

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D7/02

**Profits tax** – extension of time – delay in submitting grounds of appeal – section 66(1) and 66(1A) of the Inland Revenue Ordinance ('IRO') – real property – whether the gains arising from the disposal of a property were liable for profits tax.

Panel: Ronny Wong Fook Hum SC (chairman), Ho Kai Cheong and Christine Koo.

Date of hearing: 1 February 2002.

Date of decision: 4 May 2002.

The appellants ('Mr and Mrs A') were husband and wife. By an agreement dated 6 February 1996, they purchased the subject flat for \$3,000,000. The subject flat was subdivided into various units.

By a provisional agreement dated 4 April 1996, the appellants agreed to sell the subject flat to Church E for \$7,200,000. They agreed to deliver vacant possession of the subject flat to Church E on completion scheduled on or before 30 September 1996. They paid \$451,408 by way of compensation to the tenants of the subject flat. They did not manage to secure vacant possession in time for completion on 30 September 1996 and incurred a penalty of \$52,000.

By her determination dated 28 February 2001, the Commissioner confirmed the assessments levied on the appellants in respect of the gains they made arising from their dealings with the subject flat. By letter dated 6 April 2001, the appellants' representative wrote to the Board indicating the wish of their 'client ... to object on the assessable profits HK\$3,800,000 as the amount is excessive. Our client is in the final stage of processing the supporting document and income statement for your perusal'.

The Board wrote to the appellants' representative on 10 April 2001. Their attention was drawn to section 66(1) and 66(1A) of the IRO. They were reminded of the need to submit to the Board a copy of the Commissioner's determination and a statement of grounds of appeal. By letter dated 7 September 2001, the Revenue reminded the appellants of the correspondence exchanged between their representative and the Board and refused their request to withhold payment as there was no valid appeal pending before the Board. By letter dated 29 September 2001, the appellants submitted further documents to the Revenue but took no step vis-à-vis their proposed appeal. By letter dated 28 October 2001, the appellants submitted to the Board their grounds of appeal.

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### **Held:**

1. No explanation whatsoever has been placed before the Board for the delay since the determination of 28 February 2001. No step was taken within the one-month period after the determination. No remedial step was taken after the appellants' representative was reminded of the relevant statutory provisions. After the further reminder from the Revenue dated 29 September 2001, the appellants took almost a month to submit their grounds to the Board. There was no justification for the Board to extend time in favour of the appellants. It followed that there was no valid appeal before the Board and the assessment could not be disturbed.
2. It was strictly unnecessary for the Board to express any view on the merits of the appeal. Had it been necessary for the Board to consider whether the appellants had been correctly assessed, the Board would have dismissed the appeal by virtue of the failure of the appellants to discharge the onus resting upon them.

### **Appeal dismissed.**

Fung Ka Leung for the Commissioner of Inland Revenue.  
Taxpayers in person.

### **Decision:**

### **Background**

1. The Appellants ('Mr and Mrs A') are husband and wife. At all material times, Mrs A was liaison officer in Department B of the Hong Kong Government.
2. On 8 September 1991, Mr A registered a design and construction business in the name of Company C. According to this business registration, the principal place of business of Company C was at Unit 1 in Building D ('Company C Studio')
3. According to Mr A's return for the year of assessment 1994/95 dated 28 May 1995, Company C suffered a net loss of \$4,311.83 for the period from 1 April 1994 to 31 March 1995.
4. By an agreement dated 6 February 1996, Mr and Mrs A purchased the first floor and its flat roof of the said Building D ('the Subject Flat') for \$3,000,000.

