

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D99/98

Profits tax – acquisition and sale of properties – intention of purchaser at time of acquisition – burden of proof on purchaser – whether tax chargeable on the profits of sale – section 68(4) of Inland Revenue Ordinance.

Panel: Robert Wei Wen Nam SC (chairman), Mathew Ho Chi Ming and Michael Neale Somerville.

Dates of hearing: 22 and 25 May 1998.

Date of decision: 22 October 1998.

The taxpayer purchased and sold three properties (Properties A, B and C) during the years of assessment 1990/91 and 1991/92. The assessor was of the view, which was accepted by the Commissioner, that the purchase and sale of the said properties amounted to ‘adventures in the nature of trade’ and raised profits tax assessments for the year of assessment 1990/91 in the amount of \$21,000 for Property A and for the year of assessment 1991/92 in the amount of \$270,000 for Properties B and C. At a later stage, the assessor revised the profits tax assessment for the year of assessment 1991/92 to \$133,079 as it was accepted that Property C was purchased by the taxpayer’s wife and any profit derived was not profit of the taxpayer.

The taxpayer appealed to the Board. He stated that there had never been any intention of trading as the properties had all been purchased for long-term investment. In any event, the assessable profits were excessive. The taxpayer further argued:

- (1) Property A was originally purchased to accommodate his first child. He sold it to purchase Property C because he had wanted to live near his parents in another district and there were facilities for children at Property C;
- (2) Property B was purchased by the taxpayer on behalf of his brother-in-law who had insufficient income proof to obtain a mortgage loan. It was sold because it was found to be unaffordable to his brother-in-law;
- (3) After having purchased Property C, it was sold because the taxpayer was planning for a larger family, wanted improved living standards and cleaner air in another district of Hong Kong. It was also registered in his wife’s name.

In the course of deliberating, the Board laid down the following principles:

- (1) The onus was on the taxpayer to prove that:

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- (a) Property A was acquired as a long-term investment;
 - (b) Property B was acquired by the taxpayer, on behalf of his brother-in-law, as a long term investment
- (2) The stated intention of the taxpayers, although of great weight, is not decisive but must be viewed in the light of the whole of the surrounding circumstances (All Best Wishes Limited v CIR 3 HKTC 750, 771 per Mortimer J, followed);
- (3) ‘Intention’ connotes having the volition, means and determination to enable such intention to be implemented (D11/80, IRBRD, vol 1, 374). A person cannot be said to ‘intend’ a particular result if his volition is no more than a minor agency collaborating with, or not thwarted by, the factors which predominantly determine its occurrence (Cunliffe v Goodman [1950] 2 KB 237,253 per Asquith LJ);
- (4) A long-term investment is a capital asset and not a trading asset. Profits arising from the sale of a capital asset is not taxable while profit arising from a sale of a trading asset is taxable. It is not possible for an asset to be both trading stock and a long term investment. Trading requires an intention to trade (Simmons v CIR 53 TC 461, 491 per Lord Wilberforce).

Held by the Board, after hearing and observing the taxpayer:

Property A

- (1) The taxpayer had only held the property for 3 months. Although he had inspected the premises on a number of occasions, knowing that it had a lack of facilities for children, one would have expected him to have taken this into account before the purchase;
- (2) Property C was said to have also been purchased for long term investment yet the taxpayer never lived in either of the premises preferring to live in rent-free accommodation provided by his employers. The overall picture was inconsistent with a long-term investment intention towards Property A or Property C;
- (3) The Board was not impressed by the reasons given by the taxpayer in attempting to advance his case, thus, the taxpayer failed to prove on a balance of probabilities that he acquired Property A as a long-term investment. The Board was of the view that it was acquired with the intention of it being sold at a profit.

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Property B

- (4) Since the taxpayer claimed that he purchased the property on behalf of his brother-in-law, the onus was on the taxpayer to prove the existence of a trust in the absence of a declaration of trust or a document evidencing the existence of a purported trust;
- (5) Although various documents were presented to the Board purporting to demonstrate the breakdown of both payments made by the brother-in-law towards the purchase price of Property B and receipts of sale proceeds by the brother-in-law after the property was sold, there were too many inconsistencies in the information provided. A serious doubt was cast as to the credibility of the brother-in-law;
- (6) The Board was not satisfied, on the evidence, that the cost of purchase of Property B was met by the brother-in-law or that the net proceeds of sale were paid over to him. Further, there was no clear evidence of the existence of a trust. Hence, the taxpayer had failed to discharge its burden of proof under section 68(4) of the IRO that he purchased Property B on behalf of the brother-in-law;
- (7) The Board found that the fact that the property was sold only 9 days after being assigned to the taxpayer was inconsistent with a long-term investment intention towards Property B. The taxpayer had purchased the property for his own benefit.

Obiter

If the taxpayer had been found to have purchased the property on behalf of his brother-in-law, any trading profit derived from the sale of the property should be assessed to the taxpayer as trustee because he was more than a mere nominee – his trading activities embraced purchase, financing and sale (D37/93, IRBRD, vol 8, 304 considered).

Appeal dismissed.

Cases referred to:

Simmons v CIR 53 TC 461
All Best Wishes Ltd v CIR 3 HKTC 750
Cunliffe v Goodman [1950] 2 KB 237
D11/80, IRBRD, vol 1, 374
D37/93, IRBRD, vol 8, 304

Chu Wong Lai Fun for the Commissioner of Inland Revenue.

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Taxpayer in person.

Decision:

Nature of appeal

1. This is an appeal by an individual (the Taxpayer) against the profits tax assessments raised on him for the years of assessment 1990/91 and 1991/92. The Taxpayer contends that the profits derived from the sale of two properties (Property A and Property B) are not assessable to tax.

Facts

2. The following facts are agreed or not in dispute.

2.1 On 17 December 1988, the Taxpayer purchased a property at District H (Property G) for \$557,000.

2.2 In March 1989, the Taxpayer sold Property G for \$610,000.

2.3 From 1 April 1989 onwards, the Taxpayer resided in quarters in District I (Property D) with rent borne by his employer.

2.4 On 2 September 1989, the Taxpayer got married.

2.5 On 9 August 1990, the first child, a daughter, was born.

2.6 On 11 August 1990, the Taxpayer purchased from the developer Property A, a flat in a building in District I, for \$943,730. Property A was still under construction.

