

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D14/03

Profits tax – sale of property – intention at the time of acquisition – section 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Edward Cheung Wing Yui and Karl Kwok Chi Leung.

Date of hearing: 7 April 2003.

Date of decision: 14 May 2003.

The appellant and Mr A are husband and wife. By an agreement dated 28 July 1989, Mr A acquired Property 1 and Property 1 has since been used as their matrimonial home. By an agreement for sale and purchase dated 24 September 1996, the appellant acquired Property 2. The sale of Property 2 was completed by an assignment dated 22 November 1997. The issue before the Board is whether the appellant is liable for profits tax in respect of her gains arising from her dealings with Property 2.

Held:

1. The intention of the appellant at the time of acquisition of Property 2 is crucial in determining whether that flat was acquired as capital asset or trading asset. An intention to hold property as a capital investment must be definite. The stated intention of the taxpayer is not decisive. Actual intention can only be determined objectively (Simmons v IRC (1980) 53 TC 461 and All Best Wishes Ltd v CIR (1992) 3 HKTC 750 followed).
2. Under section 68(4) of the IRO, the onus of proving the assessment appealed against is excessive or incorrect is on the appellant. In order to discharge this onus, it is incumbent on the appellant to place before the Board credible materials in support of her assertions.
3. The Board had in this case the mere assertions of the appellant through her husband. There was hardly any objective evidence in support of Mr A's contentions. The Board had serious reservations on the appellant's ability to finance the purchase of Property 2 on a long term basis. The Board found it difficult to reconcile the credibility of the appellant's case with the manner whereby she answered the

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questionnaire from the Revenue. The Board was not prepared to accept the unsworn and untested statements of Mr A. The objective evidence was highly inconsistent with his bald assertions.

Appeal dismissed.

Cases referred to:

Simmons v IRC (1980) 53 TC 461
All Best Wishes Ltd v CIR (1992) 3 HKTC 750

Yeung Siu Fai for the Commissioner of Inland Revenue.
Taxpayer represented by her husband.

Decision:

Background

1. Mr A and the Appellant are husband and wife. By an agreement dated 28 July 1989, Mr A acquired a flat at Housing Estate B ('Property 1') for \$393,500. By a legal charge dated 30 January 1990, Mr A charged Property 1 in favour of Bank C for \$354,150. Property 1 has since been used as their matrimonial home.
2. By an agreement for sale and purchase dated 24 September 1996, the Appellant acquired a flat at Housing Estate D ('Property 2') for \$2,911,000. The purchase was supported by a loan of \$2,037,700 extended by Bank E in favour of the Appellant and two other persons surnamed '[F]'. The loan was secured by an equitable mortgage in favour of Bank E dated 24 October 1996. According to a statement dated 27 November 1997, the Appellant and the two Fs paid a total of 12 monthly instalments ranging between \$17,684 and \$18,321.
3. By an agreement dated 5 February 1997, the Appellant with two other persons acquired as tenants in common a flat at Housing Estate G ('Property 3') for \$2,450,000. Property 3 was disposed of by the Appellant by an agreement dated 27 March 1997 for \$2,680,000. The Appellant was duly taxed on her one-third share of the gains arising from this disposal.
4. The Appellant completed the purchase of Property 2 by an assignment dated 5 July 1997. By an agreement dated 6 October 1997, the Appellant disposed of Property 2 for \$4,600,000. The sale was completed by an assignment dated 22 November 1997.

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5. By an agreement dated 5 November 1997, the Appellant and a Mr H purchased another flat at Housing Estate D ('Property 4') for \$6,250,000. This purchase was completed on 5 May 1998 with the aid of a mortgage loan from Bank I. Property 4 is still being held by the Appellant and Mr H.

6. On 10 July 2000, the Appellant completed a questionnaire issued by the Revenue in respect of her dealings with Property 2. By this questionnaire, she informed the Revenue that her gross profit was \$600,000 and after deducting expenses totalling \$350,000, her net profit was \$250,000. She did not give any response as to her source of finance; her reasons for acquisition and her reasons for disposal.

7. In response to further inquiries by the Revenue, the Appellant by letter dated 17 January 2002 informed the Revenue that

- (a) She did not have any income in the period between 1 April 1995 and 31 March 1998. Mr A was a tour guide with annual income ranging between \$150,000 and \$200,000.
- (b) The initial and subsequent instalment payments in respect of Property 2 came from their savings and loans from their parents. Such loans amounted to approximately \$600,000. The loans were repaid on sale of Property 2. There is no documentary proof due to the long lapse of time.
- (c) She paid \$46,000 by way of commission to the real estate agent in respect of her sale.

