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BADGES OF TRADE REVISITED

This article looks at the question of trading in the Singapore and Malaysian contexts. The focus is on transactions in real property. It seeks to establish that, contrary to what has been argued, an isolated transaction in real property can amount to the carrying on of a trade or business under the Singapore Income Tax Act. Reference is made to relevant Malaysian cases on the matter. The article further examines the factors which the Singapore and Malaysian courts (including the Income Tax Board of Review and Special Commissioners, as the case may be) take into consideration in determining whether a trade/business has been carried on. A proper assessment of these factors is most crucial so as to steer clear of the pitfalls of trading.

I. INTRODUCTION

THE question whether the activities of a taxpayer in real property transactions amount to the carrying on of a trade or business or that of an investment is a vexed one. The reason is obvious. There is no single indicium that is determinative of the question in issue. However, a finding that a trade or business in land dealings has been carried on has serious tax consequences for a taxpayer under the tax laws of both Singapore and Malaysia. Under section 10(1)(a) of the Singapore Income Tax Act[1] (hereafter "Singapore Act"), any gains or profits arising from any trade or business is liable to a charge of income tax.[2] However, the said section does not impose a charge of income tax on profit from an investment which is a capital appreciation or gain.[3] In Malaysia, section 4(a) of the Income Tax Act 1967[4] (hereafter "Malaysian Act") similarly provides for "gains or profits from a business" to be chargeable to income tax. There is, generally, no tax liability in respect of profits from investment in Malaysia. However, where the investment undertaken by the taxpayer is in respect of real property, the gains arising from the disposal of the property in question

1 Cap 134, 1994 Rev Ed.

2 S 10(1)(a) provides for income tax to be payable on "gains or profits from any trade, business..., for whatever period of time such trade, business...may have been carried on or exercised;".

3 Note, however, that s 10A of the same Act provides for tax to be paid on the profits of an investment company.

4 Act 53.

may be liable to tax under the Malaysian Real Property Gains Tax Act 1976.[5]

II. Can an Isolated Transaction in Real Property Amount to a Trade or Business?

Whether the gains or profits arising from an isolated transaction in real property are chargeable to income tax under section 10(1)(a) and section 4(a) of the Singapore and Malaysian Acts respectively will depend on whether the transaction amounts to a trade or business thereunder. The position under the Malaysian Act is much clearer. The word "business" in section 4(a) of the Malaysian Act[6] is defined in section 2 of the same Act to include "...trade and every manufacture, adventure or concern in the nature of trade...." In the United Kingdom, where income tax is also charged on profits arising from a trade,[7] the word "trade" is also similarly defined[8] as the word "business" in the Malaysian Act. Thus, it is easier to establish that an isolated transaction in real property can amount to a business or a trade under the Malaysian and United Kingdom Acts respectively as an "adventure or concern in the nature of trade" is also caught thereunder.[9] As Gill FJ (as he then was) said in the Malaysian Federal Court case of *E* v *Comptroller-General of Inland Revenue*:[10]

> It was to overcome this difficulty of bringing an adventure in the nature of trade within the meaning of section 10(1)(a) of the [former] Income Tax Ordinance, 1947 that section 4(a) of the Income Tax Act, 1967 was enacted to provide for income tax to be chargeable upon income in respect of "gains or profits from a business for whatever period of time carried on", and "business" was defined in section 2

5 Act 169. Real property gains tax is a form of capital gains tax which was introduced by the 1976 Act to discourage speculation in real property in Malaysia. Different rates of tax are imposed depending on how soon the disposal of the property was effected after its acquisition. Gains arising from the disposal by an individual in the 6th year after acquisition or thereafter are exempted from tax. For a more detailed discussion of real property gains tax in Malaysia, see Chin, *Malaysian Taxation* (1995), Ch 23.

6 S 4, in so far as is material, reads: "Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of – (a) gains or profits from a business, for whatever period of time carried on;...."

7 See the Income and Corporation Taxes Act 1988, s 18(3).

8 *Ibid*, s 832(1).

9 See also Whiteman *et al*, *Whiteman on Income Tax* (3rd ed, 1988), Ch 4 at 149 where, in the context of the UK Act, it was stated that "This definition [of the term 'trade'] establishes that an isolated transaction can give rise to a trading profit...."

10 [1970] 2 MLJ 117.

> of the Act to include "profession, vocation and trade and every manufacture, adventure or concern in the nature of trade,...."[11]

Earlier, while speaking of the English position, his Lordship said:

> ...in view of the definition of "trade" in the English Income Tax Act..., the mere fact that there is only one transaction does not preclude the possibility that that transaction is in the nature of a trade. Thus, one single purchase and sale or one purchase and many sales have been held in the English and Scottish courts to be trading (see *Halsbury*, 3rd edition, Vol 20, paragraph 213, page 119).[12]

While it is easier for an isolated transaction to come within the meaning of an "adventure in the nature of trade" as can be seen from the numerous cases decided in the United Kingdom,[13] such a finding would, however, not be made unless the guidelines laid down in *Leeming* v *Jones*[14] to support a finding of "an adventure in the nature of trade" have generally been satisfied on the facts of the case in question.

The position under the Singapore Act is different in that there is no definition of the words "trade" or "business" thereunder. Accordingly, in the Singapore Court of Appeal case of *DEF* v *Comptroller of Income Tax*,[15] Buttrose J, in delivering his judgment, opined as follows:

> Now the word "business" in section 10(1)(a) of the Ordinance is used in association with "trade", "profession" or "vocation", all of which connote habitual and systematic operations, a continuity or repetition of acts or similar operations. Taking the Ordinance as a whole there can be no doubt that the business must be carried on and section 10(1)(a) clearly implies it. The term "business" as used in the section does not apply to one isolated act; it does not mean a "business transaction".[16]

[11] *Ibid*, at 125.

[12] *Ibid*, at 122.

[13] For a sampling of these English cases, see *CIR* v *Fraser* (1942) 24 TC 498; *Rutledge* v *CIR* (1929) 14 TC 490; *Californian Copper Syndicate Ltd* v *Harris* (1904) 3 TC 159; *Clark* v *Follett* (1973) 48 TC 677; *Eames* v *Stepnell Properties Ltd* (1966) 43 TC 678 and *Edwards* v *Bairstow & Harrison* [1955] 3 All ER 48.

[14] (1930) 15 TC 333. The House of Lords laid down the following 4 criteria, one of which must be present, for an adventure in the nature of trade to exist: (a) the existence of an organization; (b) activities which lead to the maturing of the asset to be sold; (c) the existence of special skills, opportunities in connection with the article dealt with; or (d) the fact that the nature of the asset should lend itself to commercial transactions.

[15] [1961] MLJ 55.

[16] *Ibid*, at 59.

Ambrose J took a similar view, holding that:

> ...the business from which the profit is derived has to be a business which has been carried on. The phrase "carried on" implies a repetition or series of acts and confirms the fundamental idea of the continuous exercise of an activity.[17]

Rose CJ concurred with the views expressed by Buttrose and Ambrose JJ on this issue. *DEF* dealt with an isolated transaction of purchase and sale of a rubber estate by the appellant taxpayer. Without inspecting the estate, he bought it with money borrowed free of interest from his brother. In less than three weeks after purchasing it, he sold it to a company in which his wife's brother-in-law and another person were directors. He repaid the loan and invested the profit. He was not the nominee of any person or company and had not previously engaged in land dealings before. Based on these facts and for the above reasons, the Court of Appeal held that the transaction did not constitute a business of the appellant and consequently he was not liable to pay income tax under section 10(1)(a) in respect of the profits he made on the resale.

This decision of the Singapore Court of Appeal was followed in the Malaysian Federal Court case of *E* v *Comptroller-General of Inland Revenue*[18] which was decided at the time when the Federation of Malaya Income Tax Ordinance 1947[19] was still in force and where the charging section 10(1)(a) therein on gains or profits from trade or business was in identical terms with that of the Singapore Act. Gill FJ, in delivering the judgment of the Federal Court, took the view that:

> [A] trade usually consists of a series of transactions implying some continuity and repetition of acts of buying and selling or manufacturing and selling...[20]

On the meaning of the word "business" in section 10(1)(a) of the 1947 Ordinance, Gill FJ merely adopted the views and reasonings of Buttrose and Ambrose JJ in *DEF*.[21] *E's* case also dealt with an isolated transaction of purchase and sale of a rubber estate by the appellant taxpayer. The estate

17 *Ibid*, at 61.
18 *Supra*, note 10.
19 No 48 of 1947. The 1947 Ordinance, together with the Sabah Income Tax Ordinance 1956 and the Sarawak Inland Revenue Ordinance 1960, were subsequently replaced by the Income Tax Act 1967 which applies throughout the whole of Malaysia.
20 *Supra*, note 10, at 122.
21 *Ibid*, at 129.

was eventually sold to a company in consideration of the company issuing fully paid up shares to the appellant. The Federal Court held that as the transaction undertaken by the appellant was an isolated one, it did not constitute a trade of his in the absence of a definition of "trade" extending that term to an adventure in the nature of trade. Neither did it constitute the business of the appellant as it was not part of the business carried on by him. The profit arising from the transaction was therefore not subject to tax under the said section.

