

**Case No. D8/10**

**Profits tax** – calculation of profits – limited company selling a landed property – whether cost should be based on the price paid by current shareholders to acquire shares in the limited company. [Decision in Chinese]

Panel: Kenneth Kwok Hing Wai SC (chairman), Lee Fen Brenda and Wong Fung Yi.

Date of hearing: 29 April 2010.

Date of decision: 14 May 2010.

The Appellant was a limited company. The Appellant used \$8,778,000 to purchase a property in 2003. In 2004, the Appellant sold the property for \$12,000,000. The Inland Revenue gave notice of profits tax assessment. The Appellant claimed that the calculation of profits from the sale of the property should be based on the price paid by the current shareholders to acquire the shares of the appellant of \$10,600,000, but not the price paid by the previous shareholders to acquire the property. Otherwise it would cause the problem of double taxation and violate the principle of fairness.

The Deputy Commissioner of Inland Revenue refused to accept the viewpoints of the Appellant and gave the following reasons:

1. The limited company and the shareholders were separate legal entities. The property transaction of the limited company and the shares transaction of the shareholders involved different dealers and different legal rights and responsibilities. Therefore, the tax assessment criteria would be different. Whether or not the previous shareholders had paid profits tax for the profits gained from the sale of the shares of the Appellant was irrelevant to the profits tax assessment in the sale of the property by the Appellant. The problem of double taxation does not exist.
2. Although the Appellant alleged that the purpose of the present shareholder to buy the shares of the Appellant was to purchase the property, the agreement of the transfer of shares and the deed of the loan for the shares transfer showed clearly that the present shareholder bought the shares and the liability from the previous shareholder, while the ownership of the property still belonged to the Appellant. Even though the property was an inseparable and important element in the transaction, the Revenue should consider the fact that at the time of shares transaction, the property was not yet sold. The Appellant's argument of substance over form could not sustain.
3. The Appellant used a price of \$8,778,000 to purchase the property.

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

Therefore, when calculating the profits from the sale of the property, that purchase price should be considered as the cost.

The Appellant's ground of appeal was that the assessment was excessive. The cost of the property should be the price paid by the current shareholders to acquire the shares of the Appellant. This was a substance over form transaction. There was no reason for the current shareholders to pay the tax on the profits earned by the previous shareholders of the Appellant. The Appellant's representative attended the hearing. He called no witness. He did not quote any authorities and had not made any understandable submission.

**Held:**

In profits tax assessment, the cost should be the purchase price of the property. The price paid by the shareholders in the subsequent shares transaction is irrelevant. The cost could not be adjusted subsequently as well. The Appellant disregarded the reasons and authorities relied on by the Deputy Commissioner. The representative of the Appellant failed to provide any evidence to show that the property was a capital investment, therefore the ground of appeal cannot be sustained. The appeal was frivolous and vexatious, and was an abuse of the tax appeal procedure. The Board considered the present case a waste of resources of the Board. The Board ordered the taxpayer to pay \$5,000 as cost before the Board.

**Appeal dismissed and costs order in the amount of \$5,000 imposed.**

Chow Mo Lam, Certified Public Accountant (Practising), for the taxpayer.  
Chan Wai Yee, Chan Tsui Fung and To Yee Man for the Commissioner of Inland Revenue.

**案件編號 D8/10**

**利得稅** – 計算所得利潤 – 有限公司出售地產物業 – 成本是否根據現股東購買有限公司股份的價格計算

委員會：郭慶偉資深大律師（主席）、李帆及王鳳儀

聆訊日期：2010年4月29日

裁決日期：2010年5月14日

上訴人是一有限公司。上訴人於2003年以8,778,000元購入一物業。上訴人於2004年把物業以12,000,000元出售該物業。稅務局向上訴人作出利得稅評稅。上訴人聲稱在計算出售地產物業所得的利潤時，應以現股東購入上訴人股份的代價10,600,000元作計算，而不是上訴人購入物業價格，否則這會引起雙重徵稅的問題，有違公平的原則。

稅務局副局長不能接納上訴人的觀點和提出以下理由：

1. 有限公司及股東為獨立法人，有限公司就其物業的交易，與股東就其股份的交易，涉及不同的交易者，各產生不同的法律權利及責任，因此評稅的基準亦有所不同。前股東有否就出售上訴人股份所得的利潤課繳利得稅，與上訴人出售物業的應課稅利潤無關，當中不涉及雙重徵稅的問題。
2. 雖然上訴人聲稱現股東購買其股份的目的是購買該物業，但《有限公司股份轉讓協議》及貸款轉讓契約均清楚顯示，現股東是向前股東購買他的股份及債權，而該物業的業權仍由上訴人持有。即使物業是有關交易中不可分割的重要因素，本局仍須根據上訴人當時沒有出售該物業的事實去處理上訴人的稅務事宜。上訴人提出實質重於形式的論點是不成立的。
3. 上訴人是以8,778,000元的價格購入該物業，因此在計算其出售該物業的利潤時，應以該價格作為成本。

上訴人的上訴理由是評稅過高，購買物業的成本應以購買該公司的價值計算，這是一宗實質重於形式的交易，他們沒理由要負擔上一手所賺的利潤的稅款。上訴人代表出席聆訊，並無傳召任何證人，沒有引述任何有關典據，亦沒有作出任何可理解的陳詞。

**裁決：**

在評定上訴人的利得稅時，成本價是上訴人購買地產物業的成本價。與股東後來買賣股票的代價無關，亦不能隨後調整。上訴人漠視副局長所列出的理由及典據。上訴人代表完全沒有提出任何有關典據或理據支持明顯不能成立的上訴理由。委員會認為上訴人提出這瑣屑無聊或無理取鬧的上訴絕對是濫用稅務上訴程序。委員會認為本案浪費委員會資源，對其他納稅人不公平。委員會命令上訴人繳付5,000元作為委員會的訟費。

