INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D83/89

Profits tax – sale of property – whether capital assets or trading profits – onus of proof.

Panel: T J Gregory (chairman), Kenneth Ku Shu Kay and Ernest Lim Siu Yin.

Dates of hearing: 18, 19, 20 September and 23 October 1989.
Date of decision: 11 December 1989.

The taxpayer acquired certain properties with a view to their redevelopment. The properties were not suitable as an investment for rental purposes in their undeveloped state. The taxpayer maintained that the intention was to redevelop for rental purposes.

Held:

The taxpayer had satisfied the Board that the intention of the taxpayer when acquiring the properties was with a view to redevelopment for rental purposes.

Appeal allowed.

Cases referred to:

Simmons (as Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 1 WLR 1196
D65/87, IRBRD, vol 3, 66
Marson v Morton [1986] STC 463
Hudson v Wrightson 26 TC 55

So Chau Chuen for the Commissioner of Inland Revenue.
Denis G Q C Yu instructed by M K Lam & Co for the taxpayer.

Decision:

1. THE NATURE OF THE APPEAL

The Taxpayer appealed to the Board of Review against the assessment to tax on the profits received from the sale of the two houses defined in paragraph 2.1.2.1 below as 'the properties'.

2. THE FACTS

2.1 The facts which were not in dispute are as follows:

2.1.1 The Taxpayer

2.1.1.1 The Taxpayer is a company incorporated in Hong Kong pursuant to the Companies Ordinance, Cap 32, in 1963.

2.1.1.2 By letter addressed to the Commissioner in or about October 1975 the Taxpayer gave notice that it had discontinued its business as from March 1975.

2.1.1.3 In March 1978 the issued share capital of the Taxpayer comprised 5,000 shares of $100 which, after two transfers made on the same day, were owned as to 2,500 by a Mr X and 2,500 by Mrs X. Mr X was called as a witness for the Taxpayer.

2.1.1.4 By letter dated 9 January 1982 to the Commissioner the Taxpayer gave notice that it had recommenced business with effect from February 1980.

2.1.2 Properties acquired by the Taxpayer

2.1.2.1 In October 1978 A Limited ('A Ltd'), refer paragraph 2.1.3 below, purchased two houses ('the properties') and which houses, numbered 5 and 6, were in a terrace contiguous nine terraced houses, numbered 1 to 9, and two detached houses, numbered 10 and 11. The purchase price was $2,107,000.

2.1.2.2 In February 1980 A Ltd assigned the properties to the Taxpayer at a price of $2,287,746 being the value of the properties in A Ltd's books.

2.1.2.3 In March 1980 the Taxpayer mortgaged the properties to a bank to secure a loan of $2,100,000.

2.1.2.4 By an agreement in September 1985, the Taxpayer agreed to sell the properties to a company dissociated with the Taxpayer, its directors and shareholders, at a price of $11,000,000 and the assignments were in February 1986. The mortgage on the properties was discharged by the Taxpayer on the same day as the assignments. It is the profit realized on these sales of the properties which gave rise to the assessment for profits tax which is the subject matter of this appeal.

2.1.2.5 Whilst the properties were owned by the Taxpayer, initially through its ownership of A Ltd and ultimately as registered owner, that is from October 1978 to February 1986, they were fully let and the rental income received and

the mortgage interest paid by the Taxpayer during that period is set out in the Commissioner's determination.

2.1.3 A Limited

2.1.3.1 A Ltd is a company incorporated in Hong Kong pursuant to the Companies Ordinance in June 1978.

2.1.3.2 In March 1979 two shares in the authorized capital of A Ltd had been issued and one of such shares was transferred to Mr X and the other to Mrs X and on the same day each executed a declaration of trust, declaring that the share in A Ltd registered in their respective names was held upon trust for the Taxpayer.

2.1.3.3 Three days later, eight shares in A Ltd were allotted to the Taxpayer.

2.1.4 B Limited

2.1.4.1 B Limited ('B Ltd') is a company incorporated in Hong Kong pursuant to the Companies Ordinance in November 1978.

2.1.4.2 In or about April 1979, following an allotment of shares, Mr X became the owner of 20,000 shares of $1 each, which shares represented 6.67% of the issued share capital of B Ltd, and he was appointed a director. At this time the other shareholders of B Ltd were a Mr Y, a personal friend of Mr X, who, after the allotment, owned 100,000 shares representing 33.33% of the issued share capital, a Hong Kong corporation, C Limited ('C Ltd'), which after the allotment, also owned 100,000 shares, and refer paragraph 4.3.3.6 below, and a Madam Z, Mr X's mother, who after the allotment, owned 80,000 shares, or 26.67% of the issued share capital.

2.1.4.3 In March 1979 the ground floor of house 7 in the terrace in which the properties were located was assigned to B Ltd at a price of $300,000.

2.1.4.4 In March 1981 Madam Z transferred her 80,000 shares in B Ltd to Mr X whereby he became the owner of one-third of the issued share capital of B Ltd.

2.1.4.5 In April 1983 C Ltd transferred its 100,000 shares in B Ltd to Mrs X. This transfer resulted in each Mr X and his wife Mrs X owning one-third of the issued share capital of B Ltd. Mr Y continued as the registered holder of the other one-third of the issued shares of B Ltd.

2.1.4.6 In February 1986 B Ltd assigned the property referred to in paragraph 2.1.4.3 above to a company dissociated with the Taxpayer, its directors and shareholders at a price of $1,686,686.

2.1.5 Other Companies

During the course of the cross-examination of Mr X and submissions, the existence and activities of four other companies was explored. These companies are:

2.1.5.1 D Limited ('D Ltd'), a company incorporated in Hong Kong under the Companies Ordinance, of which Mr X was a director and shareholder and which had traded in land.

2.1.5.2 E Limited ('E Ltd'), a company incorporated in Hong Kong under the Companies Ordinance, of which Mr X was also a director and shareholder and which owned undeveloped land.

2.1.5.3 F limited ('F Ltd'), a company incorporated in Hong Kong under the Companies Ordinance, of which Mr X was a director and shareholder and which had redeveloped and sold a property.

2.1.5.4 G Limited ('G Ltd'), a company incorporated in Hong Kong under the Companies Ordinance in December 1972 and which, pursuant to a prospectus issued in early 1972, issued 4,550,000 shares of $1 each at par to the public. Mr X, members of his family and business associates, were the promoters and during part of the period relevant to this appeal Mr X was a director and shareholder. This company's business embraced all aspects of real estate ownership.

3. GROUNDS OF APPEAL

3.1 At the commencement of the hearing Counsel for the Taxpayer made application for leave to amend the grounds of appeal. This was not opposed by the representative of the Revenue and, accordingly, leave was granted.

