Case No. D130/02

Profits tax – sale and purchase of a property – whether profits tax should be assessed – depends on whether the sale of a property was trading in nature – it was crucial to ascertain the intention of the appellant at the time of acquisition of the property – mere declaration of intention was of limited value – subjective intention has to be tested against objective facts and circumstances – burden of proof on the appellant – sections 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Panel: Anthony Ho Yiu Wah (chairman), Ho Kai Cheong and Ng Ching Wo.

Date of hearing: 6 December 2002.
Date of decision: 15 March 2003.

The appellant signed a sale and purchase agreement in December 1996 for the purchase of Property 1. She sold Property 1 in May 1997 in the capacity of a confirmor.

The IRD imposed profits tax of $477,200 for the year of assessment 1997/98 on the appellant on the ground that the sale of Property 1 was an adventure in the nature of trade.

The appellant objected to the above assessment on the ground that Property 1 was purchased for self use as her residence. Upon considering her objections and the relevant grounds, the Commissioner confirmed the above profits tax assessment for the year of assessment 1997/98 by a determination dated 23 August 2002.

The appellant appealed to the Board against the Commissioner's determination. The appellant's grounds of appeal were: the purchase of Property 1 was for self use as her residence; the sale of Property 1 in the capacity of a confirmor was done at the encouragement of the estate agent; the same estate agent introduced another property in the same building, that is, Property 2, which was larger than Property 1, to her; all the sale proceeds of Property 1 were used to acquire Property 2. The appellant argued that she had not entered into an adventure in the nature of trade and thus she should not be liable for profits tax.

The facts appear sufficiently in the following judgment.

Held:

1. The relevant statutory provisions were contained in section 14(1) of the IRO.

2. According to section 68(4) of the IRO, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

3. In Simmons v IRC (1980) 53 TC 461, Lord Wilberforce pointed out at page 1199:

> *'Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing it at a profit, or was it acquired as a permanent investment?'*

4. Mortimer J in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 held (at page 771) that:

> *'The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence.'*

5. Judging from the said provisions and authorities, it is necessary for the Board to ascertain the intention of the appellant at the time of acquisition of Property 1 and whether she had successfully discharged the burden of proof that Property 1 was acquired with the intention for self use. Mere declaration of intention of the appellant in her acquisition of Property 1 was of limited value and could not be relied on entirely. The stated intention of the appellant had to be tested against objective facts, circumstances and the whole of the evidence.

6. Given the evidence of the appellant, the Board got the impression that the appellant was not satisfied in residing in the quarters provided by Company C, which was owned by her daughter and her son-in-law. The appellant all along wished to hold one or more property in her own name.

7. Although Company C provided quarters to the appellant to live, that did not negate the appellant's intention to acquire a property as her residence.

8. The Board was of the view that the issue of whether the water leakage problem occurred in Property 1 was serious or not was irrelevant to this appeal. Perhaps the appellant used this water leakage problem as an excuse to obtain her children's consent to give her more money to buy a larger property with better environment. This was just the fortune of the appellant.

9. On the day immediately after the sale of Property 1, the appellant, through the same estate agent, acquired Property 2, which was a larger premises in the same building. Therefore, this was clearly indicative of the appellant's intention to exchange Property 1 for Property 2. By reason of this, the Board had no reason to believe the appellant was engaged in the nature of trading in relation to the sale of Property 1 and purchase of Property 2.

10. The appellant contended that she had lived in Property 2 until the end of 1997 when she rented out the premises because of the decrease of her children's income. Regarding this contention, the Board accepted this evidence of the appellant. This strongly indicated that the appellant was not involved in trading when she purchased Property 2. The intention of the appellant at the time of acquisition of Property 2 was a crucial factor for the consideration of the Board.

11. As to whether the building where Properties 1 and 2 were situated was an ideal flat for a patient suffering from stroke, the Board believed that different people would have different views. The appellant claimed that the building was adjacent to a park, which was convenient for her husband to take his morning walk. On the other hand, the Revenue was of the opinion that the building was situated in a rather steep geographical area, and it was therefore not a first choice or suitable residence for a patient suffering from stroke.

