Case No. D93/02

Profits tax – sale of a three-storey house erected on a piece of New Territories land – definition of 'trade' – whether chargeable to property tax – depends on whether the sale of a property is trading in nature – it is crucial to ascertain the intention of the taxpayer at the time of acquisition of the property – the stated intention of the taxpayer is not decisive – actual intention has to be tested against objective facts and circumstances – evidence is needed to substantiate the contention of the taxpayer – the circumstances and facts of the case cast doubt on the veracity of the taxpayer – burden of proof on the taxpayer – sections 2, 14(1), 16 and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Patrick Fung Pak Tung SC (chairman), Richard Anthony Glofcheski and Wong Chi Ming.

Date of hearing: 10 January 2002.
Date of decision: 29 November 2002.

This was an appeal by the taxpayer, an indigenous villager in the New Territories, against an assessment for profits tax in the sum of $281,160 for the year of assessment 1993/94 ('the Assessment') raised on him by the Commissioner arising out of his sale of a three-storey house ('the House') erected on a piece of land ('the Lot') in the New Territories. The Lot was assigned to the taxpayer, when he was 14 at a consideration of $1, from his father.

There was a dispute between the taxpayer and the Commissioner on the purpose of development of the Lot.

On the one hand, the taxpayer contended that he had originally intended to develop the Lot as accommodation for his own future family and the other members of his family and hence as a long term investment. However, eventually, by reason of financial difficulty, he was forced to sell the three-storey house, which was divided into three separate properties ('the Flats'), erected on the Lot.

On the other hand, the Commissioner argued that the taxpayer's intention was to develop the Lot and sell the Flats for profit.

The issue in the appeal was whether the taxpayer was liable to profits tax from the sale of the Flats by having entered into an adventure in the nature of trade (sections 14 and 2(1) of the IRO).

The facts appear sufficiently in the following judgment.

Held:

1. Section 14 of the IRO is the charging provision for profits tax.

2. Definition of 'trade' is set out in section 2 of the IRO.

3. Ascertainment of chargeable profits is provided by section 16(1) of the IRO.

4. It was well established by the decided cases in both England and Hong Kong that whether a taxpayer in selling a piece of property and making a profit was engaged in a trading activity thus rendering him liable to pay tax on such profit depended on his intention at the time of his acquisition of the property: per Lord Wilberforce in Lionel Simmons Properties Limited (in liquidation) v Commissioners of Inland Revenue [1980] 1 WLR 1196 at 1199.

5. This had been elaborated upon by Mr Justice Mortimer in Hong Kong in his oft-quoted judgment in the case of All Best Wishes Limited v Commissioner of Inland Revenue [1992] 3 HKTC 750 at 771. In a gist, he held that an intention to hold property as a capital investment must be definite. The stated intention of the taxpayer was not decisive. Actual intention had to be determined objectively.

6. Thus, the Commissioner and any tribunal in ascertaining the true intention of a taxpayer at the time of his acquisition of the asset in question must look at all the surrounding circumstances and draw an inference therefore.

7. Regarding the intention of the taxpayer, in this case, since the Lot was in effect given to the taxpayer by his father and the taxpayer had to apply for a building licence from the District Lands Office before he could build the House on the Lot, his intention must be ascertained at the time when he applied for the building licence and not when he took the assignment of the Lot, that is to say, in October 1991.

8. Further, the application by the taxpayer for a building licence in October 1991 and the completion of the erection of the House in March to June 1993 must be considered as part and parcel of the same process of developing the Lot.

9. The Board had come to the conclusion that the evidence all pointed one way to an intention on the part of the taxpayer to sell for profit the development on the Lot after its completion for the following reasons, which were not exhaustive but were sufficient for present purposes:

(a) As at 1993, the taxpayer was a young man in his mid-twenties. He had not shown that at that stage he had the financial ability to develop the Lot and keep the House for the use of himself and his family members.

(b) Indeed, in his testimony, the taxpayer admitted that his parents had paid all the construction fees, that it was his father who dealt with the builder and that he had very little to do with the process of development.

(c) On the evidence of the taxpayer, the maximum debt which he was able to give an account of amounted to about $2,600,000. Such debt could have been repaid by his selling two of the three flats. Yet, he sold all three flats. The Board did not believe the taxpayer's claim that he and his family were being harassed by loan sharks in respect of some unidentified debt incurred as a result of unidentified business activities.