3.2 The amended grounds of appeal are:

> ' The properties,[identified], were purchased and held by the company as capital assets for the purpose of long term investment.'
>
> ' Notwithstanding protracted efforts on the part of the company, redevelopment of the said properties proved to be impracticable owing to planning restrictions, the non-participation of owners of adjoining property, Government plan to build a retaining wall between [the terrace] and the main road, and the lack of Government approval for the building of a private access road.'

‘ 'The points of low rental income in the meantime and comparatively high interest payments are not by themselves supportive enough to draw the conclusion that the properties were acquired for short term trading profit. Other points related to the “badges of trade test”, namely, period of holding the assets, classification of assets, business history of the company, circumstances leading to the disposal, etc. are all in favour of the company and are all leading to the idea that the properties were held for investment purpose and not for trading purpose.’

‘ In disposing of the said properties, the company was realizing a capital asset, and the profit derived from such disposal was not trading profit assessable to profits tax.’

4. THE CASE FOR THE TAXPAYER

4.1 Facts

A statement of facts, which the Revenue had been unable to agree prior to the commencement of the appeal because of the late date on which the request was made, was read and cross-referenced to the documentation. A synopsis of the relevant facts agreed by the Revenue, has been set out in paragraph 2 of this decision.

4.2 Parol Evidence

Counsel then called Mr X to give evidence on behalf of the Taxpayer. Having been affirmed in English Mr X gave the following evidence. For this decision his evidence is recorded in the order, generally, in which the events referred to occurred, to the exclusion of the order in which the evidence was adduced. Mr X’s evidence was to the following effect:

4.2.1 Events prior to 31 December 1978

4.2.1.1 The Taxpayer was incorporated in Hong Kong as stated in the statement of facts, refer paragraph 2.1.1.1 above.

4.2.1.2 Prior to the acquisition by Mr X and his wife of any of its issued shares the Taxpayer had developed a property owned by his wife’s parents in Kowloon. After development, all of the units, excluding the ground floor, were sold. Eventually, the ground floor was sold to G Ltd refer paragraph 2.1.5.4 above.

4.2.1.3 After that development the Taxpayer had ceased operating, refer paragraph 2.1.1.2.

4.2.1.4 Although Mr X initially said that the Taxpayer was acquired by his wife and himself in 1978 subsequently he agreed that in 1977 they each acquired 25% of the issued shares from, respectively, Mr X's father and mother and in 1978 they acquired a further 25% each from, respectively, Mr X's parents-in-law. This second sale was made at a time when Mr X's parents-in-law were emigrating to Canada. Prior to the first acquisition he was aware of the business of the company, land investment, as to that time he had been its secretary. At the time of the first acquisition he and his wife became directors. Mr X and his wife advised the Revenue that they had revived the Taxpayer in 1980, refer paragraph 4.3.3 below.

4.2.1.5 When he decided to acquire the properties, the purchase was completed in October 1978, his intention was to redevelop and retain the units in the redevelopment for rental income. The properties were pre-war three-storey buildings forming part of a terrace of nine houses the first of which, house 1, had previously been redeveloped into a six-storey building. Although not part of the terrace two other detached houses had the same terrace address but unlike the terraced houses these two abutted onto a road. House 4 was owned by a friend, Mr H.

4.2.1.6 The location of the properties was good as was the price at which the Taxpayer was able to buy them, that is $2,000,000 for some 3,000 square feet. Mr X referred to a document which recorded the calculations he had prepared before the purchase of the properties. He explained that the document produced to the Board had been typed for production to the Board and it reduced into legible and typed form the calculations which he had made before the purchase. He stated that if the Taxpayer and Mr H jointly developed their three properties a rental of $6 per square feet would yield 19% and $10 per square foot would yield 31%. He considered these yields were sufficient to persuade a bank to finance the redevelopment. He stated that he also owned real estate that he could pledge as collateral and that this type of investment was ideal for injection into a listed company.

4.2.17 He acquired A Ltd, a company subscribed by staff of a solicitors firm with which at the time he was associated, as he did not wish the vendors of the properties to know who the real purchaser was. His plan was to build up a property portfolio and when this was sufficiently large to form a public company and to offer shares in this company to the public on the basis of the formula adopted for G Ltd.

4.2.2 <u>Events during 1979</u>

Mr X referred to the letter from the chartered architect to the Building Authority and stated that this letter was a follow-up the proposal to develop the properties with the adjacent property of Mr H. He referred to the reply of the Building

Authority which related to the properties and that of Mr H. The content of the reply from the Buildings Ordinance Office did not change his idea of redeveloping. Essentially he was hoping to get access by the purchase of adjacent crown land, which was a slope and not of any value to the crown, or by a development of all nine houses in the terrace and the two other adjacent houses, which had street access.

4.2.3 Events during 1980

4.2.3.1 The properties were assigned by A Ltd to the Taxpayer in February 1980 which then mortgaged them and although the terms of the mortgage included repayment on demand Mr X stated that he had a good relationship with the mortgagee bank and with interest at only 9% the properties were a good buy. Mr X stated that this assignment was for administrative convenience and by virtue of section 5A of the then Stamp Duty Ordinance the only duty payable was to duty of $20.

4.2.3.2 His initial approach was to the owners of the nine terraced houses which included house 1 which had already been redeveloped. Out of all of the owners six expressed an interest but the others were uncooperative.

4.2.3.3 A meeting of the interested owners took place on 22 March 1980 and he took the chair. Mr X referred to the minutes of this meeting. He explained that at this meeting he had with him outline of a joint redevelopment agreement setting out the points to be discussed at the meeting. This outline had been prepared jointly by Mr X and Mr H after discussions with various owners of other houses in the terrace. The agreement was never signed, the various owners had too many different opinions, and one of the owners in house 1 wanted to sell his property.

4.2.3.4 He was prepared to pay his share of the cost of the redevelopment but Mr H wanted someone else to pay the construction cost and thereby make a profit without incurring any expenditure. The provisions in the outline with respect to selling were incorporated to accommodate those owners who joined in the redevelopment who wanted to sell their interest. The Taxpayer did not want to sell its interest in the redevelopment. This was the reason why point 10 in the outline, dealing with management, had been incorporated. The Taxpayer also wanted compatible rental levels to avoid competition between the owners for tenants.

4.2.3.5 Resolution number 3 in the minutes was included to preserve all options. The discussions at that stage were preliminary and it was too early to make a final decision whereby the resolution needed to record all three options.

4.2.3.6 Several of the owners did not attend this meeting. He endeavoured to acquire the interest of those who did not want to join in the redevelopment and, in fact, he was successful in negotiating the purchase of the ground floor of house 7. However, instead of acquiring this on behalf of the Taxpayer it was acquired by B Ltd, refer paragraph 2.1.4.3 above. C Ltd, a one-third shareholder of B Ltd, refer paragraph 2.1.4.2 above, was a subsidiary of G Ltd. He brought G Ltd into the project as he felt that a public limited company could obtain any necessary finance without undue difficulty.

