**DALAM MAHKAMAH RAYUAN MALAYSIA DI PUTRAJAYA**

**(BIDANGKUASA RAYUAN)**

**RAYUAN SIVIL NO: W-01(A)-732-12/2021**

**ANTARA**

**INTERNATIONAL NATUROPATHIC BIO-TECH (M) SDN BHD**

**…PERAYU**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI …RESPONDEN**

**(DI DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR**

**RAYUAN SIVIL NO: WA-14-4-02/2021)**

**ANTARA**

**INTERNATIONAL NATUROPATHIC BIO-TECH (M) SDN BHD**

**…PERAYU**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI …RESPONDEN**

**(DALAM PERKARA PESURUHJAYA KHAS CUKAI PENDAPATAN**

**RAYUAN NO. PKCP(R) 423/2015**

**ANTARA**

**INTERNATIONAL NATUROPATHIC BIO-TECH (M) SDN BHD**

**…PERAYU**

**DAN**

**KETUA PENGARAH HASIL DALAM NEGERI …RESPONDEN)**

**CORAM**

**S NANTHA BALAN, JCA**

**MOHD NAZLAN MOHD GHAZALI, JCA**

**DR CHOO KAH SING, JCA**

## JUDGMENT OF THE COURT

## Introduction

**[1]** This is an appeal against the judgment of the High Court which had by way of case stated affirmed the decision of the Special Commissioners of Income Tax ("SCIT") which had earlier dismissed the appellant's appeal against the assessment raised by the respondent under Section 4(a) of the Income Tax Act 1967 ("the ITA").

**[2]** Having heard the appeal - which was conducted by way of a remote communication technology via *Zoom* - examined the appeal records and considered the submissions by parties, we unanimously decided to affirm the decisions of the High Court and the SCIT, and therefore dismiss the appeal, for the reasons which we set out herein.

## Key Background Facts

**[3]** International Naturophatic Bio-Tech (M) Sdn Bhd, the appellant herein, is a locally incorporated company, and has as its main business, the promotion of naturopathic medicine including the provision of training, advice, information, consultancy, guidance and counselling on all aspects of naturopathic medicine. The appellant company's two first

shareholders and directors were Dr Fei Chong Ming and Fei Xiao Yun. The appellant operated its health product distribution business from 1986 until the passing of Dr Fei Chong Ming in 2012.

**[4]** On 8 July 2008 the appellant executed six sale and purchase agreements to purchase six different shop lot units - specifically A-3A-G, A-3A-1 and A-3A-2 in Block A as well as B-23A-G, B-23A-1 & B-23A-2 in Block B at Zenith Corporate Park located in Kelana Jaya, Petaling Jaya ("the Shop Lots").

**[5]** Delivery of vacant possession in respect of all the Shop Lots was made in August 2010.

**[6]** Subsequently, the Shop Lots in Block A were sold on 27 June 2011 and those in Block B, on 1 August 2011.

**[7]** The respondent is the Director General of Inland Revenue who had raised the notice of assessment dated 18 December 2014 in the requisite Form J on the appellant company in respect of the disposal of the Shop Lots, amounting to RM543,906.00 for the year of assessment 2011.

**Principal Issue for Determination in this Appeal**

**[8]** The one central issue in this appeal as it was before the SCIT and the High Court is whether the disposal by the appellant of its Shop Lots is subjected to real property gains tax (RPGT) under Section 3 of the Real Property Gains Tax Act 1976 or Section 4(a) of the ITA.

**[9]** The SCIT and the High Court both held that the disposal of the Shop Lots in Block A and Block B were subject to income tax, thereby confirming the assessment made by the respondent dated 18 December 2014 for the year of assessment 2011, with tax payable in the amount of RM543,906.00.

**[10]** The High Court found no reasons to interfere with the findings of fact made by the SCIT, which were found to be consistent with the evidence produced before it. The High Court also agreed with the SCIT that the appellant is not an investment holding company within the meaning of Section 60F of the ITA (although this point was abandoned by the appellant) and also concurred that once the appellant was found to have made an incorrect return, the respondent had every right to impose a penalty. Both the SCIT and the High Court affirmed that the imposition of a 45% penalty on the appellant was allowable and correct.

## Principles governing appellate intervention in appeals against decisions of SCIT

**[11]** Although the merits of the appeal would require examination on whether the disposals by the appellant of the Shop Lots in Block A and in Block B ought properly to be made subject to the ITA or to the RPGT, where the appellant's principal ground of appeal is founded on the main argument that the application of the badges of trade criteria should rightfully result in a determination that gains from the disposals would not be subject to the ITA, it would be remiss of us not to highlight, albeit in summary fashion, the principles on appellate intervention, and their relevance to this appeal, given the fact that this appeal emanates from a decision of the SCIT.

**[12]** As distilled from caselaw authorities on the subject, we find it useful to summarise the governing principles on appellate intervention vis-à-vis decisions of the SCIT in the following terms.

**[13]** First, the tax statute states that the decision of the SCIT is final; and it is appealable only on a question of law. Paragraph 23 of Schedule 5 to the ITA provides:

> 23. As soon as may be after completing the hearing of an appeal, the Special Commissioners shall give their decision on the appeal in the form of an order which shall be known as a deciding order and which, subject to this Schedule shall be final.

**[14]** Paragraph 34 of the same Schedule 5 further states as follows:

> 34. Either party to proceedings before the Special Commissioners may appeal to the High Court on a question of law against a deciding order made in those proceedings.

**[15]** And to further augment the position that an appeal to High Court is only on a question of law, Paragraph 39 of Schedule reads thus:

> 39. The High Court shall hear and determine any question of law arising on an appeal under paragraph 34 and may in accordance with its determination thereof:
>
> (a) order the assessment to which the appeal relates to be confirmed, discharged or amended;

(b) remit the appeal to the Special Commissioners with the opinion of the court thereon; or

(c) make such other order as it thinks just and appropriate.

**[16]** Further elucidation was made by the former Federal Court in *Director General of Inland Revenue v Rakyat Berjaya Sdn Bhd* [1984] 1 CLJ (Rep) 108 as to the limited situations where finding of facts by the SCIT could be disturbed on appeal, where Lee Hun Hoe CJ (Borneo) stated as follows:

> "In Chu*[a]* Lip Kong's case the Privy Council reversed the Commissioners' decision on the ground that it was wrong in law. The approach is similar to that of the House of Lords in *Edwards v. Bairstow & Harrison* [1956] AC 14; [1955] 3 All ER 48; [1953] 36 TC 207, a case universally acknowledged as the leading authority on the distinction between questions of fact and questions of law. It was also referred to by the learned Judge. He was fully conscious of the critical distinction between questions of fact and law. He stated the position succinctly and accurately before citing a passage from the above case. At p. 54 of the Appeal Record he reminded himself in the following words:
>
> > "...The power of the Court to interfere is quite limited where the findings of the Special Commissioners are basically findings of facts. The Court will interfere only if there is no evidence to justify the finding or where they have applied erroneous tests in arriving at their conclusions or have drawn a wrong inference on the facts or have misdirected themselves in law ...".

**[17]** We should add in this regard that a true appreciation of the law, as so legislated, cannot be emphasized enough. This was highlighted by the Court of Appeal in *Kenny Heights Development Sdn. Bhd. v Ketua Pengarah Hasil Dalam Negeri* [2015] 5 CLJ 923, where the following observation was made:

> "[24] We make the general observation that courts, acting in accordance with the law, are at all times bound by the legislation placing jurisdiction and authority in specialised bodies such as the SCIT. The legislation specified that the deciding order of the SCIT is final and allowed appeals to the court on question of law and not any grievance. It underlines, within the SCIT's jurisdiction, its authority, and prevents the courts being buried under an avalanche of tax appeals by parties unhappy with the determination of the KPHDN and the SCIT".

**[18]** Secondly, and it follows from the first, findings of primary facts by the SCIT are unassailable. The High Court cannot interfere with such findings. This much was made clear by Privy Council in an appeal from Malaysia in the case of *Chua Lip Kong v Director General of Inland Revenue* [1982] 1 MLJ 235 where it was stated as follows:

> "Their Lordships cannot stress too strongly how important it is that, in every Case Stated for the opinion of the High Court, the Special Commissioners should state clearly and explicitly what are the findings of fact upon which their decision is based and not the evidence upon which those findings, so far as they consist of primary facts, are founded. Findings of primary facts by the Special Commissioners are unassailable. They can be neither overruled nor supplemented by the High Court itself; … From the primary facts admitted or proved the Commissioners

> are entitled to draw inferences; such inferences may themselves be inferences of pure fact, in which case they are unassailable as the Commissioners' finding of a primary fact; but they may be, or may involve (and very often do), assumptions as to the legal effect or consequences of primary facts, and these are always questions of law upon which it is the function of the High Court on consideration of a Case Stated to correct the Special Commissioners if they can be shown to have proceeded upon some erroneous assumption as to the relevant law..."

**[19]** The third principle that may be distilled from the authorities is that where the appeal is by way of a Case Stated, like presently, the High Court is only concerned with the points of law on the facts stated as given in the Case Stated as set out by the SCIT. It cannot go beyond the Case Stated from the SCIT. The former Federal Court in *UHG v Director General of Inland Revenue* [1974] 2 MLJ 33, in the judgment written by Raja Azlan Shah FJ (as HRH then was) had stated thus:

> "It is well established that where the appeal is by way of a Case Stated a statutory duty is laid upon the Special Commissioners to set forth the facts as found by them and the deciding order but not the evidence on which the findings are based. The court of appeal is not concerned with the evidence given in the Case Stated but with the facts therein stated and it is points of law upon those facts the court has to decide. The question for the court of appeal therefore is whether, given the facts as stated, the Special Commissioners were justified in law in reaching the conclusions they did reach".

**[20]** Fourthly, the High Court is not entitled to interfere with the decision of the SCIT even if the High Court would not have come to the

same conclusion, on the same material. In the same case of *UHG v Director General of Inland Revenue* (supra), the Federal Court explained thus:

> "But where there is evidence to consider, the decision of the Special Commissioners is final, even though the court might not, on the materials, have come to the same conclusion. In treating the question I can desire no more apt exposition of the law than what is contained in Lord Atkinson's speech in *Great Western Railway Co v Bater* (1928) 8 TC 231 244.
>
> > "Their (Commissioner's) determination of questions of pure fact are not to be disturbed, any more than are the findings of a jury, unless it should appear that there was no evidence before them upon which they, as reasonable men, could come to the conclusion to which they have come: and this, even though the Court of Review would on the evidence have come to a conclusion entirely different from theirs."
>
> To displace the presumption the respondent led the following evidence: the drivers of the taxpayer company were not direct employees; they were independent contractors who hired out the taxis from the company on rentals; at all material times no relationship of master and servant ever existed between them; the taxi drivers were forced to sign certain documents, one of which was exhibit A1, the contents of which were never explained to them.
>
> I should have thought that this is a case of a finding of fact that the service agreements are a sham. If that is so, then such finding is one which ought to be accepted and the court will not disturb it simply because it prefers a different conclusion."

