

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D151/99

Profits Tax - sale of property – intention – self-serving statement – onus of proof.

Panel: Anna Chow Suk Han (chairman), Gerald To Hin Tsun and Mary Teresa Wong Tak Lan.

Date of hearing: 8 September 1999.

Date of decision: 28 March 2000.

The taxpayers (Mr A & Ms B) are husband and wife. Mr A joined the Hong Kong Government in March 1989. He rented Unit 1 and took benefit from the Private Tenancy Allowance from the Government. During the subsistence of this tenancy, on 22 August 1990 the taxpayers entered into a provisional agreement to purchase Property 2 that was then subject to an existing tenancy.

It was the taxpayers' case that Property 2 was purchased by them for use as their residence and that of Mr A's mother, because the flat rented by them would not be renewed upon expiry. Property 2 was subsequently sold because the Mr A's mother refused to move into Property 2. Property 4 was again acquired by the taxpayers for use as their residence because the tenancy agreement of their residential premises was to expire in October 1991. Property 4 was sold because they found that extensive remedial work was required at the property before they could move into it.

The assessor is of the view that both Property 2 and Property 4 were purchased by the taxpayers for resale and that accordingly the profits from the sales of both properties should be charged to profits tax.

Held :

1. A self-serving statement by a person is of limited value until it has been tested against the objective facts and surrounding circumstances (All Best Wishes Limited v CIR 3 HKTC 750 and D11/80 IRBRD, vol 1, 374 applied).
2. The Board was unconvinced by the taxpayers' claim that they purchased Property 2 because they wished to make use of the Home Financing Scheme offered by the Government. The Board observed that since the taxpayers had only just started the term of their tenancy of Unit 1 and Mr A was claiming Private Tenancy Allowance,

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there was no urgent need for them to buy a property for use as their residence, and particularly before the impending announcement of the details of the new package.

3. On the evidence before the Board, the Board did not believe that the taxpayer had the intention of giving up Private Tenancy Allowance for the Home Financing Scheme during the time he acquired Property 2 and Property 4.
4. The onus of proof is on the taxpayers. The taxpayers did not give evidence nor call witnesses to give evidence on their behalf. As facts cannot be proved by mere assertions we find that the taxpayers have failed to discharge the burden placed upon them to prove that Property 2 and Property 4 were acquired by them for use as their residence.

Appeal dismissed.

Cases referred to:

All Best Wishes Limited v CIR 3 HKTC 750
D11/80, IRBRD, vol 1, 374

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayers represented by their accountant.

Decision:

The appeal

1. This is an appeal by Mr A and Ms B (as 'Mr A' and 'Ms B' individually and as 'the Taxpayers' collectively) against the determination dated 31 March 1999 made by Commissioner of Inland Revenue in respect of the profits tax assessment for the year of assessment 1991/92 dated 28 November 1996 showing assessable profits of \$480,000 with tax thereon of \$72,000 being increased to assessable profits of \$1,378,082 with tax payable thereon of \$206,712.

The facts not in dispute

2. The Taxpayers have objected to the profits tax assessment for the year of assessment 1991/92 raised on them. The Taxpayers claim that the profit derived by them from the sale of Property 2 and Property 4 (both hereinafter particularly described) should not be charged to profits tax.

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3. The Taxpayers are husband and wife. They have, inter alia, the following property transactions:

Location	<u>Purchase</u>			<u>Sale</u>		
	Date of agreement	Date of assignment	Price \$	Date of agreement	Date of assignment	Price \$
Property 1, District C	6-5-1988	2-7-1988	985,000	19-5-1989	30-6-1989	1,350,000
Property 2, District C	5-9-1990 (28-8-1990)*	1-10-1990	2,050,000	4-6-1991 (27-5-1991)*	3-7-1991	3,410,000
Property 3, District D	13-7-1991 (6-7-1991)*	13-8-1991	2,460,000	27-6-1996 (12-6-1996)*	12-7-1996	3,950,000
Property 4, District C	8-8-1991 (12-7-1991)*	---	2,480,000	10-9-1991 (30-8-1991)*	28-11-1991	2,938,000
Property 5, District E	5-6-1997	8-7-1997	395,000			
Property 6, District E	17-6-1997	8-7-1997	8,150,000			

* The dates in brackets were the dates of the provisional agreements.