2.7 On 15 October 1990, an occupation permit for Property A was issued.

2.8 On 16 November 1990, the Taxpayer entered into an agreement to sell Property A for \$1,110,000. The sale was completed on 4 December 1990 with the Taxpayer acting as a confirmor.

2.9 On 1 December 1990, the Taxpayer purchased from the developer Property B, a flat at Private Housing Estate J, District K, for \$997,000. The purchase price was to be settled as follows:

(i)	Reservation fee on 1 December 1990	\$30,000
(ii)	Part payment of deposit on or before 4 December 1990	69,700

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Balance (90%) of purchase price within 7 days after signing the formal sale and purchase agreement	<u>897,300</u>
	<u>\$997,000</u>

Property B was at that time still under construction.

2.10 On 1 December 1990, the Taxpayer's wife (the Wife) purchased from the developer another flat in Private Housing Estate J, District K (Property C) for \$1,228,500. Property C was still under construction.

2.11 On 10 December 1990 the Taxpayer took out a loan of \$897,300 to finance the purchase of Property B. The loan and interests thereon were repayable by 120 monthly instalments of \$12,108 each.

2.12 In mid-1991, the Taxpayer moved to quarters at District L (Property E) with rent borne by his employer.

2.13 On 11 September 1991, the Wife entered into an agreement to sell Property C for \$2,095,000. The sale was completed on 23 January 1992 with the Wife acting as a confirmor.

2.14 In February 1992, the Taxpayer changed his employment.

2.15 On 20 February 1992, Property B was assigned to the Taxpayer.

2.16 On 29 February 1992, the Taxpayer entered into a provisional agreement to sell Property B for \$2,050,000. The selling price was to be received in the following manner:

	\$
(i) Deposit on 29 February 1992	100,000
(ii) Further deposit on 10 March 1992	105,000
(iii) Balance of selling price on 8 April 1992	<u>1,845,000</u>
	<u>2,050,000</u>

The sale was completed on 8 April 1992 when Property B was assigned to the purchaser.

2.17 From 1 April 1992 onwards, the Taxpayer was provided with the same quarters as Property E at District L with rent borne by his new employer.

2.18 On 15 August 1993, the Taxpayer's second child, a son, was born.

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2.19 On 22 November 1993, the Taxpayer's brother-in-law registered his marriage.

Objections to assessments

3. The assessor was of the view that the purchase and sale of Properties A, B and C amounted to adventures in the nature of trade and raised on the Taxpayer the following profits tax assessments for the years of assessment 1990/91 and 1991/92:

	1990/91	1991/92
Assessable profits	<u>\$140,000</u>	<u>\$1,800,000</u>
Tax payable thereon	<u>21,000</u>	<u>270,000</u>
Properties assessed	Property A	Properties B and C

4. By a letter dated 6 April 1995, the Taxpayer objected to the assessments on the grounds that there was no intention of trading and that in any event the assessable profits were excessive. The letter was to the following effect:

4.1 Property A

'Purchased for accommodating the first child, who was born in August 1990. Sold in order to live near [the Taxpayer's] parents (who lived in District H) and elected for housing with facilities for children (such as club, swimming pool, playground), hence chose [Property C].'

4.2 Property B

'Purchased on behalf of [the Taxpayer's] brother-in-law (the Brother-in-law), who wished to buy his matrimonial home next to [the Taxpayer's]. However, as a sole proprietor and his business was still at a developing stage, [the Brother-in-law] had then no acceptable income proof to obtain mortgage loan. The Brother-in-law subsequently sold [Property B] in anticipation of a downturn in his business, coupled with increasing living costs after marriage in mid-1991. [The Brother-in-law] bought a cheaper home in District I in 1992.'

4.3 Property C

'Purchased in December 1990 for reasons in [paragraph 4.1] above. Sold for moving to District L, in preparing for further expansion of family size (second child born in mid-1993). Living in District L is considered to be more suitable because of its resort type of housing standards, which helps relieve the breathing problems that [they] have. Further [they] are able to live in a bigger

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unit as the rental cost is lower, thereby enabling [them] to employ a Filipino maid to help so that (the Wife) can resume working.'

Correspondence with the assessor

5. By a letter dated 28 February 1996, the Taxpayer made statements to the assessor to the following effect:

5.1 The purchase of Properties A, B and C was financed by bank loans to the maximum extent of 90% of their respective purchase prices.

5.2 As no business records were maintained, he could not provide any profit and loss statements showing the gains on disposal of Properties A, B and C.

5.3 The Taxpayer had resided in Property D since 1989. In mid-1991, he moved to Property E and resided in it up to mid-1993.

5.4 The floor areas and number of rooms of Properties A to E were as follows:

Property	Floor area (square feet)	No. of rooms
A	653	2 (could be expanded to 3)
B	641	2
C	776	3
D	500	2
E	1,068	4

5.5 He had inspected Property A and its surrounding environment a few times before the purchase.

5.6 The Brother-in-law was Mr M. At all relevant times, he was running a sole-proprietorship business in the name of Company O.

5.7 The Brother-in-law was responsible for paying the purchase price of Property B as well as repayments of the loan. However, he was from time to time supported by his close friends and relatives including the Taxpayer and the Wife. Upon the sale of Property B, part of the sale proceeds was used to repay his personal borrowings and to meet his marriage expenses while the balance was turned over to him. The Taxpayer however could not provide any documentary evidence to show the movement of funds after extensive searching.

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6. By a letter dated 23 August 1996, the Brother-in-law made the following allegations in reply to the assessor's enquiries:

6.1 Property B was purchased for his benefit, as his matrimonial home.

6.2 He paid the initial deposit of \$61,006.25 (his contribution) for Property B on 22 December 1990.

6.3 He paid the following monthly contributions on the loan:

Date	Amount
	\$
11-1-1991	6,756.77
13-2-1991	6,756.77
15-3-1991	6,756.77
12-4-1991	6,756.77
11-6-1991	6,756.77
11-6-1991	6,756.77
30-7-1991	6,756.77

All the funds were drawn from Company O.

6.4 He was not able to meet either the deposit or the monthly repayments by himself and was heavily indebted to his friends and relatives who were keen to see that he could acquire Property B as his matrimonial home. Accordingly on sale of the property the sale proceeds were used largely to repay the debts owed as well as paying for various marriage expenses (the wedding banquet was arranged in July 1991). Balance of the money amounting to \$49,104 were received on 16 September 1991.