**[21]** A similar outcome was arrived at in *Director General of Inland Revenue v Lahad Datu Timber Sdn Bhd* [1978] 1 MLJ 203 where Lee Hun Hoe CJ (Borneo) observed as follows:

> "With respect, the learned judge was wrong to interfere with the decision of the Special Commissioners as there was sufficient evidence to support their conclusion. The learned judge, in exercising appellate jurisdiction, was not supposed to alter conclusion of facts simply because he feels that on the evidence the Special Commissioners should not have arrived at the conclusion of facts they did. In *Bracegirdle v Oxley Lord* Goddard CJ made these observations:
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> > "It is, of course said that we are bound by the findings of fact set out in the Case by the justices, and it is perfectly true that this court does not sit as a general court of appeal against justices' decisions in the same way as quarter sessions, for instance, sit as a court of appeal against the decisions of courts of summary jurisdiction. In this court we only sit to review the justices' decisions on points of law, being bound by the facts which they find, provided always that there is evidence on which the justices can come to the conclusions of fact at which they arrive."

**[22]** The fifth principle, another corollary of the others, is that even if the primary facts found by the SCIT are capable of two alternative inferences, the High Court would not substitute its own preferred inference. This is trite since an appellate court would only set aside the decision of the tribunal if the tribunal had acted without any evidence or on a view of facts which could not reasonably be

supported. But if the primary facts, as found, were capable of supporting two alternative inferences, the appellate court would not substitute its preferred inference over the one validly drawn by the tribunal (see *Furniss v Dawson* [1984] STC 153 at 166 per Lord Brightman, *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] STC 255 at 259 per Lord Oliver and reaffirmed in *Richfield International Land and Investment Co Ltd v IRC* [1989] STC 820).

**[23]** This was elucidated in clear terms by the Privy Council in *Richfield International Land & Investment Co Ltd v IRC* [1989] STC 820 where it was held that:

> "The sole question therefore in this appeal is whether they were entitled to draw the inference from the circumstances of these sales that Gardena Court had become part of the trading stock prior to its sale. A finding of fact by tax commissioners or other similar bodies charged with the hearing of appeals against assessment to tax will only be set aside by an appellate court, whose jurisdiction is restricted to matters of law, if it appears that the body in question has acted without any evidence or on a view of the facts which could not reasonably be supported (*Edwards* (*Inspector of Taxes*) *v Bairstow* [1956] AC 14 at 29, 36 TC at 224 per Viscount Simonds). These principles apply not only to primary facts but to inferences drawn there from (*Furniss* (*Inspector of Taxes*) *v Dawson* [1984] STC 153 at 166, [1984] AC 474 at 527–8 per Lord Brightman). Furthermore if the primary facts as found are capable of supporting two alternative inferences it is no function of the appellate court to substitute its preferred inference for that legitimately drawn by the body in question (*Furniss v Dawson* per

Lord Brightman, *Lim Foo Yong Sdn Bhd v Comptroller-General of Inland Revenue* [1986] STC 255 at 259 per Lord Oliver)."

## Analysis & Findings of this Court

### *Whether disposal gains by the appellant is caught under the ITA*

**[24]** This case brings to the fore yet another tax dispute which highlights the fine line between income tax and capital gains tax vis-à-vis disposals of landed properties. This determination is important since only gains or profits arising from the sale of property acquired for profit-making which is subject to income tax. In determining whether a tax liability exists under Section 4(a) of the ITA, it is essential to establish whether the taxpayer, like the appellant herein is deriving gains or profits from the carrying on of a business. The Act does not prescribe the circumstances an income or a gain is considered as a capital or revenue in nature.

**[25]** The key question whether the gains from the disposals of the Shop Lots fell under the scope of the ITA arises since Section 4 (a) provides for several classes of income which is taxable under the ITA. The relevant parts read as follows:

> **4. Classes of income on which tax is chargeable**
>
> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of –
>
> (a) Gains or profit from a business, for whatever period of time carried on; ….

**[26]** This in turns calls for the need to construe the meaning of the aforesaid word "business" which is provided in Section 2(1) of the ITA to include:

> "…professions, vocation and trade and every manufacture, adventure or concern in the nature of trade, but excludes employment."

**[27]** Relevant for present purposes, the word "trade" is mentioned, but is not defined in the ITA. Caselaw authorities on this subject are sufficiently well-established. Trade has been described as involving *"something in the nature of a commercial undertaking, of which the buying and selling are most obvious characteristics"* by Lord Buckmaster in *The CIR v The Forth Conservancy Board* 16 TC 103.

**[28]** The former Federal Court in *E v Comptroller of Inland Revenue* [1970] 2 MLJ 117, when interpreting the meaning of trade under the Income Tax Ordinance in force then (whilst making references to the applicable English statutes which had also defined 'trade' to include *"every trade, manufacture, adventure or concern in the nature of trade"*), held in the judgement written by Gill FJ, as follows:

> "...Whilst a trade usually consists of series of transactions implying some continuity and repetition of acts of buying and selling, or manufacturing and selling, in view of the definition of 'trade' in the English Income Tax Act which I have mentioned above, the mere fact that there is only one transaction does not preclude the possibility that the transaction is in the nature of 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...".

**[29]** That a single transaction may amount to a trade is further augmented by the definition of business as set out above which includes the concept of *"adventure or concern in the nature of trade".* In other words, in light of Sections 2(1) and 4(c) of the ITA, the business gains designed to be taxable under the ITA result from the activity of buying and selling, either in a series of transaction, continuously and repeatedly, or that it could also merely be an isolated or single transaction.

***The Badges of Trade***

**[30]** Crucially, on the pivotal question whether it is non-taxable capital receipt or a taxable profit from a trade or an adventure in the nature of trade, guidance may be sought by examining the characteristic features of a trading activity, or the concept of *"badges of trade".* This was attributed to the Final Report released in 1955 of the UK's Royal Commission on the Taxation of Profits and Income or the Radcliffe Commission which then suggested six *"badges of trade"* to be considered to test the existence of a trade or an adventure in the nature of trade. The UK's HM Revenue & Customs now lists nine badges of trade.

**[31]** The application of the badges of trade concept is also found in Malaysia's tax jurisprudence and practice.

**[32]** However we must make four key observations on the application of the badges of trade. First, these badges are merely a guide which is employed to assist in the deliberation as to whether a set of facts and circumstances would constitute a trade or an adventure in the nature of trade.

**[33]** Secondly, no one single badge is usually conclusive or determinative in answering the question itself, for it is likely that the answer will turn on a combination of more than one badge. In some circumstances, the existence of one single badge is enough to show trading but in most cases consideration of a combination of the badges of trade is warranted. In other words, the presence of a specific badge is generally unlikely, by itself, to achieve anywhere near a definitive answer to the question of whether or not there is a trade.

**[34]** Thirdly, it is also not uncommon that the application of one badge may lead to one answer but that of another result in another, potentially contradictory conclusion. As such, fourthly, often, the deliberation involves the interplay of the combination of the various badges, having regard to the facts and circumstances of each particular case, with certain badges being considered as more significant. The weight to be attached to each badge will depend on the precise circumstances of the case. Fifthly, it is also fair to say that the more badges of trade that can be fastened on a transaction makes it more likely that the transaction will be construed as a trade and thus subject to income tax.

**[35]** It is apposite that these nine badges of trade be stated briefly, together with the general proposition that each of them carries, and in no particular order of significance, in summary fashion, as follows.

**[36]** The first is the ***intention or the motive of the purchase*** of the property which is subsequently disposed. Here, in order to establish that a trade is being carried on, the taxpayer must show motive rather than the existence of profit. Having an intention to make a profit indicates a

trading activity. In *Rutledge v Commissioners of Inland Revenue* 14 T.C. 490; 1929 S.C. 379 it was held that the profit realized on the sale of a million rolls of toilet-paper being a large quantity single purchase and resale item was taxable as being from an adventure in the nature of trade. The purchase was of a large quantity that would not be purchased for ordinary domestic needs, or for investment purposes. This was therefore held to be an adventure in the nature of trade.

**[37]** The second is the ***subject matter of the asset*** being disposed of. This looks at the nature of the asset. In comparison with property which does yield to its owner an income or personal enjoyment simply by reason of its ownership, property which does not provide its owner income or enjoyment is more likely to have been required with the object of dealing with it - trading activity. Properties that yield rental income are generally construed as being held for investment purposes. Conversely, if the asset is inherited or gifted, it would likely signify that it was not acquired with a view to sale for profit.

**[38]** Still, landed properties may give rise to different inferences depending on circumstances. For example, a land would be a stock-in-trade to a property developer, but an investment to an individual. A leading case on this subject is *Marson (Inspector of Taxes) v Morton* [1986] 1 WLR 1343 where despite having purchased the land as an investment with the intention of holding on to it for at least two years, no income was however generated. This was also despite the taxpayer having obtained planning permission to increase the value of the land. The transaction was not an adventure in the nature of a trade as the sale was ruled to have been far removed from the taxpayer's normal activity; and the gains was not a trading profit.

**[39]** The third badge of trade is the interval of time between purchase and sale or what may essentially be the length of the ***period of ownership*** where in general, property intended for trading is realized within a short time after acquisition. This also means that the longer the period of ownership the greater the likelihood the property be regarded as an investment rather than a trade (see *Wisdom v Chamberlain* [1969] 1 All ER 332, *Marson v Morton* (supra)).

**[40]** Fourth is the number or ***frequency of transaction*** in that repetitious transactions in the sense of the disposal of similar property takes place in succession over a period of years or there are several of such transactions at about the same date, thus usually indicating that the purpose was for resale at a profit.

**[41]** A leading case on this badge is *Pickford v Quirke* [1927] 13 TC 251 where after purchasing a cotton mill for trading purposes, the taxpayer bought a spinning mill business but then stripped all the items out and sold them piecemeal. Given the repeated number of transactions – four times, it was held that the profits were taxable as trading income. In light of the various transactions where there were several such realizations at about the same date, the Court stated that whilst an isolated transaction would not have given rise to a trading gain, such systematic repetition raises an inference of trading in respect of each.

**[42]** But even if it is to be regarded as isolated, superior courts have also decided that a single or isolated transaction could amount to trading (see the Federal Court decision in *E v Comptroller-General of Inland Revenue* [1970] 2 MLJ 117 and the Privy Council decision in *International Investment Ltd v Comptroller-General of Inland Revenue* [1979] 1 MLJ 4).

**[43]** The fifth is ***changes made to the asset*** which would make it more saleable. Generally, any special effort to attract purchasers, including large scale advertising provides some evidence of trading. Essentially where there seems to be an organized effort to obtain profit, this suggests the presence of a source of taxable income. However, if nothing at all is done, the inference would be to the opposite effect.

**[44]** Much however depends on the subject-matter. If the property is intended for investment, it could be said that renovation could make it more tenantable, and thus fetch a higher rental. If the property is meant for resale (in the nature of trade), it would probably make little sense to renovate the properties in advance as it might not satisfy the intended purchaser's requirements. However, if the purchase was for other purposes (for example home occupation) and subsequent improvement was done to render it more saleable after it was no longer useful for such original purpose (say after having occupied for so many years), the gain on the disposal should not ordinarily be taxable.