12. Even if the view of the Revenue was right, that did not affect the result of this appeal. The fact that the building was not a first choice or suitable residence for a patient suffering from stroke could be attributed to many reasons, including the making of a wrong judgment in the selection of residence by the appellant. Perhaps, due to the constraint of circumstances, the appellant could only buy a second choice of residence. But that did not negate the intention of the appellant to acquire Property 2 as the residence for herself and her husband.

13. Upon considering the evidence of the appellant and the overall circumstances, the Board accepted the contention of the appellant that she bought Property 1 with an intention as her residence. Therefore, the profits received in the sale of Property 1 were profits derived from the sale of a capital asset and as such, it was not chargeable to profits tax.

14. For reasons given above, the Board allowed the appeal and withdrew the assessment.

Appeal allowed.

Cases referred to:

Simmons v IRC [1980] 1 WLR 1196
All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750

Tsui Nin Mei for the Commissioner of Inland Revenue.
Taxpayer in person.

案件編號 D130/02

利得稅 – 買賣物業 – 應否課繳利得稅 – 要視乎買賣物業是否屬生意性質的活動 – 關鍵是上訴人當初購買有關物業的意圖 – 不能盡信上訴人陳述她當初購買物業的意圖 – 必須考慮所有客觀事實及證據 – 舉證責任在上訴人 –《稅務條例》第14(1)及68(4)條

委員會：何耀華（主席）、何繼昌及吳正和

聆訊日期：2002年12月6日
裁決日期：2003年3月15日

上訴人於1996年12月簽訂買賣合約購買物業一，並於1997年5月以確認人身份出售該單位。

評稅主任認為上訴人買賣物業一屬生意性質的投機活動，遂向上訴人作出1997/98課稅年度利得稅評稅477,200元。

上訴人以購買物業一作自住之用為理由反對上述評稅。稅務局局長考慮過上訴人的反對通知書後於2002年8月23日發出決定書，決定維持上述1997/98課稅年度的利得稅評稅。

上訴人反對稅務局局長的決定，並就此提出上訴。上訴人的上訴理據為：購買物業一的意圖確實是用作自住；在買賣成交前以確認人身份出售物業一是因為受到地產代理慫恿；該地產代理向上訴人介紹了同一大廈另一較大單位，即物業二；出售物業一所得的款項全數用作購買物業二。上訴人因此堅稱本上訴所涉及的買賣並非生意性質的投機活動，無需課稅。

本案情詳細列於下述裁決書中。

裁決：

1. 有關的法例條文及法律原則見於《稅務條例》第14(1)條。

2. 根據《稅務條例》第68(4)條的規定，證明上訴所針對的評稅額過多或不正確的舉證責任須由上訴人承擔。

3. 在Simmons v IRC [1980] 1 WLR 1196一案中，Lord Wilberforce法官於1199頁中指出：

「*買賣需要買賣的意圖；一般來說，問題是納稅人購入資產時該意圖是否已經存在。納稅人購入的意圖是轉售圖利抑或作為永久投資？*」

4. Mortimer 法官在All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750一案中裁定（第771頁）：

「*納稅人購入資產和持有該資產時的意圖無疑十分重要。假如納稅人的意圖證據充分，而意圖又是真確的、實際的和可以實現的，而且所有情況均顯示納稅人購入該資產時，正在進行投資的話，我便同意納稅人的意圖屬實。但這是關於事實的問題，因此單一測試不能提供答案。特別需要留意的是納稅人所聲稱的意圖不能作準，實際的意圖只可憑整體證據來決定。*」

5. 從上述法例條文及案例中委員會得到的啟示是：在此宗上訴，委員會要判斷究竟上訴人是否成功地舉證了她當日購入物業一時抱著購入自住的意圖。上訴人自己今天陳述她當日的意圖當然不能盡信，她所聲稱的意圖必須憑客觀事實、情況及整體證據來驗證。