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5. The Subject Flat had been subdivided into various units. The Company C Studio was one of the units. By agreements dated 29 March 1996, 3 and 4 April 1996, the tenants of Units 2, 3, 4 and 5 agreed to vacate their units on dates between August and December 1996 in return for payment of compensation by Mr and Mrs A. Similar undated agreements were reached with tenants of other units.
6. By a provisional agreement dated 4 April 1996, Mr and Mrs A agreed to sell the Subject Flat to Church E ('the Church') for \$7,200,000. They agreed to deliver vacate possession of the Subject Flat to the Church on completion scheduled on or before 30 September 1996.
7. Mr and Mrs A completed their purchase of the Subject Flat on 19 April 1996. Their purchase was supported by a loan of \$1,600,000 from Bank F repayable by 84 monthly instalments of \$34,588.8 each.
8. Mr A continued the process in securing the vacation of tenants from the remaining units. By an agreement dated 20 April 1996, the tenant of Unit 6 agreed to vacate on or before 25 October 1996 in return for compensation of \$30,000.
9. Mr and Mrs A paid a total of \$451,408 by way of compensation to the tenants of the Subject Flat. They did not manage to secure vacant possession in time for completion with the Church on 30 September 1996. The sale to the Church was only completed on 26 October 1996. As a result of this delay, Mr and Mrs A incurred a penalty of \$52,000.
10. By his return dated 28 May 1996, Mr A reported to the Revenue a loss of \$88,631.56 in respect of his Company C business for the year of assessment 1995/96. There was no improvement in Company C's position for the year of assessment 1996/97. The loss in that year was \$434,868.08. Company C ceased business with effect as from 1 April 1997. Apart from the Company C Studio, Company C did not have any other studio.

### **Pre-hearing correspondence**

11. In a questionnaire dated 30 May 1997, Mr A informed the Revenue that he purchased Units 1 and 3 of the Subject Flat for 'self-use'. Those units were intended to be used as workshop and office. The building was old and worn down and access to the units was difficult. Illegal structures could be found within the units. As the units could only be used for commercial and not residential purpose, the units were sold whilst they looked for alternative premises.
12. By letter dated 22 May 1999, Mr and Mrs A asserted that the Subject Flat was purchased for use as workshop and office. It was sold because of poor access; unsanitary surroundings and the poor state of the premises. They had no alternative but to continue the business elsewhere.

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### **The determination and the notice of appeal**

13. By her determination dated 28 February 2001, the Commissioner confirmed the assessments levied on Mr and Mrs A in respect of the gains they made arising from their dealings with the Subject Flat.

14. By letter dated 6 April 2001, Accountants' Firm G ('the Tax Representative') wrote to this Board indicating the wish of their 'client ... to object on the assessable profits HK\$3,800,000 as the amount is excessive. Our client is in the final stage of processing the supporting document and income statement for your perusal'.

15. This Board wrote to the Tax Representative on 10 April 2001. Their attention was drawn to section 66(1) and 66(1A) of the IRO. They were reminded of the need to submit to this Board a copy of the Commissioner's determination and a statement of grounds of appeal.

16. By letter dated 7 September 2001, the Revenue reminded Mr and Mrs A of the correspondence exchanged between the Tax Representative and this Board and refused their request to withhold payment as there was no valid appeal pending before this Board.

17. By letter dated 29 September 2001, Mr and Mrs A submitted further documents to the Revenue in support of their request for withholding payment. They took no step vis-à-vis their proposed appeal to this Board.

18. By letter dated 28 October 2001, Mr and Mrs A submitted to this Board their grounds of appeal.

### **Issues before us**

19. There are two issues before us:

- (a) whether we should extend time in favour of Mr and Mrs A; and
- (b) if so, whether they have been correctly assessed.

### **Any extension of time**

20. No explanation whatsoever has been placed before us for the delay since the determination of 28 February 2001. No step was taken within the one-month period after the determination. No remedial step was taken after the Tax Representative was reminded of the relevant statutory provisions. After the further reminder from the Revenue dated 29 September 2001, Mr and Mrs A took almost a month to submit their grounds to this Board.

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21. There is no justification for this Board to extend time in favour of Mr and Mrs A. It follows that there is no valid appeal before this Board and the assessment cannot be disturbed.

### **The merits of the appeal**

22. It is strictly unnecessary for us to express any view on the merits of the appeal.

23. We would simply state that we are not persuaded by the submissions on behalf of Mr and Mrs A. There is little evidence to suggest that they could afford to hold the Subject Flat as a long term investment. Mr A had been using the Company C Studio since September 1991. He was well familiar with the state of the premises. The Subject Flat was sold in less than two months. Company C had been operating at a loss. There was little justification for expanding its operation. The suggestion to use the Subject Flat as their family residence is hardly credible. Had it been necessary for us to consider the second issue, we would have dismissed the appeal by virtue of the failure of Mr and Mrs A to discharge the onus resting upon them.