6.5 He sole Property B and purchased instead another flat (Property F) in March 1992 for \$855,000 for the following reasons:

- (i) He found it difficult to meet the monthly loan instalments of Property B and his friends and relatives were exhausted in supporting him. On the other hand, Property F was more affordable with monthly loan instalments of \$6,250.24 only.
- (ii) Upon inspection of Property B in early 1992, he found that it had a cemetery view and he was asked by his parents, his wife and in-laws to dispose of Property B.

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7. By a letter dated 15 March 1997, the Brother-in-law gave the following explanations in reply to the assessor's further enquiries:

7.1 He was the only beneficial owner of Property B.

7.2 The shortfalls of the downpayment of \$38,693.75 (\$99,700 - \$61,006.25) (see paragraphs 2.9 and 6.2 above) and of the monthly instalment of \$5,351.23 (\$12,108 - \$6,756.77) (see paragraphs 2.11 and 6.3 above) were mainly financed by the Wife and another sister, Ms N. There were no loan agreements and the borrowings were interest free and repayable on demand.

7.3 As he had no steady income, the loan was obtained by the Taxpayer on his behalf and was on the best terms obtainable.

7.4 He was sorry for the error regarding the sum of \$49,104 mentioned in paragraph 6.4 above, because he did not have a detailed record of his non-business transaction. It was in fact money advanced to him by his relatives. The acquisition of Property B was not his trading business and accordingly no detailed records were kept. The proceeds were applied firstly to repay the mortgage loan, secondly to repay his borrowings from his relatives (whether for the mortgage or for the wedding) and lastly to meet the down payment and related expenses of his second matrimonial home at Property F in March 1992, totalling \$360,000.

8. The assessor has since ascertained the following:

8.1 The Taxpayer has two children, a daughter born on 9 August 1990 and a son born on 15 August 1993.

8.2 The Brother-in-law registered his marriage on 22 November 1993.

8.3 During the years ended 31 March 1990 to 1993, the Brother-in-law derived the following assessable profits from Company O.

Year of assessment	Assessable profits \$
1989/90	83,812
1990/91	138,177
1991/92	139,890
1992/93	200,576

At all material times, the Brother-in-law did not have any income except from Company O.

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Proposed revision of the 1991/92 assessment

9. The assessor was not satisfied that Property B was purchased by the Taxpayer on behalf of the Brother-in-law and maintain her view that the profits derived by the Taxpayer from the sale of Properties A and B should be chargeable to tax. She however agreed that the profit on sale of Property C was not profit of the Taxpayer because the property was purchased by the Wife. By letter dated 21 July 1997, she issued a proposed computation to the Taxpayer suggesting that the profits tax assessment for the year of assessment 1991/92 should be revised as follows:

	\$	\$
Selling price to Property B		2,050,000
Less: Purchase price	997,000	
Legal fee on purchase	22,500	
Stamp duty	14,955	
Mortgage interest	113,000	
Legal fee on sale	<u>15,350</u>	
Revised assessable profits		<u>1,162,805</u>
		<u>877,195</u>
Tax payable thereon		<u>133,079</u>

10. By a letter dated 28 August 1997, the Taxpayer declined to accept the assessor's proposal. The letter may be summarised as follows:

10.1 You can appreciate how a working couple with no child raising experience like themselves back in August 1990, had taken the rush in purchasing Property A. That is why at a later stage, when they were back on their feet and re-assessed the situation, they found Property A not up to their expectation and that led to its eventual disposal.

10.2 The proposed computation of gain on disposal of Property B was incorrect as it did not taken into account many expenses which he had incurred including the agency fee.

10.3 As the Brother-in-law could not fulfil the income proof requirement, the banker insisted that Property B be registered in the Taxpayer's sole name. Therefore he lent his name as the owner of Property B to the Brother-in-law in the transaction.

10.4 Since Property B was not purchased for trading purposes, no detailed books and records were maintained. Further, as he and the Brother-in-law had moved houses several times since 1991/92, some of the records had been lost.

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Determination

11. By his determination dated 11 December 1997, the Commissioner of Inland Revenue determined the objection against the Taxpayer, confirmed the profits tax assessment for the year of assessment 1990/91 and revised the profits tax assessment for the year of assessment 1991/92 as shown in paragraph 9 above.

Grounds of appeal

12. By a notice of appeal dated 6 January 1998, the Taxpayer filed his grounds of appeal which are to the following effect:

Property A

12.1 Property A was purchased in August 1990, but the properties in Private Housing Estate J were not in the market until December 1990. Property C was directly purchased from the developer.

12.2 As it was, Property A was their best choice in August 1990. They were then living in District I and their first child was born in August 1990. They had time and efforts constraints when Property A was selected. Property A was also in District I and it came up easily as a preferred option when the time to search was really limited.

12.3 This choice was superseded by a later choice namely Property C which was not available until December 1990. Situation had changed and re-assessment was called for. Reasons for the change are set out in paragraph 4.1 above, namely, to improve living standards. They were willing to wait a little while to be accommodated in this better choice.

12.4 As they continued to search for better living standards, Property C was disposed of for the reasons stated in paragraph 4.3 above. Note the gradual increase in living area (paragraph 5.4 above) which amply illustrates their continuous attempt to improve their living standards.

12.5 The purchase of Property A was intended for self-use. Its disposal was the result of a later change in circumstances, of both the property market and the Taxpayer's situation. Hence there is no trading involved.

Property B

12.6 This was purchased in his name because his Brother-in-law did not have sufficient recurring income to support a bank mortgage application. Based on the figures in paragraph 2.11 above, the annual mortgage payments totalled \$145,296, which was even higher than his assessable income of \$139,890 for the year of assessment 1991/92 (see paragraph 8.3 above).

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12.7 With the benefit of hindsight, he has obviously been too optimistic in forecasting his business revenue. He found it therefore too difficult for him and his friends and relatives who supported him, to meet the mortgage dues. In fact he could not even pay for the August 1991 and beyond mortgage instalments (see paragraph 6.3 above), after his wedding banquet (see paragraph 6.4 above).

12.8 The objection by his in-laws to living in Property B (on fung shui grounds) (see paragraph 6.5 above) proved to be the last straw that broke this heavily debt-laden camel's back. Property B was therefore sold.

12.9 The fact that his Brother-in-law confirmed to the assessor that he was the beneficial owner of Property B (see paragraphs 6 and 7 above) is strong circumstantial evidence that he was the beneficial owner of Property B.

