

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D47/99

Profits Tax – sale of property – whether profits derived from the sale of the property assessable to profits tax – whether intention at the time of acquisition ‘genuinely held, realistic and realisable’.

Panel: Ronny Wong Fook Hum SC (chairman), William Cheng Chuk Man and Ho Chung Ping.

Date of hearing: 11 June 1999.

Date of decision: 16 August 1999.

On 19 July 1988, the taxpayer’s husband entered into service agreement with Company B as its finance director. Company B agreed to pay the taxpayer’s husband a housing allowance. As from 1988, the taxpayer and her husband moved into rented accommodation. On 1 April 1993, the taxpayer entered into an agreement to purchase property from a developer at District F. The taxpayer has made offers through several estate agents to acquire the adjoining unit, but the adjoining owner was not interested.

On 2 February 1994, the taxpayer entered into an agreement to purchase Property 5 at District G. On 25 February 1994, the taxpayer entered into a provisional agreement disposing the said property. This sale was made shortly before the developer was in a position to assign on 28 March 1994. The taxpayer gave evidence and it was taxpayer’s case that after purchasing the said property, the taxpayer found that the location of the said property might be remote and inconvenient and the taxpayer decided to change her residence. The issue before the Board is whether the taxpayer is rightly assessed in respect of her gains arising from her dealings of the said property.

Held:

- (1) The Board has to be satisfied that the taxpayer’s intention was to purchase it as her residence and such intention is on the evidence ‘genuinely held, realistic and realisable’ (All Best Wishes Ltd v CIR 3 HKTC 750 applied).
- (2) The Board found difficulty in accepting that the choice of the said property as the taxpayer’s residence is a genuine one. The Board also found difficulty to reconcile the taxpayer’s evidence to repeated offers for the adjoining unit and the alleged traffic difficulties that prompted the sale. If the traffic problems were apparent during her visits after the purchase, it is improbable that she would still make the offer to acquire the adjoining unit.

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Appeal dismissed.

Case referred to:

All Best Wishes Ltd v CIR 3 HKTC 750

Yeung Siu Fai for the Commissioner of Inland Revenue.

Koo Tsang Hoi of T H Koo & Associates, Solicitors for the taxpayer.

Decision:

Background

1. The Taxpayer is a chartered secretary. Her husband ['Mr A'] is a chartered accountant.
2. On 19 July 1988, Mr A entered into service agreement with Company B. By this agreement, Company B employed Mr A as its finance director and agreed to pay Mr A 'a housing allowance of \$288,000 per annum or such other amount as [Company B] shall agree'. Mr A's then address as shown on this agreement was a unit at District C ['Property 1'].
3. As from 1988, Mr A and the Taxpayer moved into rented accommodation. The premises chosen were at District D ['Property 2']. The lease was taken in the name of Company B. The tenancy in Property 2 was renewed on 1 November 1990 for a period of 2 years expiring on 31 January 1993 with rent at \$27,500 per month.
4. After expiration of the tenancy in Property 2, Company B entered into a tenancy agreement to rent a unit in District E ['Property 3'] for a period of 2 years commencing on 20 March 1993 and expiring on 19 March 1995 with rent at \$51,500 per month.
5. On 14 April 1993, the Taxpayer entered into an agreement to purchase from the developer a unit at District F ['Property 4'] for \$3,621,000 payable as follows:

Time for payment	Amount
Upon signing of agreement	\$195,000
17-4-1993	\$167,100
31-7-1993	\$90,525
30-11-1993	\$90,525
14 days after notification that the developer is in a position to	\$3,077,850

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assign	
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Property 4 is of an area of about 1,097 square feet.

6. On 2 February 1994, the Taxpayer entered into an agreement to purchase a unit at District G ['Property 5'] for \$10,800,000. Property 5 is of an area of about 1,750 square feet.

7. On 25 February 1994, the Taxpayer entered into a provisional agreement disposing of Property 4 for \$5,450,000. This sale was made shortly before the developer was in a position to assign on 28 March 1994.

8. The sale of Property 4 and the purchase of Property 5 were both completed on 25 April 1994. Property 5 was mortgaged in favour of Company H on 28 April 1994 for \$6,480,000. It was let to a tenant on 30 May 1994 for a period of 6 months.