**[45]** Thus more difficult to differentiate is between work which merely adds to the value and marketability of the asset (investment activities) and work which alters the nature and identity of the subject matter (trading activities). In the case of *Cape Brandy Syndicate v IR Commissioners* [1921] 2 KB 403 the taxpayers, who were members of different firms purchased three lots of brandy, then shipped them to London where they were blended, mixed and packaged before being sold by the taxpayers. The Court of Appeal held this to be trading, and rejected the argument that the transaction was of a capital nature from the sale of an investment. On the other hand, in *Jenkinson v Freedland* (1961) 39 TC 636, having bought two metal stills, the taxpayer used his own skill to have them repaired and restored them to use. He then sold the stills to two

companies which he controlled. The Court of Appeal did not consider this to be a trading transaction.

**[46]** We reiterate that the general rule is that where the additional work to the property does not change the nature of the property apart from making it somewhat more desirable a piece of property, thus commanding a higher purchase price, gains from the sale of the property ought not therefore to be deemed as taxable income. This is to be contrasted with works which say converts a large house into a boutique hotel, in respect of which the profit realized on a resale should generally be assessable as a profit from a trading venture, since the venture and identity of the subject matter has been totally changed. But where no steps at all are made vis-à-vis the property to increase its value, this may not always be consistent with the contention that the property is held for investment.

**[47]** Sixth, is in relation to the ***circumstances that were responsible for the realization*** of the property. This badge of trade envisages certain explanation such as a sudden emergency which displaces the contention that the purchase was accompanied by a plan to trade in the property. As such, if the sale is attributed to an unanticipated need for funds or as a result of an unsolicited offer, this will tend to indicate that the sale is not made pursuant to a profit-making scheme.

**[48]** Similarly if sale of the property is as a result of financial constraints or compulsory acquisition by the Government, this would suggest that the disposal was not initiated by the property owner. This in turn would mean that it is unlikely to be a transaction in the nature of trade. This badge necessarily requires assessment of the transaction from the perspective of the requirements of the taxpayer at the later time of realisation, not at the initial purchase.

**[49]** In *HCM v Director General of Inland Revenue* [1993] 2 MSTC 539 the taxpayer sold three lots of land to finance her domestic requirements and for the education of her children. The SCIT decided that she was realising her investment which did not thus attract income tax. This ruling was arrived at notwithstanding that the taxpayer had a history of trading in land 10 years prior, given the findings that among others, she did nothing to enhance the value of the properties, the properties had been held for a long period of time - between 10 and 22 years; and she did not take steps to attract purchasers and that the disposal was actuated by her needs and her children's educational expenses (see also the decision of the Supreme Court in *Lower Perak Co-operative Housing Society v Ketua Pengarah Hasil Dalam Negeri* [1994] 2 MLJ 713).

**[50]** It is of some interest to note that prior to the introduction of Section 4C of the ITA, the Court of Appeal in *Ketua Pengarah Hasil Dalam Negeri v Penang Realty Sdn Bhd* [2006] 3 MLJ 597, following *Lower Perak Cooperative Housing Society Berhad* (supra) held that compensation received by the taxpayer for compulsory acquisition of land is not subject to income tax since the element of compulsion vitiated the intention to trade.

**[51]** Although Section 4C subsequently reversed the effect of these decisions, more recently the Federal Court in *Wiramuda (M) Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2023] 5 MLRA 285 ruled that Section 4C of the ITA was unconstitutional since it violated Article 13(2) of the Federal Constitution by depriving the taxpayer of adequate compensation arising from the compulsory acquisition of the land.

**[52]** Seventh is the ***source of finance or method of financing*** for the purchase of the property. Its relevance is in respect of whether the

financing was taken to purchase the property which suggests that the same property may have to be sold to repay the facility. If however an asset is purchased on a short term loan which the taxpayer is unable to fund without selling the asset again, it may be argued that the same was purchased specifically with a view to selling it (see *Wisdom v Chamberlain* (supra)).

**[53]** In addition, the financial ability of the taxpayer to acquire the asset is an indicator of whether the asset is acquired for long term investment such that where there is sufficient capital coverage and reserves to finance long term assets, the taxpayer would be considered to be in a stronger position to maintain itself as a long term investor.

**[54]** In *Turner v Last (HM Inspector of Taxes)* [1965] T.R 249, it was held that the weak financial position of the taxpayer made it doubtful that the taxpayer would have been able to hold the land indefinitely as an investment.

**[55]** Eight is the ***existence of similar trading transactions*** or interests. By this it is meant that if the disposal transaction is in keeping with the ordinary business of a taxpayer, the same would likely be deemed as a trade transaction. The converse is true if the disposal is far removed from the taxpayer's usual business activity.

**[56]** Ninth is ***the way the sale or disposal was carried out*** in that if the disposal is undertaken within an organized arrangement which could involve activities such as utilization of property brokers, printing of brochure and pamphlets, extensive advertising, opening of an office, and employment of sales staff etc., this would tend to signify the presence of a business of trading.

***The Key Findings of the SCIT***

**[57]** We now refer to the key findings made by the SCIT. There, the appellant had argued that its ownership of the Shop Lots was in the nature of a long term investment such that the subsequent disposal was subject to RPGT, not income tax. The respondent viewed it in directly opposite fashion, asserting that the badges of trade methodology designed to distinguish between taxable and non-taxable profits concluded that the sale of the Shop Lots was in the form of trade or adventure in the nature of trade, thus attracting the application of the ITA instead.

**[58]** The primary finding by the SCIT, as affirmed by the High Court, that the gains arising from the disposal of the Shop Lots in Block A and Block B owned by the appellant company were subject to the ITA are attributed to a number of considerations, which included the following.

**[59]** First, on frequency of transaction, it was found that Block A Shop Lots were rented for a short period and that no effort was done to look for tenant for Block B. Secondly, there was only short period of ownership, in the sense that the Shop Lots in Block A were sold some 6 months after they were rented out and 10 months after delivery of vacant possession, whilst the Shop Lots in Block B were sold 12 months after vacant possession. The Shop Lots in Block B were left vacant, and there was admission of absence of any attempt to secure tenants for its Shop Lots in Block B or to advertise for better rental for those in Block A.

**[60]** Thirdly, the circumstances responsible for the sale were not established by the appellant as its assertion that the disposal of the Shop

Lots was undertaken with the objective of utilising the sale proceeds to help pay for the medical bills of Dr Fei Chong Ming was not substantiated by any documents such as medical receipts recording such expenses.

**[61]** Fourthly, the intention for the purchase of the Shop Lots in the first place was to trade, by reasons of the findings among others that the purchases were financed by loans taken by a director, not by the appellant company; that the Shop Lots were located at a strategic business area – Kelana Jaya, PJ; that the availability of strata titles of the Shop Lots when purchased by the appellant made the value of the properties more attractive and any sale and purchase transactions much easier to complete; that the appellant did not find it difficult to sell the Shop Lots within the relatively short period of not more than 12 months after obtaining vacant possession of the same; and that there was not much effort expended to rent out the Shop Lots.

***The Principal Grounds of Appeal***

**[62]** Here before us, the appellant raised a number of grounds of appeal as stated in its memorandum of appeal. We shall deal with the more substantive of the grounds as they are set out in the appellant's written submissions and raised in oral submissions at the hearing, and that a number of which will be examined together given that certain of the issues and arguments overlap.

**1) <u>There was no intention to trade</u>**

**[63]** The first grievance of the appellant is that the appellant never had the intention to trade in the Shop Lots, disagreeing with the decisions of the SCIT and the High Court.

**[64]** The SCIT stated that the appellant had failed to prove that the acquisition of the Shop Lots was for the purpose of investment as the facts instead showed that these were the appellant's stock in trade acquired for trading purposes. The High Court stated that even though intention at the time of purchase may be for investment it could later change and be for trading.

**[65]** This potential for change in intention was recognised by the House of Lords in the following passage from the case of *Simmons (As Liquidator of Lionel Simmons Properties Ltd) v Inland Revenue Commissioners* [1980] 2 All ER 798, 53 TC 461 :

> "One must ask, first what the Commissioners were required or entitled to find. Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock, and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and, possibly, a liability to tax ... What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor for it to possess an indeterminate status, neither trading stock nor permanent asset. It must be one or the other ..."
>
> [Emphasis added]

**[66]** In the English Court of Appeal case of *Taylor v Good (Inspector of Taxes)* [1974] 1 WLR 556, a husband purchased a property to be used as a family home but his wife refused to live in it, which resulted in the sale of the house. This was plainly one-off but despite the existence of a badge of trade given the short period of ownership (which suggested trading gains) it was determined that the transaction was not a trading transaction because there was a genuine intention by the taxpayer to live in the house rather than to make a quick profit. The Court of Appeal allowed the taxpayer's appeal as it found no evidence of an adventure in the nature of trade.

**[67]** A related point of interest is that although the decision the High Court was set aside, the following passage from the judgment of Megarry J on change of intention is instructive and still correct in its proposition:

> "Even if the house was purchased with no thought of trading, I do not see why an intention to trade could not be formed later. What is bought or otherwise acquired (for example, under a will) with no thought of trading cannot thereby acquire an immunity so that, however filled with the desire and intention of trading the owner may later become, it can never be said that any transaction by him with the property constitutes trading. For the taxpayer a non-trading inception may be a valuable asset: but it is no palladium. The proposition that an initial intention not to trade may be displaced by a subsequent intention, in the course of the ownership of the property in question, is, I think, sufficiently established…"
>
> [Emphasis added]

**[68]** In the instant case, the appellant submitted that the High Court held that the appellant's only witness, Fei Xiao Yun (AW1)'s evidence was

that the subject property was for investment purpose which was later changed to resale at profit because of the problem to rent the said properties. This, according to the appellant is an error in law because a mere sale does not change 'intention' nor evidence of change of 'intention', and that as held by *Simmons* (supra), an intention to change must be precise. But the High Court gave no evidence of a change in 'intention' of the appellant, nor is there finding that intention was changed. The Shop Lots were also held in fixed assets accounts until sold.

**[69]** The appellant also made much of the finding by the SCIT that the principal activity of the appellant company as stated in the director's report was as distributors of health products and particularly as an investment holding company. The appellant maintained therefore that the Shop Lots were held in fixed assets as found by the SCIT and never changed.

**[70]** The appellant repeated the argument that no intention to trade at time of acquisition of Block A and B was found in the facts proved, and this was agreed by the High Court. Since there was no finding of fact at time of acquisition of Block A and B, the appellant had no intention to trade in Block A and Block B, the principles in *Simmons* (supra) on need for precision on evidence of change of intention should apply and the assessments by the respondent on the appellant should accordingly be discharged. The appellant thus maintained that the dominant purpose of purchasing Blocks A and B which were office lots was for investment, that is, to use as an office.

**[71]** We are mindful that a mere sale does not change a capital asset into a trading stock. Also, a mere profit motive is not trading as ruled

by the Supreme Court in *Lower Perak Co-operative Housing Society* (supra) which found the SCIT had erred in holding that the mere acquisition and sale of an asset resulting in a profit constituted trading or an adventure in the nature of trade.