12.10 He can arrange for both the Brother-in-law and himself to sign a statement that the Brother-in-law was the beneficial owner of Property B.

12.11 Neither the beneficial ownership, nor the financing, of Property B was evidenced in writing. This was because it was a domestic and social arrangement to help his Brother-in-law to acquire his matrimonial home (see paragraph 6.4 above). These arrangements were made in good faith and mutual trust.

12.12 Property B was not purchased as his trading stock. Hence no profit is assessable.

13. By a letter dated 20 May 1998, the Taxpayer filed further grounds of appeal. Having considered them, we have come to the conclusion that they are not proper grounds for this appeal and we shall not deal with them.

Hearing and parties

14. At the hearing of this appeal, the Taxpayer appeared in person while Mrs CHU, chief assessor, appeared as the representative of the Commissioner of Inland Revenue. The Taxpayer gave evidence for himself. No other witness was called.

Evidence

15. Evidence consisted of the testimony of the Taxpayer and documents put in by both sides. The authenticity of the documents are not in dispute.

Testimony of the Taxpayer

16. The testimony of the Taxpayer is to the following effect:

In chief

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16.1 Looking at exhibit A, the Taxpayer stated that it was the birth certificate of his daughter which stated that she was born on 9 August 1990. This was his main motivation why they wanted to purchase a property instead of renting one as they had done before. The property purchased was Property A.

16.2 After birth, his daughter went back with them to the rented Property D. Property D was 500 square feet while Property A was 653 square feet. That showed they hoped to provide better environment for the new baby. That was what he meant by accommodating the child.

16.3 The daughter never went to Property A because in November 1990 they found that the first phase of Private Housing Estate J was available for sale. His parents lived in District H and their place was adjacent to Property C where the Taxpayer's family intended to live. Further, the facilities for children such as club, swimming pool and playground in Private Housing Estate J were obviously better than Property A.

16.4 Asked whether he was planning further expansion of his family when he moved to Property E in District L, bearing in mind that the second child did not arrive until mid-1993, the Taxpayer stated that actually his wife had a miscarriage at the end of 1991 or beginning of 1992.

16.5 Property E had 4 rooms with an area of 1,068 square feet. Because of the spacious quarters at Property E, he decided to sell Property C. He never entered Property C.

16.6 The air was fresh in District L. As to breathing problems, his daughter suffered from asthma slightly. Not exactly asthma but a little bit of a breathing problem, coughing and a lot of spit. He did not dare to move into Property C because the construction of Private Housing Estate J had not yet been completed and it was dusty. So he chose District L. Property C was in the first building of phase 1 that was put on the market.

16.7 The two employers let him choose where he wanted to live and then they arranged the tenancy agreements for him; hence it was still the right of his family to choose where to live, and there was no specific quarters assigned by the employer that they had to move in.

16.8 Everyone understands the big difference between the tenancy market and the property purchasing market. You may not be able to rent the property you want to live in. And sometimes you only got the chance of purchasing one. Every property agent can tell you that, if you want to rent a property, what are your choices, but if you want to purchase a property you have got a lot more choices.

16.9 Property B was his Brother-in-law's property. The Brother-in-law has confirmed that he was the only beneficial owner. Since they are relatives, they do not think of making any sort of document to prove or clarify their relationship, their position as beneficial owner and acting on behalf of the purchaser.

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16.10 The mortgage repayments were usually paid by the Taxpayer's cheque. If the total amount of around \$12,000 was to be paid with his cheque, he would issue a cheque of that amount and then collect all the money from the Brother-in-law and his relatives for the payment they should pay.

16.11 Usually the Brother-in-law collected all the money. Sometimes if it was not convenient, the Taxpayer would pay the difference first. The Brother-in-law collected all the money from relatives and friends, but sometimes they directly went to the bank and paid the amount into the bank account opened by the bank for the purpose when the mortgage instalments started.

16.12 There were statements from the bank from time to time to show payments in. Whenever he received documents from the bank he would pass them to the Brother-in-law because he should be the one who should be responsible.

16.13 The Brother-in-law's relatives and friends were keen to see that he could acquire a property for marriage (referring to Brother-in-law's letter in paragraph 6.4 above).

16.14 He was running a business called Company O. As a businessman maybe he was a little bit optimistic. So when he first purchased the property they talked about it with him. He realised that it would be tough for him to purchase this property. He knew that, but he hoped that his business would do well, so he thought he might have to borrow money from relatives and friends temporarily, but he hoped that when his business was doing better, he could repay his friends and relatives.

16.15 The Taxpayer's wife has 9 brothers. And the Brother-in-law has his own friends. What he meant was he did not intend to rely on others' help for the long term. He hoped when his business was on track he would have his own plans.

In cross-examination

16.16 When asked about the exact nature of the daughter's breathing problem, the Taxpayer stated that usually his wife took the daughter to see the doctor. When she returned, she told him that the daughter had a breathing problem and he saw the daughter coughing and spitting. He was not sure how to describe it. There was no need for her to go to the hospital.

16.17 When she was born, she got this problem. Comparing with her cousins, she went to the doctor more with the breathing problem.

16.18 Property G was sold in March 1989 because his wife insisted on living near her brothers and sisters in District I.

16.19 Property G is located in District H which is near the residence of his parents.

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16.20 During the period from 1 April 1989 to 31 March 1993 he was provided with quarters by his employers, except for a period of two months, that is, between end of January 1992 and the end of March 1992 when he changed his employment.

16.21 The sale of Property A was procured through property agents. It only took a few days to secure the sale.

16.22 In answering the assessor's enquiries, he stated that he was unable to produce documents to show the source of the funds to finance the purchase of Property B and the disposal of the sale proceeds. When he replied to the assessor, it was 1996; by that time he was in Country P and he did not have the documents required. He phoned his relatives to get them without success. Now he did not have the documents with him. After he came back from Country P, he did ask his relatives, but they said it had been a long time and they did not have them.

16.23 The Taxpayer was referred to paragraph 5.7 above, which he confirmed. According to his memory, neither he nor his wife lent money to the Brother-in-law except in connection with the purchase and sale of Property B. He did lend a little bit of money to him for the wedding dinner.

16.24 When asked whether he kept any record of the dates and amounts lent to the Brother-in-law and his repayments, he stated that usually his wife dealt with that. He did not know how she recorded these monies. The Taxpayer remembered that he was having a tough time with his own finance at that time.

