

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D76/94

Profits tax – purchase and sale of property – whether capital gain or a transaction amounting to an adventure in the nature of trade.

Panel: Audrey Eu Yuet Mee QC (chairman), Michael Choy Wah Ying and Rowdget W Young.

Dates of hearing: 20, 21 and 23 February 1995.

Date of decision: 14 March 1995.

The taxpayer was a private limited company which purchased a commercial building on 17 August 1987. Completion of the sale and purchase took place on 26 September 1987. The property was resold on 30 December 1988 at a substantial profit. The taxpayer claimed that its intention when acquiring the property was as a long term investment and that therefore the surplus on disposal of the property was a capital gain not subject to profits tax. The Revenue maintained that the profit was assessable to profits tax.

Held:

The intention of the taxpayer at the time of the acquisition of the property is a matter of fact. The Board carefully weighed the evidence before it including the short period of ownership and took into account that the onus lies on the taxpayer to give a credible explanation. On the evidence before it the Board found as a fact that the taxpayer acquired the property with the initial intention of retaining it as an investment for rental income.

Appeal allowed.

Cases referred to:

Lionel Simmons Properties Ltd v CIR 53 TC 461

All Best Wishes Ltd v CIR 3 HKTC 750

D3/88, IRBRD, vol 3, 133

Chinachem Investments Co Ltd v CIR 2 HKTC 261

So Chau Chuen for the Commissioner of Inland Revenue.

J J E Swaine instructed by Messrs Woo, Kwan, Lee & Lo for the taxpayer.

Decision:

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1. This is an appeal by the Taxpayer against the determination of the Deputy Commissioner of Inland Revenue dated 15 February 1994 ('the determination') wherein he disallowed the Taxpayer's objections and confirmed the additional profits tax assessment for the years of assessment 1987/88 and 1988/89 and profits tax assessment for the year of assessment 1989/90. The objections and the appeal relate to profits tax assessment and the rebuilding allowance in respect of the Taxpayer's only property. It is common ground that only one issue is involved, namely whether the purchase and sale of that property by the Taxpayer was the acquisition and realization of a capital asset such that the property merited rebuilding allowance and the surplus on realization was not subject to profits tax or whether transaction amounted to an adventure in the nature of trade.

2. It is also common ground that, pursuant to section 68(4) of the Inland Revenue Ordinance (the IRO) Chapter 112, the onus is on the Taxpayer to prove, on a balance of probabilities, that the property was acquired as a long term investment asset. If the Taxpayer fails to discharge that onus, the appeal should be dismissed.

3. We shall begin by setting out those facts which are not in dispute.

The Taxpayer

4. The Taxpayer was incorporated as a private company in Hong Kong in June 1987. The authorized and paid up capital was \$10,000 and \$2 respectively. Since 17 August 1987 (the date of acquisition of the relevant property), the two paid up shares have been beneficially owned as follows: one share by Company A and one share by Company B.

5. As stated in the statement of agreed facts, Mr X was a shareholder and director of Company A. According to Mr Y, who gave evidence before the Board, Company A is and was at all times ultimately owned by Mr X.

6. As stated in the statement of agreed facts, Company B was a wholly owned subsidiary company of Company C, a company owned and controlled by Mr Z, Mr W and other members of their family. But it would appear from Mr W, who gave evidence before the Board, that Company B is and was at all times in fact controlled by his father, Mr U.

7. At all relevant times, the directors of the Taxpayer were:

	Appointed on	Resigned on
Mr W	17-8-1987	-
Mr Z	17-8-1987	-
Madam M	17-8-1987	29-9-1987
Madam N	17-8-1987	29-9-1987

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Mr P	29-9-1987	-
Madam Q	29-9-1987	-

It is clear from the evidence that the directors represent the interest of those behind the scene namely two of the directors are for Mr X and two for Mr U (and/or his family) and that the Taxpayer is in effect a joint venture of the two parties.

The Property

8. The property in question is known as Building AA, a commercial building. According to the land search, the occupation permit was issued on 10 May 1985. Thus it was a relatively new building when it was acquired by the Taxpayer in 1987. Again, according to the land search, it was originally owned by Company D. On 18 July 1987, Company E entered into an agreement to purchase the property for \$58,000,000.

