

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D28/93

Profits tax – purchase of flat claimed to be as a residence – evidence disproved the assertions of taxpayer – profit subject to profits tax.

Panel: William Turnbull (chairman), Raphael Chan Cheuk Yuen and Joseph E Hotung.

Date of hearing: 21 July 1993.

Date of decision: 18 October 1993.

The taxpayer and his wife purchased a residential apartment and claimed that the reason for so doing was as a residence for themselves and their family. The taxpayer claimed that for certain reasons it was not convenient for himself and his family to live at the apartment which they had purchased and accordingly it was sold. However there was evidence to show that the taxpayer had acquired a number of other properties which had also been sold and the profits from which had been assessed to tax.

Held:

On the evidence before it the Board was not satisfied that the property purchased by the taxpayer had been purchased as a future residence for himself and his family.

Appeal dismissed.

Cases referred to:

Lionel Simmons Properties Ltd v CIR 53 TC 461

Cunliffe v Goodman 1950 1 All ER 720

Hillerns and Fowler v Murray 17 TC 77

All Best Wishes Ltd v CIR (Inland Revenue Appeal No. 1 of 1992, unreported)

Wong Kuen Fai for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

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This is an appeal by an individual taxpayer against a profits tax assessment for the year of assessment 1987/88 wherein the Taxpayer was assessed to profits tax on the profit arising when he sold a flat. The facts are as follows:

1. The Taxpayer and his wife lived in Place X. The Taxpayer had one son who was born in 1986. The Taxpayer worked as a salesman in Place Y and his wife worked in Place Z. The mother-in-law of the Taxpayer lived in Estate A, Kowloon. The mother of the Taxpayer lived with the Taxpayer. The brothers and sisters of the Taxpayer lived near the Taxpayer in Place X.

2. In late 1986 the Taxpayer entered into an agreement for the purchase of a flat in Place C on Hong Kong Island ('the property') at a consideration of \$892,800. The Taxpayer paid a deposit of 10% of the purchase price and the balance of \$803,520 was paid by the Taxpayer obtaining an equitable mortgage from a bank. At the time of purchase the property was still under construction.

3. By an agreement for sale and purchase made in June 1987 the Taxpayer sold the property at a consideration of \$1,128,000. In July 1987 the Taxpayer completed the assignment of the property to the purchaser with the Taxpayer acting as a confirmor.

4. In reply to an enquiry from the assessor the Taxpayer by letter dated 12 June 1989 informed the assessor as follows:

- (a) that the intention of purchasing the property was for use as residence by his family,
- (b) that the property was sold because his wife considered that the area of the property was too large and that it was located far away from their place of work which was on the Kowloon side,
- (c) that after disposing the property, he was looking for another suitable place of residence,
- (d) that he and his wife had never engaged in the buying and selling of properties before, and
- (e) that it was never their intention to sell the property for profit.

5. By letter dated 7 August 1989 the Taxpayer further informed the assessor that another reason for selling the property was that his son had to be looked after by his mother-in-law who was also living on the Kowloon side. The Taxpayer also stated that on 17 May 1989 he had acquired another flat in Place K, New Territories which would be used as his residence.

6. Being of the view that the purchase and resale of the property by the Taxpayer amounted to an adventure in the nature of trade, the assessor raised a profits tax assessment

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on the Taxpayer for the year of assessment 1987/88 showing assessable profits of \$200,000 with tax payable thereon of \$33,000.

7. By letter dated 12 March 1991 the Taxpayer objected to this assessment on the ground that the gain on the disposal of the property was a capital gain.

8. By letter dated 1 July 1991 the Taxpayer put forward the following additional reasons for selling the property:

- (a) The Taxpayer worked in Place Y while his wife worked in Place Z, it would be very inconvenient for them to travel to and from Kowloon every day.
- (b) His son was taken care by his mother-in-law, who lived in Place N, Kowloon. It would cause great inconvenience to him and his wife if they had to bring their son to and back from Kowloon every day.
- (c) The Taxpayer had asked his mother to move into the property but she rejected the suggestion for the reason that she was not familiar with the area.
- (d) The floor area of the property was about 1,000 square feet which was considered too big for a family of three persons.'