4.2.3.7 There was no progress following this meeting and although he tried to obtain co-operation from the other owners they were uncooperative and they would not sell.

4.2.3.8 Mr X referred to the offer letters dated 17 and 18 November 1980 which were addressed to the solicitor's firm with which he was associated marked for his attention. He discussed these offers with the other owners. Some were interested but he, personally, was not. He tried to buy out those who were interested but they would not sell to him. He wanted a redevelopment and with his interest eventually to go into his projected public company he wanted to retain ownership. Mr X stated that his idea was to use the Taxpayer as the proposed public company as it had the by then required track record of five years. He said that he did not reply to either letter.

4.2.4 Events of 1981

4.2.4.1 In 1981 the property boom was getting towards its peak and the owners of two of the other houses in the terrace expressed an interest in proceeding with a redevelopment. He again tried to discuss the scheme with all of the other owners, including the owners of houses 10 and 11, the houses with road access, but he was unable to obtain their interest. Nevertheless, and whilst still endeavouring to get the owners of house 1 to join in, as this would enable an access road to be acquired over crown land, he instructed an architect to do a survey to see how a redevelopment could be sub-divided.

4.2.4.2 Later, he learned that the owners of houses 10 and 11 were interested in a redevelopment of their own. Mr X stated that when he found out about this and that they had approached a firm of architects, I Limited ('I Ltd'), for this purpose he approached them again, unsuccessfully.

4.2.4.3 In December 1981 the chartered land surveyor who had been engaged to do the survey wrote to the architect and requested that the client pay a Government demand note for a boundary survey of the terrace. This survey was duly completed.

4.2.5 Events of 1982

4.2.5.1 Mr J, a friend of Mr H, had a contact in I Ltd and Mr J was asked to speak to this contact about a redevelopment of the terrace. The owners of the houses in the terrace had decided that I Ltd should be approached and as all but two of the other owners wanted to sell after a redevelopment they were looking for somebody to provide finance. It was thought that I Ltd would be able to do this. Employing I Ltd suited everybody.

4.2.5.2 I Ltd required an authority to represent the interested owners, and in early September I Ltd approached the Director of Lands. There were no firm proposals indicated in the penultimate paragraph of the letter. Mr X said he was prepared for the Taxpayer to put up its share of the capital commitment but others were not. Although it took some time, even with the assistance of I Ltd and, subsequently, K Limited ('K Ltd') which acquired the business of I Ltd with effect from January 1983, no progress was made. This is confirmed in a letter from K Ltd dated 6 October 1984 to the owners of houses 2 to 9 in the terrace.

4.2.6 Events of 1983

4.2.6.1 Mr X referred to his purchase of shares in B Ltd from his mother, refer paragraph 2.1.4.4 above, namely in March 1981. At the time his mother was not in good health and wanted to sell. He was a director of B Ltd at this time.

4.2.6.2 At the time Mr X and his wife acquired the investment of C Ltd in B Ltd, refer paragraph 2.1.4.5 above, namely in April 1983, Mr X and his family had agreed to sell their shares in G Ltd to a subsidiary of another public company. The purchasers agreed to sell the interest in the development, namely the shares of B Ltd, to Mr X and his wife.

4.2.7 Events of 1984

4.2.7.1 By the middle of the year K Ltd had not progressed the proposal and Mr X stated that he tried to locate another developer. He approached another firm of architects who, in his phrase, 'were in with big developers'. Mr X stated he wanted to use a middle-man so that his anonymity would be preserved. However, this architects firm did not produce a redevelopment partner.

4.2.7.2 Mr X referred to a letter addressed to Mr J, which was made as a result of his introduction at a time when Mr X was of the opinion that K Ltd would not be able to finance the redevelopment. Mr X stated that in discussions the writer of the letter, Mr L, had indicated that he wanted the owners of house 1 to join in. He approached the owners with a view to buying them out but was unsuccessful. Every offer he made was rejected as inadequate. If, having been

asked for $1,000,000 he agreed they would then ask for $1,200,000; when he agreed to that they would ask for $1,500,000.

4.2.8 Events of 1985

4.2.8.1 Mr X stated that, eventually, he realized he could not pull all the owners together or buy them out.

4.2.8.2 He referred to a document which contained a summary of conditions affecting proposed redevelopment and stated that this was prepared preliminary to an unsuccessful attempt to obtain an introduction to yet another redeveloper partner.

4.2.8.3 After he had finally acknowledged that he would not be able to progress the redevelopment he received an offer for the properties and the floor owned by B Ltd which he accepted, refer paragraphs 2.1.2.4 and 2.1.4.6 above.

4.3 Cross-Examination of the Witness

4.3.1 After questioning about his background and that of his wife's family, none of which, with due respect to the representative of the Revenue, the Board regards as relevant to the determination of his appeal, the Revenue questioned Mr X about his association with the Taxpayer.

4.3.2 Questions were directed with respect to the earlier redevelopment covered by Mr X in his evidence-in-chief, refer paragraph 4.2.1.2 above. Counsel for the Taxpayer intervened and stated that there was no dispute as to the purpose of the questions: the Taxpayer had traded prior to giving notice of cessation of business in 1975.

4.3.3 Mr X was questioned with respect to the acquisition by himself and his wife of their shares in the Taxpayer and the acquisition of A Ltd and agreed that the Taxpayer recommenced business when it acquired the shares in A Ltd in March of 1979 and not February 1980, as stated in the letter to the Revenue dated 9 January 1981.

4.3.4 Mr X was questioned about his involvement in various other companies, D Ltd, refer paragraph 2.1.5.1 above, and E Ltd, refer paragraph 2.1.5.2 above, but, with due respect to the representative of the Revenue, the Board does not consider the involvement of either Mr X or his wife or the activities of these companies relevant to the issue.

4.3.5 Mr X was referred to the Taxpayer's balance sheet as at 31 March 1980, and confirmed that this was the first balance sheet prepared since the Taxpayer gave notice that it had ceased business in 1975. He confirmed that the fixed assets of

$2,616,146.02 represented the properties and that the investment in the subsidiary of $10 represented the shares in A Ltd.

4.3.6 Mr X agreed that the investment of $4,900 appearing at note 4 to the accounts for the year ended 31 March 1984 represented shares in D Ltd and E Ltd. Mr X also confirmed that the shares in B Ltd were owned personally and not by the Taxpayer.

4.3.7 Mr X was questioned about the activities of another company which he was involved, F Ltd, refer paragraph 2.1.5.3 above, but, with due respect to the representative of the Revenue, the Board does not consider this line of questioning relevant to the determination of this appeal.

4.3.8 Mr X confirmed that having acquired the properties it was the intention of the Taxpayer to buy as many of the other houses in the terrace as possible and that he used other nominees when trying to buy these other houses. Mr X confirmed that whilst he was doing this he was also exploring the possibility of a redevelopment of the properties together with that of his friend Mr H and that the letter dated 19 September 1979, to the Building Authority was written with this in mind.