4. Property 2 was subject to an existing tenancy at the time of the Taxpayers' purchase. The tenancy agreement was entered into on 21 March 1989 between the vendor and the tenant and was for a period of two years from 1 April 1989 to 31 March 1991 at a monthly rent of \$15,000.

5. Certificate of compliance in respect of Property 4 was issued on 10 September 1991. The property was sold by the Taxpayers before it was assigned to them.

6. Mr A worked in a Government department between 30 March to 1 October 1989 and has been working in another department of the Hong Kong Government since 1 October 1989.

7. In a letter dated 9 December 1991, Mr A told the assessor that after he had joined the Government, he was entitled to receive Private Tenancy Allowance (' PTA ') from the Government. He said as he could not use PTA to finance mortgage repayment of his own property, he sold Property 1 and rented accommodation using PTA.

8. From early 1989 to June 1998, Mr A received PTA from the Government to rent his

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accommodation. A list of the rented accommodation is set out below:

Address	Period of occupation	Gross floor area	Persons living there
Unit 1, Private Housing Estate F, District G	5-4-1990 – 1-10-1991	850 square feet with 3 bedrooms	The Taxpayers, their elder son and a domestic helper
Unit 2, Private Housing Estate F, District G	2-10-1991 – 9-8-1993	850 square feet with 3 bedrooms	The Taxpayers, their elder son and a domestic helper
Unit 3, Private Housing Estate H, District I	10-8-1993 – 31-1-1997	1,050 square feet with 3 bedrooms	The Taxpayers, their elder son, their younger son born on 30-8-1994, Mr A's mother and a domestic helper
Unit 4, Private Housing Estate H, District I	1-2-1997 – 26-6-1998	1,200 square feet with 3 bedrooms and 1 maid room	The Taxpayers, their two sons and Mr A's mother and a domestic helper

9. Particulars of the agreements are summarized below:

Address	Date of agreement	Period of tenancy	Monthly rent \$
Unit 1	30-3-1990	18 months from 5-4-1990 to 4-10-1991	8,500
Unit 2	2-10-1991	2 years from 2-10-1991 to 1-10-1993	14,500

Clause (11) of the tenancy agreement of Unit 1 provided that the landlord would not renew the tenancy after its expiry.

10. The Taxpayers have informed the assessor that they are presently living in Property 6 which has a gross floor area of 980 square feet with three bedrooms and that repayment of the mortgage loan of this property is financed by allowances received by Mr A under the Government Home Financing Scheme ('HPS').

11. The assessor raised on the Taxpayers the following profits tax assessment in respect of the profit made by them from the sale of Property 4:

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Year of assessment 1991/92

Estimated assessable profit from the sale of Property 4	<u>\$480,000</u>
Tax payable thereon	<u>\$72,000</u>

12. The Taxpayers submitted to the assessor the following computation of the profit from the sale of Property 4:

	\$	\$
Selling price		2,938,000
Purchase price		<u>2,480,000</u>
Gross profit		458,000
Less: Expenses		
Commission for purchase	24,800	
Commission for sale	25,000	
Management fee	2,380	
A set of kitchen cabinet	6,178	
Payment to the vendor of \$17,800 per month for September to November 1991 as per provisional sale and purchase agreement	53,400	
Legal fees (estimated)	5,000	
Application fee for Home Loan	<u>2,000</u>	
		<u>118,758</u>
New profit		<u><u>339,242</u></u>

