

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D12/98

Profits tax - whether profits derived from the sale of a property assessable to profits tax.

Panel: Ronny Wong Fook Hum SC (chairman), Alfred Chow Cheuk Yu and Ronald Tong Wui Tung.

Date of hearing: 13 December 1997.

Date of decision: 14 April 1998.

The taxpayers were married couples. They shall be called as Mr and Mrs A respectively. Before Mr A get married, his father ("the Father") and himself purchased as tenants in common Property B for \$396,500. Property B was then mortgaged in favour of a loan agency for \$230,000. 7 years later, the Father made a gift of his half interest in favour of Mrs A. Property B became the matrimonial home of the taxpayers. During then, their two children were born.

On late 1990, the taxpayers purchased as joint tenants Property C for \$1,248,400. Property C was mortgaged in favour of a bank.

On 28 May 1991, Mr and Mrs A formed Company E in which each held 50% of its issued share capital. On 11 July 1991, they became directors of that company. A day later, Company E entered into an agreement to purchase Property F for \$2,790,000.

The occupation permit in respect of Property C was granted on 20 December 1991. It was assigned in favour of the taxpayers on 20 July 1992 for \$1,248,400. Upon failure to find a suitable tenant, Property C was then sold on 20 November 1992 for \$2,960,000.

On March 1993, the taxpayers sold Property B for \$2,230,000. They moved to Property F in June 1993 and have been living there ever since.

The sold issue before the Board was related to the taxability or otherwise of the gains made by the taxpayers from their dealings of Property C.

Held:

1. Having heard and observed both taxpayers, the Board accepted in full the evidence presented on behalf of the taxpayers.

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2. The Board was wholly satisfied that Property C was purchased with the intention of using the same as their family home. That intention was frustrated by virtue of the fire that took place on site.

Appeal allowed.

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

Decision:

Preliminaries

1. In our experience in this Board this is the best prepared case presented by Taxpayers who are wholly unversed in the law. The amount of thoughts they put into preparing their appeal bring shame to a lot of professional advisers appearing before this Board. We wish to record our appreciation for the considerable help they extended to us in reaching our decision.

2. We allowed the Taxpayers' appeal at the conclusion of our hearing. These are our reasons.

The background

3. The Taxpayer are husband and wife. We shall refer to them as Mr and Mrs A.

4. On 5 October 1982, Mr A and his father ('the Father') purchased as tenants in common Property B for \$396,500. Property B was mortgaged on about 12 October 1982 in favour of a loan agency for \$230,000. On 26 July 1989, the Father made a gift of his half interest in favour of Mrs A. Property B was the home of Mr and Mrs A and their two children. Their daughter was born on 5 April 1988 and their son was born on 6 August 1990.

5. On 8 December 1990, Mr and Mrs A purchased as joint tenants Property C for \$1,248,400. Property C was mortgaged on 10 December 1990 in favour of Bank D.

6. Company E is a company incorporated on 28 May 1991. Mr and Mrs A each holds 50% of its issued share capital. They became directors of that company on 11 July 1991. A day later, Company E entered into an agreement to purchase Property F for \$2,790,000.

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7. On 11 March 1992, Mr and Mrs A sold Property B for \$2,230,000. They moved from Property B to Property F in June 1992 and have been living in Property F ever since.

8. The occupation permit in respect of Property C was granted on 20 December 1991. It was assigned in favour of Mr and Mrs A on 20 July 1992 for \$1,248,400. The couple sold Property C on 20 November 1992 for \$2,960,000.

9. The issue before us relates to the taxability or otherwise of the gains made by Mr and Mrs A arising from their dealings of Property C.

Evidence of Mr and Mrs A

10. Mr A explained to us the efforts they made in ensuring that their two children would receive proper education from respectable schools in Hong Kong. Mr A pointed out that Property B is far away from town. There was no primary school in its vicinity. It was half an hour's drive to Kowloon.

11. Their daughter was admitted to a kindergarten near Property B in 1990. At around the same time, the couple had discharged the mortgage over Property B. They were anxious about the schooling for their children and decided to move into town to ensure that the children would be properly educated. His mother in law suggested that they should move to District G.

12. Property C was offered to the public in about November 1990. According to the advertisements and brochures of the developer, the estimated time for completion of Property C was in October 1991. The timing was therefore right for their daughter's continued education. Property C was purchased with the view of using the same as their family home.

13. According to report in a newspaper dated 11 May 1991, a huge fire occurred at the site of Property C. The anticipated completion date for Property C was therefore delayed.

14. The couple had to take remedial action to salvage their plan in relation to the continued education of their children. They widened their search and concentrated on sites around reputable schools in Hong Kong. Property F was found. It is near two reputable schools. Property F was purchased as its proximity to these reputable schools would enhance the chance of their children gaining admissions into these schools. Their children were duly admitted into these two schools. Both are doing well.

15. After the purchase of Property F, Mr A tried to let out Property C. It was offered to a Mr H who refused to take it up on grounds of lack of convenience and inadequacies of facilities.

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Our decision

16. We have no hesitation whatsoever in accepting in full the evidence presented on behalf of the Taxpayers.
17. We are wholly satisfied that Property C was purchased with the intention of using the same as their family home. That intention was frustrated by virtue of the fire that took place on site.
18. We allow the appeal and discharge the assessment accordingly.