9. The property was at all times tenanted. It was originally let to Company F who in turn let various units or floors to various sub-tenants. The tenancy to Company F expired on 8 September 1987. We are told that there was agreement between Company D and Company F that upon such expiration, Company F's tenants would become the landlord's tenants. Thus for the entire period the Taxpayer was owner of the property, these original sub-tenants had become in effect the tenants.

The Acquisition

10. By a sale and purchase agreement dated 17 August 1987, the Taxpayer as sub-purchaser purchased the property at \$67,000,000 from Company E as the sub-vendor.

11. The purchase of the property was entirely financed by interest free loans from the shareholders in equal amounts. The evidence, which was not challenged, was that the shareholders had the funds 'internally'. They did not need any outside loans and never incurred any mortgage or other financial charges. The balance of the advances due to the shareholders as at 31 December 1988 was \$31,880,000 each.

12. The acquisition was completed on 26 September 1987.

13. The acquisition was approved by two board minutes of the Taxpayer dated 17 August 1987 and 26 September 1987 respectively. They were described by Mr So, chief assessor who appeared for the Revenue, as 'conveyance' minutes in that they formally authorized the relevant directors to sign the relevant documents. They are silent as to the purpose or the circumstances of the purchase.

The Lettings

14. The property was purchased with the sitting tenants. Most of the tenancies at the time of acquisition commenced in 1985 and 1986 at monthly rental of approximately

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\$5.50 and \$7.60 per square foot. Most of these tenancies would come to an end in 1988 or 1989. The market rental at that time was approximately \$10 per square foot. The Taxpayer forecast that the rental would increase in 1988 and 1989 to approximately \$15 and \$20 per square foot. The Taxpayer appointed Company G, a company related to Mr X, as its agent for all leasing matters. Advertising was done to let out vacant units.

15. Throughout the time when the Taxpayer was the owner of the property, 17 tenancy agreements were renewed or entered into to replace existing tenants and the occupancy rate of the property was never below 92%.

16. According to the Taxpayer's accounts, in the period from September 1987 (when the Taxpayer completed the acquisition) to December 1987, the net rental income was \$1,048,950 and for the next 12 months ending December 1988, the net rental income increased to \$4,964,132. The schedule of tenancies attached to the subsequent agreement dated 19 January 1989 for sale and purchase of the property by the Taxpayer showed 4 renewals at the time with increase of rent ranging between two and half to more than three times the existing rental.

The Litigation

17. We come to something which was described by Mr J J E Swaine appearing for the Taxpayer as a 'wrinkle' in the story.

18. One of the major tenants occupying the Basement and 1/F to 4/F of the property was Company H, a company controlled by the directors of Company D. That tenancy was due to expire on 14 November 1988. There was a clause in the tenancy agreement giving Company H the right to renew the tenancy for a further three years. The clause also provides a formula for arriving at the new rental.

19. However, on 21 September 1987, which was 5 days before the completion of the sale and purchase between Company D and the Taxpayer, Company D entered into a supplemental agreement with Company H which gave Company H an option to renew the tenancy for three years at a new rent with an increment of not more than 10% of the existing rent. Mr Y said this was a 'grossly depressed rent'. Mr So appearing for the Revenue accepted that the Taxpayer did not know of this supplemental agreement until 12 May 1988 when the solicitors for Company H wrote to the Taxpayer purporting to exercise the option to renew and quoting the supplemental agreement.

20. On 22 December 1988, the Taxpayer issued proceedings against Company D and others in respect of the supplemental agreement. The Board is provided with a copy of the Writ naming the Taxpayer as the first plaintiff and Company I as the second plaintiff, but we are told that the second plaintiff was only added at a later stage. The action was settled in June 1989 with the Taxpayer receiving about \$1,500,000 as compensation for loss of rental by reason of the 'grossly depressed rent' and legal cost.