**[72]** The appellant thus argued that as the High Court agreed that there was no initial intention on the part of the appellant to trade in the Shop Lots and there is no supporting fact found of a change in intention upon the principle cited in *Simmons* (supra) the case for an adventure in the nature of trade is not proved.

**[73]** We must at the outset state that it is settled law that the burden of proof in tax cases lies on the taxpayer to prove that the assessment is erroneous or excessive. This is stated plainly in Paragraph 13 of Schedule 5 to the ITA. The taxpayer like the appellant herein also bears the same onus when he brings a further appeal to the High Court and yet another appeal to the Appellate Court (see also the Supreme Court decision in *Lower Perak Co-Operative Housing Society* (supra)).

**[74]** And as a corollary to this, it is equally well-established that in order to successfully challenge the respondent's assessment of business income, it is also for the appellant to prove that the Shop Lots were acquired for the purpose of investment.

**[75]** This was made clear in *MR Properties Sdn Bhd v KPHDN* [2005] 7 MLJ 260 where Raus Sharif J (later Chief Justice) stated thus:

> "[19] In fact, the burden is on the taxpayer to prove that the subject lands were purchased for investment purposes, and such

> intention must be shown to have existed at the time of the acquisition of the asset…".

**[76]** We find that the SCIT did clearly make the determination that the appellant had not proven that the purchases were investment in nature. Paragraph 10.19 of the Case Stated had this to say:

> "Oleh itu, Panel berpandangan fakta-fakta di atas tidak menunjukkan harta tanah tersebut adalah merupakan suatu pelaburan. Dakwaan Perayu perolehan kesemua hartanah di Blok A dan B bagi tujuan pelaburan tidak dapat dibuktikan Perayu. Berdasarkan fakta yang ada, Panel berpandangan kesemua harta tanah tersebut menjadi 'stock in trade' Perayu bagi tujuan 'trading'."

**[77]** We observe that the High Court found that the appellant's initial intention was for investment purposes but that this was later changed to resale at profit because of difficulties faced by the appellant associated with the renting out of the Shop Lots. We emphasise that this change potential was recognised by the House of Lords in *Simmons* (supra), as mentioned above. But despite the evidence given by the appellant's own witness (AW1) on such a change, which evidence of change in intention as so testified we consider to be sufficient in meeting the *Simmons'* requirement concerning precision, the appellant argued there was no evidence of any change.

**[78]** There is in our view absolutely nothing wrong with this finding of fact by the SCIT on the true intention of the appellant since the SCIT had made inferences from evidence on the conduct of the appellant and

the related factual circumstances, as more than plainly set out in paragraph 10.22 (c) of Case Stated, as follows:

> " Niat Perayu memperoleh harta tanah tersebut boleh dilihat melalui:
>
> - Pembelian dengan pinjaman oleh Pengarah Perayu bukan melalui pinjaman bank.
>
> - Kedudukan harta tanah kawasan strategik dan pesat membangun di Kelana Jaya, Petaling Jaya.
>
> - Jangkamasa harta tanah dilupuskan adalah dalam masa yang terlalu singkat (12 bulan).
>
> - Perayu tidak sukar untuk menjual kesemua harta tanah tersebut dalam masa yang singkat tersebut.
>
> - Harta tanah tersebut telah sedia ada dibeli oleh Perayu dalam hakmilik strata yang berasingan di mana ini secara langsung menambahkan nilai tanah tersebut dan memudahkan urusan jual beli.
>
> - Tiada aktiviti atau usaha dilakukan untuk menyewa harta tanah berkaitan. "

**[79]** This conclusion was arrived at on the basis of the various factors as stated in the above-mentioned paragraph 10.22 (c), which specifically are again first; the purchase was financed by a loan taken from its own director - Dr Fei Chong Ming; secondly, the strategic location of the Shop Lots; thirdly, that they were disposed of within a short period of less than 12 months (after delivery of possession); fourthly, the appellant did face no difficulty in selling them within such period; fifthly, the availability of separate titles for the Shop Lots when purchased by the

appellant made it easier for them to be sold and had increased their value to begin with; and; sixthly, the absence of efforts to rent them.

**[80]** We must in this connection also mention that Sharma J in *N.Y.F Realty Sdn Bhd v Comptroller of Inland Revenue* [1974] 1 MLJ 182 had emphasized that intention has to be determined by inference from proved facts, which inference is a question of fact and not law, in the following terms:

> "The question of what the intention of a taxpayer was when he acquired an asset, i.e. whether he bought it as an investment or with a view to selling it at a profit, is a question of fact. It has to be determined by inference from proved facts and such an inference is one of fact and not of law…".

**[81]** In our judgment, in the instant appeal before us, we cannot but similarly find that the SCIT and the High Court had directed their minds correctly on the law and the facts in respect of this issue of intention at the time of the purchase of the Shop Lots, in their respective evaluation of the case.

**[82]** This is further supported by the undisputed finding of fact by the SCIT that the said properties were classified as current assets at the point of purchase in 2008 (but later re-classified as fixed asset upon the buildings' completion) which indicated they were purchased for trading. Notwithstanding the subsequent classification of the Shop Lots as fixed assets, the appellant's conduct in disposing the said properties somewhat contradicted the effect of classifying the same as fixed assets.

**[83]** This underscores the point that the conduct or acts of the taxpayer are important considerations in determining whether the properties in question are for investment or trading purposes. Reference to the Federal Court decision in *Director General of Inland Revenue v LCW* [1975] 1 MLJ 250 it apt, where it was stated:

> "The important thing is to see whether the acts and conduct of the respondent in relation to the business amount to trading. In the words of Buckmaster in *J & R. O'Kane & Co. v The Commissioners of Inland Revenue*: -
>
> > "...yet the intention of a man cannot be considered as determining what it is that his acts amount to: and the real thing that has to be decided here is what were the acts that were done in connection with this business and whether they amount to a trading which would cause profits that accrued to be profits arising from a trade or business?"

**[84]** Furthermore, having regard to the badge of trade on financing of the property, as discussed earlier, the fact that the purchase of the Shop Lots was financed through loan, and even then taken from its director, tends to show that the appellant did not possess the requisite financial capacity to sustain the Shop Lots as an investment or held for a long-term investment. After all, loans must be repaid and the source for it could be the proceeds from the sale of the properties, although in this case the loan to the director was largely repaid in the financial year ended 2011.

**[85]** Another of the appellant's ground of appeal is the stand that the sale of the Shop Lots was not an adventure in the nature of trade. It

has earlier been explained that a single transaction could under certain circumstances be construed as a trade and that additionally and separately the phrase “adventure in the nature of trade” further supports such a construction and consequence. In other words, apart from gains or profits from ‘trade’, a taxpayer may also be subject to tax under the same Section 4(a) of the ITA 1967 for gains or profits arising from adventure or concern in the nature of trade. The application of this concept “adventure or concern in the nature of trade” usually arises when there is only an isolated transaction, in comparison to a series of transactions of buying and selling that would more clearly signify trading.

**[86]** The Case Stated by the SCIT does not deal with the specific issue of whether the disposal of the Shop Lots was an adventure in the nature of trade since the SCIT dealt with the matter more wholesomely by examining whether the transactions fell within Section 4 (a) of the ITA, and simply focusing on the key question whether they are in the nature of trade or investment. In other words it was unnecessary to do so since findings were made on the issue of ‘trade’ without the need to examine the same vis-à-vis ‘adventure in the nature of trade’.

**[87]** The High Court did make mention of the Supreme Court case of *Director General v Khoo Ewe Aik Realty v Director General of Inland Revenue* [1990] 1 CLJ Rep 91 which stated the meaning of adventure in the nature of trade, in the following terms:

> “…….She then referred to a passage from the judgment of the former Federal Court in *E. v. Controller-General of Inland Revenue* [1970] 2 MLJ 117, 123 in which Gill FJ (as he then was) referred to the House of Lords' decision in *Edwards (H.M. Inspector of Taxes) v. Bairstow &*

*Harrison* 36 TC 207 in which that Court considered the following four conditions approved in *Leeming v. Jones* 15 TC 333 one of which must be present to establish the existence of an adventure in the nature of trade:

> (i) the existence of an organisation,
>
> (ii) activities which lead to the maturing of the asset to be sold,
>
> (iii) the existence of special skill, opportunities in connection with the article dealt with,
>
> (iv) the fact that the nature of the asset itself should lend itself to commercial transaction.
>
> [Emphasis added]

**[88]** Even though the appellant contended that the conditions cited by the High Court have not been fulfilled, we find that it is quite plain that only one of the conditions needs to be satisfied and also that it is difficult to deny that shop lots are of a nature of asset that lends itself to commercial transaction. Furthermore, as the appellant submitted, recent cases have stated that it is not possible to determine the scope of the term or lay down any single criterion for deciding whether a particular transaction was an adventure in the nature of trade because the answer in each case must depend on the facts and surrounding circumstances of the case (see *Minister of National Revenue v James A Taylor* 51 DTC 1125).

**[89]** We therefore find no merit in this ground.

2) **<u>The disposal gains was not from the ordinary course of appellant's business</u>**

**[90]** The appellant next submitted that the profits from sale of a capital asset - claimed in this case to be the Shop Lots, was not 'income' under Section 3, read with Section 4 of the ITA as the sale of the Shop Lots was not in the ordinary course of the appellant's business. Reliance by the SCIT and the High Court on the assertions to the contrary made by the respondent's sole witness, its officer, Nokkidzan Ahmad Mokhtar (RW1) resulted in a misdirection.

**[91]** It is useful to state Section 3 of the ITA which reads:

> Subject and in accordance with this Act, a tax to be known as income tax shall be charged for each year of assessment upon the income of any person accruing in or derived from Malaysia or received in Malaysia from outside Malaysia.

**[92]** Section 4 of the same statute, it is hereby repeated, states:

> Subject to this Act, the income upon which tax is chargeable under this Act is income in respect of:
>
> (1) gains or profits from a business, for whatever period of time carried on;…..

**[93]** In its decision, it is quite clear that the SCIT did consider whether the gains were capital or trading in nature and expressly stated that it had taken into account principles applicable to Section 4 of the ITA as set out by RW1 in his testimony. As recorded in paragraph 10.13 of the Case Stated, these included that the Shop Lots were stock in trade of the appellant, its main activity was as a retail sale of direct selling products,

its intention in the purchase of the properties, the method of the purchase, the strategic locations of the Shop Lots, all properties were disposed of within a short period of time without much difficulty, the Shop Lots were purchased with strata titles already available which increased their value and facilitated the sale process, the absence of activities to show that these Shop Lots were for investment purposes and held for a long period, and the Shop Lots were sold to a number of different buyers on different dates within a short period again showed lack of difficulty in securing buyers.

**[94]** The fact that the business of the appellant company as a health product distributor has nothing to do with trading in property does not and cannot mean that any disposal of the appellant's property can never result in taxable gains.