13. The assessor now estimates that the profit made by the Taxpayers from the sale of Property 2 should be as follows:

	\$	\$
Selling price		3,410,000
Purchase price		<u>2,050,000</u>
Gross profit		1,360,000
Less: Estimated expenses		
Commission on purchase	20,500	
Commission on sale	34,100	
Mortgage loan interest from		

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1-10-1990 to 3-7-1991	
(\$1,500,000 x 276/365 x say 12%)	136,110
Appraisal fee paid to the bank	550
Penalty for early redemption of mortgage loan, say	
\$1,500,000 x 12% x 1/12	15,000
Legal fees on scale charge	
Purchase - Sale and purchase agreement	2,000
Assignment	15,250
Mortgage	12,500
Stamp duty	56,375
Miscellaneous	2,000
Sale – Sale and purchase agreement	2,000
Assignment	11,025
Release of mortgage	1,800
Miscellaneous	2,000
Any other miscellaneous expenses	<u>10,000</u>
	<u>321,160</u>
New profit	<u><u>1,038,840</u></u>

14. The assessor is now of the view that both Property 2 and Property 4 were purchased by the Taxpayers for resale and that accordingly the profits from the sales of both properties should be charged to profits tax. The assessor considers that the profits tax assessment for the year of assessment 1991/92 should be revised as follows:

	\$
Profits from the sales of – Property 2	1,308,840
Property 4	<u>339,242</u>
Total assessable profits	<u><u>1,378,082</u></u>
Tax payable thereon	<u><u>206,712</u></u>

The Taxpayers objected to the assessment and appealed against the determination in this connection.

The Taxpayers' case

15. The Taxpayers were assessed to profits tax on the profits from the sale of Property 2 and Property 4.

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16. The Taxpayers claimed that Property 2 was purchased by them for use as their residence and that of Mr A's mother, because the flat rented by them would not be renewed upon expiry. Property 2 was subsequently sold because Mr A's mother refused to move into Property 2. She found the location of Property 2 inconvenient and lacking in public transport and that in winter the weather there, was particularly windy and cold. Since the Taxpayers had always relied upon either Mr A's mother or Ms B's mother to look after their son, it was only reasonable that the property should be sold, when Mr A's mother refused to live in it. Although Mr A informed his mother of the location of Property 2 prior to the purchase, she was not aware of the severe condition until winter approached.

17. The Taxpayers relied on the following to prove their intention that Property 2 was purchased for their own use.

- (i) A long term mortgage of \$1,500,000 was arranged.
- (ii) Property 2 was subject to a tenancy agreement when it was purchased. The Taxpayers served a notice of termination on the tenant on 10 December 1990. The Taxpayers stated clearly in the notice that Property 2 was required for use as a residence for himself and his family.
- (iii) The Taxpayers wished to make use of the new package under HFS announced by the Government on 24 September 1990.
- (iv) The tenancy agreement of the apartment (Unit 1) in which the Taxpayers were living would expire on 1-10-1991 and would not be renewed after its expiry.
- (v) Property 2 had three bedrooms and a floor area of 1,360 square feet, which was much larger than that of Unit 1 so as to accommodate the Taxpayers and his parent.

18. Property 4 again was acquired by the Taxpayers for use as their residence because the tenancy agreement of Unit 1 was to expire in October 1991. They claimed that their stated intention could be proved by the fact that Property 4 had a gross floor area of 1,217 square feet which was large enough to accommodate their family and also the parents of Mr A. They bought a set of kitchen cabinets from a furniture company to replace those at the property. They were to apply for a mortgage loan from a bank, if the occupation permit of the property had been issued. However, the property was sold because they found that extensive remedial work was required at the property before they could move into it. They claimed that they made a hasty decision in buying the property because at the time the tenancy of their rented flat was due to expire.

19. It was further asserted that both Property 2 and Property 4 were purchased at the time when Unit 1 was to expire which demonstrated the Taxpayers' intention to buy a property for use

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as their residence. The Taxpayers did not buy a replacement property after Property 4 was sold because they had rented Unit 2 and after the expiration of its term, due to the schooling of their elder son and the subsequent birth of their second son, they could not decide on the location of their home until 1997. Apart from Property 2 and Property 4, they had not purchased and sold other properties for short terms.