(d) The House itself was designed not as a single house but as three separate and self-contained flats. This was at least a pointer to an intention to sell the three flats separately.

(e) The fact that the three flats were sold within about six months from the date of issue of the certificate of compliance and within about three months of the District Lands Office consenting to the sale of them was a very significant indication that the original intention of the taxpayer was to sell the flats for profit.

(f) The agreement for sale and purchase and the assignment in relation to the ground floor flat were very telling. It was to be noted that both documents bore the same date, 18 January 1994. Furthermore, the agreement for sale and purchase provided that a deposit of $568,000 was to be paid by the purchaser upon the signing thereof and that the balance of the purchase price in the sum of $852,000 was to be paid on the date of completion. The Board found that this was very strange bearing in mind the fact that both documents were supposed to have been signed on the same day.

(g) Furthermore, it was to be noted that the deed of mutual covenant was also dated 18 January 1994. This was very unusual and suggested that it must have been contemplated that there was to be no gap between the date of the agreement for sale and purchase and the date of completion. The deed of mutual covenant would most probably have been prepared some time before 18 January 1994.

(h) The agreement for sale and purchase and the assignment in relation to the first floor flat were even more telling. They also bore the same date, 28 January 1994. Again, as in the case of the ground floor flat, the agreement provided for payment of the purchase price in two instalments. Furthermore, the address of the purchasers was stated as being the first floor flat itself. That suggested that the purchasers were already occupying the first floor flat before the agreement for sale and purchase had been entered into. The taxpayer was questioned about this. His answer was: 'I could only remember that there is a person whose surname is [D] lived there but I really do not know much about the details.'

(i) The claim by the taxpayer that he had lived in the House before the sale thereof was open to doubt. He claimed to have occupied the House during the period from 'January 1993 to 17/01/1994'. It was quite clear however that as at January 1993 the House had not yet been completely erected. Furthermore, in his tax return for the year of assessment 1992/93 dated 3 June 1993, the taxpayer put down his residential address as '[Address C]'.

10. On all the evidence, the Board had come to the view that the probability was that it was the father of the taxpayer who had undertaken the development of the Lot by using his own resources. The Board suspected that the assignment of the Lot to the taxpayer in 1981 was in contemplation of one day utilizing the ability of the taxpayer as an indigenous villager to apply for permission to build a small house. It was, however, not necessary for the Board to come to any firm conclusion on this point.

11. As to the claim by the taxpayer that he had in fact suffered a loss of $1,972,600 as particularized in the relevant appendix A, none of the items therein was supported by any documentary or other evidence of any kind. In so far as an item that related to commission allegedly paid in the sum of $42,000, it was to be noted that under all the agreements for sale and purchase relating to the three flats, the estate agent's commission payable by the vendor was specified to be 'NIL'. Such circumstances indeed threw much doubt on the genuineness of the claim particularized in the said appendix A.

12. Regarding the taxpayer's claim that the land cost of the Lot should be assessed at $2,000,000 (see the relevant appendix A) or $1,260,000 (contained in the written submission of the representative of the taxpayer), no expert evidence on this part had been adduced by the taxpayer. On the other hand, the Commissioner had produced the evidence of the Commissioner of Rating and Valuation who assessed the land price to be $100,000 with vacant possession or with vacant possession

and contemplating the building of a small house thereon. The Board preferred the evidence of the latter.

13. In respect of the taxpayer's claim as to the worth of the 'Indigenous right', in the relevant appendix A, in item 2 therein, it was claimed that the 'Indigenous villager's right and introduction fee' was worth $1,000,000. In the said written submission of the representative of the taxpayer, the 'Indigenous right' was claimed to be worth $420,000. Again, no expert evidence had been adduced by the taxpayer in support. Furthermore, since such 'right' had not been alleged by the taxpayer to have been purchased at a price, no deduction could be claimed under section 16(1) of the IRO in the assessment of the profit made by the taxpayer.

14. Section 68(4) of the IRO provided that the burden of proving that the assessment appealed against was excessive or incorrect was on the appellant. The Board certainly did not think that the taxpayer had discharged such burden.

15. Having considered all the documentary evidence, the oral evidence of the taxpayer and the submissions of the parties, the Board had come to the conclusion that the taxpayer failed in this appeal.