6. 委員會從上訴人的證供得到的印象是上訴人並不滿足於居住在大女兒及女婿的公司丙所提供的宿舍，她一直希望能以自己名義擁有物業或更多的物業。

7. 雖然公司丙提供宿舍給她居住，但這並不否定上訴人有購買居所自住的意圖。

8. 至於物業一的漏水問題是否嚴重，委員會認為與本上訴無關。或許上訴人只是利用漏水問題作為藉口，從而成功取得她的兒女同意多花金錢給她購買一間面積較大及環境較好的單位，這是上訴人的福氣。

9. 上訴人在出售物業一翌日即經由同一位地產經紀購買同一大廈的較大單位（即物業二），這明顯是一個換樓行為。因此，委員會沒有理由將上訴人的換樓行為分拆為炒賣頭一間再購入下一間。

10. 至於上訴人聲稱曾入住物業二，直至因為兒女收入減少才於1997年年底把有關單位出租，委員會相信上訴人這方面的證供。這強烈

顯示上訴人購買物業二不是作為炒賣之用，而購買物業二的意圖是委員會處理此上訴時一重要的考慮因素。

11. **至於有關大廈是否屬於一個中風病人首選的安居之所，委員會認為各人可有不同的看法。上訴人聲稱該大廈鄰近公園，方便她的丈夫晨運。但稅務局代表則認為該大廈地形微斜，不是一個中風病人居所的首選。**

12. **即使稅務局代表的看法正確，也不影響本上訴的結果。該大廈不是中風病人居所的首選可以有很多原因，包括上訴人作了錯誤判斷；或由於環境所限，上訴人只能購買一個次選居所。但這並不否定上訴人購買該單位作為她與其丈夫的居所的意圖。**

13. **在考慮過上訴人的證供及整個案情後，委員會接納上訴人購買物業一的意圖是用作自住。因此，本上訴所涉及的利潤並非源自生意活動，而是屬於資產增值，無需課稅。**

14. **基於上述原因，委員會裁定上訴得直，撤銷有關的評稅。**

上訴得直。

參考案例：

Simmons v IRC [1980] 1 WLR 1196
All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750

徐年美代表稅務局局長出席聆訊。
納稅人親自出席聆訊。

裁 決 書：

背景

1. **甲女士（「上訴人」）於1996年12月簽訂買賣合約購買大廈乙一單位（「物業一」），並於1997年5月以確認人身份出售該單位。**

2. **評稅主任認為上訴人買賣物業一屬生意性質的投機活動，遂向上訴人作出下列1997/98課稅年度利得稅評稅：**

	元	元
售價		3,080,000
減：買入價	2,480,000	
買樓律師費	15,000	
印花稅	37,200	
買樓代理佣金	24,800	
賣樓律師費	15,000	
賣樓代理佣金	30,800	2,602,800
應評稅利潤		477,200
應繳稅款（已扣減應徵收的稅項款額的10%）		64,422

3. 上訴人以購買物業一作自住之用為理由反對上述評稅。稅務局局長在考慮過上訴人的反對通知書後於2002年8月23日發出評稅決定書，決定維持上述1997/98課稅年度的利得稅評稅。

4. 上訴人反對稅務局局長的決定，並就此提出上訴。上訴人的上訴理據為：購買物業一的意圖確實是用作自住，在買賣成交前以確認人身份出售物業一是因為受到地產代理慫恿。該地產代理向上訴人介紹了同一大廈另一較大單位，即物業二。出售物業一所得的款項全數用作購買物業二，因此本上訴所涉及的買賣並非生意性質的投機活動，無需課稅。

案情事實

5. 上訴人向委員會作供，委員會從證供及雙方呈交的文件中得悉以下事實。

6. 在1997至1998年期間，上訴人曾擁有下列物業：

物業項目	擁有人	購買 正式合約日期 轉讓契約日期* 買價	出售 正式合約日期 轉讓契約日期* 賣價
物業三	上訴人	- 30-10-1993* 上訴人獲丈夫送贈物業	18-2-1997 27-3-1997* 1,880,000元
物業一	上訴人	6-12-1996 -* 2,480,000元 上訴人以確認人身份 出售物業	10-4-1997 31-5-1997* 3,080,000元