The Sale

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21. On 30 December 1988, about 16½ months after the acquisition, the Taxpayer entered into a provisional contract with Mr R for the sale of the property at \$131,000,000. Company I was nominated by the purchaser to complete the transaction. A sale and purchase agreement was signed by the Taxpayer and Company I on 19 January 1989. There was a board minute dated 6 February 1989 approving the sale. The minute gave no reason for the disposal of the property.

22. The property was disposed of with existing tenants and a full disclosure of the litigation with Company D. Clause 28 of the sale and purchase agreement dated 19 January 1989 provided that the Taxpayer was to have the benefit and to bear the costs of the litigation prior to completion and conversely, Company I was to have the benefit and to bear the costs of the litigation thereafter.

23. The sale proceeds was applied to repay the shareholders' loans and the balance was advanced to the shareholders interest free.

24. The Taxpayer became dormant thereafter. No other asset was acquired in place of the property.

The Accounts

25. In all its profits tax returns, the Taxpayer described the nature of its business as 'property investment'. It submitted the profit tax returns for the years of assessment 1987/88 and 1988/89 together with its accounts for the period from 30 June 1987 to 31 December 1987 and for the year ended 31 December 1988 respectively. Rebuilding allowance on the property was claimed in the proposed tax computations attached with the accounts.

26. The assessor raised on the Taxpayer profits tax assessments for the years of assessment 1987/88 and 1988/89 in accordance with the profits returned, but at the same time, she raised enquiries for further information in respect of the property and advised the Taxpayer that she would consider whether it had been assessed at the proper amounts upon submission of the information requested.

27. The Taxpayer submitted the profits tax returns for the year of assessment 1989/90. In its accounts for the year ended 31 December 1989, the profit on disposal of the property in the amount of \$61,014,697 was classified as an 'extraordinary item' and was not offered for assessment in the proposed tax computation.

28. The assessor did not agree that the profit on sale of the property was of a capital nature. She raised on the Taxpayer the following 1989/90 profits tax assessment:

Profits Per Return	\$ 1,551,123
<u>Add: Profits on Disposal of Fixed Assets</u>	<u>61,014,697</u>

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Assessable Profits	<u>\$62,565,820</u>
Tax Payable thereon	<u>\$10,323,360</u>

29. The Taxpayer objected to the assessment on the ground that ‘the surplus on disposal of the properties held as fixed assets amounting to \$61,014,697 is of capital nature and should not be taxable’.

30. The assessor raised on the Taxpayer the following additional profits tax assessments for the years of assessment 1987/88 and 1988/89:

	<u>1987/88</u>	<u>1988/89</u>
	\$	\$
Profits Per Return	1,027,781	4,725,663
<u>Add: Rebuilding Allowance</u>	<u>150,750</u>	<u>150,750</u>
	1,178,531	4,876,413
<u>Less: Profits Already Assessed</u>	<u>1,027,781</u>	<u>4,725,663</u>
Additional Assessable Profits	<u>\$150,750</u>	<u>\$150,750</u>
Additional Tax Payable thereon	<u>\$27,135</u>	<u>\$25,627</u>

The Determination

31. We set out below the reason in the determination.

- ‘ (1) The issue for my determination is whether certain profit upon sale of a property was trading profit subject to profits tax in accordance with section 14 of the IRO or whether it was profit arising from the sale of a capital asset.
- (2) The Taxpayer claims that it had the intention to hold the property for long term investment purpose and therefore the surplus on disposal of the property was a capital gain not subject to profits tax and that it should be granted rebuilding allowance for the period prior to the disposal.
- (3) On the facts before us, we cannot accede to the Taxpayer’s contention. Having regard to the following factors, we have concluded that the purchase and sale of the property by the Taxpayer amounted to an adventure in the nature of the trade:

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- (a) There is no contemporaneous documentary evidence to demonstrate the alleged intention. Bearing in mind the size of the property it is unusual that no written feasibility study was prepared before acquisition to ascertain that it would be commercially viable to acquire the property as a long term investment.
 - (b) The appointment of Company G as its leasing agent is not indicative of an intention only to hold the property as a capital asset, especially as the property is a commercial building. Unlike residential units, commercial units with tenants would not deter potential buyers. On the contrary, tenanted commercial units might well be more attractive to potential buyers.
 - (c) Despite the expectation of improving rental yield as contended by the Taxpayer, the actual course of events make it perfectly clear that the Taxpayer was ready to sell the property immediately it received an attractive offer.
 - (d) The short period of ownership of the property is inconsistent with the Taxpayer's claim that the property was acquired for long term letting.
 - (e) With regard to the Taxpayer's claim that the sale of the property was unsolicited, it is noted that this is contradictory to the information provided by the purchaser. Furthermore the Taxpayer paid selling commission to its broker Mr S for the disposal of the property.
 - (f) The Taxpayer has become dormant and no other capital asset was acquired in substitution for this alleged capital asset after its sale. The sale proceeds were in fact used to repay the shareholders' loan with the balance advanced to the shareholders interest free.
- (4) In all the circumstances, we consider that the only logical conclusion is that the Taxpayer had a desire to turn the property to account in the most advantageous way and such desire included selling the property when the right offer was obtained or came along, which is precisely what the Taxpayer did. We think that this was a case in which actions speak louder than words.
- (5) We therefore conclude that the property was the Taxpayer's trading asset ab initio. Accordingly, the Taxpayer should not be entitled to rebuilding allowance in respect of the property and the profit derived from its sale is correctly chargeable to profits tax. The objections therefore fail and the assessments are confirmed.'

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The Appeal

32. On 14 March 1994, the Taxpayer through its solicitors, filed a notice of appeal. Mr J J E Swaine who appeared for the Taxpayer relied heavily on the well known case of Lionel Simmons Properties Ltd v CIR 53 TC 461. He attacked the Commissioner's finding as in effect saying that the property was held by the Taxpayer at the material times both as a capital asset and as a trading asset, which finding was not permissible and he quoted from Lord Wilberforce in Simmons '*An investment may become trading stock, or vice versa, but an asset must be one or the other – it cannot be both or have an indeterminate status*'.

The Evidence

33. The Taxpayer called two witnesses: Mr Y and Mr W.

34. Mr Y is not a director of the Taxpayer. He is a director of Company A and Company G. For twenty years, he has been assisting Mr X in various property transactions. He said that in August 1987, he was approached by Company J, an estate agent, about the availability of the property. He could not remember whether it was a verbal or written approach, he could not remember the person who approached him nor could he remember the occasion of the approach. After he was approached, he went to inspect the property, he looked into the level of rental and the management. Calculations were made of the amount of the rental income on the information supplied. He could not remember if those calculations were made by him or by his assistants. He came to the conclusion that at the price offered, the property would be a very good buy for long term investment. Although it was fairly new, it was badly managed. The tenancies could be improved in the coming years so there was a very good potential for improvements in the future if the property was in their hands. Very soon after the approach, within one or two days, he discussed the matter with Mr X and Mr U. The discussion took place in Company G's office, at the penthouse of Building BB. Mr X had specifically invited Mr U to the meeting to discuss this investment and to form a joint venture with both parties. Mr Y briefly introduced the prevailing condition of the building, the offer and his own views about the offer. He showed a map and probably some sheets of paper. Three figures were important, the price, the level of rental and the percentage of return. The return if based on the information supplied at that time was something around 7% but they thought that after the expiration of the current leases, the return could be double or even more. While no detailed calculations were gone into, they formed a general view for the period beyond the second year. They believed it would definitely improve significantly. As to the rate of return, Mr Y said that for commercial and office properties, a reasonable return would very much depend on the market and prevailing interest rates. When the market was very good, the return expected would be much lower; but when the market was bad, the expected return would be relatively high, so there was no standard level of return. At the time, 7% represented a reasonable and a good investment. It was a short meeting, just less than an hour. At the meeting, they all concluded it was a good opportunity for investment and a decision was reached to purchase the property.

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35. Mr Y also gave evidence that Company A was involved in a lot of property investments or property developments in Hong Kong through other single purpose companies. Some of these holdings were for long term investments and some for trading. He gave the following explanations of the two types of property deals:

‘Usually will not hold for so-called quick trading because I think we either usually will buy the property if either we think that that is a good long term investment property or because the property has good potential for redevelopment. So usually we are very certain to not just to buy some property and then to sell it.