**上訴駁回及判處港幣5,000元的訟費命令。**

納稅人由周武林執業會計師代表出席聆訊。  
陳慧儀、陳翠鳳及陶綺雯代表稅務局局長出席聆訊。

**決定書：**

**事關重要的事實**

1. 稅務上訴委員會(「委員會」)作出以下事實的裁斷。
2. 上訴人於 2003 年 9 月 1 日在香港註冊成立為有限公司。
3. 上訴人於 2003 年 9 月 27 日與一地產發展商簽訂臨時買賣協議，以 8,778,000 元購入當時尚在興建中的地產物業。上訴人於 2004 年 9 月 14 日簽署轉售合約，以 12,000,000 元出售該地產物業，交易於 2005 年 4 月 26 日完成。
4. 稅務局向上訴人作出 2005/06 課稅年度利得稅評稅。
5. 上訴人聲稱在計算出售地產物業所得的利潤時，應以現股東購入其股份的價格作為地產物業的成本。
6. 稅務局副局長維持 2005/06 課稅年度利得稅評稅。

**副局長的決定理由**

7. 副局長所持的決定理由為：

- 「(1) 在本個案中，本人須決定〔上訴人〕從出售物業所得的應評稅利潤的款額，當中本人須確定該物業的成本價格。
- (2) 〔上訴人〕聲稱出售該物業的成本應以現股東從〔前股東〕購入〔上訴人〕股份的代價 10,600,000 元作計算，而不是〔上訴人〕向發展商購入該物業的價格 8,778,000 元，否則這會引起雙重徵稅的問題，有違公平的原則。就本個案的事實而言，本人不能接納〔上訴人〕的觀點。
- (3) 有限公司及股東為獨立法人，有限公司就其物業的交易，與股東就其股份的交易，涉及不同的交易者，各產生不同的法律權利及責任，因此評稅的基準亦有所不同〔可參考 Beutiland Co Ltd v CIR, 3 HKTC 520<sup>1</sup>及 Hong Wah Investment Co Ltd v CIR, HCIA 1/1986, 5 November 1986<sup>2</sup>〕。〔前股東〕有否就出售〔上訴人〕股份所得的利潤課繳利得稅，與〔上訴人〕出售物業的應課稅利潤無關，當中不涉及雙重徵稅的問題。
- (4) 雖然〔上訴人〕聲稱現股東購買其股份的目的是購買該物業，但〔現股東〕或〔另一人〕簽訂的『有限公司股份轉讓協議』及貸款轉讓契約均清楚顯示，現股東是向〔前股東〕購買他的股份及債權，而該物業的業權仍由〔上訴人〕持有。即使該物業是有關交易中不可分割的重要因素，本局仍須根據〔上訴人〕當時沒有出售該物業的事實去處理〔上訴人〕的稅務事宜。〔上訴人〕提出實質重於形式的論點是不成立的。在 Harley Development Inc. & Trillium Investment Ltd v CIR 4 HKTC 91<sup>3</sup>一案中，法官指出即使納稅人可藉着不同方式的交易達致相同的結果，納稅人仍受到其交易的形式的約束。有關判詞的原文如下：
- ‘Here it may be that the appellants could have achieved the same result by going about the transactions in a different way but they have not done so. The appellants are bound by the form of their transactions.’
- (5) 〔上訴人〕是以 8,778,000 元的價格自發展商購入該物業，因此在計算其出售該物業的利潤時，應以該價格作為成本。此外，〔上訴人〕是於 2005/06 課稅年度的評稅基期內出售其物業，因此它從中賺取的利潤須全數於 2005/06 課稅年度內評定。
- (6) 基於上述理由，〔上訴人〕的反對無效。2005/06 課稅年度利得稅評稅現予維持。」

<sup>1</sup> 參閱第 526 頁。

<sup>2</sup> 參閱第 4 頁。

<sup>3</sup> 參閱第 110 頁。

## 上訴理由

8. 上訴人的上訴理由陳述書的內容如下:

「該評稅過高，因為我們認為我們購買物業的成本應以我們購買該公司的價值計算，這是一宗實質重於形式(Substance Over Form)的交易，我們沒理由要負擔上一手所賺的利潤的稅款。」

## 聆訊過程

9. 上訴人所有董事、股東及員工全部缺席聆訊。上訴人派遣周武林執業會計師代表出席。

10. 周武林執業會計師並無傳召任何證人，沒有引述任何有關典據，亦沒有作出任何可理解的陳詞。

11. 周武林執業會計師說：

「我哋唔同意。睇吓你哋點講。」

12. 委員會邀請周武林執業會計師就《稅務條例》第 112 章第 68(9)條作出陳詞。然後委員會告知雙方稅務局沒有必要回應。

## 瑣屑無聊或無理取鬧的上訴

13. 顯而易見，在評定上訴人的利得稅時，成本價是上訴人購買地產物業的成本價。與股東後來買賣股票的代價無關，亦不能隨後調整。

14. 上訴人漠視副局長所列出的理由及典據。周武林執業會計師完全沒有提出任何有關典據或理據支持明顯不能成立的上訴理由。

15. 委員會認為上訴人提出這瑣屑無聊或無理取鬧的上訴絕對是濫用稅務上訴程序。

## 個案的處置

16. 委員會駁回上訴，並確認上訴所針對的評稅額。

17. 委員會認為本案浪費委員會資源，對其他納稅人不公平。委員會命令上訴人繳付 **5,000 元** 作為委員會的訟費，**該筆款項須加在所確認的稅款內一併追討**。