16. The Board therefore dismissed the taxpayer's appeal and confirmed the determination of the Commissioner to the effect that the assessable profits should be $1,874,000 with profits tax payable by the taxpayer being $281,160.

Appeal dismissed.

Cases referred to:

Lionel Simmons Properties Limited (in liquidation) v Commissioners of Inland Revenue [1980] 1 WLR 1196
All Best Wishes Limited v Commissioner of Inland Revenue [1992] 3 HKTC 750

Tse Yuk Yip for the Commissioner of Inland Revenue.
Ko Kok Fai of Messrs Ko & Chow, Solicitors, for the taxpayer.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against an assessment for profits tax for the year of assessment 1993/94 ('the Assessment') raised on him by the Respondent ('the

Commissioner'). An objection was lodged by the Taxpayer against the Assessment. By his letter dated 16 March 2001 (which was re-directed on 6 April 2001), the Commissioner made a determination rejecting the Taxpayer's objection and revised the assessable profits from $1,500,000 to $1,874,400 with the consequence of the profits tax payable on the assessable profits being increased from $225,000 to $281,160. The Taxpayer has brought this appeal against such determination.

2. At the hearing, the Taxpayer was represented by Mr Ko Kok-fai of Messrs Ko & Chow, solicitors.

The facts

3. At the beginning of the hearing of appeal, Mr Ko on behalf of the Taxpayer informed the Board that the facts as stated in the determination had been agreed between both parties. In the circumstances, it is convenient for us to set out such facts and adopt them for the purpose of this decision:

> ' (2) The Taxpayer is an indigenous villager in the New Territories.
>
> (3) On 2 December 1981, a piece of land known as Sub-section 1 of Section A of Lot No. [XXXX] in Demarcation District [XX], New Territories ["the Lot"] was assigned to the Taxpayer at a consideration of $1.
>
> (4) By an application dated 19 October 1991, the Taxpayer applied to the District Land Office for building a small house on the Lot.
>
> (5) On 2 November 1992, the District Lands Office granted a Building Licence ["the Licence"] to the Taxpayer to erect on the Lot a small house of not more than three storeys. The Licence contained a restriction clause prohibiting the Taxpayer from assigning or disposing of the small house erected on the Lot unless –
>
> (i) a period of five years had elapsed from the date of issue of a Certificate of Compliance by the District Lands Office; or
>
> (ii) the Taxpayer had paid to the Government a premium to be determined by the District Lands Officer.
>
> (6) On 5 November 1992, District Lands Office issued to the Taxpayer certificates of exemption which were to exempt the building to be erected on the Lot from certain provisions and regulations of the Building Ordinance in respect of the site formation works, building works and drainage works.

(7) The Taxpayer erected on the Lot a small house ["the House"] consisting G/F, 1/F and 2/F and Roof. The House is also known as [Block 1, Garden A].

(8) By a letter dated 16 March 1993, the Taxpayer informed the District Lands Office that the construction of the House had been completed and applied for a Certificate of Compliance.

(9) On 25 June 1993, the District Lands Office issued to the Taxpayer a Certificate of Compliance certifying that all the positive obligations under the Licence had been complied with.

(10) By a letter dated 1 July 1993 to the District Lands Office, [Solicitors' Firm B], on behalf of the Taxpayer, applied for removing the five-year assignment restriction clause [Fact (5)] in the following terms:

> " We are further instructed that (the Taxpayer) intends to sell the said property by way of 3 equal undivided shares. We are therefore further instructed to apply to you for a modification of (the Licence) and shall be obliged if you would let us know the premium thereof."

(11) On 15 October 1993, the District Lands Office issued a letter to the Taxpayer consenting the assignment of the House on the condition that a premium of $725,600 was to be paid on or before 11 November 1993. The Taxpayer paid the premium on 15 October 1993.

(12) The Deed of Mutual Covenant in respect of the Lot was dated 18 January 1994.

(13) The Taxpayer sold all the three storeys of the House:

	Date of Agreement for Sale and Purchase	Date of Assignment	Sale Consideration/$
G/F and garden	18.01.1994	18.01.1994	1,420,000
1/F	28.01.1994	28.01.1994	1,280,000
2/F and Roof	29.01.1994	04.02.1994	1,500,000
			4,200,000

(14) On 14 March 2000, the Assessor raised on the Taxpayer the following 1993/94 Profits Tax assessment to assess the profit on disposal of the House:

	$
Estimated Assessable Profits	1,500,000

Tax Payable thereon	225,000

(15) Ko & Chow, Solicitors ["the Representatives"], on behalf of the Taxpayer, objected against the assessment on the ground that the profit arising from the sale of the House was a capital gain not chargeable to profits tax and alternatively that the estimated assessable profits were excessive.