**[95]** The related complaint of the appellant here is that the High Court, according to the appellant, held that the SCIT had come to the aforesaid findings and accepted the findings as "facts" when in fact, those "findings" are mere allegations or opinions expressed by RW1 - the respondent's witness.

**[96]** We do not think this contention is tenable. For the very reason that the appellant put forth - which is based on the leading authority of *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 where Viscount Simonds, for the House of Lords held that:

> "For it is universally conceded that, though it is a pure finding of fact, it may be set aside on grounds which have been stated in various ways but are, I think fairly summarized by saying that the court should take that course if it appears that the commissioners

have acted without any evidence or upon a view of the facts which could not reasonably be entertained."

[Emphasis added]

**[97]** Ergo, can it be seriously argued that the SCIT in the case before us acted without evidence or on a view of the facts which could not reasonably be entertained, when it decided to take into consideration and accepted the evidence (as per the above-mentioned paragraph 10.13 of the Case Stated) given by the respondent's witness, the officer who was responsible for putting up the assessment in respect of the gains arising from the disposal of the Shop Lots?

**[98]** Surely not. And more so given the fact that the SCIT had considered other factors as well when evaluating the badges of trade test in this case before it determined that profits from the sale of the Shop Lots is not "income" under the ITA.

**[99]** This in our view is the main recurring problem with the submissions of the appellant before us, which have the tendency to cherry pick on certain points and argue that a finding on any such particular issue should not, based on case law authorities, automatically lead to a specified consequence. This is of course not untrue, but the SCIT did not just rely on any single issue to arrive at its decision. As mentioned, the SCIT had set out a number of considerations which largely followed the badges of trade methodology which it had considered in arriving at its decision that the gains from the disposal of the Shop Lots was subject to income tax under the ITA.

**[100]** We ought to state again that the appellant made much of the argument that mere opinions of the key witness for the respondent, RW1,

were relied on as findings by the SCIT. This, according to the appellant are factual errors that also became errors of law.

**[101]** One example highlighted by the appellant was the testimony of RW1 that one of the bases he used to raise the assessment under Section 4 the ITA for the disposals of the Shop Lots by the appellant was that *"a. Tanah tersebut adalah stok perniagaan Perayu".* Or that the Shop Lots were stock in trade of the appellant. The appellant insisted that no evidence of facts were given in support of this allegation, relying on the earlier passage from the leading case of *Edwards (Inspector of Taxes) v Bairstow* (supra) particularly in respect of the commissioners having acted "without any evidence or upon a view of the facts which could not reasonably be entertained".

**[102]** We fail to appreciate how this advances the case of the appellant. For two simple reasons. First, it certainly cannot be said the SCIT acted without evidence when it accepted the testimony of the witness for the respondent. Secondly, it would be wholly unwarranted to say that the SCIT acted on a view of the facts - essentially that the Shop Lots were the appellant's stock in trade - which could not reasonably be entertained. Not when the facts of this case are examined as was indeed done by the SCIT as affirmed by the High Court.

**[103]** In fact it is untrue that the SCIT merely relied on the evidence of RW1, without more. The SCIT in the Case Stated did examine the very issue of stock in trade, as set out in paragraphs 10.14 to 10.18 before concluding with the finding that the properties were the appellant's stock in trade in paragraph 10.19, as stated earlier.

**[104]** And just to give one other example - in support of its decision, the SCIT considered that the Shop Lots were in a strategic location. But the appellant asserted that the respondent was in error of law since a property in a strategic area does not automatically become "stock-in-trade" (by referring to the case of *Ketua Pengarah Hasil Dalam Negeri v Gracom Sdn Bhd* [2013] Tax Practice e-LawAlert LHAG).

**[105]** But it is to us clear that the SCIT never stated that it was only because the address of the Shop Lots was in strategic locations that the properties became the appellant company's stock in trade. In contrast, as has been shown earlier and as was unequivocally reasoned by the SCIT and the High Court, the conclusion that the gains from the disposal was trading in nature was arrived at after consideration of several factors, and a number of the badges of trade, to the extent that it would be fair to say that none of which was determinative of the issue.

**[106]** It is therefore unnecessary, despite the argument of the appellant, that the respondent must show that the appellant had traded in office or shop lots consistently to justify the finding that the gains were trading in nature and subject to tax under the ITA. We therefore reiterate that as mentioned earlier on the true construction of Sections 2(1) and 4(c) of the ITA the business gains taxable would not only be from a series of transaction, continuously and repeatedly, but that it could also be an isolated or single transaction. This we repeat has also further been made plain by authorities such as *E v Comptroller-General of Inland Revenue* (supra) and *International Investment Ltd v Comptroller-General of Inland Revenue* (supra).

**[107]** We venture to add that it is true that as stated earlier in one of the badges of trade, in general, repetitious transactions - to the extent that

the sale transactions of Shop Lots in Block A and in Block B could be deemed as such - would tend to show that the objective is for resale at a profit - but even if the transactions undertaken by the appellant here are construed as a single and isolated transaction, they could also be deemed as trading. As such, on the one hand, in *Pickford v Quirke* (supra) the Court observed as follows:

> "Now of course, it is very well known that one transaction of buying and selling a thing does not make a man a trader, but if it is repeated and becomes systematic, then he becomes a trader and the profits of the transaction, not taxable so long as they remain isolated, become taxable as items in a trade as a whole, setting losses against profits, of course, and combining them all into one trade... "

**[108]** On the other hand, again, at the risk of further repetition, it suffices for us to state that there are enough authorities to also hold that even if certain disposals such as in the instant case were regarded as an isolated transaction, they could still constitute an adventure or concern in the nature of trade (see again the Federal Court decision in *E. v Comptroller-General of Inland Revenue* (supra), and the Privy Council decisions in *I. Investment Ltd v Comptroller-General of Inland Revenue* (supra). And in *Teoh Chai Siok v Director General Of Inland Revenue* [1981] 1 MLJ 269, where the taxpayer, after having purchased land and obtained the permission of the Government to alter the conditions in the land title from agricultural purposes to one of erecting dwelling houses, sold the land at a profit, Lord Edmund-Davies, for the Privy Council held that the SCIT, the High Court and the Federal Court were all correct in holding that the transaction, although an isolated one, was an adventure or concern in the nature of trade.

**[109]** Accordingly, largely for the same reason, and in light of these authorities, it is not strictly necessary for the respondent here to establish what was held in *Reed v Nova Securities Ltd* [1985] 1 All ER 686, in that in order to qualify an asset as trading stock, the asset acquired by the company must not only be of a kind which is sold in the ordinary course of the company's trade but must also be acquired for the purposes of that trade with a view to a resale at a profit.

**[110]** After all, it is to be further noted that in *Rutledge* (supra), a case referred to in the discussion earlier on the badge of trade on intention to trade*,* the profit realized on the sale of a million rolls of toilet-paper was taxable as being from an adventure in the nature of trade, even though the taxpayer was in a money-lending business. Thus, just because the appellant here was a distributor of health products, it does clearly not follow, as contended by the appellant, that the disposal of the Shop Lots could not amount to trade or adventure or concern in the nature of trade. We therefore find that this ground of appeal that to be taxable as trading gains the same must have arisen from the ordinary course of the business of the appellant to be without merit.

## 3) <u>Accounting evidence not given due weight and whether the appellant is an investment holding company</u>

**[111]** The third ground raised by the appellant is the complaint that accounting evidence was not given due weight by the SCIT and the High Court. The appellant stated that the accounting treatment accorded to Block A and Block B was, as shown earlier, that of “fixed assets”, and this was also the finding of the SCIT which held that the audited accounts of

the appellant company from 2008 to 2013 showed that the said properties were classified as current assets in 2008 at time of purchase and later re-classified as fixed asset upon the buildings' completion.

**[112]** The appellant further highlighted that the appellant is an investment company as stated in the accounts, in that other than distributing health products, the accounts also recorded that it holds property as investment and it was in fact also the finding of the SCIT that the appellant is an investment holding company. This therefore renders the decision of the SCIT that the Shop Lots were trade in stock to be untenable.

**[113]** We do not disagree that accounting treatment and audited accounts would constitute supporting evidence of some weight (see *Odeon Associated Theatres Ltd v Jones* [1971] 2 All ER 407), and we are mindful of this passage from the case of *DJ Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1996] MSTC 2471 which stated the following:

> "(e) Treatment in the accounts
>
> Right from the time of purchase of the estate till now the estate has been treated as a fixed asset in the balance sheet of the appellants. We do realise that accounting evidence is not conclusive (see *DGIR v LCW* [1975] 1 MLJ 250). As was said in *Gold Coast Selection Trust Ltd v Humphrey* 30 TC 228 the method of keeping accounts is often a guide though not conclusive in income tax issues. However, it should be given due weight (see *I Investment Ltd v Comptroller General of Inland Revenue* (1975) 2 MLJ 208)….".

**[114]** Further, despite the appellant's focus on the Shop Lots being classified as fixed asset, it is again clear from the decision of the SCIT that the said properties were in fact classified in the accounts of the company as current assets, from the point of purchase in 2008. But the Shop Lots

were later re-classified as fixed asset upon the completion of the Shop Lots.

**[115]** In our view, the incontrovertible fact that the Shop Lots were originally classified as current assets in 2008, which was unmistakably from the point of acquisition meant, as found earlier, that the appellant's intention was not for the purpose of investment given that such accounting treatment as current assets at the time of acquisition (and which continued for a number of years thereafter) typically signified the holding of the same as trading stock.

**[116]** It is no less true that the Shop Lots were indeed later re-classified and remained as fixed assets until disposal, but that fact had been considered by the SCIT together with other evidence concerning the acts and conduct of the appellant and other circumstances vis-à-vis the Shop Lots which concluded with the finding that the appellant did not succeed in showing that the same were acquired for the purpose of investment.

**[117]** The crucial point is to ascertain whether despite any classification made or professed, the acts and conduct of a taxpayer in relation to its business amount to trading or investment (see the Federal Court decision in *Director General of Inland Revenue v LCW* [1975] 1 MLJ 250). And in *I Investment Ltd v CGIR* [1975] 2 MLJ 208 Raja Azlan Shah FJ (as HRH then was) similarly observed thus:

> "In my opinion, the form which a company takes is no criterion in determining the question whether it was carrying business. To ascertain the business of a limited company, one must look at

what business it actually carries and not what business it professes to carry on".