16.25 There were not many documents. The whole thing happened because he had an in-law relationship with the Brother-in-law who purchased a property in the Taxpayer's name. To save his face, the Taxpayer did not want to have direct dealings with the Brother-in-law concerning the money. So usually his wife represented him to deal with the financial issue with the Brother-in-law.

16.26 The Brother-in-law was not present when the Taxpayer signed the memorandum for sale dated 1 December 1990 in respect of Property B. When they purchased Property B, the Brother-in-law was not present.

16.27 Property G is in District H and is not very far away from Property C. The Brother-in-law was living in District I.

16.28 Before they purchased Property B, the Brother-in-law knew that they wanted to move into Private Housing Estate J. On 1 December 1990, the day when they purchased Property B, the Brother-in-law knew that he might not be free to go with them to see the developer and to sign up for the purchase of property because of his business; hence the Brother-in-law asked the Taxpayer's wife, if they really purchased a property, to purchase one close by for him also.

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16.29 When Private Housing Estate J was first put on the market, there was a very hot response to it. When the Taxpayer and his wife queued up to the front of the developer's counter, the developer announced a temporary rule that each person was permitted to purchase one property only; hence his wife purchased Property C in her name, while he purchased Property B in his name on behalf of the Brother-in-law. At the time the staff of the developer told them that this was only a temporary purchase agreement, and that, if they wanted to change the name of the owner, they could do so at the solicitors' firm when they went there to sign the formal sale and purchase agreement. As his wife had chosen a property, he did not want to let the Brother-in-law down, so he signed his name on the memo for sale (see paragraph 16.26 above).

16.30 When asked who decided which unit to purchase for the Brother-in-law, the Taxpayer stated that the Brother-in-law had stipulated the amount of the purchase price, the direction of the property and the floor. When they found a choice that met his criteria, they decided for him. After they had signed the contract, they phoned him immediately and he agreed.

16.31 They did not change the name when they signed the sale and purchase agreement, because the Brother-in-law found that the bank did not accept his application (referring to grounds of appeal in paragraph 12.6 above) because he had no income proof.

16.32 As to why not have the Brother-in-law and the Taxpayer jointly acquiring the property, he did try that. 'Once you have a joint account for the mortgage, the bank will suppose that you are speculating. They only accept joint account for a couple.' He also offered himself as a guarantor but the bank was unwilling to accept this because firstly they wanted to assess the repaying ability of the borrower.

16.33 Upon signing the memo for sale on 1 December 1990, he paid the deposit of \$30,000 and he also paid the further deposit of \$69,700 to make up the 10%. He paid with his own cheques, but he was not sure whether he borrowed money from relatives through his wife.

16.34 To arrange mortgage, he and the Brother-in-law approached their respective bankers. Eventually they borrowed from a bank approached by the Taxpayer. As requested by the Brother-in-law, they borrowed as much as they could, that is, 90% for a term of 10 years.

16.35 As to why a longer repayment period was not arranged, the Brother-in-law was confident towards his business and the Taxpayer did not know the real situation of the Brother-in-law's balance of payments and receipts. The Taxpayer trusted him when he said he was able to pay. He also mentioned that if he was not able to pay, he would have his relatives and friends to help him. Under these circumstances the Taxpayer carried on with this deal.

16.36 It was pointed out to the Taxpayer that, according to the Brother-in-law, he contributed \$61,006.25 towards the initial deposit on 22 December 1990. When asked to

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explain how this odd sum was arrived at, the Taxpayer stated that in his company he was the accountant and in his home his wife was the accountant. He let his wife do all the calculation. 'So when you ask me this question, what I can say is that usually Chinese save face for others, I mean for my Brother-in-law.'

16.37 When asked to whom it was made payable, the Taxpayer stated that he guessed it was made payable to his account to reduce the overdraft. He did not remember, maybe it was the joint account of him and his wife. He did not think that a special account was opened for the purchase and sale of Property B.

16.38 As for the shortfall amounting to \$38,700, the difference between \$99,700 the 10% deposit and \$61,000 paid by the Brother-in-law (see paragraph 6.2 above), his wife dealt with all this issue, so on the first day of December when he paid the total deposit, he borrowed some money through his wife already. His wife promised that she would do her best to persuade the Brother-in-law to pay as much as he could towards the deposit and the first and subsequent instalments provided it did not affect the general running of his business. Whenever there was a shortfall, the Taxpayer, his wife and the Brother-in-law had to think of ways to cover the difference. Sometimes she paid the money herself, sometimes she asked the Brother-in-law to borrow from his friends and relatives.

16.39 As for the legal fee on purchase of \$22,500 and stamp duty of about \$15,000 (see paragraph 9 above), he paid them out of the joint account of him and his wife. His wife told him that, when they sold Property B, they got back all this money.

16.40 Property B was sold because of two reasons: the Brother-in-law was heavily in debt, and the wife of the Brother-in-law did not like the property that much for fung shui reasons (referring to grounds of appeal in paragraph 12.8 above).

16.41 As to why the Brother-in-law contributed only \$6,756.77 per month (see paragraph 6.3 above) while the mortgage loan was repayable by monthly instalments of \$12,108 each, his wife was the accountant. She said that provided it would not affect the Brother-in-law's business, he would pay \$7,000 per month.

16.42 As to why, at the time of purchase, they did not negotiate for a smaller month instalment package, the Brother-in-law was optimistic about his business and he thought that it would pick up very soon. So his wife said that the \$7,000 per month was just for an initial, short term.

16.43 Sometimes the Taxpayer issued a cheque of around \$12,000, sometimes his wife gathered all the cheques and money.

16.44 [Mrs Chu informed the Board that the Revenue had obtained 7 copy cheques from the banks which corresponded with the 7 monthly payments mentioned in paragraph 6.3 above, 6 of them being made payable to the Taxpayer and 1 of them payable to the Wife.] When asked whether he would agree, or not agree, that the 7 cheques were paid to

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repay part of the Brother-in-law's liabilities in respect of Property B, the Taxpayer stated that he totally agreed.

16.45 The Taxpayer appointed an agent to sell Property B. It was sold within one month from the appointment of the agent.

16.46 As to how the proceeds of sale of Property B were turned over to the Brother-in-law, the Taxpayer's wife was handling all the financial issues concerning the family though she is not an accountant. After selling the property, his wife said they had deducted all the money they paid before.