(16) The Representatives provided a profit and loss account [Appendix A] in respect of the development and sale of the House showing a loss of $1,972,600.

(17) The Representatives provided the following information:

(a) The construction cost was financed by loans from friends and relatives. There was no written loan agreement.

(b) The loans obtained from friends and relatives were repaid by sales proceeds of the House.

(18) The Representatives put forward the following contentions:

(a) "(the Taxpayer) applied to the Government for the approval of the building a small village house on the land. The purposes of the said application:

(i) to obtain a living place for (the Taxpayer) and his family to live within the village which (the Taxpayer)'s family belongs.

(ii) to exercise his right of building one small village house during his lifetime."

(b) "later, (the Taxpayer) faced financial problem and need money to repay the building costs. He decided to sell the small house."

(c) "… (the Taxpayer) at the outset could finance the building in the majority parts but with a small part from the personal loans from relatives. Having built (the House), (the Taxpayer) moved into (the House) to live. Then, (the Taxpayer) faced financial difficulties (A subsequent event). The original intention in making application to the District Lands Office is long term holding and capital in nature which intention was forced to change due to subsequent financial difficult (sic)

of (the Taxpayer). The financial difficult (sic) happened several years after the application to build (the House) for long term holding and after the completion of the building works of (the House)."

(d) "… (The House) has been completed and resided by (the Taxpayer) long before the issuance of the Letter of Compliance. Moreover, (the Taxpayer) owns the land since 1981 which is a much longer time than the completion of (the House). … **Even if your argument that (the Taxpayer) own (sic) (the House) of a short time and thus a trading is implied is correct, which is expressly denied, the trading element is only restricted on (the House) but not the land.** (The Taxpayer) owns the land for more than 10 years and any gain in value must be capital in nature. Therefore the element of land (i.e. the market value of the land as when (the House) was sold) must be deducted. (The Taxpayer) takes the view that the market value of the land as when (the House) was sold is HK$1,000,000 must be deducted."

(e) The residential addresses of the Taxpayer since 1 April 1991 were:

" 01/04/1991 to about January 1993
[Address C] (about 400 sq. ft.)

January 1993 to 17/01/1994
[Block 1, Garden A] (about 2,100 sq. ft.)

18/01/1994 to 03/02/1994
2/F., [Block 1, Garden A] (about 700 sq. ft.)

04/02/1994 to 16/11/1997
[Address C] (about 400 sq. ft.)

17/11/1997 to now
G/F., [Block 2, Garden A]"

(19) Despite requests by the Assessor, the Taxpayer has not provided the following information in respect of the loans allegedly obtained by the Taxpayer to finance the construction of the House:

(a) the names and addresses of the lenders;

(b) the amounts of the loans;

(c) the dates on which the loans were made;

(d) the account number of the bank account into which the loans were deposited; and

(e) the amounts and dates of the loan repayments and the account number of the bank account from which the requested funds were withdrawn.

(20) The Assessor has ascertained the following information:

(a) In his 1992/93 tax return dated 3 June 1993, the Taxpayer declared that his residential address was "[Address C]".

(b) The Taxpayer was charged to salaries tax in respect of the following income:

Year of Assessment	Amount of Income/$
1991/92	56,899
1992/93	56,869
1993/94	68,694

(21) The Commissioner of Rating and Valuation advised the Assessor that the market value of the Lot as at 19 October 1991 was $100,000.

(22) The Assessor now proposes to revise the 1993/94 Profits Tax assessment as follows:

	$	$
Total sale proceeds of the House [Fact (13)]		4,200,000
Less: Land at valuation [Fact (21)]	100,000	
Land premium [Fact (11)]	725,600	
Construction costs and other expenses	1,500,000	2,325,600
Assessable Profits		1,874,400
Tax thereon		281,160'

4. In addition to the facts as agreed between the parties and as set out in paragraph 3 above, the following facts as appear from the oral evidence given by the Taxpayer at the hearing of the appeal are also relevant:

(a) At the hearing of the appeal, the Taxpayer was aged 34 years. Thus, as at 1981, when the Lot was assigned to him, he would be aged about 14 years.

