

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D14/87

Board of Review:

William Turnbull, *Chairman*, Andrew J. Halkyard and Lester C. H. Kwok, *Members*.

23 June 1987.

Profits Tax—Whether profit arising from the purchase and resale of the flat in which the Appellant was living constituted a trading transaction.

In 1979 the Appellant purchased and resold at a profit the flat in which he was then living as a tenant and the profit arising was assessed to profits tax as being a trading profit. By a sale and purchase agreement dated 19 November 1979 the Appellant agreed to purchase the property and by a sale and purchase agreement dated 20 November 1979 the Appellant agreed to sell the property to a third party making a net profit of \$201,850.00. The Appellant being a civil servant was at that time hoping to join the Home Purchase Scheme and argued that it was the delay in the implementation of the scheme which ultimately changed his original intention of not reselling the property.

Held:

On the facts, at the time the Appellant committed himself to purchase the property on 19 November 1979 he did so with the intention of selling the same at a profit to a third party. Such a transaction is in the nature of trade and any profit arising therefrom is taxable.

Appeal dismissed.

J. G. A. Grady for the Commissioner of Inland Revenue.
Appellant in person.

Reasons:

The Taxpayer has appealed against a determination of the Acting Deputy Commissioner (“the Commissioner”) which confirmed an assessment raised on him for the year of assessment 1979/1980. In 1979 the Taxpayer purchased and resold at a profit the flat in which he was then living and a carpark space (“the Property”). The profit has been assessed to Profits Tax as being a trading profit. The Taxpayer denies that he purchased the Property with a view to its resale and says that accordingly he should not pay tax on the profit which is of a capital nature.

This case does not involve any new or complex legal considerations. It is a matter of fact and interpretation of fact.

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This history of events can be summarised as follows:—

- (a) The Taxpayer became the tenant of the Property in about 1978 and had at the material time a tenancy due to expire on 30 September 1980.
- (b) During the month of August 1979 the Taxpayer was informed in writing that the then owner of the Property was interested in selling it to the Taxpayer and the Taxpayer confirmed that he was interested in purchasing the Property. It was suggested by the Commissioner's representative but not proved that the tenant was offered a beneficial price because he was the sitting tenant. The Taxpayer denied that such was the case.
- (c) By a sale and purchase agreement dated 19 November 1979 the Taxpayer agreed to purchase the Property and by a sale and purchase agreement dated 20 November 1979 the Taxpayer agreed to sell the Property to a third party. The result of these two sale and purchase agreements was that the Taxpayer made a net profit of \$201,850.00 which the Commissioner has decided was a trading profit and taxable as such. The Commissioner rejected the contention of the Taxpayer that the profit was a capital profit.

In the absence of any other explanation or any further facts it would prima facie appear that the Commissioner was correct in deciding that the transaction was in the nature of trade. An unexplained purchase and immediate resale the next day of the Property must raise the inference of a trade transaction. In support of his contention that it was a capital profit the Taxpayer submitted that he was a Government servant who understood that his employer would introduce a Home Purchase Scheme under which the employer would make available finance which would permit the Taxpayer to buy the Property. The Taxpayer said that between the date when he decided to purchase the Property and the date when he decided to sell the Property there had been a fundamental change because he became aware that the proposed Home Purchase Scheme would not be implemented in time to allow him to purchase the Property. He said that the reason for buying the Property was as his home and that when making the decision to buy the Property he had no intention of reselling it. The decision to resell was in effect forced upon him because of the delay of his employer in implementing the Home Purchase Scheme.

The onus of proof in a tax appeal lies on the Taxpayer. In this case if the Taxpayer had been able to produce evidence to substantiate what he said then he might have been successful in his appeal. Unfortunately for the Taxpayer the Board is not satisfied that what the Taxpayer told us was correct. The evidence given on behalf of the Taxpayer was his own self serving evidence and such documents as were produced can hardly be said to substantiate his submission or verify his evidence.

The Taxpayer said that he became aware of the intention of the owner of the Property to offer it to him for sale at some time prior to August 1979. He gave no date of when he became aware of this and produced no supporting evidence.

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The Home Purchase Scheme to which much reference was made and which was the cornerstone of the Taxpayer's case was, at the relevant time, no more than a proposal. In May 1979 the Governor-in-Council endorsed general principles of future policy for housing assistance to civil servants. Based on these principles, outlines of proposed new schemes were circularised to Heads of Departments in July 1979. Comments were obtained and detailed discussions took place in the Senior Civil Servants Council. Revised proposals were then submitted to and approved by the Executive Council and Finance Committee in June and July 1981 and the same were formally introduced at the end of 1981. The circular which was issued in July 1979 asks Heads of Departments to consult with staff directly or indirectly and reply to the Secretary of the Civil Service by the end of October 1979. The circular went on to state that firm proposals will be drawn up for consideration at a later date when the views and comments of Heads of Departments and staff have been received.

The Taxpayer was cross examined with regard to the fact that on 19 November 1979 he entered into a binding commitment to purchase the Property and on the very next day entered into a binding commitment to sell it for a higher price. The Taxpayer said that he had committed himself earlier by paying an initial deposit of HK\$10,000. The Taxpayer was unable to say when this provisional deposit was paid and produced no documentary evidence to substantiate it.

We find the evidence given by the Taxpayer to be unsatisfactory in many regards and we find that he has failed to substantiate the submission which he made. The sale and purchase agreement which he executed on 19 November 1979 refers to completion taking place on 15 July 1980. It refers to a deposit of HK\$166,972.50 being paid by the Taxpayer. On the Taxpayer's own admission this deposit was not paid by him but was paid by the person to whom he sold the flat at a profit. He said that he only visited the solicitors office once for about 10 minutes when the entire transaction so far as he was concerned was handled. He did not pay any money (other than the HK\$10,000 initial deposit).

When the Taxpayer was first asked by the Inland Revenue Department to state why he had sold the Property, he said that the reason was that he had found a better flat and did not wish to live in the Property. When asked about this in cross examination he said that the reason originally given to the Inland Revenue Department was incorrect because he did not understand about tax matters. Apparently had he known about tax matters he would have given a different answer. This sort of evidence we find totally unsatisfactory.

It is clear to us that the Taxpayer would not have entered into any binding sale and purchase contract unless either he was satisfied that under the Government Home Purchase Scheme he was entitled to financial assistance which would have enabled him to complete the purchase or he had already found an existing sub-purchaser who would purchase from him the Property at a profit so that he would have no personal liability. It may be, though we are not satisfied on the evidence before us that such was the case, that the Taxpayer hoped that he would be entitled under the Home Purchase Scheme to financial assistance. However a hope is the most that he had. We are satisfied that based on such a hope he could

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not and would not have entered into any legally binding commitment to purchase the Property as a long term investment. We find as a matter of fact that at the time when he committed himself to the purchase of the Property, i.e. 19 November 1979, he did so with the intention of selling the same at a profit to a third party. Such a transaction is in the nature of trade and any profit arising therefrom is taxable.

For the reasons given we dismiss this appeal and confirm the assessment appealed against.