16.47 There was something to be handed over to the Brother-in-law.

16.48 When asked how much was handed over, the Taxpayer retorted, 'Did I mention that?'

16.49 When referred to paragraphs 6.4 and 7.4 above and asked to explain the discrepancy between the proceeds of sale and the amounts accounted for by the Brother-in-law, the Taxpayer stated that Mrs Chu was asking a question she knew he could not explain.

16.50 Mr Somerville, a member of the Board, remarked as follows:

'There are very specific sums that are mentioned as having been repayments or contributions towards the deposit. Also there is a statement that when the property was sold there was a final calculation of amount. All this would suggest that there has been a detailed calculation undertaken. So why has it not been possible to make this available for inspection?'

16.51 The Taxpayer's answer was, 'I really cannot answer your question as I think this question should be answered by my Brother-in-law instead.'

The law

17. The following legal principles and propositions will be applied in this case.

17.1 Trading requires an intention to trade. Was the asset acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? It is not possible for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It is either one or other (per Lord Wilberforce in Simmons v CIR 53 TC 461 at 491).

17.2 The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as

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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... 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 (per Mortimer J, as he then was, in All Best Wishes Ltd V CIR 3 HKTC 750 at 771).

17.3 An intention connotes a state of affairs which X decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition. X cannot be said to 'intend' a result which is wholly beyond the control of his will. He cannot 'intend' that it shall be a fine day to-morrow. At most he can hope or desire or pray that it will. Nor can X be said to 'intend' a particular result ... if X's volition is no more than a minor agency collaborating with, or not thwarted by, the factors which predominantly determine its occurrence (per Asquith, LJ in Cunliffe v Goodman [1950] 2 KB 237 at 253).

17.4 'Intention' connotes an ability to carry it into effect. It is idle to speak of 'intention' if the person so intending did not have the means to bring it about or had made no arrangements or taken any steps to enable such intention to be implemented (see D11/80, IRBRD, vol 1, 374).

17.5 A permanent or long-term investment is a capital asset. Profit arising from the sale of a capital asset is not taxable, while profit arising from the sale of a trading asset is.

17.6 The onus is on the Taxpayer to prove that the assessments under appeal are incorrect (see section 68(4) of the Inland Revenue Ordinance) and, for that purpose, to prove that:

- (a) Property A was acquired as a long-term investment, that is, as a residence to accommodate the first child; and
- (b) Property B was not acquired by the Taxpayer as his trading stock, but was acquired by the Taxpayer on behalf of the Brother-in-law as a long-term investment, that is, as the Brother-in-law's matrimonial home.

Findings and reasons

Property A

18. The declared intention of the Taxpayer is that Property A was acquired as a long-term investment, that is, as a residence to accommodate the first child (see paragraphs 4.1 and 12.3 above). By reason of its self-serving nature, the declared intention is not decisive and has to be tested against the surrounding circumstances, particularly those surrounding the purchase and subsequent sale of Property A.

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The purchase

18.1 As Mrs Chu pointed out, the birth of the child should have been long expected, but the Taxpayer only entered into an agreement to purchase Property A two days after the child was born (see paragraphs 2.5 and 2.6 above). Had the Taxpayer genuinely intended to buy a flat to accommodate the child, one would expect him to make his purchase much earlier and to choose a flat which suited his needs. Property A had only two rooms (see paragraph 5.4 above). Its total floor area (653 square feet) was not much larger than that of the Taxpayer's then rented premises at Property D (500 square feet). It had no facilities for children, had to be altered to suit his needs and was not available for occupation until 4 months later (see paragraphs 2.6 and 2.8 above). The delay in acquiring a flat to accommodate the child is out of character, compared with his assertion that in mid-1991, he rented a flat (Property E) in District L in anticipation of the arrival of his second child which miscarried at the end of 1991 or beginning of 1992.

18.2 In our view, the circumstances surrounding the purchase do not support the Taxpayer's declared intention of acquiring Property A to accommodate the first child. Rather, they seem to indicate the absence of such intention.

The sale

18.3 The Taxpayer held Property A for only 3 months. He never took up possession but sold it as a confirmor. The quick sale is inconsistent with a long-term investment intention towards Property A. Since such an intention is essential to the Taxpayer's case, he cannot succeed without satisfactorily explaining away the quick sale.

18.4 The Taxpayer's explanations are scattered in his correspondence with the assessor and the statement of grounds of appeal, and may be summarised as follows:

- (a) He had purchased Property A in a rush, and it was later found to be not up to his expectation (see his letter to the assessor in paragraph 10.1 above).
- (b) He sold it in order to live near his parents who lived in District H. He preferred housing with facilities for children and therefore chose Property C (see his letter in paragraph 4.1 above).
- (c) This choice (Property A) was superseded by a later choice namely Property C which was not available until December 1990. Situation had changed and re-assessment was called for. Reasons for the change are set out in paragraph 4.1 above, namely, to improve living standards (see grounds of appeal in paragraph 12.3 above).

18.5 Regarding the explanation in paragraph 18.4(a) above, Mrs Chu pointed out that the Taxpayer had inspected Property A and its surrounding environment a few times before the purchase (see paragraph 5.5 above). So the purchase was not made in a hurry and

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the lack of facilities for children was a known factor which one would expect the Taxpayer to have taken into consideration before the purchase. We agree.

18.6 As for the Taxpayer's assertion that he sold Property A in order to live near his parents in District H (see paragraph 18.4(b) above), the Taxpayer had sold Property G in District H which was near his parents' residence because his wife (then his future wife) insisted on living near her siblings in District I (see paragraphs 16.18 and 16.19 above). He then moved into quarters provided by his employers at Property D in District I. He got married and continued to live at Property D with his wife. He then entered into an agreement to purchase Property A which was also in District I. Three months later, on 16 November 1990, he entered into an agreement to sell Property A purportedly in order to live near his parents who lived in District H (see paragraph 18.4(b) above). There is no explanation as to why the Wife no longer insisted on living near her siblings in District I, nor any explanation as to why, in the grounds of appeal, he stated for the first time that reasons for the change (that is, selling Property A and buying Property C) were 'to improve living standards', avoiding any express mention of the purported wish to live near his parents (see paragraph 12.3 above). His assertions are not matched by the surrounding circumstances, and we are unable to accept that he sold Property A in order to fulfil that wish.

