

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/99

Profits Tax – real property – intention of taxpayer at the time of purchase – ‘genuinely held, realistic and realisable’ – whether the gains arising from the disposition of a property was liable for profits tax.

Panel: Ronny Wong Fook Hum SC (chairman), Dennis Law Shiu Ming and Kenneth Leung Kai Cheong.

Date of hearing: 13 May 1999.

Date of decision: 27 August 1999.

By an agreement dated 11 November 1992, the taxpayer bought a ‘ting’ house. The taxpayer borrowed money from his mother, brother and girl friend to support the purchase. The units of the ‘ting’ house were sold in quick succession shortly after completion.

The taxpayer claimed that initial interests to purchase the ‘ting’ house for self use were expressed by the taxpayer’s mother, his younger brother and his family. The ‘ting’ house was also intended to be used as his matrimonial home.

Held:

- (1) The Board has to be satisfied that the taxpayer’s intention at the time was to purchase the ‘ting’ house as his residence and such intention is on the evidence ‘genuinely held, realistic and realisable’.
- (2) The taxpayer did embark on a trade when he purchased the ‘ting’ house. He had limited resources and had to borrow extensively for the initial instalment and the premium. The units were sold in quick succession shortly after completion. There was no detailed plan in respect of the actual occupant. His place of work and his actual needs do not support his case of purchase for ‘self-use’.

Appeal dismissed.

Case referred to:

All Best Wishes Ltd v CIR 3 HKTC 750

Cheung Lai Chun for the Commissioner of Inland Revenue.
Taxpayer in person.

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Decision:

1. The Taxpayer was a legal executive working with a firm of solicitors in District A.
2. On 3 May 1985, the Taxpayer and his father purchased a flat in District B ['Property 1']. The Taxpayer resided in Property 1 till May 1997.
3. By an agreement dated 11 November 1992, the Taxpayer purchased from Company C a 'ting' house that was being built by Company C in District D. The following were terms and conditions of this agreement:
 - (a) Price : 2,030,000.
 - (b) Payment :
 - i. 10% within 7 days after the grant of a building licence for construction of the 'ting' house.
 - ii. A further 10% on completion of construction of the 2/F.
 - iii. The balance to be paid upon issuance of the certificate of compliance.
 - (c) The price was inclusive of a premium of \$300,000 payable to the authorities in respect of the 'ting' house. The Taxpayer was responsible for any excess over \$300,000.
4. Company C duly completed construction of the 'ting' house. It became known as Property 2 at District D. It consisted of 3 storeys:
 - (a) G/F including the garden yard ['the G/F Unit'];
 - (b) 1/F including the balcony ['the 1/F Unit'] and
 - (c) 2/F including the balcony and roof ['the 2/F Unit'].

Each of these units was of an area of about 700 square feet.
5. The certificate of compliance in respect of the 'ting' house was granted on 15 September 1994. This was followed by the usual consent letter permitting disposition dated 29 November 1994. Additional premium of \$475,000 had to be paid by the Taxpayer.

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6. The 3 units in the 'ting' house were assigned in favour of the Taxpayer on 9 January 1995.

7. The Taxpayer disposed of the 3 units in rapid succession:

Unit	Date of sale	Price
2/F Unit	6-3-1995	\$1,330,000
G/F Unit	24-3-1995	\$1,200,000
1/F Unit	25-4-1995	\$1,066,000
		\$3,596,000

8. By an agreement dated 29 March 1995, the Taxpayer purchased a unit in District E ['Property 3'] for \$3,057,000. Property 3 was assigned in favour of the Taxpayer on 19 September 1995.

9. The issue before us is whether the Taxpayer is chargeable for profit tax in respect of his gains arising from his dealings with the units in the 'ting' house.

Case of the Taxpayer in correspondence with the Revenue

10. His wife ['Ms F'] was his colleague in the solicitor firm. They fell in love in about 1990. They began planning their marriage in about 1995. Their marriage took place in May 1997. Between January 1992 and April 1997, Ms F was residing in District G.

11. His mother lent him \$180,000 to meet the initial payments for the 'ting' house. He also borrowed from his brother and Ms F to support the purchase. His mother contributed \$250,000 towards the additional premium of \$475,000.