4.3.9 Mr X agreed that the regulation 19 referred to in the letter of 19 September 1979 relates to the permitted height of buildings and plot ratio. Mr X agreed that he did not know what the plot ratio would be and that it could be the existing bulk. He was questioned about plot ratios in the vicinity of the properties and stated that this was eight times for class B, that is buildings facing one street, and ten times for class C, that is buildings facing two streets. He agreed that the properties did not face a street but would not accept that the concept for redevelopment was abandoned because the potential for the redevelopment of the properties, including that of Mr H, was minimal. Mr X stated that an existing right of way could be surrendered and made into a street or crown land purchased for that purpose. He agreed that a redevelopment of the properties with that of Mr H was difficult and that they both tried to buy other properties in the terrace or persuade the other owners to join in to overcome that difficulty.

4.3.10 Mr X agreed that the meeting on 22 March 1980, refer paragraph 4.2.3.3 above, was as a result of his inability to buy out the adjacent owners and was an attempt to get them together. He agreed that only three out of the six owners of house 1 attended.

4.3.11 Mr X was questioned about the two offer letters, refer paragraph 4.2.3.8 above. He was asked how both writers had obtained the impression that he, and/or the addressed solicitors firm, acted for all of the owners. Mr X said he could not explain this and that the solicitors firm did not act for all of the owners. He

confirmed that he ignored these letters. He also confirmed that these were the only two offers which were received.

4.3.12 Mr X was referred to a letter from the surveyor to a firm of architects and confirmed that the signatures were his own and that of Mr H and that at that time he did not have any authority from the other owners although he stated that he thought the owners of house 8 contributed but not house 1. Mr X was referred to a letter to Mr H, enclosing a signed letter to I Ltd and confirmed that this was the first authority from the owners of houses 8 and 9. Mr X was referred to a letter from owners of houses 2 to 9, both inclusive, to K Ltd and agreed that the owners of house 1 and the adjacent detached houses, houses 10 and 11, did not sign the authority to K Ltd.

4.3.13 Part of the last paragraph of a letter from K Ltd to Mr H was read to Mr X who agreed that there were difficulties with respect to the plot ratio of the entire site.

4.3.14 Mr X was referred to a letter addressed to him from an architect, written almost a year later, and agreed that the plot ratios specified was probably the architect's assumption based on the site being a class B site. Mr X agreed that the engagement of this architect was with a view to securing a party who would finance the redevelopment.

4.3.15 Mr X would not agree that there was a maximum plot ratio of eight: if adjacent crown land could be acquired the maximum for domestic use for the area was ten.

4.3.16 Mr X confirmed that the owners of house 1 were integral to a redevelopment but he could neither get them nor another developer interested.

4.3.17 At this stage the Revenue questioned Mr X with respect to various Government indices. The Board is of the view that the indices are insufficiently particular to be of any assistance in the determination of this appeal.

4.3.18 Mr X agreed that the property market had gone up by September 1985 when the properties were sold and that a commission of $600,000 was paid to a broker.

4.3.19 Mr X was referred to a document which showed the site area of house 1 to 11 in the terrace and asked whether he had got the figure from the site survey he had commissioned. Mr X stated that the areas probably came from searches at the Land Office but he was not sure.

4.3.20 Mr X was questioned as to the document referred in paragraph 4.2.8.2 above and confirmed that the basis was his own prior investigations. The expression 'present moment' in paragraph 3 referred to when he, personally, was considering the project and agreed that it covered the entire terrace.

4.3.21 Mr X confirmed that the calculation of rental yield of redeveloped site presented before the Board was a reconstruction of his previous working papers. Those working papers contained the information he had gathered before A Ltd purchased the properties and that it was prepared for submission to the Board after the hearing date for the appeal had been fixed. Mr X was questioned at length as to the calculations and it was put to him that the figures for the calculations were optimistic. Mr X disputed this and stated that the location had certain unique attributes which justified the figures. Mr X was also questioned about what the Revenue considered to be mistakes in assumptions but Mr X stated that this was a record of the bases upon which he sought to satisfy himself whether or not the cost of the properties and their redevelopment would be justified. Mr X confirmed that at this time he had had no commitment from a bank to provide the necessary finance but stated that it would have been premature at that stage to seek such a commitment. He was satisfied that the project was bankable.

4.3.22 Mr X was questioned about his concept of floating off the Taxpayer as a public company when it had sufficient properties. In reply Mr X stated that in addition to the properties there were other properties which he owned. Mr X confirmed that the Taxpayer ceased business in 1975 but was unable to say whether accounts were prepared for the period between the cessation and recommencement of business.

4.3.23 Mr X confirmed that the dividend shown in the Taxpayer's accounts for the year ended 31 March 1986, arose out of the proceeds of sale of the properties.

4.3.24 He also confirmed that the Taxpayer had not acquired any further properties apart from the properties mentioned above.

4.4 Re-examination

4.4.1 Under re-examination Mr X reiterated that he acquired the properties with a view to a redevelopment involving all of the terrace and that he sold when he realized that a redevelopment was not feasible and to a purchaser who was purchasing other contiguous houses in the terrace. He also confirmed that he owned other real estate which he was prepared to sell to the vehicle to go public to increase its size.

5. SUBMISSION ON BEHALF OF THE TAXPAYER

5.1 Counsel referred the Board to Simmons (as Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 1 WLR 1196. Having read the headnote Counsel read the first paragraph of page 1197 of the report,

less the first sentence, and the sentence at letter B on page 1202. Counsel submitted that those extracts set out the relevant law.

5.2 Counsel stated that from the evidence the Board would be satisfied that the Taxpayer had spent the best part of five years endeavouring to set up a redevelopment and that from October 1978 until K Ltd relinquished its authority to represent the owners in October 1984, that Mr X was single-mindedly behind a redevelopment.

5.3 Counsel reminded the Board that even after K Ltd stepped down Mr X still tried to buy house 1. In between times there had been an opportunity for him to sell. Counsel submitted that the evidence established that the Taxpayer intended to retain the properties and it was not until Mr X lost heart, towards the end of 1984, that this concept was abandoned.

5.4 Counsel conceded that the intention to redevelop was not sufficient for the appeal to succeed. It was for the Taxpayer to prove that its intention was to redevelop and retain the redevelopment for investment. Counsel submitted that the Board should accept the evidence that the Taxpayer's interest in the redevelopment was to be retained as assets to back the intended floatation. Mr X had said that he hoped to follow the precedent of the floatation of G Ltd with which he had been associated as shown in G Ltd's prospectus. Counsel drew the Board's attention to the fact that G Ltd had had no track record: it had been purchased off the shelf a few days before the prospectus was issued.