18.7 The Taxpayer asserts that Property A was superseded by Property C, but, as Mrs Chu pointed out, phase 1 of Private Housing Estate J, of which Property C forms part, was not available for sale and was not launched in the market until December 1990 (see paragraph 12.1 and 12.3 above). On 1 December 1990, the Taxpayer and his wife queued up at the developer's office and chose the flats they wanted to purchase, and it was not till then that they found what they wanted and knew they were going to be the owners of Property B and Property C respectively (see paragraph 16.28-30 above). On the other hand, on about 9 November 1990, that is, 3 weeks before the properties in Private Housing Estate J were first put in the market, property agents had been appointed to sell Property A and on 16 November 1990, the Taxpayer entered into an agreement to sell it. There is no evidence that, when he decided to sell Property A and appointed property agents for that purpose, or indeed at anytime prior to 1 December 1990, he knew that he would become the owner of Property C, or, for that matter, of any property of Private Housing Estate J.

18.8 Property C was purchased in December 1990. In mid-1991 the Taxpayer moved into new quarters provided by his employers at District L. Property C was sold in September 1991 by the Wife as a confirmor. After that, there was no further purchase.

18.9 As for his reasons for moving to new quarters in mid-1991, the 'further expansion of family size (second child born in mid-1993) mentioned in his letter to the assessor (see paragraph 4.3 above) is at variance with his testimony that his wife had a miscarriage at the end of 1991 or beginning of 1992 (see paragraph 16.4 above), which is in our view an afterthought. The 'breathing problems that they have' referred to in paragraph 4.3 above seem to be overstated (see paragraphs 16.6 and 16.16-17 above). On the whole, we are not impressed by the reasons.

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18.10 It is the Taxpayer's case that Property A and Property C were purchased as residences, that is, as long-term investments. But he never lived in either of them. Throughout the relevant period he chose to live in rent-free quarters provided by his employers, while selling off Property A and Property C one after the other. The overall picture is inconsistent with a long-term-investment intention towards Property A or Property C.

18.11 For all the reasons stated above, we find that the Taxpayer has failed to prove on a balance of probabilities that he acquired Property A as a long-term investment, that is, as a residence to accommodate his first child. We further find that he acquired Property A with the intention of selling it at a profit, and that the profit derived from the subsequent sale is assessable to profits tax.

Property B

19. It is the Taxpayer's case that he acquired Property B on behalf of his Brother-in-law as a long-term investment, that is, as the Brother-in-law's matrimonial home. This case involves the creation of a trustee and beneficiary relationship with the Taxpayer holding the legal title to Property B as trustee and the Brother-in-law holding the equitable interests in Property B as beneficiary. The onus is on the Taxpayer to prove the existence of the trust.

19.1 There is no declaration of trust or any other document evidencing the existence of the purported trust. There are statements in his letters to the assessor, in his grounds of appeal and in his testimony asserting or implying a trust. However, they are self-serving statements unsupported by strong and cogent evidence and therefore are of little assistance.

19.2 In the grounds of appeal, the Taxpayer stated that he could arrange for both the Brother-in-law and himself to sign a statement that the Brother-in-law was the beneficial owner of Property B. Although that was not done, the Taxpayer was not in our view prejudiced, for such a statement would not have assisted the Taxpayer for lack of credibility.

19.3 Apart from assertions, there is no evidence that the initial deposits, monthly mortgage payments and other disbursements in connection with the purchase of Property B were met by the Brother-in-law.

19.4 In his letter dated 23 August 1996, the Brother-in-law stated that he had paid the sum of \$61,006.25 and 7 monthly payments of \$6,756.77 each (see paragraphs 6.2 and 6.3 above) which he described as his contributions. The 7 monthly payments are proved by 7 copy cheques obtained by the Revenue from the bank, 6 of them made payable to the Taxpayer and 1 payable to the Wife. When asked whether he would agree, or not agree, that the 7 cheques were paid to repay part of the Brother-in-law's liabilities in respect of Property B, the Taxpayer stated that he totally agreed. But, again, that is a mere assertion. There is no proof that the 7 sums were payments towards the purchase of Property B. The

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monthly payments from the Brother-in-law ceased after 31 July 1991, 8 months before Property B was sold.

19.5 The 8 sums paid by the Brother-in-law (see paragraph 19.3 above) come to a total of \$108,303.64. When asked to explain how the sum of \$61,006.25 was arrived at, he stated that in his company he was the accountant but at home his wife was the accountant. He let his wife do all the calculation (see paragraph 16.36 above). As to why the Brother-in-law contributed only \$6,756.77 per month while the monthly mortgage instalment was \$12,108, he repeated his answer that his wife was the accountant. The Taxpayer's evasive response casts serious doubt on the assertion that the 7 monthly sums were paid for the purchase of Property B.

19.6 On the other hand, actual outlay in connection with the purchase of Property B was \$318,775:

Actual Outlay		
Date	Description	Amount \$
1-12-1990	Deposit (paragraph 2.9 above)	30,000
4-12-1990	Further deposit (paragraph 2.9 above)	69,700
10-12-1990	Legal fee and stamp duty (paragraph 9 above)	<u>37,455</u> 137,155
10-1-1991 to 10-3-1992	Mortgage instalments \$12,108 per month x 15 (paragraph 2.11 above)	<u>181,620</u> <u>318,775</u>

19.7 There is no evidence that the Taxpayer has turned over the following net proceeds of sale of Property B to the Brother-in-law.

Date	Description	\$	\$
29-2-1992	Deposit		100,000
10-3-1992	Further Deposit		105,000
8-4-1992	Balance of selling price	1,845,000	
	<u>Less: Repayment of mortgage loan, say</u>	(828,000)	
	Legal fee (paragraph 9 above)	<u>(15,350)</u>	<u>1,001,650</u>

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Total 1,206,650

19.8 The Brother-in-law at first identified a sum of \$49,104 received on 16 September 1991 as the balance of the sale proceeds from Property B after deducting debts and marriage expenses (see paragraph 6.4 above). When the assessor pointed out that Property B was not sold until April 1992, the Brother-in-law advised that the sum \$49,104 was in fact money advanced to him by his relatives, and that the net proceeds from the sale of Property B were applied to repay his personal borrowings and to meet the down payment and related expenses of Property F totalling \$360,000 (see paragraph 7.4 above). We accept Mrs Chu's submission that the lack of detail, and the discrepancies in amount between the cost of Property B and the sums contributed by the Brother-in-law on the one hand, and between the proceeds of sale of Property B and the sum paid to him on the other, as well as the inconsistencies in the information provided by him, cast a serious doubt on the credibility of the Brother-in-law.