That English cases have also held that there must be repeated acts or transactions of the same kind in order to amount to a trade can be seen in *Pickford* v *Quirke*.[22] Similarly, in the House of Lords case of *Ransom* v *Higgs*,[23] Lord Reid expressed the view that trade "...is commonly used to denote operations of a commercial character by which the trader provides to customers for reward some kind of goods or services."[24] In the same case, Lord Wilberforce opined that:

> Trade involves, *normally*, the exchange of goods, or of services, for reward...there must be something which the trade offers to provide by way of business. Trade moreover, presupposes a customer...[25]

Does this mean that an isolated transaction in real property can never amount to a trade or business under the Singapore Act? It is respectfully submitted that this need not necessarily be so.[26] In *International Investment Ltd* v *Comptroller-General of Inland Revenue*,[27] a Privy Council case on appeal from Malaysia, Viscount Dilhorne had to deal with the question whether an isolated land transaction undertaken by a company can constitute the carrying on of a trade or business under section 10(1)(a) of the then Federation of Malaya Income Tax Ordinance 1947, which section, as seen above, is *in pari materia* with section 10(1)(a) of the Singapore Act. In affirming the decision of the Federal Court[28] that the isolated land transaction in question amounted to the carrying on of a trade or business, his Lordship expressed agreement with the views of Raja Azlan Shah FJ

22 (1927) 13 TC 251 at 269, 274-275.
23 (1974) 50 TC 1.
24 *Ibid*, at 78. Lord Brightman adopted these words of Lord Reid when he expressed a similar opinion on the matter in *Kowloon Stock Exchange Ltd* v *CIR* [1984] STC 602 at 607.
25 *Ibid*, at 88. (emphasis mine)
26 *Cf* Liu, "Income Taxation of Isolated Property Transactions in Singapore" (1994) 6 SAcLJ 96 at 99, 100, 104 and 113. See also, generally, Soon, "Taxation of Trade and Business Income" [1986] 1 MLJ clix at clxxx, where he concludes that the matter remains uncertain.
27 [1979] 1 MLJ 4.
28 [1975] 2 MLJ 208.

(as he then was and with whose judgment the other members of the Federal Court concurred) that the relevant tests for individuals and companies are not the same. In this regard, Viscount Dilhorne referred to an earlier Privy Council case on appeal from Malaysia, *ie*, *American Leaf Blending Co Sdn Bhd* v *DGIR*,[29] which did not deal with the issue of trading, but where Lord Diplock drew attention to the fact that a company incorporated for the purposes of making profits is *prima facie* carrying on a business where it makes gainful use of its property and that in practice, this *prima facie* inference is not easily displaced. However, no such presumption arises in the case of a private individual. On the application of the relevant tests for private individuals and companies, Viscount Dilhorne further elaborated as follows:[30]

> ...Mr Pinson for the appellant company...did not dispute that this was a business transaction, but he submitted that it was not in the course of carrying on the particular business of dealing or trading in land because it was an isolated transaction, and that it would not have been in the course of dealing in land even if such dealing had been the company's only object. Their Lordships are unable to accept that submission. In their view a company whose business is, or includes, trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature. The same would apply to an *individual* who had set himself up as a trader and declared his intention of trading if the transaction fell within the scope of his trade; only if he had no business, or if the isolated transaction was not within the scope of his trade, would the result be otherwise. No doubt trading *normally* involves an element of repetition or continuity, but it has to begin sometime and even if it only continues for a short time and *only includes one transaction*, that does not by itself mean that the

[29] [1979] 1 MLJ 1 at 3.

[30] *Supra*, note 27, at 5-6 (emphasis added). These observations of Viscount Dilhorne and that of Lord Diplock in *American Leaf Blending Co Sdn Bhd*, *supra*, note 29, were cited with approval by the Singapore Income Tax Board of Review in *C Ltd* v *CIT* (1991) 1 MSTC 5052 at 5070, 5074 where it was held that the profits arising from the isolated land transactions undertaken by the appellant were taxable as they did not represent capital gains from the realisation of investment. A similar decision was also arrived at in *SCL Pte Ltd* v *CIT* [1991] 3 MLJ cxvi where the transaction undertaken by the appellant was held not to be an isolated one even though it had not sold any other property before or after the transaction in question. The appellant was found to have been incorporated and used by its holding companies as a vehicle to undertake the particular transaction in order to avoid the tax which the holding companies would otherwise have to pay on the gain arising from the sale as they themselves were dealing in properties.

> transaction cannot constitute trading – see *Commissioner for Inland Revenue* v *Lydenburg Platinum Ltd*.[31] (emphasis mine)

In the South African case of *Lydenburg Platinum Ltd*, the taxpayer company acquired farms believed to contain platinum-bearing reefs and thereafter sold them at a profit. In holding the profit taxable, Stratford JA (with whose judgment the other members of the court concurred) took the view that a company, one of whose objects is to buy and sell land, would be considered to be doing the business of selling and buying land even though it carries out only a single transaction.[32] In fact in *DEF* itself, Ambrose J conceded that:

> I must make it clear, however, that, in my opinion, if it is proved that a person intended to carry on a business and that he carried out one business transaction with that intention, then he has carried on a business.[33]

And speaking of the Kenyan case of *H Co Ltd* v *Commissioner of Income Tax*[34] in which it was held by Windham J that the profits from a single business transaction were liable to income tax under section 7(1)(a) of the Kenya Income Tax Ordinance (Cap 254) which is *in pari materia* with section 10(1)(a) of the Singapore Act, Ambrose J said:

> In my opinion, considering the clear intention (in *H Co Ltd's* case), the carrying out of the isolated business transaction was clearly the carrying on of a business: and it would have made no difference if the land had been sold to one purchaser without any sub-division.[35]

It could, thus, be seen from the above that, in appropriate circumstances, an individual, as much as a company, can be held to be carrying on a trade or business under section 10(1)(a) of the Singapore Act even though the transaction undertaken was an isolated one.[36] In fact, on this very issue,

[31] (1928) 4 SATC 8.

[32] *Ibid*, at 16. See also *Smith* v *Anderson* (1880) 15 Ch D 247 at 260-261 and *CIR* v *Stott* (1928) 3 SATC 253 at 262.

[33] *Supra*, note 15, at 61.

[34] (1955) 1 East African Tax Cases 65.

[35] *Supra*, note 15, at 61.

[36] See Cheong, "Singapore: Taxation of Isolated Transactions In Land" [1992] APTIRC Bulletin 378 at 379, where it is suggested that an isolated land transaction cannot come within s10(1)(a) of the Singapore Act unless the day-to-day business of the taxpayer has to do with property transactions and that the taxpayer has a history of engaging in property dealings. This is, undoubtedly, taking a more restrictive approach to the question of trading than that laid down by Viscount Dilhorne in *International Investment Ltd*, *supra*, note 30

the Malaysian case of *International Investment Ltd* has been cited with approval in the Singapore Income Tax Board of Review decision in *C Ltd* v *Comptroller of Income Tax*.[37] While the opinion expressed by Viscount Dilhorne in *International Investment Ltd*[38] on the position of an individual may be regarded as merely *obiter* as the case concerned a company, it, nevertheless, casts doubts on the proposition that a private individual cannot be held to be carrying on a trade or business where the transaction is an isolated one. Moreover, to require the characteristic of continuity or repetition to be present before there can be a finding of trade or business, is to over emphasise the importance of this element to the exclusion of all other relevant factors. Where a taxpayer, be it an individual or a company, has all the intention to trade and does effect a transaction, albeit an isolated one, pursuant to this intention, there is every reason to hold that the taxpayer is trading as the element of repetition or continuity is, it is submitted, *normally or usually*, but not necessarily, *always*, present in the carrying on of a trade or business. As can be seen from the above-quoted observations of Viscount Dilhorne in *International Investment Ltd*,[39] business or trading *normally* involves an element of repetition or continuity which suggests that the element of continuity or repetition need not necessarily *always* be present before a taxpayer can be said to be carrying on a trade or business. Indeed, in *Ransom* v *Higgs*,[40] Lord Reid had commented that "[a]s there is no limiting definition [of the term 'trade'] trade has been held to include cases where some element is absent which is *normally* present in trading."[41] In the earlier House of Lords case of *Griffiths* v *JP Harrison (Watford) Ltd*,[42] Lord Denning stated to the same effect when he observed that "[u]sually in trade, the trader makes many trading transactions. But that is not essential. An isolated transaction may do."[43] As will be seen later, there is no one

and the accompanying main text. The reference to *CBH* v *CIT* [1982] 1 MLJ 112 as a case for comparison with *DEF* is not particularly helpful as *CBH* was not a case involving an isolated transaction.

37 (1991) 1 MSTC 5052 at 5074.

38 *Supra*, note 30 and the accompanying main text.

39 *Supra*, note 30 and the accompanying main text. See also the above-quoted observation of Lord Wilberforce in *Ransom* v *Higgs*, *supra*, note 25 and the accompanying main text, where the word "normally" was also used in the context of what constitutes a trade.

40 *Supra*, note 23.

41 *Ibid*, at 79. (emphasis mine)

42 (1962) 40 TC 281.

43 *Ibid*, at 299-300. For other earlier cases which made similar observations, see *Balgownie Land Trust Ltd* v *CIR* (1929) 14 TC 684 at 691 ("A single plunge may be enough provided it is shown to the satisfaction of the Court that the plunge is made in the waters of trade..." *per* Lord President Clyde) and *Martin* v *Lowry* (1925) 11 TC 297 at 318 ("It is not essential to trading or trade...that there should be a series of transactions both of purchase and of sale." *per* Sargant LJ).

single indicium that is determinative of the question whether a taxpayer is or is not carrying on a trade or business. All indicia relevant to a finding of trade or business would have to be considered.

As to the scope of section 10(1)(g) of the Singapore Income Tax Act,[44] it is the considered view that it is far from clear whether the provision covers profits from an isolated transaction which does not amount to a trade or business.[45] It is difficult to conclude from the wording in the provision itself that it does have this effect and the matter must, therefore, await future guidance from the local courts.

III. Trade/Business or Investment: The Characteristics Examined

Generally, the test for determining whether a particular transaction undertaken by a taxpayer constitutes a trading transaction or an investment is an objective one.[46] One looks at whether the acts and conduct of the taxpayer in relation to the transaction amount to trading.[47] This is essentially a question of fact to be decided after taking into account all the surrounding circumstances of the case. No undue reliance should be placed on any one single factor.[48] In 1954, the Royal Commission in the United Kingdom listed six badges of trade as being the relevant considerations in determining whether a transaction is or is not to be treated as a trading transaction.[49] This part of the article will look at how the badges of trade have been dealt with by the courts in Singapore and Malaysia in recent years so as to better deal with this vexed question. In this connection, the

[44] This paragraph imposes tax on any gains or profits of an income nature not falling within any of the preceding paragraphs in s 10(1) of the same Act.