5.5 Counsel submitted that the use of the Taxpayer as a vehicle for floatation was not ridiculous. Even so, had another company been needed the properties could have been assigned by the Taxpayer to the proposed public company and its investment in the redevelopment substituted by the shares received in consideration therefor. Counsel suggested that the Board would have no difficulty in being satisfied that Mr X wanted a public company which he could control and whichever method was adopted, had the project gone ahead, he would have controlled the public company.

5.6 Counsel stated that it was clear from the evidence that the intention all along had been to acquire the properties as an investment and whether for the Taxpayer or as an asset of a public company. Counsel referred the Board to the passage he had cited in the Simmons case:

> ' A permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation in trade whether the first investment is sold at a profit or at a loss.'

5.7 Counsel also referred to the other passage from page 1202 which had been cited and repeated this:

> ' Frustration of a plan for investment which compels realization, even if foreseen as a possibility, surely cannot give rise to an intention to trade.'

5.8 Counsel submitted that both the law and facts supported the Taxpayer: the purpose of the purchase of the properties was for investment.

5.9 Counsel referred to the cross-examination by the Revenue of Mr X with respect to the other companies. Counsel submitted that as none of these other companies was controlled by Mr X their activities were not analogous, the only possible exception being B Ltd. Counsel reminded the Board of Mr X's evidence as to this, namely that instead of using another personally owned company, he wanted his old friend Mr Y to be involved and he hoped that the one-third interest of C Ltd in the one floor of house 7 might assist in persuading G Ltd, a public company of which he was a director and shareholder, to join in.

5.10 In 1983 the shareholdings of Mr X's family in G Ltd were disposed of and it was at the time of this disposal that Mr X bought C Ltd's shareholding in B Ltd because the sale of G Ltd would have taken control of B Ltd away from Mr X and his wife. Counsel accepted that around about this time B Ltd wrote to the Commissioner saying that its intention was to sell its property in the terrace, but this was at a time when control of G Ltd was sold by Mr X and his family and was no longer wanted as a party to the redevelopment and the only alternative was for the Taxpayer to buy B Ltd's property and add it to its holding. The evidence as to B Ltd was consistent with the Taxpayer's case.

5.11 Counsel submitted that it was clear that Mr X, was the mind behind the Taxpayer and that he had done a lot of ground work on a redevelopment both before and subsequent to the meeting of owners in March 1980. The cross-examination as to his calculations had not shaken his original evidence that they were reasonable in that they assumed a reasonable interest rate and rental yield. It was also reasonable for Mr X to assume planning permission would be forthcoming, an access road made available whereby redevelopment would be viable. No evidence to rebut this had been adduced.

5.12 There was an abundance of evidence that Mr X did all he could to get a redevelopment off the ground. He only lost hope towards the end of 1984. The minutes of the meeting of the owners, the correspondence with surveyors etc all recorded his efforts and it could not be said that this contemporaneous evidence was unreliable. Counsel accepted that the evidence adduced at the appeal had not be placed before the assessor. At the time the matter was before the assessor only general arguments had been put forward. However the evidence adduced before the Board was not bogus. Counsel submitted that if the Board

accepted that the meetings took place and that the various parties had been approached by Mr X, or on his behalf, and became involved, the fact that the case at the appeal had not been put before the assessor should not have affect the outcome of the appeal.

5.13 The Taxpayer's intention was to hold the properties as an investment. Two offers had been received in October 1980, refer paragraph 4.2.3.8 above. However, there was no evidence that the Taxpayer tried to sell. By the time these letters were received the Taxpayer had already instructed others to communicate with the Building Authority. The Taxpayer never thought of selling. The Revenue had put to Mr X various price indices to endeavour to establish that Mr X's calculations were unreasonable and, Counsel submitted, the Taxpayer could rely on the data recorded trend which disclosed that the market continued to rise at least for one year after 1980.

5.14 The only relevant cross-examination as to Mr X's intention to float a public company was with respect to the suitability of the Taxpayer. The Taxpayer had been in business until it ceased in 1975 and remained dormant until revived in 1979. Mr X had already been through the floatation of G Ltd, which was a shelf company immediately before it was floated. There was no evidence from the Revenue that the Taxpayer could not be floated and, in any event, if it was decided that the Taxpayer was unsatisfactory it could either sell the properties for shares or, alternatively, its shares could have been sold to the vehicle to go public.

5.15 Counsel accepted that the Taxpayer's record prior to 1975 was that of a trader. Counsel also accepted that Mr X had been involved with the Taxpayer prior to 1975. However, there had been a clear break and the Taxpayer's activities prior to its reactivation was not relevant to the matter in issue. The intentions of Mr X in buying the properties was to acquire an asset for a company which could be floated but controlled by him.

5.16 Counsel also referred to the questioning of Mr X as to his other businesses. Counsel pointed out that none of these other businesses were wholly controlled by him. They were family companies with members holding an equal number of shares each with the other. These companies were not comparable to the Taxpayer.

5.17 Counsel requested the Board to allow the appeal.

6. SUBMISSION ON BEHALF OF THE REVENUE

The representative of the Revenue handed in a written submission which may be summarized as follows:

6.1 The Issue

The issue was whether the profits arising from the sale of the properties were chargeable to profits tax in terms of section 14 of the Ordinance. If the properties were a capital asset of the Taxpayer the profits were not taxable. Conversely, if the properties were trading stock of the Taxpayer the profits would be taxable. The question the Board had to determine was whether the acquisition and disposal of the properties amounted to an adventure in the nature of trade.

6.2 The Meaning of an Adventure in the Nature of Trade

6.2.1 The representative referred the Board to:

6.2.1.1 A Board of Review Decision in Case No D65/87, IRBRD, vol 3, 66 and read to the Board the first four paragraphs under the heading 'capital asset or adventure in the nature of trade' appearing on page 79 of the volume.

6.2.1.2 Marson v Morton [1986] STC 463 and read to the Board the passage commencing at letter J on page 470 and concluding with the paragraph next following the sub-paragraph numbered (9) on page 471, which passage set out the matters described by the learned Vice-Chancellor.

6.3 The 'badges of trading'

The representative then proceeded to apply the facts to each of the nine 'badges of trading'. His submissions were to the following effect:

6.3.1 Was the transaction a one-off transaction?

6.3.1.1 It was not correct to regard the acquisition and disposal of the properties as a one-off transaction. The Taxpayer had undertaken a trading transaction with respect to the pre-war building referred to in paragraph 4.2.1.2 above and had dealt in another property immediately prior to suspending its business in 1975. From its incorporation until 1975 it was not in dispute that the Taxpayer had been a property dealer. The fact that there had been a break in business activities from 1975 to 1979 was irrelevant. Further Mr X had been much associated with the company prior to 1975 as post-1979. Accordingly, Mr X provided a link between the Taxpayer's business before 1975 and after 1979. It was not correct to consider the Taxpayer's post-1979 activities in isolation.