19.9 In his letter to the assessor (see paragraph 5.7 above), the Taxpayer stated that upon the sale of Property B, part of the sale proceeds was used to repay the Brother-in-law's personal borrowings and to meet his marriage expenses while the balance was turned over to him, but that the Taxpayer could not provide any documentary evidence to show the movement of funds after extensive searching.

19.10 Mr Somerville, a member of the Board, remarked:

'There are very specific sums that are mentioned as having been repayments or contributions towards the deposit. Also there is a statement that when the property was sold there was a final calculation of amount. All this would suggest that there has been a detailed calculation undertaken. So why has it not been possible to make this available for inspection?' (See paragraph 16.50 above.)

19.11 The Taxpayer's answer was, 'I really cannot answer your question as I think this question should be answered by my Brother-in-law instead.' (See paragraph 16.51 above.)

19.12 In conclusion, we are not satisfied that the cost of purchase of Property B was met by the Brother-in-law or that the net proceeds of sale were paid over to him. Apart from assertions, there is no clear and cogent evidence to prove the existence of a trust. We find that the Taxpayer has failed to discharge the onus of proving on a balance of probabilities that he purchased Property B on behalf of the Brother-in-law.

19.13 We further find that the Taxpayer purchased Property B for his own benefit. It was never put to any beneficial use but was sold 9 days after it was assigned to him (see paragraphs 2.15 and 2.16 above). The quick sale is inconsistent with a long-term-investment intention towards Property B. There are no explanations for the sale. The Brother-in-law's reasons for the sale, that is, financial difficulties and discovery of a cemetery view (see paragraph 6.5 above) are irrelevant because the purchase and sale of

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Property B had nothing to do with the Brother-in-law on the premise that the Taxpayer purchased the property for the benefit of himself and of no one else.

19.14 For the reasons stated above, we find that the Taxpayer purchased Property B with the intention of selling it at a profit and that the profit derived from the subsequent sale is assessable to profits tax.

20. That disposes of this appeal in respect of Property B. However, since both the Commissioner of Inland Revenue in his determination, and Mrs Chu in her submission, adverted to the question of whether the Taxpayer would be chargeable to profits tax if he had acquired Property B on behalf of the Brother-in-law, and they both answered the question in the affirmative, we shall also state our views briefly.

20.1 In order to examine the position of the Taxpayer as a trustee, we shall assume for argument's sake the following:

- (a) The Brother-in-law was financially incapable of holding the property on a long-term basis. He did not have sufficient recurring income to make a mortgage loan application. He was unable to meet the deposit payments and monthly mortgage instalments by himself and was heavily indebted to friends and relatives. At the time of the purchase, he realised that it would be tough for him to purchase the property, and that he might have to borrow money from friends and relatives, but he expressed a hope to the Taxpayer that his business might do well so that he could repay them.
- (b) Since the Brother-in-law knew that he had no reasonable prospect of being able to hold the property on a long-term basis, he could not genuinely hold a long-term-investment intention towards the property (see paragraph 17.2 above). It follows that, at the time of the purchase, his intention was to trade, and the property was purchased as trading stock. He hoped that his business might do well so that he might be able to retain the property on a long-term basis, but that was not to be. His business did not do well and his trading intention was never displaced by a long-term-investment one, so Property B remained trading stock until it was sold.
- (c) The Taxpayer purchased Property B as trustee for the Brother-in-law. The activities carried out by the Taxpayer under the trust include: purchasing Property B, obtaining a mortgage loan, financing the payment of deposits and monthly mortgage instalments, selling the property and applying the proceeds of sale to pay all costs and expenses incurred in connection with the sale, to repay the remainder of the mortgage loan, and to pay the balance to the Brother-in-law. These activities constituted an adventure in the nature of trade which was actively carried on by the Taxpayer as trustee. The Wife assisted him in the collection of borrowings from friends and relatives (including the Taxpayer and the Wife) to meet the financial obligations to the bank and also acted as the accountant in respect of the property.

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- (d) On 29 February 1992, the Taxpayer sold the property through agents appointed by him. By that time the source of funding for the monthly mortgage instalments had dried up. Friends and relatives could no longer continue their assistance, and the Taxpayer's financing activities could no longer continue. A concurrent reason for the sale was a cemetery view discovered by the Brother-in-law during an inspection of the property in early 1992. But, cemetery view or no cemetery view, the property had to be sold because of financial difficulties in any event. From the very outset until sale, the property was trading stock. Discovery of the cemetery view did not and could not transform the status of the property from trading stock into a long-term investment.
- (e) The proceeds of sale were paid to the Taxpayer. After deductions made, the net proceeds were paid to the Brother-in-law.

20.2 In our view, the profit derived from the sale is assessable to profits tax. The question is, To whom should the tax be assessed, the Taxpayer, or the Brother-in-law?

20.3 Section 14 of the Inland Revenue Ordinance states that 'profits tax shall be charged ... on every person carrying on a trade ... in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong from such trade ...' (Emphasis supplied.)

20.4 Section 2 defines 'person' to include '... a trustee, whether incorporated or unincorporated ...'; 'trustee' to include 'any trustee...'; and 'trade' to include '...every adventure and concern in the nature of trade'.

20.5 The Taxpayer was a trustee carrying on an adventure in the nature of trade as part of the trust in Hong Kong, and a profit has been derived from Hong Kong from the adventure. The Taxpayer is liable to profits tax on the profit if, and only if, it is 'his profit'.

20.6 We adopt the view suggested in Willoughby and Halkyard's Encyclopaedia of Hong Kong Taxation, volume 3, at II [5045]-[5085] that the profit is his profit in the sense of 'his profit' as trustee, and that it is only the subsequent disposal of the profit by him which is subject to control under the terms of the trust. The Taxpayer was carrying on the adventure, not for his own account, but as trustee; profit made out of the adventure can only be his profit as trustee, and not beneficially.

20.7 In D37/93, IRBRD, vol 8, 304, it was decided that, where a mere nominee's only function was to hold the assets in which the beneficial owner was trading, the trading profits could only be assessed to the beneficial owner. In this case the Taxpayer was no mere nominee. His trading activities embraced purchase, financing and sale (see paragraph 20(1)(d) above), and he was actively engaged in them. We are of the view that the trading profit in question should be assessed to the Taxpayer as trustee.

Conclusion

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21. This appeal fails and the profits tax assessments for the years of assessment 1990/91 and 1991/92 under appeal are hereby confirmed.