[45] See Soon and Liu, *supra*, note 26, at clxxix and 115 respectively. The same consideration equally applies to s 4(f) of the Malaysian Income Tax Act, the equivalent of the abovementioned Singapore provision.

[46] *IRC* v *Livingstone* (1926) 11 TC 538 at 542; *Griffiths* v *JP Harrison (Watford) Ltd*, *ibid*, at 304 and *DGIR* v *LCW* [1975] 1 MLJ 250 at 254. See also the Singapore Income Tax Board of Review cases of *SCL Pte Ltd* v *CIT* [1991] 3 MLJ cxvi at cxxvi; *C Ltd* v *CIT* (1991) 1 MSTC 5052 at 5069 and *W Holdings Pte Ltd* v *CIT* (1992) 1 MSTC 5135 at 5148.

[47] *J & R O'Kane & Co* v *CIR* (1922) 12 TC 303 at 347.

[48] In *Edwards* v *Bairstow & Harrison* (1953) 36 TC 207 at 229, Lord Radcliffe had occasion to observe that "...many of the facts are...neutral in themselves, and only take their colour from the combination of circumstances in which they are found to occur."

[49] See *Final Report of the Royal Commission on the Taxation of Profits and Income* (1955) Cmd 9474 at para 116 where the six badges of trade listed were: (1) the subject matter of the realisation; (2) the length of the period of ownership; (3) the frequency or number of similar transactions by the same person; (4) supplementary work on or in connection with the property realised; (5) the circumstances that were responsible for the realisation; and (6) motive. See also Whiteman *et al*, *supra*, note 9, at 157-167.

decisions of the Singapore Income Tax Board of Review and the Malaysian Special Commissioners, which represent a wealth of materials on the subject, will also be looked at. In particular, this part of the article will examine the various factors which influence the courts in coming to a decision, one way or the other. This would, in turn, enable a taxpayer, who is seeking to effect an investment, to better plan and organize his tax affairs so as to avoid the pitfalls of trading.

A. *Accounting Treatment of Assets*

The accounting methodology employed by the taxpayer in regard to his assets may throw light on whether he is engaged in investment or trading activities. In other words, the manner in which his accounts are maintained can reinforce the finding that he is trading or undertaking an investment, as the case may be. Thus, in *International Investment Ltd*,[50] where the taxpayer constructed a six-storey shopping arcade and hotel on a piece of land all of which it subsequently sold at a profit, the Privy Council attached importance to the fact that the building was shown in the balance sheet for the relevant year under current assets. Consistent with the fact that the building work was entirely financed by bank overdraft and other short-term loans, this indicated that the taxpayer was treating the building as trading stock, not as an investment. In addition, what was a borderline case to trading tilted against the taxpayer because an admission had been made in the accounts that "the nature of the business conducted by the company is dealing in immovable property and land development."[51] In the result, the profit realized was held taxable. In contrast, in *Director-General of Inland Revenue* v *Khoo Ewe Aik Realty Sdn Bhd*,[52] the respondent taxpayer had initially treated the subject land as a current asset but later treated it as a fixed asset in its balance sheet. The Supreme Court, in holding that the gain arising from the disposal of the subject land did not represent profit from a trade, found that the subsequent treatment of the subject land as a fixed asset was consistent with the respondent's intention to revert to that of an investment company. Similarly, in *HCM* v *Director-General of Inland Revenue*,[53] the appellant taxpayer had been trading in land from 1956 up to 1963. However, from 1963 onwards she was no longer buying and selling properties but merely holding them and disposing of them when necessity arose, *viz*, to support her family and to pay for the overseas

[50] *Supra*, note 27.
[51] *Ibid*, at 6. This was also one of the factors which led to a finding that the taxpayer was trading in land in *OP Sdn Bhd* v *DGIR* (1988) 1 MSTC 2062.
[52] [1990] 2 MLJ 415.
[53] (1993) 2 MSTC 539.

education expenses of her children. From 1964, her properties were reclassified under fixed assets reflecting a change from trading to one involved solely in investment. Based on these findings, the Special Commissioners held that the taxpayer was not trading in land with the result that gains from the disposal of the properties were not taxable as they represented realisation of the taxpayer's investments.

In normal circumstances, at the corporate level, a decision to acquire any property for investment or trade is by way of resolution taken at board meetings and it will be, accordingly, recorded in the company's books of accounts. Where no directors' resolution is produced to support a claim that the company has changed the nature of its activities, for example, from trading to investment, and this is coupled with the fact that the accounting system adopted has remained consistent throughout the years for all transactions, for example, where all acquisitions have been treated as fixed assets, this would support the view that the company is trading in the buying and selling of land.[54]

Where an asset is held as an investment and classified as a fixed asset, but is later transferred out into a trading account and dealt with in such a manner that the taxpayer has manifested an intention to carry on a business activity involving that particular asset, the profit realised therefrom is liable to tax. This proposition was laid down by the Malaysian Federal Court in *Director-General of Inland Revenue* v *LCW*[55] where the respondent, an individual, originally bought a piece of land with the intention of constructing flats thereon for renting as an investment. Subsequently, when he became short of ready cash, he borrowed to complete the buildings and made arrangement to sell the flats. The original purchase price of the land was shown as fixed assets. The Federal Court held that the surplus was correctly assessed to income tax as it was a profit from the sale.

The practice of consistently debiting expenses relating to the assets against business receipts may also reinforce the finding that the taxpayer is trading.[56] However, in this regard, one must look at the facts of each case to determine the actual position. In *Lim Foo Yong Sdn Bhd* v *Comptroller-General of Inland Revenue*,[57] the appellant taxpayer carried on a hotel and restaurant business. Throughout the relevant years, the appellant had shown the landed property ("Merlin Hotel") in question as a fixed asset in their accounts. There was no doubt that the appellant derived income

[54] *AS Sdn Bhd* v *DGIR* (1991) 1 MSTC 434 at 440.
[55] [1975] 1 MLJ 250.
[56] *ABM* v *DGIR* (1992) 1 MSTC 502 at 510.
[57] [1986] 2 MLJ 161.

from the hotel and restaurant which were investment. The income was, of course, taxable but the dispute was over whether certain sums received in connection with, *inter alia*, the purchase and sale of Merlin Hotel by way of a sale and lease-back transaction so as to pay back a loan from the lender, were trading receipts and therefore taxable. The Privy Council held, *inter alia*, that the sale was merely associated with an investment business and did not constitute trading *per se*. In their Lordships' opinion, the activities of the appellant were designed to expand, improve and intensify its hotel and restaurant investment. Lord Oliver of Aylmerton, in delivering the judgment of the Board, cautioned that undue reliance should not be placed on the fact that the expenses relating to building the Merlin Hotel were charged to revenue account. If this meant that interest and bank charges were shown in the profit and loss account, that was exactly what one would expect whether the asset was to be treated as a capital investment or as trading stock. Furthermore, the fact that the surplus on sales of properties was shown in the balance sheet as such and was not labelled "capital reserves" was a pure point of semantics and did not indicate that the sums received represented profits of a trade.

While the way in which a company keeps its accounts may be evidence of the company's intention, such evidence must be weighed against other evidence to decide the nature of the transaction. As Buckley J said in *Shadford (HM Inspector of Taxes)* v *H Fairweather & Co Ltd*:[58]

> For, however, genuinely the accounts may have been framed by those responsible for them, and however carefully they may have been studied by those responsible for auditing them, the other evidence may show that in fact they do not truly indicate the nature of the relevant operations.[59]

A similar view was also expressed by Chan JC in *Mount Elizabeth (Pte) Ltd* v *Comptroller of Income Tax*.[60] In the instant case, the 8 flats in question were classified as fixed assets in the balance sheet of the appellant taxpayer only after they were completed. His Honour held that this was a colourless fact having regard to the other evidence in the case. His Honour took the view that the intention to retain these 8 flats as investments could have been reflected in the appellant's accounts or other corporate records upon or shortly after these apartments became identifiable on the approved plans

[58] (1966) 43 TC 291.

[59] *Ibid*, at 299. See also *Emro Investments Ltd* v *Allen* (1954) 35 TC 305 and *BY Sdn Bhd* v *DGIR* (1988) 1 MSTC 3023 at 3026-3027.

[60] [1987] 2 MLJ 130 at 137.

or the sales brochure. Moreover, the flats themselves could have been classified before their completion as an investment and their development cost separately itemised in the balance sheet. In the absence of any expert evidence that accountancy principles and practice prevailing in Singapore did not permit such classification or accounting entry, his Honour was unable to accept the explanation of the appellant that it was neither practical nor realistic to document such intention earlier than the completion of the 8 flats. Instead, his Honour concluded that the flats were retained to await an upturn in the property market in the course of carrying on the business of property development for sale. Accordingly, the gains arising from the disposal of 6 of the flats were held to be taxable. In *SCL Pte Ltd* v *Comptroller of Income Tax*[61] and *C Ltd* v *Comptroller of Income Tax*,[62] the Singapore Income Tax Board of Review, in holding that the profits realized from the disposal of the properties in question were taxable, also took the view that the appellant taxpayers' classification of the assets in their accounts as an investment was not conclusive of the nature of the transactions undertaken when viewed in the light of the other evidence obtained therein. The totality of the evidence showed that the appellants did not intend to hold the properties as investments but to carry on the business of purchasing and selling immovable properties.