6.3.1.2 The Board's attention was drawn to the fact that the first balance sheet for the Taxpayer prepared after the revival of its business in 1979, refer paragraph 4.3.6 above, showed that it owned 20% of the issued share capital of D Ltd and

50% of the issued share capital of E Ltd and that both of these companies were property dealers as opposed to investors.

6.3.2 Was the transaction in question in some way related to the trade which the Taxpayer otherwise carried on?

The Taxpayer could be regarded as a corporate vehicle used by Mr X to carry on his business activities whereby it was appropriate to ask what other business activities Mr X conducted. It was not clear from his evidence whether or not Mr X carried on any property investment activities in 1978 and 1979. However, the evidence showed that, as a director of F Ltd, he was involved in the redevelopment for sale of one property from at least 1973 to 1980 and to the extent that he was rewarded for his efforts in seeing that particular project to a satisfactory conclusion. The Taxpayer's purchase and sale of the properties was closely related to the development for sale carried on, through F Ltd by Mr X.

6.3.3 Nature of the subject matter

The properties were three-storey pre-war buildings producing very little rental income whereby it was not credible that the Taxpayer acquired them for rental income: the interest cost on the borrowing exceeded the rental income. The attraction was the redevelopment potential. Redevelopment potential is a neutral factor because a redevelopment could be for trading or investment purposes. However, the properties were in the middle of a terrace of pre-war buildings which did not abut on to a street. Both of these factors were apparent from a physical inspection of the site. Mr X, as an experienced property developer, would immediately know that the properties alone could not be redeveloped profitably and that the adjacent buildings would have to be an integral part of any redevelopment. As Mr X could not organize a redevelopment the only choice left was to sell. All of these factors collectively point to the properties having been acquired as trading stock as opposed to an investment asset.

6.3.4 Was the transaction carried through in a way typical of the trade in a commodity of that nature?

The Taxpayer acquired the properties through the agency of a broker and financed the acquisition by a bank loan. It attempted to acquire adjacent properties and it engaged architects and surveyors and then sold the properties through another broker. These actions were consistent with the operations of a person acquiring property as part and parcel of a trading activity.

6.3.5 The source of finance

A bank loan was obtained for 100% of the purchase price for a term of one and a half years. Mr X had admitted that the cost of a redevelopment would be financed by a bank loan. This was the method adopted with respect to the project undertaken by F Ltd, refer paragraph 6.3.2 above. It was clear that Mr X was following the same pattern.

6.3.6 Supplementary work

The Taxpayer could not put in any work because it failed to acquire the adjacent properties; the other owners could not be persuaded to participate. However, what was done is neutral for the same reasons previously advocated, refer paragraph 6.3.3 above.

6.3.7 Whether the asset acquired was sold in one lot or in broken lots

It was accepted that this 'badge' was not relevant to the appeal.

6.3.8 What was the intention as to resale at the time of purchase?

6.3.8.1 Mr X asserted that at the time of acquisition he intended to redevelop the properties for letting purposes. From the factors previously canvassed it was submitted that this assertion should be given very little weight. First, there was no contemporary evidence to support the assertion. Secondly, the yield calculation was prepared only after the notice of the hearing of the appeal was received, refer paragraph 4.3.21 above. Thirdly, the minutes of the meeting of the directors dated 7 February 1980 said that the subject properties were 'for letting purpose' and did not mention a redevelopment. Fourthly, the first balance sheet prepared after the purchase of the properties classified the properties as fixed assets but the evidential value of that classification was neutralized by the fact that the Taxpayer did not claim the rebuilding allowance under section 36 of the Ordinance whereby, for tax purposes, the properties were treated as trading stock.

6.3.8.2 The only documentary evidence close in time to the date of purchase of the properties was the meeting of the owners on 22 March 1980 and the draft joint development contract. Not much weight should be given to the draft as it was only prepared for discussion. The minutes were more important as they record the decisions of the owners. Paragraph 3 under the heading 'resolutions' lists three possibilities 'depending on which action is more beneficial and feasible'. One possibility reads:

> ' Jointly sell the property together with the design of [the architect] and the approved plans'.

This was actually done finally. None of the specified actions referred to letting. This documentary evidence reduced the credibility of Mr X's oral assertions.

6.3.8.3 Mr X had also said that the yield calculations was what he had in mind before A Ltd acquired the properties in October 1978. This was not credible.

6.3.8.3.1 In 1978 Mr X faced two important hurdles: first the consent of the owners of adjoining properties had to be obtained and; second, the actual location of the properties could delay redevelopment because of the required approvals from the Building Authority and the Fire Services Department, to name but two government departments. With that background how could Mr X reasonably expect that a redevelopment could be completed in one and a half years.

6.3.8.3.2 The properties were not situated in a high grade residential area. The map produced by the Taxpayer, refer paragraph 4.3.19 above, showed that the property was close to a low cost housing estate and immediately opposite houses 6 to 8 in the terrace was a factory. In view of those factors an estimate of $6 per square foot rental in one and a half year's time from 1978 was extremely optimistic and a rental of $10 per square foot was ridiculous.

6.3.8.4 Mr X had entirely ignored operating expenses such as rates and repairs and no interest was taken into account in his calculations. Mr X had assumed that the total bank loan of $10,600,000 would be fully repaid once the new building was completed but there was no indication as to where that money would come from. An investor in real estate would not calculate the yield in the way Mr X had.

6.3.8.5 The evidence that the intention to acquire the properties, redevelop and then float the Taxpayer were untenable as:

6.3.8.5.1 Mr X had in mind that there was a floatation requirement in 1978 for a vehicle to have had a trading record of several years. Whether or not that requirement actually existed in 1978 is not important. What is important is that if Mr X thought such requirements existed the Taxpayer would be unsuitable because it had been dormant for four years and had not even made up accounts in those four years.

6.3.8.5.2 The sale of the properties was completed in February and March 1986 the Taxpayer paid a dividend which represented 97% of the total profits from the sale of the properties and the Taxpayer had not acquired any property subsequently.

6.3.8.5.3 At the appeal Mr X had changed his reasons for acquisition and sale of the properties as given to the assessor. No explanation for this change had been

given and this was a matter for the Board to take into account in considering his credibility.

6.3.9 Did the item purchased provide enjoyment etc?

The properties were acquired for redevelopment. They did not provide any enjoyment by the Taxpayer or pride of possession and they did not produce income whilst owned as the interest cost exceeded the rental income.

6.3.10 Overall Picture

6.3.10.1 From the headnote in the Marson case:

> '... whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are presented in any given case.'

6.3.10.2 Taking together all of the matters referred to in the submission there could be but one proper finding, namely that the Taxpayer acquired the properties with the intention to redevelop them in conjunction with adjacent properties for sale after the redevelopment or sale if a redevelopment was not practical. Accordingly, the acquisition and disposal of the properties amounted to an adventure in the nature of a trade.