物業二	**上訴人**	11-4-1997 8-7-1997* 4,700,000**元**	**不適用**

7. **除了上述第6段所列舉的物業外，上訴人與其女兒曾聯名持有一住宅物業。上訴人又曾與其女兒男友聯名持有一商舖，有關商舖已出售，售價低於買價。**

8. **上訴人是一位低教育程度的家庭主婦，丈夫於**1994**年中風，已退休，家庭經濟完全倚賴幾位兒女，特別是三位女兒。**

9. **上訴人於**1996**年**12**月**6**日簽合約購買物業一，並於**1997**年**4**月**10**日簽訂合約以確認人身份出售該單位。在出售物業一翌日，即**1997**年**4**月**11**日，上訴人簽訂合約購買物業二，並一直持有該單位。**

10. **上訴人聲稱她購買物業一作自住用途，因為大廈乙鄰近公園，方便她的丈夫晨運，但在成交前發覺該單位有漏水情況。在向地產經紀查詢時，地產經紀一方面說可以維修，而另一方面又向她推介轉買高層一單位，即物業二。在取得家人的支持後，上訴人選擇了轉買物業二。**

11. **上訴人聲稱於**1997**年**7**月與家人搬入物業二居住，直至**1997**年年底因金融風暴兒女經濟出現問題時，才將該單位出租。**

12. **對於上訴人聲稱物業一有漏水情況一事，評稅主任曾向該單位買家查詢。該單位的買家證實於**1998**年在睡房冷氣機位置的空隙有漏水，使牆身大部份濕透，維修費約用了**800**元。根據這些資料，漏水問題確是存在，但並不嚴重。**

13. **稅務局代表並向委員會提供了資料，顯示上訴人一直享有由公司丙提供的董事宿舍：先在物業四；其後由**1996**年**12**月開始在物業五。一切有關宿舍開支如電費、水費、煤氣、差餉及管理費皆由公司丙支付。**

上訴人的證供

14. **上訴人在作供時承認公司丙向她提供免費宿舍。她向委員會解釋她只是公司的掛名董事，公司是她的大女兒及女婿的，所以一有經濟能力，她就希望不用再住公司物業，搬入自己名下的物業。她又重申在**1997**年**7**月購入物業二後，她和家人搬入該物業居住。當時該物業每月供款兩萬多元，至**1997**年年底因金融風暴，她的兒女收入減少，因此只好搬回大女兒及女婿公司名下的物業五居住，並把物業二出租，幫補供款。**

15. 至於物業一的漏水問題，上訴人強調這是她轉買物業二的原因之一。此外，物業二的面積、環境及空氣都比物業一好，而兒女又願意多付金錢購買，所以她便售出物業一而購入物業二。

有關的法例條文及法律原則

16. 《稅務條例》（第112章）第14(1)條規定：

> *「除本條例另有規定外，凡任何人在香港經營任何行業、專業或業務，而從該行業、專業或業務獲得按照本部被確定的其在有關年度於香港產生或得自香港的應評稅利潤（售賣資本資產所得的利潤除外），則須向該人就其上述利潤而按標準稅率徵收其在每個課稅年度的利得稅。」*

17. 《稅務條例》第68(4)條規定：

> *「證明上訴所針對的評稅額過多或不正確的舉證責任，須由上訴人承擔。」*

18. 在Simmons v IRC［1980］1 WLR 1196一案中，Lord Wilberforce法官於1199頁中指出：

> *「買賣需要買賣的意圖；一般來說，問題是納稅人購入資產時該意圖是否已經存在。納稅人購入的意圖是轉售圖利抑或作為永久投資？」*

以下是所節錄的判詞的英文原文：

> *'Trading requires an intention to trade; normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing it at a profit, or was it acquired as a permanent investment?'*