B. *Objects in Memorandum of Association*

The proposed objects of a company are relevant when considering the transactions in which the company is found to have been engaged. As seen earlier, Lord Diplock in *American Leaf Blending Co Sdn Bhd* v *Director-General of Inland Revenue*[63] observed that in the case of a company incorporated for the purpose of making profits for its shareholders, any gainful use to which it puts its assets *prima facie* amounts to the carrying on of a business. Furthermore, the onus of proving that the surplus arising from the transaction is an accretion of capital and not profits from the carrying on of a trade or business is a heavy one as this *prima facie* inference is not easily displaced in practice.[64] Thus, it can be seen that the onus, other things being equal, is greater for a company than an individual as no such presumption arises in regard to the latter. However, it does not follow that just because the company has powers to do certain things, anything done

61 [1991] 3 MLJ cxvi.
62 (1991) 1 MSTC 5052.
63 *Supra*, note 29. See also, *supra*, note 30 and the accompanying main text and *Mount Elizabeth (Pte) Ltd* v *CIT, supra*, note 60, at 139.
64 *Supra*, note 29 and the accompanying main text.

by the company must necessarily be carrying on the business of the professed objects of the company. As Lord President Clyde said in *CIR* v *Hyndland Investment Co Ltd*:[65]

> ...the question is not what business does the taxpayer *profess* to carry on, but what business does he *actually* carry on.[66]

Thus, the nature and quality of the transaction in question must be analysed to determine what the company was *actually* doing. This is a question of fact. In *Director-General of Inland Revenue* v *Khoo Ewe Aik Realty Sdn Bhd*,[67] the Malaysian Supreme Court found that although the respondent taxpayer had power in its memorandum and articles to deal with land, there was no evidence or any finding by the Special Commissioners that the respondent had in fact traded in land. Accordingly, the profit arising from the disposal of the subject land was not assessable to income tax. Indeed, a company actively engaged in trade is also entitled to hold investments, so that one must distinguish investment from stock-in-trade.[68] A good illustration of the distinction between investment and trading is to be found in *Phillips* v *West*[69] where it was held that whilst the 287 properties which the appellant built with the intention of selling ultimately were stock-in-trade of the business of builder, the 2,208 houses built to let were investments and any surplus arising from their sale was therefore not liable to tax; and that the appellant was not carrying on the business of property dealing. In *Seaward & Ors* v *Varty*,[70] Wilberforce J stated that it was not impossible for a taxpayer who was primarily engaged in trading to also hold properties as investments. As his Lordship said:

> It is perfectly plain that there is nothing inherently impossible in persons who carry on a trade also holding investments....[I]t is a question of fact to be determined upon the circumstances of the case...[71]

65 (1929) 14 TC 694.

66 *Ibid*, at 699. This observation of Lord President Clyde was cited with approval by Goh JC when delivering the judgment of the Singapore Income Tax Board of Review in *SCL Pte Ltd* v *CIT*, *supra*, note 30, at cxxvi-cxxvii. See also *E* v *CGIR*, *supra*, note 10, at 127 and *Land Revenue Commissioners* v *Westleigh Estates Co* (1925) 12 TC 657.

67 *Supra*, note 52, at 420.

68 *Simmons* v *IRC* (1980) 53 TC 461.

69 (1958) 38 TC 203.

70 (1962) 40 TC 523.

71 *Ibid*, at 530.

In *Lim Foo Yong Sdn Bhd* v *Comptroller-General of Inland Revenue*,[72] the facts of which have been given above, the Privy Council, in holding that the transaction in question did not amount to the carrying on of a trade, observed that it was not right for the Special Commissioners to have assumed, just because the appellant's objects as appearing from its memorandum enabled it both to hold investments and also to trade in land, that the appellant had for all time and for all purposes to be labelled a company engaged in the business of dealing in property and that all property of the appellant, for whatever purpose held, necessarily constituted trading stock the profitable disposition of which would give rise to a trading profit. Their Lordships were also of the view that while an inquiry into the past dealings of the appellant was capable of casting some light on subsequent transactions, it could not, of itself, be determinative of the issue of the nature of the transaction under consideration. As Lord Oliver of Aylmerton, in delivering the judgment of the Board, explained:

> Accepting for the moment the premise that the appellant, whose objects embraced both holding land for investment and dealing in land, had, in the past, entered into transactions which were consistent with the carrying out of the latter objects, it did not follow without further analysis that the Hotel Merlin and the land on which it was built were acquired and held as part of the appellant's trading stock rather than, as every rational indication suggested, as an investment from which the appellant's income was derived. The objects of the appellant included, after all, those of holding land as an investment and carrying on a hotel business. A company may hold both trading stock and capital investments and the mere statement of historical fact that, in the past, certain surplus property has been disposed of at a profit or that some other property has been acquired and disposed of by way of trade cannot legitimately be treated as determinative for all time of the company's intention in acquiring, holding and developing other property.[73]

However, a company which describes its business as property development or itself as a property developer, as was the case in *Mount Elizabeth (Pte) Ltd* v *Comptroller of Income Tax*,[74] is *prima facie* more likely to be treated

[72] *Supra*, note 57.
[73] *Ibid*, at 166.
[74] *Supra*, note 60. See also the Malaysian case of *ABM* v *DGIR* (1992) 1 MSTC 502 where the Special Commissioners placed great emphasis on, *inter alia*, the taxpayer's own active involvement in a whole array of activities as a housing developer to reinforce the finding

as carrying on the business of property development for sale and not for investment or for both. This would be so where the company describes its only activity as the development of properties, such as luxury flats, for sale in the relevant period and where it generally conducts its affairs in conformity with the business of property development for sale.

The above discussion applies equally to a society. In *Lower Perak Co-operative Housing Society Bhd* v *Ketua Pengarah Hasil Dalam Negeri*,[75] Edgar Joseph Jr SCJ, in delivering the judgment of the Malaysian Supreme Court, opined that the by-laws are not conclusive of a society's intention as much as the memorandum of association is not conclusive of the intention of a company. However, it may support a finding of trading or investment, as the case may be, when viewed in the light of the other evidence obtained in the case. In the instant case, the appellant had purchased land for the primary objective of building houses thereon and selling them to its members in order to achieve its objective of enabling its members to own houses. The appellant engaged a developer to construct the houses. Demand for the houses was not good and to cut its losses, the appellant was forced to sell the remainder of the land to the developer. In holding that the profit realised from the disposal of the land was not taxable, Edgar Joseph Jr SCJ found, *inter alia*, that the land was acquired not for disposal at a profit but rather as a permanent investment. As the primary object in the purchase of the land was in line with the relevant by-laws for which the appellant was established, which was to build houses for its members, it reinforced and supported the contention of the appellant that it had no intention to trade at the time it acquired the land.

C. *Separate Legal Personality of Company and Lifting the Corporate Veil*

It is trite law that a company is a separate legal entity capable of suing and being sued in its own capacity and of entering into legal transactions, and of being chargeable to tax. A question which arises for consideration is whether the intention of the directors and officers of the company can be imputed or attributed to the company. In *E* v *Comptroller-General of Inland Revenue*,[76] Gill FJ, in delivering the judgment of the Federal Court, observed as follows:

that the particular transaction undertaken was to realise income from carrying on business as a housing developer.

75 [1994] 2 MLJ 713 at 734.

76 *Supra*, note 10.

> It is trite law that a company is a separate legal entity from the appellant [taxpayer]. But the state of mind of the company is also the state of mind of the persons who run the company.[77]

His Lordship relied on what Lord Denning said on the subject in *HL Bolton (Engineering) Co Ltd* v *TJ Graham & Sons Ltd*:[78]

> A company may in many ways be likened to a human body. They have a brain and a nerve centre which controls what they do. They also have hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what they do. *The state of mind of these managers is the state of mind of the company and is treated by the law as such*.[79]

As early as 1905, it was recognised that whilst a company was a separate legal entity, there must be a "brain" which serves as the thinking engine of the company. In *De Beers Consolidated Mines Ltd* v *Howe*,[80] a case mainly on the question of the residence of a company but which is also relevant as to who constitutes the "central management and control" of the separate legal entity, Lord Loreburn laid down the celebrated principle:

> ...that a company resides for purposes of income tax where its real business is carried on....and the real business is carried on where the central management and control actually abides.[81]

The House of Lords decided that it was the majority of the directors and life governors (who lived in England and held their meetings in London) who exercised the real control in practically all the important business of the company except the mining operations. In *Unit Construction Co Ltd* v *Bullock*,[82] another House of Lords case in which *De Beers* was reaffirmed, it was also found that the "central management and control" of the separate legal entity was exercised by the board of directors in London. In these

77 *Ibid*, at 128.
78 [1956] 3 All ER 624.
79 *Ibid*, at 630. (Emphasis added)
80 [1906] AC 455.
81 *Ibid*, at 458.
82 [1960] AC 351.

two House of Lords cases, there was no doubt that the company concerned was a separate legal entity but that did not prevent the House of Lords from deciding that the central management and control was being exercised by the directors.[83]

Lord Denning's speech in *HL Bolton (Engineering)* have often pioneered or been the catalyst for future legal development. The courts are prepared to disregard the separate legal personality of companies in the case of tax evasion or over-liberal schemes of tax avoidance without any necessary legislative authority. In such cases, the courts frequently dismiss the company as a mere sham.[84] This can be seen in the recent trend of judicial thinking as to transactions in the nature of a charade found in the leading House of Lords cases of *IRC* v *Burmah Oil Co Ltd*,[85] *WT Ramsay Ltd* v *IRC*[86] and *Furniss* v *Dawson*[87] where their Lordships directed their searching criticisms at make believe tax avoidance schemes. As Lord Diplock most pertinently observed in *Burmah Oil*:

> The kinds of tax avoidance schemes that have occupied the attention of the courts in recent years, however, involve inter-connected transactions between *artificial* persons, *limited companies*, without minds of their own but *directed by a single master mind*.[88]

Thus, while the distinction between an individual and a company is recognised in law, the dichotomy between the two is not an absolutely rigid one. The mind or brain or soul of the company has often been described by English judges as "the psyche" of the company and the people who constitute this "psyche" are those who are in control of the company. No one is tearing down the corporate veil but what one asks is: why is there a veil and who wears it? There is a veil because a company continues in perpetuity (until

[83] For the statutory position, which generally reflects the test laid down in *De Beers*, see s 2(1) of the Singapore Income Tax Act (Cap 134, 1994 Rev Ed) and s 8(1)(b) of the Malaysian Income Tax Act 1967 (Act 53).