6.3.10.3 Reliance is not placed on any particular fact: whether it is trading or investing is determined from the overall impression. If the Board was satisfied that Mr X's intention was to redevelop for letting only then the appeal would have to be allowed. However, the Commissioner's case is that the evidence is insufficient to establish that intention. The more reasonable inference is that Mr X intended to redevelop for sale or sell if he could not organize a redevelopment. If the Board accepted the Commissioner's case then the transaction had to be treated as a trading transaction.

7. REPLY ON BEHALF OF THE TAXPAYER

7.1 Counsel accepted that he had no right to address on facts. However, he pointed out that certain things which had been included in the submission for the Revenue had not been put to Mr X. He referred to the comments made by the Revenue with respect to the minutes of the meeting of 20 March 1980, refer paragraphs 4.2.3.3 and 4.2.8.2 above. Counsel submitted that this interpretation had not been put to Mr X in cross-examination and therefore he was entitled to comment that the three options were there to keep the proposal alive as Mr X had stated in his evidence-in-chief.

7.2 The comments as to the location of the properties, refer paragraph 6.3.8.3.2 above. No questions had been put to Mr X by the Revenue on these comments.

The Board pointed out to Counsel that the document in question was his own document and that the comments made by the representative were apparent from information provided by that document.

7.3 Counsel then made the following points:

7.3.1 Because Mr X was involved in property dealing through other companies the Revenue sought to taint this transaction. It was submitted that it was incorrect for the Revenue to do this: the Taxpayer stood on its own and its activities had to be considered in isolation from Mr X's other activities.

7.3.2 As to the Taxpayer's investment in D Ltd and E Ltd, refer paragraph 6.3.1.2 above: even if it were correct to say that the Taxpayer held the investment for trading it would be trading in shares not property. In any event what a company's subsidiaries or associates do is irrelevant. However, the Revenue had not sought to question Mr X as to why the shares of these companies were held by the Taxpayer as opposed to himself personally.

7.3.3 Counsel then prayed in aid the Morton case and stated that the Board should stand back and ask if the Taxpayer was investing or doing a deal. The Taxpayer said it was not doing a deal. It was investing. Unless the Board was satisfied on balance of probabilities that at the time of purchase the Taxpayer intended to sell or trade in the properties the appeal would have to be allowed.

8. REASONS FOR THE DECISION

8.1 The Case before the Assessor

8.1.1 This appeal is another in which the facts upon which the Taxpayer relies were not disclosed to the assessor at the time the original assessment was made and it would appear that not one of the documents handed to the Board at the outset of the appeal had been seen by the Revenue prior to that time.

8.1.2 In his determination the Commissioner quotes extensively from correspondence exchanged between the assessor and those whom he describes as 'the former representatives', namely a letter dated 31 March 1987, and those he describes as 'the current representatives', namely letters dated 14 August 1987, 15 September 1987 and 12 November 1987. Although the full text of these letters was not before the Board, the Board accepts that if any material passage(s) had been omitted by the Commissioner its attention would have been drawn to those omissions by Counsel for the Taxpayer. The extracts quoted make no mention of the existence of the documents produced to the

Board or to the efforts of Mr X to seek to organize a redevelopment of the terrace. The Taxpayer did not volunteer any explanation for these omissions and the Revenue did not seek to obtain any explanation in cross-examination.

8.1.3 The Revenue did not seek to impugn the authenticity of any of the documents submitted by the Taxpayer to corroborate Mr X's evidence as to the history of the matter although the Board comments that the authenticity of several of the documents which originated from third parties would appear to be above suspicion.

8.2 The Duty of the Board

The Board is obliged to reach its decision on the facts which, on balance of probabilities, were established to its satisfaction even though the assessor's attention had not been drawn thereto.

8.3 The Law

8.3.1 There is no difference between the parties to this appeal as to the law. The parties accept that the frequently quoted passage from the speech of Lord Wilberforce in Simmons (as Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners [1980] 1 WLR 1196 at page 1199 has application.

8.3.2 The Board is required to decide whether, on the balance of probabilities, it is satisfied that the Taxpayer acquired the properties as an investment and maintained that intention until circumstances arose in which it was prudent to sell the investment, in which event the profits are not taxable.

8.3.3 There was no dispute that the onus of proof is on the Taxpayer.

8.3.4 In considering the evidence the Board has paid particular attention to the judgment of the learned Vice-Chancellor in the Marson case. The Board has considered the learned Vice Chancellor's 'badges' but finds that in this particular appeal there is nothing which would enable it to attach one or more of those badges to any particular aspect and, thereby, support the submission of the Revenue. In reaching its decision the Board has followed the advice of the learned Vice-Chancellor set out in the paragraph at letter 'g' on page 471 which reads:

> 'I emphasise again that the matters I have mentioned are not a comprehensive list and no single item is in any way decisive. I believe that in order to reach a proper factual assessment in each case it is necessary to stand back, having looked at those matters, and look at the whole picture and ask the question – and for this purpose it is no bad

thing to go back to the words of the statute – was this an adventure in the nature of trade? In some cases perhaps more homely language might be appropriate by asking the question, was the taxpayer investing the money or was he doing a deal?'

8.4 The Evidence

8.4.1 On the evidence adduced to the Board it is well documented, and there is no suggestion that any of the documents produced by the Taxpayer were bogus, that Mr X, whom the Board, in common with the Revenue, accepts as the mind behind the Taxpayer, both personally and in conjunction with Mr H, the owner of an adjacent property, sought to put together a redevelopment of not only the nine terraced houses but also the two detached houses with the same postal address. Although early on it would appear that Mr X accepted that the two owners of the detached house would not participate, he continued actively to promote a redevelopment of the houses in the terrace. This is established by a series of events which may be summarized as follows:

8.4.1.1 July 1979: instructing a chartered architect to make enquiries of the Building Authority as to the applicability of the building regulations to the terrace, refer paragraph 4.2.2 above.

8.4.1.2 March 1980: the meeting of the owners with a draft of an agreement for redevelopment for discussion, refer paragraph 4.2.3.3 above.

8.4.1.3 September 1981 to April 1982: correspondence associated with the redevelopment, refer paragraphs 4.2.4 and 4.2.5.1 above.

8.4.1.4 September 1982 to December 1982: correspondence with I Ltd, refer paragraph 4.2.5.2 above.

8.4.1.5 May 1983 to August 1983: correspondence with K Ltd.

8.4.1.6 July 1984: approach to an architect described as well connected with developers, refer paragraph 4.2.7.1 above.

8.4.1.7 August 1984: letter from Mr L, refer paragraph 4.2.7.2 above.

Although there are gaps between the various activities identified above, the Board accepts that it is necessary to recognize that the planning of a redevelopment is not an overnight thing; architects and engineers require time to examine sites to enable them to come up with a suitable proposal. In the view of the Board the gaps do not detract in any way from Mr X's evidence that he was consistently endeavouring to put together a redevelopment.