The Respondent's (the Revenue's) case

20. The Respondent argued that it was not the Taxpayers' intention to purchase Property 2 for use as their residence and that the purchase of Property 2 was not for the purpose of Mr A joining HFS. The Respondent pointed out that the latter claim was not made by the Taxpayers until the determination was made by the Commissioner.

21. The Respondent said that it was inconceivable that the Taxpayers would commit themselves to a long term investment involving millions of dollars by relying on information which had not been officially confirmed.

22. Although the exact option deadline applicable to Mr A to join HFS was not known at the time, such deadline in any event would not be earlier than 30 September 1993. Thus, as there was no urgency for Mr A to purchase a property to join the scheme, the purchase of Property 2 could not have been prompted by its introduction.

23. Furthermore, Mr A claimed that Property 1 was sold in May 1989 because he wished to take the benefit of PTA for renting accommodation. The tenancy agreement in respect of Unit 1 for a term of 18 months was entered into by the Taxpayers in March 1990. When the Taxpayers purchased Property 2, there was still a lengthy unexpired term under the tenancy. Thus, there was no urgent need for the Taxpayers to purchase a property as their residence. The Taxpayers offered no explanation in this regard.

24. The Taxpayer were residing at a rented property with a lengthy unexpired term to run, and there was no urgent need of a property as their residence. The Taxpayers could have looked for other properties with vacant possession, instead of purchasing the one with an existing tenancy.

25. The Taxpayers said that their son had been looked after by Ms B's mother. The Taxpayers claimed that Property 2 was sold because Mr A's mother refused to move to Property 2. No explanation was given as to why such arrangement needed to be changed.

26. The Taxpayers claimed that Property 2 and Property 4 were purchased so that Mr A could claim the benefit under HFS. However, it was a fact that up to June 1998, the Taxpayers lived in rented accommodation using PTA received by Mr A.

27. The Taxpayers claimed that Property 4 was sold because of its poor condition. It was

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pointed out by the Respondent that as a usual practice the developer would provide one year warranty and would remedy defects so found at the premises. Furthermore, much of the amount alleged to be spent on remedial works at Property 4 was really on decorations which would have been necessary regardless of the construction quality of the property. The reason for the sale of Property 4 was therefore unacceptable.

28. As to the Taxpayers' claim that they purchased Property 4 under the constraint of time due to the immanent expiration of the tenancy of Unit 1, the Respondent asserted that this claim is invalid because almost at the same time, the Taxpayers also acquired Property 3. If they indeed needed a home, they should spend more time looking for a property for their use, rather than for a property for rental purpose.

The relevant statutory provision

29. The relevant sections of the Inland Revenue Ordinance (' the IRO') are as follows:

(a) Section 14(1)

' Subject to the provisions for this Ordinance, profits tax shall be charged for each year of assessment at the standard rate on every person carrying on a trade, profession or business in Hong Kong in respect of his assessable profits arising in or derived from Hong Kong for that year from such trade, profession or business (excluding profits arising from the sale of capital assets) as ascertained in accordance with this Part.'

(b) Section 2

' "trade" includes every trade and manufacture, and every adventure and concern in the nature of trade.'

(c) Section 68(4)

' The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

The established legal principles

30. A self-serving statement by a person is of limited value until it has been tested against the objective facts. In All Best Wishes Limited v CIR 3 HKTC 750, Mortimer, J said at page 771:

' 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

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the evidence, genuinely held, realistic and realizable, 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. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'

31. In Board of Review Decision D11/80, IRBRD, vol 1, 374, the Board said at page 379:

“intention” connotes an ability to carry it into effect. It is idle to speak of “intention” if the person so intending did not have the means to bring it about or had made no arrangement or taken no steps to enable such intention to be implemented.’