**[118]** Reference to the Canadian case of *Minister of National Revenue v Louis W. Spencer* [1961] C.T.C. 109, 61 D.T.C. 1079, as highlighted by the respondent, is equally apt, where the Court expressed the following observation:

> "I have only one further comment to make on the facts as I have outlined them, namely, that the respondent's statements that when he and Mr. Addison had purchased or acquired their mortgages they intended to keep them as investments and that the discounts at which they had purchased them or the bonuses with which they had been acquired were for the purpose of safeguarding their investments against the risk of loss cannot be accepted. It is well established that a taxpayer's statement of what his intention was in entering upon a transaction, made subsequently to its date, should be carefully scrutinized. What his intention really was may be more nearly accurately deduced from his course of conduct and what he actually did than from his ex post facto declaration."
>
> [Emphasis added]

**[119]** That the accounting evidence is not conclusive and should always be considered with other evidence in order to determine the true nature of the transaction has also been stated by the Federal Court in *Director General of Inland Revenue v LCW* [1975] 1 MLJ 250. In that case, the land was purchased with the intention of constructing flats thereon for renting as an investment. The flats were subsequently sold. The Federal Court reversed the High Court and held there was sufficient evidence to

conclude that the taxpayer was carrying on a concern in the nature of trade and therefore gains or profits derived therefrom were liable to taxation under Section 4(a) of the Income Tax Act, 1967. On the issue of valuation relevant to the accounting treatment of the land, Lee Hun Hoe CJ (Borneo) said:

> "It cannot be said that the Special Commissioners reached their conclusion that respondent was carrying on a concern in the nature of trade merely on the transfer of the land from fixed account to trading account in 1967. They have clearly taken other primary facts found by them into consideration. The way the U.C. House kept the account of respondent in respect of the land is admissible to show intention. However, such evidence must be weighed against other available evidence to enable the Special Commissioners to decide the nature of the transaction. As Buckley J. said at page 299 in *Shadford v H Fairweather & Co Ltd* 43 TC 291 :–
>
> > "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."
>
> [Emphasis added]

**[120]** Moreover, the appellant's contention that the SCIT's finding that the appellant is an investment holding company as stated in its memorandum and articles of association supported its case that it had always intended to hold the Shop Lots as investment, is in our view, misconceived.

**[121]** This is because the concept of investment holding company commonly referred to in the objects clause in the memorandum of association or constitution of companies incorporated under the Companies Act 1965 (and the Companies Act 2016) is not quite the same with that same term as found in Section 60F(2) of the ITA which reads:

> "investment holding company" means a company whose activities consist mainly in the holding of investments and not less than eighty per cent of its gross income other than gross income from a source consisting of a business of holding of an investment (whether exempt or not) is derived therefrom."

**[122]** Simply put, an investment holding company in the context usually found in constitution of companies, and generally in corporate law, is one which owns or holds shares in another company. The investment holding company may thus either wholly own all the shares in a wholly owned subsidiary, a majority of the shares in a subsidiary or only some shares as an investor in an investee company. And as is the case here, the investment in this context concerns shares. Never about landed properties.

**[123]** This can also be so readily seen from the relevant object clause of the appellant which states:

> "To carry on the business of an investment holding company and for that purpose to acquire and hold for investment either in the name of the Company or nominees share, stocks, debentures, debenture stock, bonds, obligations and securities issued or guaranteed by any company or private undertaking or any syndicate or persons constituted or carrying on business in Malaysia or elsewhere and debentures, debenture stocks, bonds, obligations and securities issued or guaranteed by any

> government, sovereign ruler, commissions, public body or authorities supreme, municipal, local or otherwise in any part of the world".

**[124]** In contradistinction, an investment holding company under Section 60F(2) of the ITA does not specify or limit the subject matter of the investment and is relevant to the question whether the holding of such investments is sufficiently sizeable vis-à-vis its income to attract tax.

**[125]** We understand that the appellant had even at the proceedings before the SCIT conceded that it is not a Section 60F(2) investment company under the ITA. But the appellant maintained that it is still an investment holding company under general law. This we agree for as long as the appellant company holds shares in another company. But the greater point is, notwithstanding this, its status as an investment holding company, even if true, has absolutely nothing to do with the question (let alone answer it) as to whether the appellant's purchase of the Shop Lots was for trading or investment purposes.

**[126]** In addition, it bears emphasis that what a company stated in its constitution - usually a wide ranging scope of business activities - does not automatically mean it is operating any such businesses. Abang Iskandar J (now PCA) in *Kelana Muda Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [Rayuan Sivil No. R1-14-26-12-2011] instructively held as follows:

> "14. Among those points, the appellant taxpayer had adverted to the fact that it was a holding investment company and that according to its articles of association and memorandum of association, it was stated as such. The SCIT had considered this aspect of the case and dealt with it at page 16 of the case-stated

with reference to the case of *Alf Properties Sdn Bhd v KPHDN* MSTC 4155, like so:

> "It is not safe for the Special Commissioners to come to the conclusion that the Appellant's principal activity is dealing in property *merely on the ground that it is one of the stated objects of the Appellant as found in its Memorandum of Association*. To come to a safe conclusion, one has to go into the activities of the Appellant whether in the past or in the present to find out whether the activities are one of the stated objects of the Appellant". [italics added for emphasis by me]

15. While a company may have an activity as its stated objective, that professed objective may not indeed be its *actual* activity. So, while the stated objective may be indicative of what the company may hold out as its 'legal' objective that in itself is not conclusive in determining its actual activity in the market-place. This Court finds that the SCIT had directed their minds correctly on the legal position on that issue."

[Emphasis added]

**[127]** We reiterate that when stating the appellant's business of investment holding company, the SCIT was clearly only repeating what was recorded in the Directors' report of the appellant company (in turn sourced from its memorandum and articles of association). Secondly we have stressed the point that "investment holding company" in the context stated in the memorandum or articles of companies, of their directors and other corporate statutory reports (as in the instant case, as shown earlier) concern holdings of shares, not landed properties.

**[128]** There is as such no error in the findings of the SCIT as affirmed by the High Court concerning the accounting treatment or in respect of the investment holding company.

## 4) <u>The SCIT did not provide detailed findings on badges of trade</u>

**[129]** The appellant next submitted that the SCIT misdirected itself by not setting out in detail the findings on badges of trade despite having stated that the sale of the Shop Lots in Block A and Block B had badges of trade. The SCIT stated thus:

> "Badges of Trade" and section 4(a) of the Income Tax Act 1967
>
> (xxxiv) RW1 had given evidence in Q8 of RWIS that the findings derived at by him were based on the documents presented by Appellant by virtue of the RPGT forms submitted by the Appellant. There were in existence the "badges of trade" *(petunjuk-petunjuk perdagangan)* for the disposal of all 6 Units by the Appellant" (Page 1284, Bahagian D of Rekod Rayuan Jilid 3(7)).

**[130]** The appellant argued there were no badges of trade. Its case was that rentals for the Shop Lots were poor and outstanding, as found by the SCIT, and the properties were sold not within a short period as they were bought in 2008 and disposed of in 2011 (relying on *Marson v Morton* (supra)), where one or two years could be considered long term). When purchased, there was no intention for re-sale at time of purchase.

**[131]** Even if the subject land was not producing any income at all (which was not the case here), if there was an intention to hold the land

indefinitely to make a capital profit at the end of the day, that is a pointer towards a pure investment. The Court of Appeal case of *ALF Properties* (supra) was also referred to in support, where it was stated that property held as investment would eventually be sold, but the profit would not be taxable.

**[132]** Now, it is unequivocally clear to us that the SCIT, as affirmed by the High Court had specifically made a finding on the existence of badges of trade in this case. The SCIT had provided reasons for its findings. It is untenable for the appellant to suggest that just because the SCIT did not detail out its determination and findings on each and every aspect of the applicable badges of trade, its conclusions were flawed in any manner.

**[133]** We must in this regard state that even a grievance against an alleged non-consideration of evidence by the SCIT cannot succeed as it has always been recognized as a reasonable presumption that the findings of the SCIT would take into consideration all the evidence and contentions of the parties notwithstanding that such specific evidence or contention may not be expressly stated as such in the grounds of the decision of the SCIT.

**[134]** In this regard, we need only refer to the case of *U.N Finance Bhd v DGIR* [1975] 1 MLJ 109 where Abdul Hamid Omar J (later Lord President) made the following important observations:

> "It has to be borne in mind that in arriving at a finding the Special Commissioners had in all probability weighed all the evidence before them, they had undoubtedly rejected some of the appellants' contentions. The fact that they had not said so in so

> many words need not, I think, be construed that there was no basis for their finding.
>
> Mr. Peddie strenuously argued that it was necessary to determine the intention at the time of the purchase. He cited these cases – *Harvey v Caulcott* 33 TC 159; *Mitchell Bros v Tomlinson (HM Inspector of Taxes)* (1957) 37 TC 224 and *Cooksey and Bibbey v Rednall (HM Inspector of Taxes)* 30 TC 514.
>
> I quite agree that intention at the time of purchase is a relevant factor for consideration but whether the Commissioners' failure to make a specific finding would necessarily mean that they failed to appreciate its importance such that their decision ought not to be entertained is a matter for this court to determine in the light of the facts found and the inferences that may be drawn from these facts.
>
> It seems to me the Special Commissioners took into account the circumstances surrounding the buying and selling of the shares by the appellants from various companies commencing from October 1964 and extending over a period of time before they made their finding that the business was a concern or adventure in the nature of trade. If the court is satisfied that there was reasonable evidence to support the Commissioners' decision, then, in that event, I must not disturb their decision even though I personally may not have arrived at the same decision".
>
> [Emphasis added]

**[135]** Here in contrast, the SCIT did in fact find and state that badges of trade existed. And the SCIT, as affirmed by the High Court did conclude that the taxpayer failed to prove that it should not be subject to income tax. There is as such nothing in this ground of appeal.

## 5) Circumstances on disposal negates trading

**[136]** The appellant further asserted that the circumstances which led to the disposal of the Shop Lots - another test for the existence of the badge of trade - indicated that the appellant was not trading in them. It is worthy of emphasis that the Supreme Court in *Lower Perak Co-Operative Housing Society* (supra) stated that circumstances leading to the relevant sale could afford an explanation for the sale, as follows:

> "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 any plan of dealing motivated the original purchase."

**[137]** The appellant emphasised that here, the founder shareholder - Dr Fei Chong Ming was admitted to hospital in May 2011 and passed away on 1 May 2012. The properties in question were bought in July 2008 and sold in June and August 2011.

**[138]** The appellant company did however purchase other units, one in Mont' Kiara, Kuala Lumpur on 12 August 2011, and another in Johor Bahru on 10 November 2010. This led the appellant to argue that where a property was "exchanged" by the purchase of a more profitable one, it indicated a sale of investment, not trading stock (see *Lower Perak Co-Operative Housing Society* (supra)). Moreover, in *Simmons* (supra), it was stated by the House of Lords as follows:

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

**[139]** This was also because rent collection was poor, with outstanding rental payments becoming doubtful debts.

**[140]** As discussed earlier the badge of trade on circumstances that were responsible for the realization of the property contemplates certain explanation such as a sudden emergency which displaces the argument that the purchase was accompanied by a plan to trade in the property. The case of *HCM v Director General of Inland Revenue* (supra) was referred to. Thus, if the sale is attributed to an unanticipated need for funds or as a result of an unsolicited offer, this usually indicates that the sale is not made pursuant to a profit-making scheme.

**[141]** In *NYF Realty* (supra), circumstances responsible for the sale was reiterated to be one of the badges of trade. Sharma J had explained this test in the following terms:

> "If sale of property is occasioned by sudden emergency or unanticipated need for funds, such facts will tend to indicate that the property was not acquired for the purpose of resale at a profit and that the sale was not pursuant to a profit-making undertaking or scheme."