We are much interested in the development of the property. Of course if there is a good opportunity we will buy for long term investment. I think the difference is that because really we are look for these two kinds of properties. So when we buy property for redevelopment, of course we will emphasize on the redevelopment potential of the property. So we have look into for example what is the plot ratio of the development and what is the construction costs and what is the selling price after the development. But for the long term investment we usually of course will emphasize on the rental income, what is the then prevailing rental income and if there is anything we can improve in the building management, in the tenancy structure and of course all this we want to see whether really there is a good potential in the future after our expertise put in the management of the building. So I think this is the difference.

As I said if I can remember correctly, we never think about just for a quick trading purpose because we actually are the developer, we have a lot of properties in hand, we think this is another field of business.’

36. When asked about the lack of contemporaneous documentation to evidence the intention in the acquisition of the property, Mr Y explained that being big developers, they had a lot of experience in these matters, there was no need for formal analysis or documentation. Further, this was a very small transaction and they did not think that there was need for a lot of supporting documentation.

37. Mr W said he first knew of the property after his father returned from the penthouse meeting with Mr X and Mr Y. By then a decision had already been made. He was told that they would be going into a joint venture with Mr X to purchase the property for long term investment. His father said it was a good property with a good potential. At the time, no specific figures were mentioned. Later they were given more details such as the tenancy schedules, the return as to various levels of rents. These details supported the view that the property was a good investment. The existing rentals were low but they were expecting renewals at a higher rent. They believed the property would give a 10% return once the renewal started and it would provide a steady source of income. To his mind, long term investment meant 2 – 3 years, or 3 – 5 years or even longer but the original intention to hold the property as a long term investment changed subsequently because of the litigation referred to earlier and the attractive offer they received for the sale of the property.

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38. The Taxpayer also put forward a statutory declaration dated 17 February 1995 made by Mr S. Mr So for the Revenue has no objection to the admissibility of the statutory declaration. The relevance of Mr S's testimony arises in this way. The Taxpayer claims that in December 1988 it received an unsolicited offer through Mr S, an estate agent, for the purchase of the property at \$131,000,000. This represented such an attractive return on the investment that the Taxpayer accepted the offer within a very short time. The buyer turned out to be Mr R who later nominated Company I as referred to above. In reply to an inquiry from the Revenue, Company T, the accountants of Company I claimed that the sale was initiated by the Taxpayer and that Company I's agent was Company K. Not surprisingly, the Revenue made inquiries from Mr S. The first letter of 7 May 1993 to him went unanswered. There was a reminder dated 26 July 1993. This invoked a reply dated 2 August 1993 from Company L, a certified public accountants, who claimed to act on instructions of Mrs S, wife of Mr S. The letter says that Mr S entered the hospital on 10 March 1993 due to T B lung breakage and other serious sicknesses. Although he was out of the hospital in June 1993, he was taking rest. He could not walk. On 9 February 1995, the Revenue again wrote to Mr S and asked him to reply to the queries raised in the first letter of 7 May 1993. There was no reply. Mr Y said Mr S is over 70 years old and he is not fit to attend before the Board. No details as to his present condition is given. We note that the statutory declaration, which is dated as recently as 17 February 1995, was made at a solicitors office in Building BB. It is not explained why Mr S was fit enough to attend the solicitors office but not before the Board. Further, in his statutory declaration, Mr S does not even condescend to stating the full name of this 'Ms V' who allegedly approached him with the offer to buy the property. Further, nowhere in his statutory declaration does he mention how the price of \$131,000,000 came about. We cannot, in the circumstances, attach any weight at all to this statutory declaration.

Reasons for Decision

39. Similar cases have time and time again come before the Board and the Courts. It is a matter of fact, a matter of intention at the time the property is acquired. We bear well in mind the words of Mortimer J (as he then was) in All Best Wishes Ltd v CIR 3 HKTC 750:

'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.'

