that Shop No 4 shall be used as the premises of our restaurant. Since the frontage of Shop No 4 is not wide enough for the exit/entrance of the restaurant, it is suggested that Shop No 1 should be partitioned into six units. Shop No 6 will be used as the main display of the restaurant at ground floor. Although the remaining Shops Nos 1 to 5 are not suitable for our company, they can be easily rented out to other users.

2. Work Arrangement and Usage subsequent to the refurbishment of the premises

1. The original Shop No 1 will be re-numbered as No 1, No 2, No 3, No 4, No 5 and No 6. The original Shop No 2 will be re-numbered as Shop No 7. The original Shop No 3 will be re-numbered as Shop No 8 and the original Shop No 4 will be named as 1st and 2nd floors of the building.

2. a. The refurbished Shop Nos 1 to 5 shall be leased as soon as possible.

   b. Shop No 6, 1st and 2nd floors are reserved for the purposes of investing in restaurant business.

   c. Shop No 7 will be leased as soon as possible (or opening a laundry).

   d. Shop No 8 is reserved for opening a motor vehicle shop.'

The Taxpayer has made no attempt to reconcile the shop numbers referred to in WSK-6 with the shop numbers defined in the agreed facts. It would appear from the areas of the shops referred to in WSK-6 and the areas of the shops listed in the brochure, from A3 and from the plans at page 103 of bundle R1 [annexed to the memorial for the agreement dated 9 September 1991 in respect of what is defined in the agreed facts as Shop 9 (page 339 of R1)] and at page 104 of bundle R1 [annexed to the memorial for the agreement dated 28 May 1992 in respect of what is defined in the agreed facts as (the new) Shop 3 (page 313 of R1)] that Shop No 1 in WSK-6 is equal to Shop 1 referred to in paragraph 5(a) above; Shops No 2 and 3 in WSK-6 is equal to Shop 2 referred to in paragraph 5(a) above; and Shop No 4 in WSK-6 is equal to Shop 3 referred to in paragraph 5(a) above.

The Taxpayer has also made no attempt to explain why the Shops 2 and 3 referred to in WSK-6, in A3 and in the brochure having apparently been combined into **one** shop and re-numbered Shop 2 in the agreement dated 9 September 1991, was nevertheless subsequently subdivided into **two** shops and [Shops 7 and 8 in paragraph 6(a) above].

It is incumbent on the parties to present intelligible materials. It is not for us to try to make sense out of them.

According to WSK-6, ' Shops No 1 to 5 are not suitable for our company' . According to Mr G' s testimony, Shops 1 to 4 were intended to be the laundry shop whereas Shop 5 was intended to be a magazine store.

According to WSK-6, ' Shop No 7 will be leased as soon as possible (or opening a laundry)' and ' Shop No 8 is reserved for opening a motor vehicle shop' . According to Mr G' s testimony, ' Shops 7 and 8 would be used as a Western-style restaurant' .

(c) Mr G did not impress us as a truthful witness and we reject his testimony.

33. Further, there is no evidence of the Taxpayer' s financial ability, with or without the assistance of its shareholders, to complete the acquisition and keep Shops 1 to 5 on a long term basis.

(a) According to what Mr G said under cross-examination, the Taxpayer' s share were divided into 15 portions and he held five portions, Mr H held three portions, Mr I held two portions, Mr J held two portions, and Mr K and one Mr L together held one portion. Thus, Mr G was **not** the majority shareholder.

(b) It is clear from Mr G' s own testimony that he and three other shareholders needed to ' raise funds and .. more investors' :

> ' The idea of purchasing the premises is actually initiated by the four of us which was listed on the meeting minutes. Because we need to raise funds and we need more investors that is why we invite the others to join. That' s the reason why the others like Mr L and Mr K joined the company later, as well as Mr I.'

(c) There is no evidence on the financial ability of any of the shareholders or any of the ' related companies' to enable the Taxpayer to acquire and keep the properties on a long term basis. There is no evidence on the net worth of any of

the shareholders or any of the 'related companies' in about August or September 1991.

(d) There is no evidence on the financial ability of any of the shareholders or any of the 'related companies' to set up the allegedly intended Chinese restaurant business, not to mention a European restaurant, a laundry and a magazine store.

(e) There is no evidence on the financial ability of the Taxpayer and its shareholders to make monthly mortgage repayments. No cash flow statement has been put before us.

34. Mr G sought to explain the **quick confirmor sales** of Shops 2 to 4 by claiming that in about mid-February 1992, Bank D informed them that they had changed their policies and would not do the commercial property mortgage. We reject his claim:

(a) No explanation has been given for the alleged change. When asked whether 'the bank ever explained why they refused to lend on a commercial property', Mr G said that the 'reason is they have changed their policies and they will not do any commercial premises mortgage'. In the absence of any explanation, we do not accept that the bank was prepared to lend on the strength of a mortgage on the residential units but not the commercial units in the **same** building.

(b) According to the land search records, the purchasers of Shops 2 to 4 which Mr G claimed the Taxpayer was forced to sell, appeared to have obtained bank financing. Three tenants in common completed the acquisition of Shop 2 on 10 August 1992 at the consideration of $2,807,000, with a mortgage to Bank F to secure $1,850,000 (65.9%). Three joint tenants completed the acquisition of Shop 3 on 6 July 1992 at the consideration of $1,808,000, with a mortgage to Bank M to secure general banking facilities. Two joint tenants completed the acquisition of Shop 4 on 6 July 1992 at the consideration of $1,608,000, with a mortgage to Bank M to secure general banking facilities.

(c) It is an agreed fact that the Taxpayer's acquisition of Shops 6 and 9 was financed by a mortgage loan of $8,000,000 by Bank F, repayable by 84 monthly instalments of $128,712.7 each [paragraph 10(b) above].

35. For the reasons we have given, the Taxpayer has not proved any of the following and its case of capital assets fails:

(a) that at the time of the acquisition in September 1991, in intention of the Taxpayer was to hold, on a long term basis, the original Shop 1 or Shops 1 to 5 or any of them on a long term basis;

(b) that such intention was genuinely held, realistic or realisable;

(c) its financial ability, with or without its shareholders, to acquire the original Shop 1 or Shops 1 to 5 or any of them;

(d) its financial ability, with or without its shareholders, to keep on a long term basis the original Shop 1 or Shops 1 to 5 or any of them.

36. As Mr Neil Thomson told us that the rebuilding allowance depended on success of the Taxpayer's case that Shops 1 and 5 were capital assets, the ground of appeal on rebuilding allowance also fails.

Disposition

37. The Taxpayer has not begun to discharge the onus under section 68(4) of the IRO of proving that any of the assessments appealed against is excessive or incorrect. We confirm the assessments as increased or reduced by the Commissioner.