[84] See Farrar et al *Farrar's Company Law* (3rd ed, 1991) at 79 and Morse (ed) *Palmer's Company Law* (25th ed, 1992) vol 1, at para 2.1520. It may also be noted that in Divari & Stein (eds) *Silke on South African Income Tax* (11th memorial ed, 1991) vol 1, at 3-18, it is laid down that "...in circumstances where a *shareholder* effectively controls a company not merely through his power to replace the directorate but directly, an exception may arise to the rule that the intention of a company will be determined without reference to the intention or activities of its shareholders." See also ITC 1375 (1982) 45 SATC 207 and *Elandsheuwel Farming (Edms) Bpk* v *SBI* (1977-78) 39 SATC 163.

[85] [1982] STC 30.

[86] [1981] STC 174.

[87] [1984] STC 153.

[88] *Supra*, note 85, at 32. (Emphasis added)

wound up) and with its legal existence intact notwithstanding the appearance of new directors. It is given corporate status by the statute, namely, the Acts or Act of Parliament relating to company law but the people who direct the veil are those who decide how to use the veil. The veil is legal and is deemed in law to be a "person". The Revenue is seeking to tax the company's legal entity having regard to the facts and the intention of the people who control the veil.

In *SCL Pte Ltd* v *Comptroller of Income Tax*,[89] the Singapore Income Tax Board of Review pierced the corporate veil in reaching the conclusion that the appellant taxpayer was obviously used by its holding companies as a vehicle for selling the property in question in order to avoid the payment of tax on the gain arising from the sale. The Board opined that if the holding companies of the appellant really had the intention of incorporating the appellant to hold onto the property for long term investment to collect rent, then they should have injected more funds into the appellant. The Board took the view that when a transaction is carried out by a company being one of a group, the relevant purpose is that of the group and not of the particular company viewed in isolation. Further, due attention must be paid to the context in which the acts of the particular subsidiary were performed.[90] In the instant case, the Board found that the holding companies provided the governing mind in the sale of the property concerned which was carried out for their own benefit. In *C Ltd* v *Comptroller of Income Tax*,[91] the appellant taxpayer was taxed on the profits arising from the sale of five apartments on the basis that it represented income from trading in property. The Board found that the appellant lacked the financial resources to hold the properties as a long term investment and that the real reason why the properties were sold was that there were substantial profits to be made since property prices increased substantially during the relevant period. The Board did not lift the corporate veil to see if those who incorporated the appellant had the financial means to hold the properties as an investment. It would appear from *C Ltd* that the approach adopted by the court is not to lift the corporate veil where the facts by themselves are sufficient, in the circumstances, to enable it to come to the conclusion that the activities of the taxpayer amounted to trading.

89 *Supra*, note 61.

90 Relying on *CIR* v *Waylee Investment Ltd* [1990] 11 HKLR 107 at 111. See also Liu, *supra*, note 26 at 98-99.

91 *Supra*, note 62.

D. *Formation/Winding Up of Company*

The mere formation of a company *per se* from the tax point of view may be innocuous and by itself is not conclusive that the taxpayer is trading or carrying on a business. It is legitimate for taxpayers to form a company so as to avoid a higher rate of tax.[92] In the Privy Council case of *American Leaf Blending Co Sdn Bhd* v *Director-General of Inland Revenue*,[93] discussed above, Lord Diplock had the opportunity to observe that:

> A company may carry on business as an *investment* or holding company deriving its gains or profits from dividends and interest from the securities it owns.... A property company or an individual may be carrying on the business of letting premises for rents from which the gains or profits of that business are derived.[94]

At the same time, the formation of a company also leads to a consideration of further matters. A company is an organisation formed for certain professed purposes. When a person of some means forms a company which is armed with powers to trade or invest, the *prima facie* conclusion is that it is formed for the purpose of carrying on a business. As noted above, in the other Privy Council case of *International Investment Ltd* v *Comptroller-General of Inland Revenue*,[95] Viscount Dilhorne stated that:

> ...a company whose business is, or includes, trading *prima facie* begins to trade as soon as it embarks upon the first transaction of a trading nature.[96]

Seen in the light of the above observations made by both Lord Diplock and Viscount Dilhorne, judgment must be suspended and one must analyse the nature and quality of the transaction in question to determine what the company was *actually* doing. Thus, in *Mount Elizabeth (Pte) Ltd* v *Comptroller of Income Tax*,[97] the facts of which have been given above, the High

[92] Assuming that they are in the range of the higher brackets. Under s 43 (1)(a) of the Singapore Income Tax Act (Cap 134, 1994 Rev Ed), a company is currently taxed at a flat rate of 27% (to be reduced to 26%, effective year of assessment 1997) compared with a current maximum rate for individuals of 30% (to be reduced to 28%, effective year of assessment 1997) under s 42(1)(a) of the same Act.

[93] *Supra*, note 29.

[94] *Ibid*, at 2.

[95] *Supra*, note 27.

[96] *Ibid*, at 6.

[97] *Supra*, note 60.

Court found, *inter alia*, that the appellant taxpayer had been incorporated solely to purchase the property at Mount Elizabeth for development of luxury flats and that it had also applied for a developer's licence to sell the flats. Such evidence pointed in the direction of the appellant carrying on business as a property developer. In regard to the fact that some of the flats were not sold immediately but were retained, the court found that it could be explained on the ground that it was the appellant's desire to await an upturn in the property market and to let them out in the meantime, rather than to fulfil a prior intention to hold as investment.[98] Similarly, as can be seen in *SCL Pte Ltd* v *Comptroller of Income Tax*[99] above, the formation of the appellant taxpayer by the holding companies was found by the Income Tax Board of Review to be consistent with the conclusion that it was part of a scheme to sell the property in question as soon as the opportunity presented itself so as to avoid paying tax on the profits arising from the sale. The fact that the appellant taxpayer did not have the capacity to hold the property for long term investment owing to its weak financial position further reinforced this conclusion of the Board. However, where it can be shown conclusively that the company was formed purely for investment purposes or for the vesting of inherited family properties in it, a different result would follow. In the Malaysian case of *Director-General of Inland Revenue* v *Khoo Ewe Aik Realty Sdn Bhd*,[100] the Supreme Court came to the conclusion that the profits arising from the sale of the land in question were not taxable. The taxpayer company was formed for investment and to safeguard family lands. The subscribers and directors of the company were the grandfather of the family and his wife. Before the company was incorporated, the grandfather had bought the land in question, which was subsequently transferred to the company. The Supreme Court found that the vesting of the land by the grandparents in their lineal descendants through the medium of a company was not only a convenient means of distributing the various properties (instead of by awkward fractional portions) but also ensured continuity in the family investment properties.[101]

Where the taxpayer's intention, right from the start, is to form a company to purchase the subject land to let it lie vacant and to wait for an opportune moment to strike it rich, after which the company would be wound up, any argument that the property was held for investment purposes is likely to fail. This, it is submitted, is so even if the taxpayer has other companies which showed that he was a hard core investor. The reason is obvious:

[98] *Ibid*, at 140.
[99] *Supra*, note 61.
[100] *Supra*, note 52. *Cf Tempest Estates Ltd* v *Walmsley* [1976] STC 10 where the company was formed to avoid tax.
[101] See also the decision of the Special Commissioners in (1988) 1 MSTC 2111 at 2112.

the particular company was set up for the special purpose of avoiding tax. The focus becomes even sharper when it is realised that after the huge profit was obtained, the company was wound up. If it was an investment company (as contended by the taxpayer), why not continue using it as a base for investment in the absence of any credible explanation to the contrary?

E. *Intention and Motive*

As noted above, the test of trading is, generally, an objective one. One looks at whether the acts and conduct of the taxpayer in relation to the transaction amount to trading or, in other words, whether the documents and terms thereof were normal when compared to transactions of the like kind in the commercial world and carried out in a similar way.[102] The test does not involve determining the motives and intentions of the taxpayer in adopting those methods.[103]

However, if the appearance of the transaction leaves the matter in doubt, an examination of its paramount object will always be relevant and will generally be decisive.[104] Even then, the paramount object of the transaction must still have a commercial purpose.[105] Whether the transaction has a commercial purpose or object must be determined from the point of view of the taxpayer.[106] This would make the taxpayer's intention a relevant factor. This can be seen in the case of *Lim Foo Yong Sdn Bhd* v *Comptroller-General of Inland Revenue*[107] where the Privy Council, in holding that the sums realized from the sale of land and shares did not represent profits from a trade, placed great emphasis on the intention of the taxpayer to retain the asset (the hotel and the profit element in it) as a capital asset. The Privy Council stressed that what was vital was the intention of the taxpayer and whether that intention remained the same or had changed. Similarly, in *Lower Perak Co-operative Housing Society Bhd* v *Ketua Pengarah Hasil Dalam Negeri*,[108] the Supreme Court of Malaysia held that

[102] See *IRC* v *Livingstone* (1926) 11 TC 538 at 542.

[103] *Supra*, note 46 and the accompanying main text. In *Kirkham* v *Williams* [1991] 1 WLR 863, the Court of Appeal reviewed the authorities and stated that the first question to be addressed is whether or not the transaction is equivocal or unequivocal. If it has all the characteristics of trading, then it is unequivocal and one does not need to have regard to the motive or purpose of the taxpayer. On this point, see also the Privy Council case of *Iswera* v *IRC* [1965] 1 WLR 663 at 668.

[104] *Lupton* v *FA & AB Ltd* [1972] AC 634 at 660.

[105] See *Lupton* v *FA & AB Ltd*, *ibid*, and *Overseas Containers (Finance) Ltd* v *Stoker* [1989] 1 WLR 606 at 613.

[106] See *Lupton* v *FA & AB Ltd*, *ibid*, at 654 and *Thomson* v *Gurneville Securities* [1972] AC 661 at 678.

[107] *Supra*, note 57 at 167. See also *BY Sdn Bhd* v *DGIR* (1988) 1 MSTC 3023.

the taxpayer was not trading in land as its intention (which had remained the same throughout) in purchasing the land was not to make a profit but to develop the land, build houses thereon and sell them to its members so as to provide them with a roof over their heads. The resulting profit from the sale of the land was, accordingly, an accretion to capital not liable to tax.