12. A sum of \$1,421,000 was borrowed from a bank to complete the purchase. This facility from the bank was guaranteed by another person. The Taxpayer made 4 monthly repayments of \$13,950 each. The loan was then completely repaid.

13. The 'ting' house was purchased for self use:

- (a) There was no detailed plan in relation to the actual occupant. Initial interests were expressed by the Taxpayer's mother, his younger brother and his family [*per letter of 23 February 1997*].
- (b) It was intended to be used as his matrimonial home. He was then preparing his marriage with Ms F [*per letter dated 1 June 1998*].

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- (c) 'The purchase of the property was for self-use. When the property was purchased in 1992, the sale and purchase agreement stipulated completion in October 1993. The developer however delayed completion till early 1995. At that juncture I was discussing marriage with my girl friend. Mr girl friend pointed out that the property is far away and suggested acquiring Property 3 which was then on sale. For these reasons, I sold Property 2 ...' [*per letter of 15 August 1998*].

14. The 'ting' house was sold because :

- (a) It's located far away [*per letter dated 7 April 1998*].
- (b) It's most inconvenient for his work [*per letter dated 1 June 1998*].

15. He resided in Property 1 till 30 April 1997 when he moved into Property 3. Property 1 is of an area of 450 square feet. Property 3 is slightly larger. It is of 666 square feet.

16. He did not make any profit. His gains were mere capital gains.

Sworn testimony of the Taxpayer at the hearing before us

17. Property 1 was next to another unit owned by his brother. He resided with his mother in Property 1. His mother rented a shop nearby where she carried on a clothing business.

18. The availability of the 'ting' house was made known to him by a colleague in the legal field. It was his hope that his mother and his younger brother would share the 'ting' house with him. Both of them expressed no interest.

19. He and his wife tried out the 2/F Unit. No decoration was done to that unit. He simply purchased a bed and some furniture. They found out that their premises were part of a complex with more than 10 'ting' houses. It was very noisy. His wife was also frightened by the number of dogs around. The units were sold in deference to the wishes of his wife.

Our decision

20. We have to ascertain the intention of the Taxpayer at the time when the 'ting' house was purchased. We have to be satisfied that his intention was to purchase the 'ting' house as his residence and such intention is on the evidence 'genuinely held, realistic and realisable'.

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

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'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.'

22. We are not satisfied that the Taxpayer had the intention of using the 'ting' house as his residence at the time when the 'ting' house was first purchased in 1992. As he himself admitted in his letter of 23 February 1997 there was no detailed plan in relation to the actual occupant. Initial interests were expressed by the Taxpayer's mother, his younger brother and his family. However his evidence at the hearing indicates that his mother and younger brother disliked the 'ting' house. The 'ting' house was way above his actual needs.

23. When the 'ting' house was purchased by the Taxpayer in 1992 there was no plan of marriage between the Taxpayer and Ms F. No question of matrimonial home arises. They only commenced planning their marriage in 1995. The Taxpayer sought to explain the delay in his marriage on the basis that the parents of Ms F were out of Hong Kong for lengthy spells for emigration purposes. This assertion is wholly inconsistent with travelling schedules of the parents of Ms F produced by the Revenue.

24. Both the Taxpayer and Ms F were working in District A in 1992. The Taxpayer was then residing in Property 1 and Ms F in District G. On the assumption that their then relationship is a relevant consideration, no convincing reason had been furnished as to why District D was selected as their future home.

25. We do not believe the Taxpayer's evidence that he tried out the 2/F together with Ms F prior to disposal of the units in the 'ting' house. This case has never been projected in the extensive pre-hearing correspondence with the Revenue. The 2/F Unit was sold on 6 March 1995. They were not married until May 1997.

26. We are of the view that the Taxpayer did embark on a trade when he purchased the 'ting' house in 1992. He had limited resources and had to borrow extensively for the initial instalment and the premium. The units were sold in quick succession shortly after completion. His place of work and his actual needs do not support his case of purchase for 'self-use'. For these reasons, we dismiss the Taxpayer's appeal.