9. The flat referred to above in fact 5 above in Place K, New Territories was sold by the Taxpayer in October 1990. In addition to this property the Taxpayer had purchased a flat in Place B on 29 March 1988 and sold the same on 24 August 1989 and had purchased a flat in Kowloon in April 1992 and sold the same in May 1992. In each case the Taxpayer sold the flat for a higher price than he had paid and in each case but one made a profit. In the case of the flat in Place K the Taxpayer made a net loss after taking into account the expenses which he incurred.

10. The matter was referred to the Deputy Commissioner of Inland Revenue who by his determination dated 26 February 1993 rejected the submission made by the Taxpayer that the gain or profit on the sale of the property was of a capital nature and directed that the assessment against which the Taxpayer had objected should be revised to show revised assessable profits of \$183,261 with tax payable thereon of \$30,238. This was in accordance with the actual profit made by the Taxpayer on the sale of the property.

11. By letter dated 20 March 1993 the Taxpayer filed notice of appeal with the Board of Review against the determination of the Deputy Commissioner.

At the hearing of the appeal the Taxpayer appeared on behalf of himself and elected to give evidence. He repeated the reasons why he had decided to sell the property saying that both he and his wife lived in Kowloon and it would be inconvenient to take his son to his mother-in-law's home every day. He said that his own mother had refused to move to the property because it was a strange place for her, was a long way away from his brothers and sisters who all lived on the Kowloon side and his mother was aged seventy and

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was not literate. He said that because his mother would not move to the property and there was no one to look after his son if he had moved there it had been necessary for him to sell the property. He also said that if his mother was not prepared to move to live in the property then it would be a waste because the property was over 1,000 square feet in area. He said that after the sale it was the intention of himself and his wife to buy another suitable flat.

The Taxpayer was cross examined and said that he had been living in Place X in the same flat for about eight years. It was owned by a limited company of which he was a director. The flat in which he was living had been purchased by the company as a quarter to be provided to himself as director. It appeared from the cross examination that the company had also purchased other flats which were used by the brothers of the Taxpayer as their residences. He confirmed that his mother-in-law was living with him and helping to look after the flat and his son. He said that the flat in Place B had also been purchased as a residence for himself and his family as had the flat in Place K. He also confirmed that he had purchased a fourth flat in Kowloon which he had also sold shortly after purchase at a profit. He said that this fourth property had also been purchased as a future residence but the flat was not suitable as it was in an old building.

The representative for the Commissioner submitted that the Taxpayer had acquired the property as a trading asset and that the determination of the Deputy Commissioner was correct. He referred us to the following authorities:

Lionel Simmons Properties Ltd v CIR 53 TC 461

Cunliffe v Goodman 1950 1 All ER 720

Hillerns and Fowler v Murray 17 TC 77

All Best Wishes Ltd v CIR (Inland Revenue Appeal No. 1 of 1992, unreported)

Having addressed us on the relevant law the representative for the Commissioner then took us through the facts which he considered to be relevant.

We have no hesitation on the facts before us in dismissing this appeal as being without foundation.

The Taxpayer purchased the property in Place C at about the same time that his son was born. He says that he did so without consulting his mother even though it was an integral part of his alleged intention that she would move and live with him to look after his new born infant son. He then gives a series of reasons for deciding to sell the property. All of these reasons were obvious to the Taxpayer at the time when he purchased the property. He and his wife were working in Kowloon and it was inconvenient for them to live in Place C. None of this changed and was obvious to him at the time.

We then have the evidence which the representative for the Commissioner adduced before us in cross examination with regard to the family company which apparently was owned by the Taxpayer and his brothers and which apparently was used to own flats for the use and occupation of the Taxpayer and his brothers who were directors of

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that company. It is significant that no mention of this had been made by the Taxpayer when he was making his representations to the assessor or indeed to the Board of Review.

Finally we have the allegations by the Taxpayer that he purchased a flat in Place B, a flat in Place K, and an old flat in Kowloon all of which were to be his intended residences and all of which for one reason or another proved subsequently after the purchase to be unsuitable.

We find as a fact that the property was no more and no less than a trading transaction into which the Taxpayer entered hoping to make a profit which he did.

For the reasons given we confirm the decision of the Deputy Commissioner and direct that the assessment against which the Taxpayer had appealed should be revised as determined by the Deputy Commissioner to assessable profits of \$183,261 with tax payable thereon of \$30,238.