(b) The Lot was in effect given to the Taxpayer by his father.

The law

5. Section 14(1) of the IRO reads as follows:

> '***14. Charge of profits tax***
>
> *(1) Subject to the provisions of this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year form such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'*

Section 2 of the IRO defines 'trade' as follows:

> *' "trade" (行業、生意) includes every trade and manufacture, and every adventure and concern in the nature of trade'*.

6. The relevant part of section 16(1) of the IRO provides as follows:

> '***16. Ascertainment of chargeable profits***
>
> *(1) In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part for any period …'.*

7. It is well established by the decided cases in both England and Hong Kong that whether a taxpayer in selling a piece of property and making a profit is engaged in a trading activity thus rendering him liable to pay tax on such profit depends on his intention at the time of his acquisition of the property. Thus in the case of Lionel Simmons Properties Limited (in liquidation) v Commissioners of Inland Revenue [1980] 1 WLR 1196 at 1199, Lord Wilberforce stated the test as follows:

> *' One must ask, first what the Commissioners were required or entitled to find. Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing it as a profit, or was it acquired as a permanent investment?'*

This has been elaborated upon by Mr Justice Mortimer in Hong Kong in his oft-quoted judgement in the case of All Best Wishes Limited v Commissioner of Inland Revenue [1992] 3 HKTC 750 at 771 as follows:

> *' The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realizable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'*

Thus, the Commissioner and any tribunal in ascertaining the true intention of a taxpayer at the time of his acquisition of the asset in question must look at all the surrounding circumstances and draw an inference therefore.

The case of the Taxpayer

8. The case of the Taxpayer can be summarised as follows:

(a) He had originally intended to develop the Lot by building the House thereon as accommodation for his own future family and the other members of his family and hence as a long-term investment. Hence, no profits tax should be levied.

(b) After he had finished developing the Lot, he got into financial difficulty and was forced to sell all three flats in the House.

(c) He had actually suffered a loss in the sum of $1,972,600 (as particularized in appendix A to the determination) in developing and selling the three flats.

(d) Even if it was found that the Taxpayer should be held to be liable to pay profits tax, the total selling price of the three flats should be assessed at $2,520,000 and not $4,200,000 because 30% thereof should be deducted as the value of the Lot and 10% thereof should be deducted for the Taxpayer's 'indigenous right'.

The case of the Commissioner

9. The Commissioner contends that in all the circumstances it is clear that the Taxpayer always intended to develop the Lot and sell the flats for profit and has advanced arguments against those of the Taxpayer as summarised in paragraph 8 above.

Our finding

10. Having considered all the documentary evidence, the oral evidence of the Taxpayer and the submissions of the parties, we have come to the conclusion that the Taxpayer fails in this appeal. We set out our reasons below.

11. We deal first with the intention of the Taxpayer. In this case, since the Lot was in effect given to the Taxpayer by his father and the Taxpayer had to apply for a building licence from the District Lands Office before he could build the House on the Lot, his intention must be ascertained at the time when he applied for the building licence and not when he took the assignment of the Lot, that is to say, in October 1991.

12. Further, the application by the Taxpayer for a building licence in October 1991 and the completion of the erection of the House in March to June 1993 must be considered as part and parcel of the same process of developing the Lot.

13. We have come to the conclusion that the evidence all points one way to an intention on the part of the Taxpayer to sell for profit the development on the Lot after its completion for the following reasons:

(a) As at 1993, the Taxpayer was a young man in his mid-twenties. He has not shown that at that stage he had the financial ability to develop the Lot and keep the House for the use of himself and his family members.

(b) Indeed, in his testimony, the Taxpayer admitted that his parents had paid all the construction fees, that it was his father who dealt with the builder and that he had very little to do with the process of development.

(c) On the evidence of the Taxpayer, the maximum debt which he was able to give an account of amounted to about $2,600,000. Such debt could have been

repaid by his selling two of the three flats. Yet, he sold all three flats. We do not believe the Taxpayer's claim that he and his family were being harassed by loan sharks in respect of some unidentified debt incurred as a result of unidentified business activities.

(d) The House itself was designed not as a single house but as three separate and self-contained flats. This is at least a pointer to an intention to sell the three flats separately.