19. Mortimer法官在All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750一案中裁定（第771頁）：

> *「納稅人購入資產和持有該資產時的意圖無疑十分重要。假如納稅人的意圖證據充分，而意圖又是真確的、實際的和可以實現的，而且所有情況均顯示納稅人購入該資產時，正在進行投資的話，我便同意納稅人的意圖屬實。但這是關於事實的問題，因此單一測試不能提供答案。特別需要留意的是納稅人所聲稱的意圖不能作準，實際的意圖只可憑整體證據來決定。」*

以下是所節錄的判詞的英文原文：

> *'The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence.'*

20. **從上述法例條文及案例中我們得到的啟示是：在此宗上訴，我們要判斷究竟上訴人是否成功地舉證了她當日購入物業一時抱著購入自住的意圖。上訴人自己今天陳述她當日的意圖當然不能盡信，真確的、實際的和可以實現的意圖必須在考慮所有證據（包括有關人等曾經說過的話及曾經做過的事）後，方可作出裁決。**

案情分析及總結

21. **稅務局代表對於上訴人購買物業一的意圖提出以下的質疑：**

(a) **上訴人一直享用由公司丙提供的董事宿舍，因此上訴人購買物業一作為與丈夫養老居所的聲稱並不可信。**

(b) **物業一的漏水問題並不嚴重，不足以構成上訴人出售該物業的原因。**

(c) **上訴人在購買物業一的正式轉讓日期前已迅速將它出售，這強烈顯示該物業是作炒賣之用。**

(d) **上訴人沒有提交任何證據來支持她與丈夫曾入住物業二的聲稱。即使上訴人購買物業二不是作炒賣之用，這也不能引申為她購買物業一不是作炒賣之用。**

(e) **大廈乙的地下出入口處設有一狹窄鐵門供住戶出入，又因那裡地形微斜，故設有多級石階，對一名中風後要用枴杖步行的老人家來說，這樓宇的單位不會是他首選的安居之所。**

22. **我們不同意稅務局代表上述觀點。從上訴人的證供，我們得到的印象是上訴人並不滿足於居住在大女兒及女婿的公司丙所提供的宿舍，她一直希望能以自己名義擁有物業及更多的物業。雖然公司丙提供宿舍給她居住，但這並不否定上訴人有購買居所自住的意圖。至於物業一的漏水問題是否嚴重，我們認為與本上訴無關。或許上訴人只是利用漏水問題作為藉口，因而成功取得她的兒女同意多花金錢**

給她購買一間面積較大及環境較好的單位，這是上訴人的福氣。既然上訴人在出售物業一翌日即經由同一位地產經紀購買同一大廈的較大較高單位，即物業二，這明顯是一個換樓行為。我們沒有理由將上訴人的換樓行為分拆為炒賣頭一間再購入下一間。至於上訴人聲稱曾入住物業二，並在1997年年底時因為兒女收入減少才把有關單位出租，我們相信上訴人這方面的證供。這強烈顯示上訴人購買物業二不是作為炒賣之用，而購買物業二的意圖也是我們處理此上訴時應考慮的因素。至於大廈乙是否屬於一個中風病人首選的安居之所，我們認為各人可有不同的看法。上訴人聲稱大廈乙鄰近公園，方便她的丈夫晨運。但稅務局代表則認為大廈乙地形微斜，不是一個中風病人居所的首選。即使稅務局代表的看法正確，也不影響本上訴的結果。因為大廈乙不是中風病人居所的首選可以有很多原因，包括上訴人選錯了；或由於環境所限，上訴人只能購買一個次選居所。但這並不否定上訴人購買該單位作為她與其丈夫的居所的意圖。

23. 在考慮過上訴人的證供及整個案情後，我們接納上訴人購買物業一的意圖是用作自住。因此，本上訴所涉及的利潤並非源自生意活動，而是屬於資產增值，無需課稅。

裁決

24. 基於上述原因，我們裁定上訴得直，撤銷有關的評稅。