40. Thus we begin by examining the Taxpayer's actions. First there is the acquisition of the property in August 1987. The nature of the asset in this case, a tenanted

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commercial building, is consistent with an intention to treat it as a long term investment as well as an intention to trade. It is expected to produce a good steady income for long term investment but there is no difficulty in selling such building with the sitting tenants. Indeed a good portfolio of tenants and a well-managed building can enhance the selling price.

41. There is no need for outside finance, no question of mortgage interests. So this is not a case where, despite a declared intention to hold the property, a taxpayer cannot realistically or genuinely have intended it.

42. We are not troubled by the fact that there are no feasibility study or formal analysis and reports. We totally accept that the persons involved in this case were so experienced in what they were doing that there was no need for such documentations.

43. However, we do find it strange that there was no contemporaneous document evidencing an intention to keep the property as an investment. The persons involved must have been equally familiar with the different tax implications in the purchase of a property for investment and for trade. Thus it would have been prudent to record by contemporaneous documents an intention to purchase for investment. Had they done so, it might have been some pointer, though not a strong one, in their favour.

44. They appointed Company G as the agent for leasing the property. Advertisements were at all times for the letting and not the sale of any unit. They renewed tenancies. They achieved at all times not less than 92% occupancy. It is strongly urged by Mr Swaine for the Taxpayer that this is a sure sign that the Taxpayer intended the property as a long term investment. It is equally strongly urged by Mr So for the Revenue that the Taxpayer was merely 'nursing' the property for its better sale. The management was bad, the rentals were below market. The Taxpayer needed some time to improve the tenancies and the management for an eventual sale at a profit. Mr X and his assistants had all the necessary expertise and Company G was put in for the job. What they did can equally well be described as actions to improve the property for the purpose of sale, one of the badges of trade. Mr So relied on case D3/88, IRBRD, vol 3, 133 and Chinachem Investments Co Ltd v CIR 2 HKTC 261. In our view, the actions which Mr Swaine claim to be conclusive are, in themselves, neutral. They are what you would expect the Taxpayer to do whether the property is intended for a long term investment or for an eventual sale when the time is ripe.

45. We also have regard to the accounts. The business of the Taxpayer was said to be property investment. The property was shown as a fixed asset. Rebuilding allowance was claimed. Profits tax was returned for the rental income. The accounting presentation was consistent with the intention to keep the property as an investment. The first set of accounts was signed in July 1988. By the end of that year, the property was sold. Mr So for the Revenue said it was doubtful how serious the directors were when they described the property as 'fixed assets'. He said the accounts were not conclusive. Nonetheless, it is a factor we must take into account and we do so in favour of the Taxpayer.

46. We come to the sale of the property. There are two aspects of the sale we need to consider, first the timing and secondly the reasons for the sale.

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47. Mr Swaine said 16 months is a long time in the Hong Kong market. Whilst it may not be a very quick sale, in the circumstances of this case, the Taxpayer would probably have needed that amount of time to improve the management, and for the low rental tenancies to be replaced by better ones. As shown in the agreed facts, most of the original tenancies would expire in 1988, 1989. So if it is intended to sell the property for a good profit, the end of 1988 will be about the earliest opportune time.

48. In correspondence with the assessor, Company XX, the Taxpayer's accountants gave two reasons for the sale:

'An unsolicited offer of \$131,000,000 was received by the company. If accepted, it would mean a return of \$61,000,000 (87%) on the investment, equivalent to over twelve years rental income at the time of the offer. Obviously such an offer cannot be resisted by any sensible person; frustrated by disputes and high court action with the previous owners of the properties during the second half of 1988, the company decided to accept the offer in December 1988.'

49. We deal first with the litigation. Mr Swaine rightly described that as a 'wrinkle'. Mr Y said Company D was definitely in the wrong; the shareholders and directors of the Taxpayer (as well as the legal advisers) were confident of winning the action. In any case, if their intention was to hold the property as a long term investment, the loss of rental for the three years involving the units let to Company H, even if they lose the action, should not make a big difference in the larger picture. We are satisfied that the litigation cannot possibly be a reason for any change of intention.