It is important to note that intentions may be changed.[109] What was first an investment may be put into the trading stock and vice versa, which may, possibly, involve a liability to tax. Thus, in *Lim Foo Yong*, Lord Oliver of Aylmerton, in delivering the judgment of the Privy Council (wherein the taxpayer was found not to be trading), cautioned that the mere statement of historical fact that, in the past, certain surplus property had been disposed of at a profit or that some other property had been acquired and disposed of by way of trade cannot legitimately be treated as determinative for all time of the taxpayer's intention in acquiring, holding and developing other property.[110] In *Director-General of Inland Revenue* v *Khoo Ewe Aik Realty Sdn Bhd*,[111] the respondent taxpayer had, from 1977 to 1979, intended to become a housing developer selling luxury holiday bungalows but changed its intention from 1980 to that of an investor. The Malaysian Supreme Court held that the respondent was not liable to tax on the profits realized from the sale of the subject land on the ground that there was a change of intention on the part of the respondent from that of a trader to an investor as reflected in its accounts, namely, that the subject land was treated, in the relevant accounting period, as a fixed asset in the respondent's balance sheet,[112] coupled with the fact that the proceeds of sale of the land were mostly reinvested. On the other hand, in *CBH* v *Comptroller of Income Tax*,[113] the Singapore Court of Appeal held that even if the intention of the taxpayer, in the case before them, was to hold the two parcels of land as investments at the time of their acquisition, the taxpayer had changed his intention and had regarded the two parcels as trading stock to be sold as soon as the price was right. The court found that the taxpayer did not have the financial capability nor any plan to develop the two parcels and hold them as investments.

Where the intention of the taxpayer becomes a relevant factor, his motive

[108] *Supra*, note 75.
[109] *Simmons* v *IRC* [1980] 1 WLR 1196 at 1199.
[110] *Supra*, note 57 at 166.
[111] *Supra*, note 52.
[112] That in normal circumstances, the way in which a company keeps its accounts is indicative of its intention may also be seen in *Shadford* v *H Fairweather Co Ltd* (1966) 43 TC 291 at 299. See also *AS Sdn Bhd* v *DGIR* (1991) 1 MSTC 434.
[113] [1982] 1 MLJ 112.

may be most material. Non-commercial motivation may so affect the nature of trading transactions that they cease to be normal trading transactions.[114] The fundamental difference between intention and motive is that intention means seeking to do something and is connected to purpose or object whereas motive is concerned with the reason for doing something. Motive would be of considerable importance in borderline cases. In *Iswera* v *Ceylon Commissioner of Inland Revenue*,[115] the taxpayer had wished to reside near the school which her daughters were attending and with this in mind she had bought a two-and-a-half acre plot which she had subdivided into 12 building lots, nine of which she had sold to nine sub-purchasers, keeping one for her own house and two for reconveyance to the vendor. In holding the resulting profit taxable as arising from a trading transaction, the Privy Council laid considerable stress on the fact that the taxpayer's dominant motive was to make a profit. As Lord Reid, in delivering the judgment of the Privy Council, explained:

> If...the taxpayer has to embark on an adventure which has all the characteristics of trading, his purpose or object alone cannot prevail over what he in fact does. But if his acts are equivocal, his purpose or object may be a very material factor when weighing the total effect of all the circumstances.
>
> In the present case, not only has it been held that the appellant's dominant motive was to make a profit, but her actions are suggestive of trading as regards the greater part of the site which she bought. She had to and did make arrangements for its sub-division and immediate sale to the nine sub-purchasers before she could carry out her contract with the vendor of the site.[116]

It is obvious that an intention to make money *per se* is insufficient to amount to trading. In *Taylor* v *Good*,[117] Russel LJ stated as follows:

> All these cases, it seems to me, point strongly against the theory of law that a man who owns or buys without present intention to sell land is engaged in trade if he subsequently, not being himself a developer, merely takes steps to enhance the value of the property

[114] See *Religious Tract and Book Society of Scotland* v *Forbes* (1896) 3 TC 415 at 418.
[115] [1965] 1 WLR 663.
[116] *Ibid*, at 668.
[117] [1974] STC 148.

in the eyes of a developer who might wish to buy for development.[118]

Even where it is shown that there is a trading element in the relevant transactions on the part of the taxpayer, it is still possible for the taxpayer to argue that it is at its highest, subsidiary to the primary purpose of being a capital investment so that there is in law no trading venture. A finding that there is a primary purpose also presupposes a subsidiary purpose. In *Kirkham* v *Williams*,[119] the Court of Appeal laid down the proper approach which the courts should adopt when faced with a conflict of such purposes. In *Kirkham*, one of the taxpayer's grounds of appeal was that the General Commissioners' conclusions that the purchase, development and sale of the site in question amounted to trading was inconsistent with their finding of fact that the site was acquired principally to provide for office accommodation and storage space, that is, as a capital asset. In allowing the appeal, the court, by a majority, held that a subsidiary hope or intention to sell the property at a gain at a later date did not constitute the property as trading stock if the primary purpose of purchasing it was to use it as a capital asset of the business. In *Lower Perak Co-operative Housing Society Bhd* v *Ketua Pengarah Hasil Dalam Negeri*,[120] the Supreme Court of Malaysia applied the principles laid down in *Kirkham* as an alternative approach in reaching the conclusion that the gains accruing to the taxpayer from the land transactions were not profits of a trade but merely accretions to capital. Edgar Joseph Jr SCJ, in delivering the judgment of the court, took the view that even if there was a trading element in the relevant transactions on the part of the taxpayer, then the taxpayer's primary purpose or object would be a very material factor when weighing the total effect of all the circumstances. His Lordship held that the Special Commissioners, having themselves found as a fact that the primary purpose or intention of the taxpayer was to develop the acquired land and to build houses thereon for its members, should have laid considerable stress on the taxpayer's dominant motive in entering into the relevant transactions with the developer since motive is linked to purpose. If this was done, the inevitable conclusion must be that the taxpayer's dominant motive was not to make a profit but to fulfil its primary purpose of providing homes for its members, especially when the taxpayer was a housing society.

In *SCL Pte Ltd* v *Comptroller of Income Tax*,[121] the appellant had been

[118] *Ibid*, at 154. See also *CIR* v *Reinhold* (1953) 34 TC 389 at 397; *Scottish Australian Mining Co Ltd* v *Commissioner of Taxation* (1950) 81 CLR 188 and the South African case of *Berea West Estates (Pty) Ltd* v *SIR* (1976) 38 SATC 43.

[119] [1991] 1 WLR 863. See also, *supra*, note 103 and *Evans* v *FC of T* (1936) 55 CLR 80 at 99.

[120] *Supra*, note 75.

incorporated by two companies, F Ltd and S Ltd, to hold a block of flats for investment purposes. Under its memorandum of association, the appellant had wide powers to invest and deal in land. The shareholders of the appellant were F Ltd and S Ltd. F Ltd's business was investing in shares and dealing in immovable properties, while S Ltd's principal activity was dealing in land. In due course, the block of flats was sold. The appellant contended that the profit was a capital gain as this was consistent with its intention to hold the property as an investment at the time of the acquisition. The Income Tax Board of Review rejected the appellant's contention, holding that the appellant was incorporated as a vehicle for disposing the property for its shareholders in order to avoid paying tax on the profits arising from the sale. The Board laid considerable stress on, *inter alia*, the fact that the appellant's financial position was not consistent with investment holding and that it was controlled by people who were trading in properties. As the appellant had failed to discharge the burden of showing that it was not trading in properties, the Board found for the Revenue. A similar result was obtained in *C Ltd* v *Comptroller of Income Tax*.[122] In the instant case, the appellant was incorporated in Hong Kong with a registered branch in Singapore. It bought five apartments in Singapore and the purchase was financed ninety percent by a mortgage loan and 10% by an interest-free loan from a director. The apartments were subsequently sold. In holding that the profits realized were income made in the course of its trade or business and hence taxable, the Board took into account, *inter alia*, that the appellant had no capital of its own to purchase the properties as a long term investment; that the properties were consequently sold when property prices increased substantially and that the appellant did not reinvest the gain realized from the sale of the properties. In the earlier case of *CBH* v *Comptroller of Income Tax*,[123] the Singapore Court of Appeal had also laid considerable stress on the fact that where a property developer acquires land substantially with external financing that is a factor which goes to show that he is in the business of property development for sale. This coupled with the fact that the land was not acquired for his own personal use and was not producing any income would further reinforce the finding that he was carrying on the trade of dealing with land.

It cannot be denied that the task of determining what is the true intention of the taxpayer is a difficult one.[124] As in other contexts where intention is an issue, it is essentially a question of fact to be decided after taking

[121] *Supra*, note 61.
[122] *Supra*, note 62.
[123] *Supra*, note 113.
[124] See Liu, *supra*, note 26, at 113 and 116-117 where he argues and concludes that the test of intention "...is not a good determinant of taxability" as it is inherently vague.

into account all the surrounding circumstances. Nevertheless, to avoid being taxed, a taxpayer should structure his transaction in the light of the factors which, considered in totality, have been regarded by the courts as indicating that the transaction was undertaken more for investment, than for trading, purposes. It can be seen that in all the Singapore cases discussed above, the courts have held in favour of the Revenue. However, it must be recognised that the factual matrix in all these cases casts strong doubts on the non-trading nature of the transactions in question. Where, on the other hand, the appearance of the transaction lends itself more towards investment than trading, the courts, at least in Malaysia, are inclined to find in favour of the taxpayer. Cases such as *Khoo Ewe Aik Realty*, *Lower Perak Co-operative Housing Society* and *Lim Foo Yong*, discussed above, are examples. And this is despite the fact that, in Malaysia, the taxpayer is placed in a more unfavourable position compared to his counterpart in Singapore, at least where the statutory language of the respective provisions in the Income Tax Act is concerned (as an adventure or concern in the nature of trade, let alone trading, is sufficient to find a liability to tax in Malaysia).