8. The issue before us is whether the Appellant is liable for profits tax in respect of her gains arising from her dealings with Property 2.

The hearing before us

9. At the hearing before us, the Appellant was accompanied by Mr A and two members of a firm of accountants who acted as her tax representative since 15 April 2002. The appeal was conducted throughout by Mr A. Mr A elected not to adduce any sworn testimony. By his unsworn statement, he informed this Board the following:

- (a) His family had been residing in Property 1 for six to seven years. He wanted to improve the family's living environment.
- (b) He selected Housing Estate D as it is close to the Mass Transit Railway and his friends were talking about it.

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- (c) He was successful in the drawing of lots for units in the development. It was very crowded when he attended the developers for selection of units. He was under great pressure when he picked Property 2. He selected the same as it was within his budget.
- (d) He inspected Property 2 after its completion. It was noisy and its diamond shape was unsuitable for his use. He therefore decided to sell Property 2.
- (e) He purchased Property 4 as it is larger in size with better view and less noise. Mr H was his brother-in-law. Mr H was prepared to finance him in the purchase of Property 4 as his home. In order to be fair to Mr H, Mr H was named as a co-purchaser although he was only interested as an investor.
- (f) The market took a turn for the worse. He had to let Property 4 out in order to support its purchase.

The law

10. The intention of the Appellant at the time of acquisition of Property 2 is crucial in determining whether that flat was acquired as capital asset or trading asset. As stated by Lord Wilberforce in Simmons v IRC (1980) 53 TC 461

‘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?’

11. An intention to hold property as a capital investment must be definite. The stated intention of the taxpayer is not decisive. Actual intention can only be determined objectively. In All Best Wishes Ltd v CIR (1992) 3 HKTC 750 Mortimer J gave the following guidance:

‘The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence ... It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and

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things done at the time, before and after. Often it is rightly said that actions speak louder than words'.

12. Under section 68(4) of the IRO, the onus of proving the assessment appealed against is excessive or incorrect is on the Appellant. In order to discharge this onus, it is incumbent on the Appellant to place before this Board credible materials in support of her assertions.

Our decision

13. We have in this case the mere assertions of the Appellant through her husband. There is hardly any objective evidence in support of Mr A's contentions.

14. The transaction in question is not a one-off transaction. It is accepted that the Appellant traded in relation to Property 3. Mr A seeks to place reliance on Property 4 in support of the Appellant's alleged intention to purchase a new home. We are of the view that Property 4 gives no such support. There is no credible evidence as to the financial standing of Mr H to warrant our acceptance of the assertion that he was financing the acquisition of the family home of Mr A and the Appellant. Mr A is closer to the truth when he referred to Property 4 as an investment of Mr H.

15. We have serious reservations on the Appellant's ability to finance the purchase of Property 2 on a long term basis. She did not have any source of income. Mr A's income averaged between \$12,500 and \$16,667 per month. Mr A's income was hardly sufficient to meet the mortgage instalments in favour of Bank E. The account with Bank E was in the name of the Appellant and two Fs. The precise role of the two Fs has not been satisfactorily explained. There is no evidence of any concrete step being taken to dispose of Property 1. That flat is held on terms which require payment of premium in favour of the Government on alienation. There is no evidence as to the amount of premium involved and how the Appellant and Mr A proposed to finance such premium.

16. Mr Yeung for the Revenue drew our attention to various discrepancies in the figures claimed by the Appellant. Mr Yeung placed particular emphasis on the fact that a sum of \$46,000 was claimed as commission paid on sale of Property 2 when in truth no more than \$16,000 was paid to the estate agent for such purpose. Mr A's explanation that the sum of \$46,000 was the commission entitlement of the estate agent is hardly convincing. We also find it difficult to reconcile the credibility of the Appellant's case with the manner whereby she answered the questionnaire from the Revenue. Had there been any truth in her contentions, she could easily have told the Revenue that Property 2 was purchased as her family home.

17. For these reasons, we are not prepared to accept the unsworn and untested statements of Mr A. The objective evidence is highly inconsistent with his bald assertions.

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18. No attempt has been made to justify the various items of expenses claimed. We reject such claim on the ground that the same has not been proved.
19. For these reasons we dismiss the Appellant's appeal and confirm the assessment.