(e) The fact that the three flats were sold within about six months from the date of issue of the certificate of compliance and within about three months of the District Lands Office consenting to the sale of them is a very significant indication that the original intention of the Taxpayer was to sell the flats for profit.

(f) The agreement for sale and purchase and the assignment in relation to the ground floor flat are very telling. It is to be noted that both documents bear the same date, 18 January 1994. Furthermore, the agreement for sale and purchase provided that a deposit of $568,000 was to be paid by the purchaser upon the signing thereof and that the balance of the purchase price in the sum of $852,000 was to be paid on the date of completion. We find that this is very strange bearing in mind the fact that both documents were supposed to have been signed on the same day.

(g) Furthermore, it is to be noted that the deed of mutual covenant is also dated 18 January 1994. This is very unusual and suggests that it must have been contemplated that there was to be no gap between the date of the agreement for sale and purchase and the date of completion. The deed of mutual covenant would most probably have been prepared some time before 18 January 1994.

(h) The agreement for sale and purchase and the assignment in relation to the first floor flat are even more telling. They also bear the same date, 28 January 1994. Again, as in the case of the ground floor flat, the agreement provided for payment of the purchase price in two instalments. Furthermore, the address of the purchasers is stated as being the first floor flat itself. That suggests that the purchasers were already occupying the first floor flat before the agreement for sale and purchase had been entered into. The Taxpayer was questioned about this. His answer was: 'I could only remember that there is a person whose surname is [D] lived there but I really do not know much about the details.'

(i) The claim by the Taxpayer that he had lived in the House before the sale thereof is open to doubt. He claims to have occupied the House during the period from 'January 1993 to 17/01/1994' (see fact (18)(e) in paragraph 3 above). It is quite clear however that as at January 1993 the House had not yet been completely erected. Furthermore, in his tax return for the year of assessment 1992/93 dated 3 June 1993, the Taxpayer put down his residential address as '[Address C]' (see fact (20) in paragraph 3 above).

14. The reasons set out above in relation to the intention of the Taxpayer are not exhaustive but are sufficient for present purposes.

15. On all the evidence, we have come to the view that the probability is that it was the father of the Taxpayer who had undertaken the development of the Lot by using his own resources. We suspect that the assignment of the Lot to the Taxpayer in 1981 was in contemplation of one day utilizing the ability of the Taxpayer as an indigenous villager to apply for permission to build a small house. It is, however, not necessary for us to come to any firm conclusion on this point.

16. We next deal with the claim by the Taxpayer that he had in fact suffered a loss of $1,972,600 as particularized in the said appendix A. None of the items therein is supported by any documentary or other evidence of any kind. Item 13 relates to commission allegedly paid in the sum of $42,000. It is to be noted that under all the agreements for sale and purchase relating to the three flats, the estate agent's commission payable by the vendor is specified to be 'NIL'. Such circumstances indeed throw much doubt on the genuineness of the claim particularized in the said appendix A.

17. Next, we deal with the Taxpayer's claim that the land cost of the Lot should be assessed at $2,000,000 (see the said appendix A) or $1,260,000 (see paragraph 2(l) of Mr Ko's written submission). No expert evidence on this part has been adduced by the Taxpayer. On the other hand, the Commissioner has produced the evidence of the Commissioner of Rating and Valuation who assessed the land price to be $100,000 with vacant possession or with vacant possession and contemplating the building of a small house thereon. We prefer the evidence of the latter.

18. Finally, we deal with the Taxpayer's claim as to the worth of the 'Indigenous right'. In the said appendix A, in item 2, it is claimed that the 'Indigenous villager's right and introduction fee' is worth $1,000,000. In the said written submission of Mr Ko, the 'Indigenous right' is claimed to be worth $420,000. Again, no expert evidence has been adduced by the Taxpayer in support. Furthermore, since such 'right' has not been alleged by the Taxpayer to have been purchased at a price, no deduction can be claimed under section 16(1) of the IRO in the assessment of the profit made by the Taxpayer.

Conclusion

19. Section 68(4) of the IRO provides that the burden of proving that the assessment appealed against is excessive or incorrect is on an appellant. We certainly do not think that the Taxpayer has discharged such burden.

20. We therefore dismiss the Taxpayer's appeal and confirm the determination of the Commissioner to the effect that the assessable profits should be $1,874,400 with profits tax payable by the Taxpayer being $281,160.