F. *Nature of Subject-Matter*

In considering the question whether there had been an intention to trade, a factor to which regard may be had is the nature of the subject-matter in question. A disclosed intention not to hold what was being bought might provide evidence that the purchaser intended to trade and if the commodity purchased in the transaction was not of a kind normally used for investment but for trading and if the commodity could not produce an annual return by retention in the hands of the purchaser, then the conclusion may easily be reached that the transaction was a trading one.[125]

However, if the subject-matter of the transaction is one which is normally held as an investment, such as land, houses, stocks and shares, the inference is not so readily to be drawn that the taxpayer is trading. An over-simplistic approach should not be adopted by merely determining whether there was a disposal of the subject-matter at a profit.[126]

Although this indicium is, generally, a decisive one, all the surrounding

[125] See, *eg*, *Rutledge* v *IRC* (1929) 14 TC 490 where the subject-matter of the taxable transaction was one million rolls of toilet paper. The nature of the subject dealt with and the quantity involved led to the conclusion that it could not have been disposed of otherwise than as a trade transaction.

[126] *Lower Perak Co-operative Housing Society Bhd* v *Ketua Pengarah Hasil Dalam Negeri*, *supra*, note 75.

circumstances leading to the purchase and sale of the asset must, nevertheless, be taken into consideration in determining whether the transaction constitutes trading. In *SCL Pte Ltd* v *Comptroller of Income Tax*,[127] the fact that the subject-matter in question was a block of flats did not prevent the Income Tax Board of Review from holding that the transaction in question constituted trading. The Board considered that the surrounding circumstances were not consistent with the transaction being an investment having regard to, *inter alia*, the finding that the taxpayer company was used by its holding companies as a vehicle for selling the property in order to avoid the payment of tax on the gain arising from the sale. The same result was arrived at in *C Ltd* v *Comptroller of Income Tax*,[128] which involved the purchase of apartments by the taxpayer company. The Board found, *inter alia*, that the properties could not have been intended to be held as investments as the company had no capital of its own to finance the purchase of the properties and hold them as a long term investment. In the case of an individual, the position is no different as can be seen in *CBH* v *Comptroller of Income Tax*[129] discussed above. In fact, in *CBH*, the court found that the taxpayer did not acquire the land for his own personal use. Nor was it producing any income. What the taxpayer wanted was to carry on the trade of dealing with the land and was seeking planning permissions to subdivide and enhance the eventual realised prices of the parcels.

Where the taxpayer company is a property developer, it would be extremely difficult to argue, as can be seen from *Mount Elizabeth (Pte) Ltd* v *CIT*,[130] that it was holding the property as an investment, especially where the evidence is consistent with the company carrying on the business of property development for sale and no other.

G. *Method of Financing*

In some of the cases on purchases and sales of real property, stress has been laid on the method of financing as an indication of trading. This is particularly true where a property developer acquires land substantially with external financing which is a factor which goes to show that he is in the business of property development for sale. In *CBH* v *Comptroller of Income Tax*,[131] the property developer, an individual, failed to convince the court that he was holding the land as an investment. The court laid considerable

[127] *Supra*, note 61.
[128] *Supra*, note 62.
[129] *Supra*, note 113.
[130] *Supra*, note 60.
[131] *Supra*, note 113.

stress on the fact that he did not have the financial capability to develop the land with flats and terrace houses and hold them as investments. In fact, he had acquired the land with barely enough capital.[132] It is pertinent to note that a long-term investor would make sure that he has long-term financing to ensure that he can hold onto the property indefinitely. This would be most unlikely where the balance of the cost of purchase was financed by an overdraft. In *SCL Pte Ltd* v *Comptroller of Income Tax*,[133] the taxpayer company had financed the purchase of the property by using the whole of its paid-up capital which amounted to a mere 13% of the cost of the purchase. The balance of the cost of the purchase, *ie*, 86% of the purchase price, was financed by an overdraft to the tune of $4 million. In coming to the conclusion that the property was not held as an investment by the taxpayer company, the Income Tax Board of Review reasoned that if that was the intention, it would have been more appropriate to get a term loan instead of an overdraft which is a short-term financing subject to recall by the bank at any time.

It would, however, appear that the court is not prevented from making a finding that the taxpayer is trading just because of the type of financing adopted. So long as the external financing is substantial and the other factors point in the direction of trading, it is more probable than not that the taxpayer will be held to be trading. In *C Ltd* v *Comptroller of Income Tax*,[134] the taxpayer company purchased five properties with 100% financing. It had no money of its own to purchase any property as a long term investment. It had an authorised capital of HK$1,000 and an issued and paid-up capital of only HK$20. The Income Tax Board of Review concluded that the sale profits realized were income from trading in property. The fact that the properties were purchased with 90% financing from a *term loan* did not appear to have a material bearing on the Board's finding that the taxpayer company had no intention of acquiring the properties as long term investments.

It is clear that the converse proposition that the absence of any external borrowing by (and therefore financial pressure on) the taxpayer is consistent with and evidenced his intention to hold the property as investment, does not necessarily hold true. In *Mount Elizabeth (Pte) Ltd*,[135] Chan JC (as he then was) expressed the view that the absence of external borrowing could just be another colourless fact depending on the surrounding circumstances of a particular case. In the case before his Honour, there was overwhelming

[132] *Ibid*, at 114.
[133] *Supra*, note 61.
[134] *Supra*, note 62.
[135] *Supra*, note 60.

evidence to support the finding that the taxpayer company was engaged in property development for sale. Accordingly, the fact that there was no external borrowing did not assist the argument of the taxpayer company that it intended to retain and hold the flats in question as investment.

To adopt a less conventional method of raising money to finance the purchase of property does not necessarily indicate that the transaction is not undertaken for investment purposes. For example, a sale and lease back arrangement is by no means an unusual method of raising money. Where the arrangement produced substantially the same result as a mortgage, it could hardly be contended by the Revenue that if this money had been raised by the more conventional but also more expensive method of a mortgage, income tax would be payable on any part of the money raised as a profit from trade. In *Lim Foo Yong Sdn Bhd* v *Comptroller-General of Inland Revenue*,[136] the taxpayer company adopted a sale and lease back arrangement to finance the purchase of the hotel in question. The taxpayer company had sold the hotel to the lender, *ie*, the Employees Provident Fund Board ("EPF")(a body incorporated by statute), for a sum of M$5 million. The agreement provided that the sum of M$3 million, the balance due after discharging the amount outstanding on the security of the charge to EPF, should be paid on completion. It also provided for the simultaneous execution of a lease back to the taxpayer company of the hotel at a specified annual rent. There was a contemporaneous agreement by the taxpayer company to repurchase the property at the end of ten years at the same price of M$5 million. The sum of M$2,622,510, which the Revenue sought to tax as a profit from the taxpayer company's trade, represented the difference between the total acquisition and construction cost of M$2,377,490 and the agreed purchase price of M$5 million. The Privy Council held that the profit realized from the sale of the property to the lender was not taxable, being a realisation of a capital asset. Their Lordships were unable to agree with the Revenue's contention that the mere fact that the arrangement took the form of a sale for a sum which exceeded the cost of acquisition automatically resulted in the excess falling to be treated as a taxable profit from trading. In their Lordships' opinion, to describe finance raised in this way, which in any event was subject to a liability to pay back exactly the same sum on a repurchase, to which the taxpayer company was contractually bound from the inception, as a profit from trade was a misuse of language.[137]

It is obvious from the above discussion that the factor of substantial external financing, by itself, is not conclusive of the question whether the taxpayer is trading in property, especially where other factors indicate

[136] *Supra*, note 57.
[137] *Ibid*, at 167.

otherwise. However, where such a factor is present coupled with a lack of capital to develop and hold the property as an investment, it would, in practice, make it much more difficult for a taxpayer, whether a company or a private individual, engaged in property development, to argue that it/he was not trading in property. In any event, the absence of such a factor does not necessarily lead to the opposite conclusion.

H. *Multiplicity of Similar Transactions*

It is trite that the significance of multifarious transactions of the same kind is that it may well stamp the transactions undertaken as dealings in property. But this is only one of the factors to be taken into consideration. It cannot, *per se*, stamp the nature of the taxpayer's activities indelibly as trading. An instructive case is *LKC* v *Comptroller-General of Inland Revenue*.[138] The taxpayer was a rubber holder and rubber tapper. He bought certain rubber lands in 1960, 1961 and 1963 and tapped on the lands. For the year of assessment 1967, fifteen lots were sold in various transactions, making in all a substantial profit. Subsequently, in the same year of assessment, he purchased three portions of a rubber estate. The Revenue, in assessing the profits to tax, contended, *inter alia*, that the fact that the trees on the lands in question were of some considerable age meant that the taxpayer could not be buying the lands for investment. Chang J (as he then was) held that the profits were not taxable as they represented capital appreciation. In his opinion, recognition must be had of the difference in the management of rubber estates between corporations and rubber companies on the one hand and smallholders on the other. In the case of the latter, it was very much a case of tapping of such of the trees as were capable of producing latex. Replanting was a matter not of planned operations but dependent on the resources available and on the availability of replanting grants. It was not unknown for smallholders after exhaustion of the trees, to hold rubber lands which were completely unproductive. He found that what the appellant did was to sell and invest the proceeds in other pieces of land. In his opinion, the sale of lands within a very short space of time for the clear purpose of reinvestment must in the circumstances take away any significance of multiple transactions.[139]

It would appear that the factor of multiplicity of similar transactions is fatal to a taxpayer where he does not reinvest the proceeds of sale in

[138] [1973] 2 MLJ 17.
[139] *Ibid*, at 20.

other properties.[140] In *C Ltd* v *Comptroller of Income Tax*,[141] the taxpayer company sold five apartments between April and November 1981. The Income Tax Board of Review laid considerable stress on the fact that the taxpayer company did not reinvest the profits from the five properties in short term deposits or other money market instruments. In fact, the surplus was given in the form of an interest free loan to its director. In the opinion of the Board, such an act was inconsistent with the taxpayer company's claim that it was incorporated as a property investment holding company.[142]

Although land is normally held as an investment, this does not preclude repeated land transactions from being held to constitute a trade, especially where, as seen above, the sale proceeds are not reinvested.