9. The tenancy in respect of Property 3 expired on 19 March 1995. The Taxpayer moved into Property 5. Commencing from 20 March 1995. Company B paid Company I \$73,000 per month in respect of Mr A's housing allowance. Company I is a company incorporated in Hong Kong. Its issued share capital is 100 shares of \$10 each. The Taxpayer holds 99 and Mr A 1 of Company I's issued shares.

10. On 29 September 1997, the Taxpayer sold Property 5 for \$17,700,000. Her family moved into a unit at District D ['Property 6'] owned by Company J on 1 January 1998. The housing allowance of Mr A from Company B had by this stage increased to \$85,000. The housing allowance was paid to Company J.

11. The issue before us is whether the Taxpayer is rightly assessed in respect of her gains arising from her dealings of Property 4.

Evidence of the Taxpayer

12. She has two children. The son was born in 1985 and the daughter born in 1987. The son was attending primary school in 1993. He is now attending secondary school. At all material times, the daughter is being educated in the same girl school. The family has a maid (who has been with them for 9½ years) and a chauffeur (who has been with them for about 4 years).

13. The landlord refused to renew the tenancy in respect of Property 2. She had little time to locate alternative premises. She and her husband decided it's time to live in their own property after residing in rented property for years.

14. She visited the show flat in District F several times before her purchase. The terms offered by the developer were attractive. Although Property 4 is smaller than Property 3, it was sufficient for her family. It was then part of a new development with ample

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facilities. Furthermore she did not want to take the risk inherent in purchasing a more expensive flat.

15. After working out the financial means with her husband, they decided to acquire the adjoining unit. Offers were made through several estate agents. Their offer reached 'a record high price of \$5,000 per square foot'. The adjoining owner was not interested.

16. After purchasing Property 4, she made frequent trips to the site and kept close study about the traffic planning and the development in its vicinity. There had been a lot of criticisms about the adverse traffic situation for the whole area. She heard about the construction of a bridge in District F but believed it was not available until 2 years time. After careful consideration, she found that the location might be remote and inconvenient. She decided to change her residence.

17. She wanted to move into Property 5 after its purchase. However it was not the policy of Company B to invoke the break clause in their staff's tenancies. She therefore let Property 5 out for a short lease.

18. Property 1 was her own property. The size of the other flats is as follows:

Property	Area	No of rooms
Property 2	2,250 square feet	4 rooms
Property 3	2,260 square feet	4 rooms
Property 6	2,400 square feet	4 rooms

19. She and her husband control Company J, landlord of Property 6.

20. Two of her friends are still residing in District F.

Our decision

21. The principles are clear. We have to ascertain the intention of the Taxpayer at the time when Property 4 was purchased. We have to be satisfied that her intention was to purchase it as her residence and such intention is on the evidence 'genuinely held, realistic and realisable'.

22. As pointed out by Mortimer J (as he then was) in *All Best Wishes Limited v CIR* 3 HKTC 750:

'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.'

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23. The Taxpayer is a highly intelligent and eloquent witness. However, the more we hear her, the greater difficulty we find in accepting that the choice of Property 4 as her residence is a genuine one. The history of the family residence is an impressive list of top class residential addresses. All the units where they actually resided are much bigger than Property 4. Giving every allowance for the facilities in a new development, we are not at all convinced that there was a deliberate reduction in their standard of living by opting for Property 4.

24. The Taxpayer argued that she did not wish to take the risk inherent in acquiring a bigger unit. We have no evidence as to her precise means. We do not know the fate of Property 1. Housing allowance due under Mr A's service agreement with Company B was paid to both Company I and Company J in respect of the occupation of Property 5 and Property 6. We believe such housing allowance could have been used to support a more ambitious purchase. Her evidence in relation to attempts to acquire the adjoining unit to Property 4 indicates there was no financial constraints and Property 4 was inadequate for the family.

25. We also find it difficult to reconcile her evidence pertaining to repeated offers for the adjoining unit and the alleged traffic difficulties that prompted the sale. If the traffic problems were apparent during her visits after the purchase, it is improbable that she would still make the offer to acquire the adjoining unit.

26. For these reasons, we dismiss the Taxpayer's appeal.