The proceedings

32. This Board has been presented with the following documents:

- (a) The Board's bundle consisting of the Commissioner's determination and a statement of the grounds of appeal with copies of provisional agreements for sale and purchase of Property 2, Property 3 and Property 4, tenancy agreements of Unit 1 and Unit 2, invoice of a furniture company, a letter of a bank to the Taxpayers of 1 October 1990 consisting of mortgage terms of Property 2 and notice of termination (CIR 101) and Form 13 served on tenant of Property 2.
- (b) The Respondent's (the Revenue's) bundle consisting of Land Registry records of Property 1, Property 2, Property 3 and Property 4, the Taxpayers' letters of 9 December 1991, 2 January 1997, 3 January 1997, 24 October 1997 and 7 October 1998 and assessor's letters of 29 September 1997 and 23 September 1998, and Civil Service Branch Circular No 23/90 of 24 September 1990.
- (c) Civil Service Branch Circular No 20/90 of 14 July 1990.

33. The Taxpayers did not attend the hearing of the appeal but they authorized their accountant, Mr Fung Po-fai, to represent them at the hearing.

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34. Mr Fung Po-fai did not adduce evidence for the Taxpayers but presented this Board with his written submission.

35. The Respondent also presented this Board with a written submission.

Our findings

36. Self-serving statements are of limited value until they have been tested against objective facts and surrounding circumstances.

37. Mr A joined the Hong Kong Government in March 1989. Soon after, he rented the property in Private Housing Estate J in District G so as to take benefit of PTA from the Government and sold Property 1. After one year, he rented Unit 1. During the subsistence of this tenancy, on 22 August 1990 he entered into a provisional agreement to purchase Property 2 which was then subject to an existing tenancy. The Taxpayers claimed that they purchased Property 2 because they wished to make use of HFS offered by the Government on 24 September 1990. We find this claim unconvincing. The provisional agreement to purchase Property 2 was entered into on 22 August 1990 which was before the issuance of Civil Service Branch Circular No 23/90 of 24 September 1990. This circular announced the details of the new package offered under the HPS. It was claimed that knowledge of the new package was gained through an earlier circular No 20/90 of 14 July 1990 which announced the main features of the new package. But in this circular, it also stated that a separate circular would be issued in September to announce detailed arrangements and would invite applications from eligible officers. As we observe, since the Taxpayers had only just started the term of their tenancy of Unit 1 and was claiming PTA, there was no urgent need for them to buy a property for use as their residence, and particularly before the impending announcement of the details of the new package.

38. Furthermore, although the Taxpayers claimed that Property 2 was purchased with the intent that Mr A could take advantage of HFS, the reality of the matter was that Mr A was using PTA up to 1998. The reason he ceased using PTA was because Mr A was promoted in 1998 and was no longer allowed to use PTA. He so informed the Respondent in his letter of 7 October 1998. On the evidence before us, we do not believe that Mr A had the intention of giving up PTA for the HFS during the time he acquired Property 2 and Property 4.

39. As to the documentary evidence that a notice of termination for self-use was served on the tenant of Property 2, we are not prepared to rely on this single piece of evidence to establish the Taxpayers' intention as claimed. It would be dangerous for us to do so as the notice of termination never proceeded to hearing and we have no evidence before us as to the circumstances under which the tenant surrendered Property 2 to the Taxpayers.

40. The onus of proof is on the Taxpayers. The Taxpayers did not give evidence nor call witnesses to give evidence on their behalf. As facts cannot be proved by mere assertions, we find

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that the Taxpayers have failed to discharge the burden placed upon them to prove that Property 2 and Property 4 were acquired by them for use as their residence. As we do not accept the Taxpayers' expressed intention of purchasing Property 2 and Property 4 for use as their residence, we need not go further to assess their alleged reasons for the sale of those two properties.

41. Consequently, the appeal must be dismissed and the assessment be confirmed.