I. *Duration of Ownership*

Generally, the fact that the property is held for a short time after its acquisition and then resold tends to indicate that the sole purpose of the acquisition is resale at a profit.[143] This is especially true of items bought as trading stock which are generally intended to be kept for as short a period of time as possible. On the other hand, a property held for a longer time after acquisition indicates investment.[144] In *C Ltd* v *Comptroller of Income Tax*,[145] discussed above, the five properties in question were held for less than two years before they were disposed off at a profit. Coupled with, *inter alia*, the fact that the purchase was financed 100% from external borrowings (which indicated a lack of capital to hold the properties as investment), it was not surprising that the Income Tax Board of Review held that the sale profits were income from trading in property and hence taxable. Similarly, in *SCL Pte Ltd* v *Comptroller of Income Tax*,[146] also discussed above, the property in question was held for a mere 10 months before it was disposed off at a profit. The purchase was financed by

[140] Generally, where the taxpayer does not reinvest the proceeds of sale, it is a factor which goes to show that the property was not acquired for investment. See *SCL Pte Ltd* v *CIT*, *supra*, note 61, at cxxvii and *OP Sdn Bhd* v *DGIR* (1988) 1 MSTC 2062 at 2068, both of which did not involve a multiplicity of transactions.

[141] *Supra*, note 62.

[142] *Ibid*, at 5073.

[143] See *Liquidator, Paramount Ltd* v *CGIR* [1970] 2 MLJ 193 (land sold within 10 months after its purchase held to be indicative of trading) and *NYF Realty Sdn Bhd* v *CIR* [1974] 1 MLJ 182 at 183.

[144] See *BY Sdn Bhd* v *DGIR* (1988) 1 MSTC 3023 at 3027 (land, held for more than 14 years, undeveloped and earning no income tilted scales in favour of taxpayer).

[145] *Supra*, note 62.

[146] *Supra*, note 61. See also *AS Sdn Bhd* v *DGIR* (1991) 1 MSTC 434 at 440 (property held for two years before disposal indicative of trading).

substantial external borrowing (representing 86% of the purchase price) by way of an overdraft (which is a short-term financing subject to recall by the bank at any time). Again, the Board had no difficulty in holding that the sale proceeds were derived from trading in property, emphasising, *inter alia*, that the property was held for a short duration.[147]

However, where the proceeds of sale are reinvested, this will negative a finding of trading notwithstanding the fact that the property had been held for only a short duration. In *SCL Pte Ltd*, the proceeds of sale were not reinvested. In fact, at the time of sale, the taxpayer had not adopted any plan for switching investments and this proved fatal.[148] The fact of reinvestment will also negative a finding of trading in situations involving repeated land transactions even where the lands are not held for very long periods of time. In *LKC*, the Revenue had sought to argue that the taxpayer was trading in rubber lands as he had bought and sold fifteen of the same within the short period of 3 to 6 years. In holding that the profits were from the realisation of an investment (and thus not taxable), the court laid considerable stress on the fact that the proceeds of sale were reinvested. This must necessarily negative any finding of trading, notwithstanding that the lands were sold within a very short space of time after they were purchased. The same could not, however, be said of the taxpayer in *C Ltd* as the proceeds of sale therein were not reinvested.

Although evidence of duration of ownership is usually not conclusive, it, nevertheless, represents one of the factors to be taken into consideration in determining the question of trading.

J. *Application of Special Skills/Supplementary Work*

Where special exertion is made by the taxpayer to find or attract purchasers such as the opening of an office or advertising extensively or by bringing his special skills, expertise and talents to bear in developing the property, such facts tend to indicate the presence of a trading transaction. This is especially true of a company which has been in active existence dealing in buying or selling land ever since it was incorporated and the original purpose and intention as well as its conduct had been consistent throughout those years to one of buying and selling lands.[149] In the case of an individual, the application of special skills to or the carrying out of supplementary work on the property acquired may reinforce the finding that he was dealing in land for a profit where the other factors do not point in the opposite

[147] *Ibid*, at cxxviii.
[148] *Ibid*, at cxxvii.
[149] See *AS Sdn Bhd* v *DGIR* (1991) 1 MSTC 434.

direction. In *CBH* v *Comptroller of Income Tax*,[150] discussed above, the Court of Appeal laid emphasis on the fact that the taxpayer did not acquire the land for his personal use; that the land was not producing any income and that he consulted an architect to develop the land in the best possible way. This was followed by the taxpayer submitting various applications for subdivision, layout plans and planning permission to develop the land. The court came to the irresistible conclusion that, even if the original intention of the taxpayer was to acquire the land for investment, that intention had changed and that the taxpayer was carrying on the trade of dealing with the land and was seeking planning permissions to enhance the eventual realised prices of the subdivided parcels.

However, the fact that there is supplementary work or application of special skills would not of themselves cause the profit to be taxable if the purpose in acquiring the property was for personal use or investment rather than to sell it at a profit. In the case of an investment company, it is inevitable that special skills or supplementary work be undertaken so as to bring the investment project to fruition. In such a case, it is hardly possible to contend that the company was undertaking a trading activity. Even where the taxpayer is not an investment company, it need not necessarily follow that it was engaged in trading just because an organization had been set up and that a gain had been made on the disposal of the property. An instructive case is *Lower Perak Co-operative Housing Society Bhd* v *Ketua Pengarah Hasil Dalam Negeri*.[151] A co-operative society had been set up to organize things and a gain had been made on the disposal of the subdivided land to a developer. In holding that the profit realized was not taxable, the Supreme Court stated that the mere extensiveness of the organization set up to work the land did not of itself cause the taxpayer co-operative society to be engaged in trading. Since the taxpayer was a co-operative society, it had to incorporate itself under the Co-operative Societies Act 1948. As a co-operative society, the purpose was to pool the financial resources of all the members and with the combined sum to purchase the land. The intention in acquiring the land was to build houses for members (a domestic purpose) and not for trading purposes. The subdivision of the land, which was subsequently undertaken, was done in furtherance of this intention of the society. However, owing to poor response from members and the inability to raise funds to finance the housing project, the society was forced to dispose off the land in order to cut its losses. In the circumstances, the society could not be said to be trading

[150] *Supra*, note 113.
[151] *Supra*, note 75.

in land.

Where a private landowner is concerned, it is trite law that supplementary work undertaken by him merely to enhance the value of the property before it is sold is not indicative of trading.[152]

K. *Reasons for Realization*

The circumstances necessitating the realization of an asset may be of prime importance as it may afford an explanation for the realization that negatives the idea that the taxpayer was engaged in a trading activity. If the sale of the property was occasioned by sudden emergency or unanticipated need for funds, such facts will tend to vitiate the intention to trade. For example, in *HCM* v *Director General of Inland Revenue*,[153] discussed above, the Special Commissioners found that the taxpayer disposed off her lands because she was prompted by the need to pay for her domestic needs and for her children's educational expenses. The sale was not connected in any way with any business activities. This was consistent with and reinforced the evidence that she was holding the lands as an investment. Similarly, in *Lower Perak Co-operative Housing Society Bhd* v *Pengarah Hasil Dalam Negeri*,[154] the inability of the taxpayer co-operative society to raise funds from banks or financial institutions to finance its housing project of which the beneficiaries were its members, led the court to conclude that the sale of the land in question was brought about by circumstances beyond its control. The land was not acquired for a trading purpose but for the domestic purpose of building houses for its own members. Accordingly, the profits realized from the sale of the land could not be said to be derived from a trading activity of the society as it was a forced sale, wherein the element of compulsion vitiated the intention to trade.

The above discussion would probably not apply to a trader in land, such as a dealer in real estate, where land would be the trading stock. Any transaction effected owing to a sudden emergency would remain a trading transaction, irrespective of whether a profit or loss is realized, as the case may be.

Where a sale is effected voluntarily for a profit, without any element of compulsion, it is more likely to constitute a trading transaction where other factors indicate that the taxpayer did not acquire the property for investment.[155]

[152] See *Taylor* v *Good* (1974) 49 TC 277 at 296. *Cf Iswera* v *Ceylon Commissioner of Taxation* [1965] 1 WLR 663.

[153] *Supra*, note 53.

[154] *Supra*, note 75.

[155] See, *eg*, *SCL Pte Ltd* v *CIT*, *supra*, note 61; *C Ltd* v *CIT*, *supra*, note 62; *Mount Elizabeth (Pte) Ltd* v *CIT*, *supra*, note 60 and *AS Sdn Bhd* v *DGIR* (1991) 1 MSTC 434.

IV. Conclusion

Despite the difference in statutory language in the Singapore and Malaysian Income Tax Acts on the meaning of "business", the legal position in regard to isolated transactions, as can be gathered from the decided cases, appear to be similar. Although the Malaysian provision is wider, yet the Revenue has not, generally, been successful in having isolated transactions caught within the tax net. On the other hand, its counterpart in Singapore has been more successful in persuading the court (with the exception of *DEF*) that the taxpayer is engaged in a trading transaction, albeit an isolated one. This is so despite the more restrictive provision of section 10(1)(a) of the Singapore Income Tax Act. This may be accounted for on the basis of the factual matrix obtained in the respective cases. Generally, Singapore and Malaysian courts resort to principles laid down in English (and at times, South African) cases for guidance in dealing with the question of trading. Reference to the local context is invariably made as it is in the light of local conditions and practices that the question has to be dealt with. As can be seen from the above discussion, there is no single characteristic that is conclusive of the matter. Indeed, a characteristic may appear to be determinative of the matter in a particular case but may not necessarily be so in another case as the other myriad of factors may lead to an opposite conclusion. The best that a taxpayer can do to avoid being taxed on a transaction is to structure it in the light of the factors which, considered in totality, have been regarded by the courts as steering clear of the pitfalls of trading.

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