**[142]** In the instant case before us however, the SCIT agreed with the respondent that the sale was not due to any immediate need of funds or forced sale. Instead the disposal of the Shop Lots reflected the existence of a profit-making scheme.

**[143]** The appellant did proffer a reason for the sale. The appellant explained that the sale was undertaken to finance the former director (Dr Fei Chong Ming)'s medical bills. As we have noted earlier, the SCIT had

rejected this reason, in our view correctly, since the appellant had not proved any of the payments claimed to have been expended towards medical expenses.

**[144]** We stress that it is not that the fact of the illness and death is being disbelieved here. Rather it is whether the funds of the appellant company had been expended for settlement of the medical bills. No documentary evidence in this regard was forthcoming. In addition, neither was there any evidence that the appellant company was at the material time under financial pressure or some form of compulsion to dispose of all the Shop Lots in Block A and Block B within the same year.

**[145]** Again, we must point out that the inference drawn by the SCIT was based on valid facts, which in turn were supported by evidence. It is in accordance with the above-stated principles governing appeals against SCIT. It is thus unassailable. As such, the assessment raised by the respondent against the appellant is correct as the appellant had engaged in a transaction in the nature of trade. The Shop Lots had been correctly held to be the appellant company's stock in trade.

**[146]** In our judgment the SCIT had correctly examined this badge of trade which concerns circumstances that were responsible for the realization of the property, which test, as discussed earlier, focuses on the reason or explanation for the subsequent disposal of the property, having regard to cases such as the above-stated *HCM v Director General of Inland Revenue* (supra), *Lower Perak Co-operative Housing Society* (supra), *Penang Realty Sdn Bhd* (supra), and *Wiramuda (M) Sdn Bhd* (supra).

## 6) The properties were held by appellant for a long period to justify finding of non-trading gains

**[147]** The appellant next contended that based on *Marson (Inspector of Taxes) v Morton* (supra), long term investment could mean a period of only one or two years. In the instant case, the Shop Lots in Block A were sold after three years and 11 months after purchase whilst those in Block B, after four years. The appellant again referred to the case of *ALF* (supra) which on this point held:

> "[20] ……It is not disputed that a property kept for investment would eventually be sold but the profit realised from the sale would be capital realisation and not subject to tax. From the authorities it is clear that a property kept for some time from the time it was purchased would be considered as an investment and not business dealing in land. The authorities also show that a property purchased and sold soon after would not be considered as dealing in land when there is no evidence to show that preparation being made for the sale."
>
> [Emphasis added]

**[148]** Based on this, the keeping of the property for some time would be considered as an investment, not trading. But the case also stated that authorities show that even if the property was sold soon after, it would not be construed to be in the nature of trading if there is no evidence of preparation for sale. This raises one of the badges of trade in respect of preparation made for sale of relevant property, as discussed earlier.

**[149]** Instead, the appellant developed this ground of appeal by stating that the SCIT and the High Court failed to appreciate the

background of the shareholders of the appellant company and the dominant purpose the appellant company was incorporated, that is, in the promotion of the business of the alternative medicine and not trading in "office lots".

**[150]** The appellant highlighted the case of *HT Development Sdn Bhd v Ketua Pengarah Hasil Dalam Negeri* [1996] MSTC 2775 which in turn made reference to *Federal Commissioner of Taxation v Merv Brown Pty Ltd* [1985] 7 FCR 1 which dealt with the purchase and sale of import quota, where the Federal Court of Australia observed that:

> "In determining whether moneys received by a taxpayer are of an income or capital nature one looks to the nature of the taxpayer's business and activities, the character of the assets realized and the relationship between the two. It is necessary to make both a wide survey and an exact scrutiny of the taxpayer's activities. If, having regard to these matters, the conclusion is reached that the particular realization was a normal incident in the carrying on of the profit earning operations of the taxpayer's business, the receipt will be of a revenue nature."
>
> [Emphasis added]

**[151]** This therefore raised another badge of trade, which is the nature of the asset of the appellant and the related aspect of the character of the business of the appellant company.

**[152]** If nothing else, the submissions of the appellant which appear to deal with specific points of badges of trade but in truth juxtapose other elements of badges of trade in one ground of appeal underscores our view that evaluation of all these badges of trade where relevant must be taken together as was indeed undertaken by the SCIT.

**[153]** Thus whilst arguing that the period was sufficiently long to qualify as an investment, the sale of the Shop Lots were not a 'normal incidence in the carrying on of the profit earning operations' of the dominant business of the appellant. However the appellant did not specifically elaborate with further argument on the nature of the property in the badges of trade analysis.

**[154]** Regardless, we have already dealt with the considerations related to the Shop Lots of the appellant, and have also stated that the fact that the appellant company is in a business different from trading in property, whilst a relevant consideration, is in this case far from being determinative of the issue of whether the sale of the Shop Lots was for investment or trading purposes. Regard must be had to all relevant factors, as was indeed duly considered by the SCIT. We observe, as mentioned earlier, that generally long period of ownership before disposal would more likely to be regarded as an investment. At the same time, all cases, we reiterate, must depend on the consideration of the peculiar facts and circumstances of each case, with the application of the interplay of the elements of the badges of trade.

**[155]** And one factor concerning the period of ownership that is of relevance to the instant case is that whilst the appellant predicated its argument on the period from the date or purchase, the respondent took the date of delivery of vacant possession. The SCIT agreed with the respondent's approach. And we do not disagree with the SCIT.

**[156]** This in our view is consistent with the decision in *A.S Sdn Bhd v Director General of Inland Revenue* [1991] 1 MSTC 434 which held that the relevant period is to be computed from the time the taxpayer is in

complete possession of the asset. Thus in that case as the sale and purchase agreement dated 17 July 1973 conferred only 96/98 portion of the land to the taxpayer, and the remaining 2/98 portion was only acquired in 1979, the taxpayer company was considered not the sole proprietor of this land for seven years. It would not be correct to say that the complete lot of this land was owned by the company for seven years as the company was the sole proprietor of it only in 1979.

**[157]** The Court in that case concluded that the taxpayer company was the sole proprietor of the whole lot for only two years before its disposal. It was as such held for a comparatively short period after its acquisition and, therefore, according to this criterion, the land was disposed of for trading.

**[158]** In the instant case before us, based on the date from the delivery of the vacant possession - signifying complete possession - the sale of the Shop Lots was done in a period of less than one year for the Shop Lots in Block A and also for only one year for those in Block B. This in this context which is in line with the decision in *A.S Sdn Bhd* (supra) therefore correctly demonstrated they were acquired for trading.

### 7) <u>No rentals did not mean Shop Lots were held for trading</u>

**[159]** The next ground raised by the appellant is the finding of the SCIT that since the appellant did not go out in search for tenants to rent in respect of its Shop Lots in Block B (which was never rented out) and that the Shop Lots in Block A was sold within only 10 months of vacant possession, the properties were the appellant's stock in trade. The appellant disagreed with this.

**[160]** The appellant argued that mere sale is not "trading" as held in many cases, and that not being rented out does not mean an investment asset becomes stock in trade, for there is no need for the relevant property to be rented out in order to show a capital asset. *Marson (Inspector of Taxes) v Morton* (supra) was again cited in support, as follows:

> "But in my judgment in 1986 it is not any longer self-evident that unless land is producing income it cannot be an investment."

**[161]** The SCIT and the High Court too, according to the appellant ignored the fact that the dominant purpose the appellant company was incorporated, that was to undertake the business of distributors of health products and alternative medicine, and not trading in office lots. Thus the appellant again referred to the same argument as previously and to the same passage on the significance of recognising the business of the taxpayer as mentioned in *Merv Brown Pty Ltd* (supra). However as reproduced above, the passage concerns not only the business but also the nature of the relevant asset, as well as the relationship between the two. We have already dealt with this issue on the nexus between the disposal and the business of the appellant. This was also a matter that had been taken into consideration by the SCIT.

**[162]** The appellant repeated its submission that the inference drawn by the SCIT, as agreed by the High Court, that the sale of the Shop Lots after 10 months from vacant possession denoted trading was erroneous. This was because it was not supported by the fact that the Shop Lots were held by the appellant for a much longer period, because Block A were purchased on 8 July 2008, and those in Block B also on the same date. The appellant reiterated that the Block A Shop Lots were then sold on 27 June 2011 - after two years and six months of purchase, and

those in Block B on 1 August 2011 - more than three years after date of purchase.

**[163]** We have dealt with this repeat contention, primarily by reference to the application of the principle that takes into consideration the period of time the taxpayer has ownership control of the property in terms of possession and not merely legal ownership prior to delivery of vacant possession.

**[164]** The appellant argued that the SCIT was wrong in finding that the appellant did not go out in search for tenants to rent its Shop Lots in Block B. The SCIT had found that Block B was not rented out and that Block A Shop Lots were sold within 10 months of delivery of vacant possession. The appellant posited that not being rented out does not mean an investment asset (which it contended the Shop Lots were) becomes stock in trade. There was no necessity to rent to show a capital asset. In *Marson (Inspector of Taxes) v Morton* (supra), it was thus held:

> "But in my judgment in 1986 it is not any longer self-evident that unless land is producing income it cannot be an investment. The legal principle of course cannot change with the passage of time: but life does. Since the arrival of inflation and high rates of tax on income new approaches to investment have emerged putting the emphasis in investment on the making of capital profit at the expense of income yield. For example, the purchase of short-dated stocks giving a capital yield to redemption but no income has become commonplace. Similarly, split-level investment trusts have been invented which produce capital profits on one type of share and income on another. Again, institutions now purchase works of art by way of investment. In my judgment those are plainly not trading deals; yet no income is produced from them. I

> can see no reason why land should be any different and the mere fact that land is not income-producing should not be decisive, or even virtually decisive, on the question whether it was bought as an investment."

**[165]** Again, we must highlight that the SCIT did not regard the fact that the Shop Lots in Block B were never rented out in itself as conclusive of the issue whether the gains from the disposal were trading in nature. As repeatedly stated by the appellant in its submissions itself, the SCIT, especially in paragraphs 10.16 of its decision referred not only to the fact that the Block A properties were rented out for only six months whilst none of the appellant's properties in Block B were ever rented, but that reference was also made to the testimony of the appellant's sole witness (AW1) herself who confirmed that no advertisements were issued to solicit potential tenants. Further, as per paragraph 10.17, the appellant had sold its Block A Shop Lots after six months of its tenancy with Caliente Sdn Bhd and 10 months after delivery of vacant possession, and for Block B Shop Lots, 12 months after delivery of vacant possession; and that in paragraph 10.18 it is stated that the disposal of all the Shop Lots were undertaken within a short period of 12 months from the delivery of vacant possession.

**[166]** It was among others for these reasons that the SCIT concluded in paragraph 10.19 that it could not be said that the Shop Lots were acquired for investment purposes.

**[167]** In other words, and we say this again, the SCIT, as later affirmed by the High Court, had arrived at the said important finding after evaluating various considerations, and not just as alleged by the appellant, the finding that Block B Shop Lots were never rented out by the

appellant. Based on those consideration, the SCIT concluded they were the appellant's stock in trade, thus subject to assessment under the ITA.