8.4.2 Relying on his vigorous cross-examination, the representative of the Revenue submitted that:

8.4.2.1 The intentions of the Taxpayer were established by the options recorded in paragraph 3 of the minutes of the meeting of those of the owners who attended the meeting on 20 March 1980, refer paragraph 6.3.8.2 above. The Revenue submitted that the three options noted, which read:

> ' i) that the owners invest jointly including jointly securing credit loans from a bank, and to bear the cost for redevelopment separately;
>
> ii) cooperate with a commercial developer to obtain fair and more favourable conditions;
>
> iii) jointly sell the property together with the design from [the architect] and the approved plans.'

were indicative of the fact that the Taxpayer had not determined to retain the properties as an investment.

The Board does not accept the Revenue's submission on this point: they accept the explanation put forward by Mr X as to the reasons for these three options being preserved, refer paragraph 4.2.3.5 above. It is perfectly understandable that a particular owner might not have the cash resources to meet his contribution to the cost of a redevelopment and even if he had the necessary borrowing power he might not be disposed to reducing the availability of that borrowing power by tying up some, if not all, in a redevelopment. Such an individual might be disposed to allowing a financier to acquire some part of the redevelopment which otherwise that owner would acquire if the financier were to meet his contribution to the overall cost.

Similarly, another owner might not have the desire to become an owner of real estate beyond his personal residence. When dealing with several properties, including individual buildings which are in multiple ownership, it must be recognised that each of the individual owners may have individual requirements. In the past redevelopments have taken place with the varying requirements of the various owners being satisfactorily accommodated.

8.4.2.2 The minutes in question indicate that the Taxpayer, or Mr X, was putting together a scheme which could be sold as a package to a developer with all of the owners thereby profiting from the proceeds of sale. Whilst this is a possibility, the Board notes that it was put to Mr X in cross-examination and firmly rejected. The Board accepts his rejection. Mr X gave evidence that he

endeavoured to acquire other houses, or parts thereof, in the terrace and he was conscientiously cross-examined on this. The Board is satisfied that, first, a floor in an adjacent building was acquired and, secondly, that Mr X did seek to acquire other buildings in the terrace. Whilst it was not specifically put to Mr X either in chief or under cross-examination, the tenor of his evidence did not rule out the possibility that had 'option iii', refer paragraph 8.4.2.1 above, become a reality, the Taxpayer could have been the purchaser of the package.

8.4.2.3 The motives of the Taxpayer were suspect as Mr X's purchase calculations were somewhat sketchy. It was also suggested, although it was not suggested that the document was fraudulent, that the calculations were prepared for the Board for the appeal. The evidence on this was that the document placed before the Board, refer paragraph 4.3.21 above, was a typescript of prior manuscript calculations. Mr X said that the manuscript calculations were done at the time he was considering the purchase of the properties, that these manuscript calculations had been retained by him and that the typescript was a consolidation of those figures into a more legible and orderly form, namely a form which would assist the Board in its perusal of his calculations. The Board accepts that the figures themselves do not constitute the comprehensive feasibility study which the directors of a major corporation might expect when being asked by its executive to consider a project. The Board accepts Mr X's evidence to this document. The transaction should be examined with knowledge that the 'mind' of the Taxpayer was that of Mr X who the Revenue accepted had considerable experience in real estate redevelopment. With this submission in mind, the Board accepts that the calculations in question were done when Mr X says they were done and that they were adequate for him to decide whether or not a redevelopment was, so far as he was concerned, financially viable.

8.4.2.4 The proceeds of sale were not reinvested but were distributed by way of dividend. Whilst the Board accepts that this could be a significant fact, it has to be recognized that by the time the sale of the properties was arranged economic conditions in Hong Kong were different to what they had been between 1980 and 1982. The Board is unable to accept that the shareholders of a company are obliged never to participate in a profit by way of dividend and, particularly, at a time when a prudent man might consider that the scope for enhancing a profit, and whether actual or on paper, by its substitution by another investment has been reduced by political or economic considerations.

8.4.2.5 As Mr X, the mutually agreed 'mind' of the Taxpayer, had a history of trading in real estate through corporations, the Taxpayer should be treated as no more than another of these personal trading corporations. With respect to the Revenue the Board does not accept this as a valid submission. There is no reason why an individual ought not to be able to carry on business both as an investor and trader in real estate, and whether personally or through wholly

owned corporations, refer Hudson v Wrightson 26 TC 55 and the passage at page 60:

> ' ... I entirely agree with the Solicitor-General in this - that a gentleman whose trade or business it is to deal in land may have a private investment in land ...'.

The onus is on the individual to establish the necessary interest throughout the period of ownership. Each case falls to be determined on the applicable evidence.

8.5 Conclusion

8.5.1 This particular appeal could be said to be 'different' in the sense that not only does the initial directors' meeting and the subsequent accounting treatment as to the properties indicate an intention to hold the properties as a fixed asset, save for the failure to reclaim the rebuilding allowance which in the present appeal the Board does not regard as material, but also there is considerable documentation as to the Taxpayer's attempts to put together a redevelopment. Whilst the Revenue were critical of the location of the properties, and particularly Mr X's calculations as to yields from a redevelopment of the properties, the fact of the matter is that in Hong Kong there is a decreasing availability of pre-war buildings for redevelopment and, additionally, environmental considerations are less important locally than they would be in other countries with more space and, perhaps, more clearly defined boundaries between industrial and residential areas. The area in question is a popular area and the proximity of low cost housing is not, in the opinion of this Board, of such significance as to detract from the credibility of Mr X's explanation of his actions.

8.5.2 The Taxpayer has satisfied the Board that:

8.5.2.1 The properties were acquired with a view to their redevelopment as part of a redevelopment of some part or all of the terrace;

8.5.2.2 Through the efforts of Mr X, considerable time and effort was devoted, and some expenditure incurred, in attempts to put together a package which would be satisfactory to the owners of the terraced houses as a whole; and

8.5.2.3 It was only when K Ltd pulled out, after Mr L had indicated that the two detached houses would have to form part of a redevelopment, that it was finally accepted that a redevelopment was not possible.

8.5.2.4 As the Revenue pointed out, the properties in their undeveloped state were not suitable for long term investment. This, however, is not a significant factor as

the reality is that in Hong Kong no pre-war residential building is likely to be suitable for investment per se. What they are suitable for is redevelopment. The Board does not consider the fact that, ultimately, a redevelopment could not take place must necessary impugn the genuineness of the Taxpayer's prior intention and the Board accepts that the nature of the asset was not altered by the subequent disposal.

9. DECISION

For the reasons given the Board allows this appeal and orders the assessment annulled.