50. As to the offer of \$131,000,000, there is a dispute as to whether it was solicited or unsolicited. Mr Y said in his statement that they were approached by Mr S that he had friends interested to acquire the property at \$131,000,000. As we said already, we cannot place any weight on Mr S's statutory declaration. Nor does it mention the price of \$131,000,000. Equally, we feel unable to attach any weight to the letter from Company I's accountants that it was the Taxpayer who initiated the transaction. We are told that Company I is in liquidation but that does not mean relevant persons with personal knowledge of the transaction cannot be traced. At any rate, we will not be surprised if there were a number of middle men in a deal of this size, each being jealous of his source and contact, and it might be difficult to know who first initiated the deal or suggested the price. Particularly in a rising market, a deal could have been initiated with a nod, a hint, an understanding somewhere in the line of communication. Thus we do not think it fruitful to delve into the controversy nor, in the circumstances, should it affect our ultimate decision.

51. Mr Y said in his statement the price of \$131,000,000 was very high. In cross-examination, he said it was a very good price, a fair and attractive price. Mr W also described it as 'very attractive'. Mr So submitted that it was the prevailing fair market price supportable by the expected rental income; not an extraordinarily high price. Yet the Taxpayer wasted no time in snapping it up. Mr So further submitted that in such a situation

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there is not much gain to the Taxpayer because if it goes into the market again to buy another property for long term investment, it would have needed to pay the same kind of price. Thus it was not a good reason for disposing of a property which was intended to be held as a long term investment.

52. The Taxpayer asks us to look at the figures. Assume the original intention is to hold the property for a long term investment, sixteen months later, the property price rises sharply. The profit is a staggering \$61,000,000. A sale will net a 87% return on the investment. It is said that the profit equals 12 years of rental income. We are not sure that we should look at it in such absolute terms for the rental market must also be rising. At any rate, with these figures, it is not difficult to see a keen businessman changing his mind and selling the property instead. As Lord Wilberforce said in Simmons, *'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'*. If the persons in control, Mr X and Mr U, are confined to only one type of investment, that is, long term property investment, we see the force of Mr So's argument that there is no point in selling the property only to go into the market to replace it with a different one at the same sort of price level. But we are not convinced that we can so confine Mr X or Mr U. In the circumstances, we accept that the Taxpayer has put forward a credible explanation for a change of intention.

53. Lastly, we come to the oral evidence. Mr Y gave us the impression that he had been involved in so many deals that he did not have a very clear recollection of some matters relating to the acquisition. For example, he could not remember the occasion of the approach to him, he could not remember if the calculations were done by himself or his assistant. We were given a calculation sheet showing the percentage return based on rental ranging from \$6.63 per square foot to \$25 per square foot. But this sheet was not prepared prior to the acquisition. Mr Y could not tell us under what circumstances or when this was prepared. Whilst both Mr Y and Mr W stressed the intention was to hold the property for a long term investment, nobody seemed concerned to look beyond the first or second year. But it was never put to any of the witnesses that they intended or contemplated a sale at the end of that period. There is no evidence before us which casts doubt on their oral testimony. Here we would again quote from Mortimer J (as he then was) in All Best Wishes Ltd at page 773:

'A tribunal, which hears oral evidence and considers documents, is not in the position (as is submitted) that it has to find what the witness says is the fact, even if he is not cross-examined, and even if he is not contradicted by other evidence. A tribunal, in those circumstances, may look at the whole of the circumstances presented to it and may find that the oral evidence is not acceptable on particular matters. Or, may find certain facts contrary to the evidence that has been given and, indeed, contrary to what appears in the documents and other material before it.'

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54. The main thrust of the Revenue's case is the quick sale. It certainly calls for explanations from the Taxpayer, on whom the onus lies. The Taxpayer has given a credible explanation, which we accept. The Revenue's case is based on inferences to be drawn, there is no challenge to the direct evidence. What is more important, there is no evidence or circumstance to cast doubt on Mr Y's assertion that it was not in their field of business to buy a property for sale. Their business was either property development or long term investment.

Decision

55. On the evidence presented, we find that the Taxpayer acquired the property with the initial intention of retaining it as an investment for rental income. It follows that the appeal is allowed.

56. It remains for us to thank Mr Swaine and Mr So for their very helpful assistance.