**[168]** Concerning the badge of trade on the subject matter of the transaction, as discussed earlier, and as has *NYF Realty* (supra) usefully explained, property which does not yield income or personal enjoyment to its owner merely by virtue of its ownership is normally the subject of trading and rarely the subject of investments.

**[169]** Nevertheless, there is evidence of the existence of some rental income, albeit not substantial, for the Shop Lots in Block A (but not Block B). Thus, given the usual position, this seems to support the appellant's position that its properties in Block A were therefore to that extent held for purposes of investment.

**[170]** We further take cognizant that in *NYF Realty* (supra) it was also explained by Sharma J that contrary to the usual understanding that rentals collections suggest investment asset, it does not necessarily follow that any gain of rental income means that a property is an investment asset. It was held as follows:

> "...However, the Act (i.e. the Income Tax Act) does require that taxable income shall include: -
>
> (1) profit arising from the sale by the taxpayer of any property acquired by him for the purpose of profit making by sale; or
> (2) profit arising from the carrying on or carrying out of any profit-making undertaking or scheme.

> Most of the cases which have been decided on the subject have involved the application of the first of the above requirements. In determining the application of these requirements, the focal point of enquiry is the dominant purpose for which the particular property was originally acquired. If it is established that the dominant purpose in the acquisition of property was its resale at a profit, the presence of other purposes, such as the rental of that property does not remove any profit on ultimate sale from the taxable area."
>
> [Emphasis added]

**[171]** As such, whilst as is evident in the earlier discussion on the badge of trade concerning the subject matter of the asset that the presence of rentals may ordinarily indicate the property is for investment, it is again, like any single badge of trade, as shown in *NYF Realty* (supra), not conclusive; and that depending on the circumstances of each case, the gains of the subsequent sale of such property may still be deemed to be in the nature of trade.

**[172]** More so that in the instant case, there was no attempt by the appellant to rent out its Shop Lots in Block B. So much so that the position of the appellant is that there was no real rentals in order to advance its case that the properties were bought and held for investment. For the reasons that we have just stated, this stance of the appellant was correctly found by the SCIT, as affirmed by the High Court to be untenable.

**[173]** As discussed earlier in relation to the badge of trade concerning changes made to the asset, it is not always a simple exercise to distinguish between work which merely adds to the value and

marketability of the asset (investment) and work which alters the nature and identity of the subject matter (trading).

**[174]** Thus, a landowner would not necessarily be embarking on an adventure in the nature of trade every time he enters into a transaction with a housing developer. A taxpayer may also be said to be merely enhancing the value of its land although it has carried out wholesale works on its land to make the land more saleable, and this would still not be considered as trading. This is because it is also common sense that a case cannot be viewed from only a single perspective, such as focusing only on one particular badge of trade. We have stated that the SCIT must consider all that was before it and arrive at a reasoned decision.

**[175]** This is also consistent with the case of *HCM v Director General of Inland Revenue* (supra) which explained the point in the following terms:

> "The subject matter before us is land. By itself it is a neutral commodity. The test remains what does the owner or purchaser intends to do with it. For example if he keeps it and does nothing to it except to keep it in a good tenantable condition and awaits for a right time to dispose of it then it should fall within the category of investment, but if it should be developed, for example, if the owner had applied for a conversion of its use from agriculture to housing or subdividing it in smaller lots for sale then it is trading."

**[176]** In the instant appeal before us the SCIT found that nothing was done to the Shop Lots. There was no evidence to show that attempts were made by the appellant to improve or increase the value of the Shop Lots (such as by renovating them) before they were sold.

**[177]** Reference was then made to the case of *ALF Properties* (supra) in support of the proposition - also mentioned above - that even for sale after a short period of time cannot amount to trading.

**[178]** But again we must point out that the passage in *ALF* (supra) relied on by the appellant clearly stated not just that a sale after a short period cannot amount to trading (as submitted by the appellant) but the entire sentence actually reads "*a property purchased and sold soon after would not be considered as dealing in land when there is no evidence to show that preparation being made for the sale".*

**[179]** The appellant also argued there was in this case no maturing of the assets as is required for trading. However even the authorities referred to the appellant as supporting this argument show that the factor of maturing of asset is merely one that must be examined in conjunction with the other circumstances of the particular case. The appellant cited two cases.

**[180]** The first is the following passage from the judgment of Viscount Simonds in *Edwards (Inspector of Taxes) v Bairstow* (supra):

> "I find 'activities' which led to the maturing of the asset 'to be sold' and the search for opportunities for its sale, and, conspicuously, I find that the nature of the asset lent itself to commercial transactions. And by that, I mean, what I think Rowlatt J meant in *Lemming v Jones* [1930] 1 KB 279, that a complete spinning plant is an asset which, unlike stocks or shares, by itself produces no income and, unlike a picture does not serve to adorn the drawing of the room of its owner. It is a commercial asset and nothing else."

**[181]** We think that the key essence of the above passage is the point that certain assets are by their very nature and features are commercial and trading in nature. The passage is less about the importance of showing maturing of asset in all situations.

**[182]** The other passage referred by the appellant is from the decision in *Sekong Rubber Co Ltd v Director General of Inland Revenue* [1980] 2 MLJ 198, which stated:

> "Having regard to the appellant' memorandum and articles, and to what they did from the moment they acquired the estate to the time when they sold the standing timber on the estate, their activities to use the words of Viscount Simonds (in *Edwards v Bairstow* [1956] 14 AC 14) can be said to be leading "to maturing of the asset" and the sale must be an adventure in the nature of trade, and once the transaction has the badge of trade, the fact that it is an isolated case does not prevent the transaction from being in truth an adventure in the nature of trade (see Lord Radcliffe in the same case at page 230)."

**[183]** The appellant also did not advertise or appoint any agent to sell the Shop Lots. This according to the appellant shows that the appellant was not trading when it disposed of the Shop Lots. Coupled with the finding that there was no maturing or improvements to Block A and B, the conclusion of the SCIT, as affirmed by the High Court is an error of law.

**[184]** We have earlier summarised that if the supplementary work on the property merely makes it more marketable, any gains from its sale should not be taxable under Section 4 of the ITA. Conversely if the work converts a house into a hotel or into self-contained flats which are then

sold, the nature of the property has completely changed and the disposal gains should be taxable as trading income.

**[185]** At the same time we have also stated that if no steps at all (such as rentals and advertising, not necessarily physical work) are made vis-à-vis the property to increase its value, this may not always be consistent with the contention that the property is held for investment. We stress that the relevant badge of trade speaks of changes made to the property. Thus, the aspects to be examined are twofold. The first is the extent of the changes to the property, as just described. Secondly if there is no change, greater consideration on the circumstances of the case is imperative.

**[186]** We do not disagree that, as mentioned earlier, in situations where nothing is done to the asset, with other things being equal, it may be argued that the asset is held for investment (as stated in *HCM v Director General of Inland Revenue* (supra)). This is essentially the position of the appellant here. However, much depends on the facts and circumstances of each case and on the nature of the asset. Here, the properties are shop lots. It is commercially fair to say that if they are intended for investment, renovation could make it more tenantable, commanding a higher rental. But if they are meant for resale, it would probably make little sense to renovate lest they not be to the intended purchaser's liking. In this specific context, work done on the property is only to be expected for investment assets, but not for trading asset, departing from the general view that where nothing is done, the asset is held for investment.

**[187]** Accordingly, we do not therefore find the approach taken by the SCIT in the instant case to be flawed, given that the SCIT in paragraph 7 (xl) stated that in general circumstances, steps are taken by owners of investment assets to improve or increase the market value of the said investment, but evidently nothing was done by the appellant in this case. We therefore find no substance in this ground of appeal.

**Conclusions & Decision**

**[188]** It needs no reminding that it is within the remit of the SCIT to determine whether a trade is being carried on, which is manifestly a question of fact. The High Court however may only intervene and set aside the said decision of the SCIT in situations as set out by the House of Lords in *Edwards (Inspector of Taxes) v Bairstow* (supra). At the clear risk of repetition these are first, if the SCIT, in arriving at its decision, fails to take a properly balanced view of the facts or secondly, if the said decision is one which could not be reached by properly constituted commissioners acting reasonably, such as by inferring a perverse conclusion from the facts.

**[189]** Additionally we should reiterate, as we have discussed earlier, that Malaysian tax jurisprudence has also established related principles for appellate intervention whereby an appeal against the decision of the SCIT is only justified on a question of law, that there ought to be no interference on the findings of primary facts, or in situations where the appellate court would not have come to the same conclusion and neither should it interfere if the primary facts are capable of two alternative inferences.

**[190]** We must add to mention our caution against the findings of specialised statutory entity such as SCIT being challenged on the flimsiest of arguments. We have earlier stated the key principles governing appeals against decisions of SCIT. We should refer to the decision in *Leeming v Jones* [1930] 1 KBD 279, an English case referred to by the respondent. There, the issue was whether there was an adventure or concern in the nature or trade in respect of a transaction involving the sale of rubber estate. The tax commissioners decided in the negative.

**[191]** But even though the High Court and the Court of Appeal in that case determined on the facts that there should have been a contrary finding that there was in fact and law an adventure in the nature of trade, they decided not to interfere with the finding of facts made by the commissioners. Lord Hanworth MR observed:

> "… for however strongly one may feel as to the facts, the facts are for the decision of the Commissioners. It would make an inroad upon their sphere if one were to say in a case such as the present that there could only be one conclusion. The Commissioners are far better judges of these commercial transactions than the courts, and although their attention has been drawn to what happened, they have in their final case negatived anything in the nature of an adventure or trade."

**[192]** Cases have also more than amply demonstrated the proposition that no badge in itself is usually decisive and a final determination and conclusion can only be arrived at after a mature evaluation of the facts vis-à-vis the various badges of trade.

**[193]** Having considered the record of appeal and submissions of parties, we are in full agreement that the appellant, who bears the burden

of proving any such infirmities and defects in the decision of the SCIT to justify appellate intervention has plainly not succeeded in accomplishing the same. It is our judgment that the findings of SCIT are based on the totality of the evidence adduced before it. The SCIT had properly examined the evidence made available by both parties and correctly applied the law to the facts which concluded that the appellant had failed to discharge its burden to show that the assessments raised by the respondent was erroneous or excessive. SCIT had as such correctly held that the assessment was correct.

**[194]** We accordingly unanimously hold that the High Court was correct in deciding that the findings of the SCIT are consistent with the evidence produced before it. The High Court was clearly not in error when it determined that there were no grounds to disturb the findings of fact made by the SCIT.

**[195]** The decision of the High Court is therefore affirmed and the appeal is dismissed with costs to the respondent.

**30 November 2023**

**MOHD NAZLAN MOHD GHAZALI**
**Judge**
**Court of Appeal**
**Putrajaya, Malaysia**

**For the Appellant**

Dr Arjunan Subramaniam (Messrs Shanker, Arjunan & Chua)

**For the Respondent**

Normareza Mat Rejab, Syazana Safiah Rozman and Muhammad Danial Izzat bin Zulbahari (Senior Revenue Counsel/Revenue Counsel)