

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D104/01

Profits tax – whether the sale was trading activity – intention – whether profits assessable to tax – whether the properties are capital assets.

Panel: Ronny Tong Ka Wah SC (chairman), Dianthus Tong Lau Mui Sum and Mary Teresa Wong Tak Lan.

Dates of hearing: 23, 24 and 30 October 2001.

Date of decision: 20 November 2001.

The wife of the taxpayer was the owner of a plot of land on which a building was constructed at the end of 1972. All of the units of the building were offered for sale but at the same time, a poster was displayed in the sales office to attract potential tenants. Between 6 July 1972 and 1 March 1973, 22 of the 30 units were sold leaving eight units unsold. By a determination dated 30 March 1978, the Commissioner ruled that the unsold units were part of trading stock offered for sale in the sale brochures. However, at all times, the unsold units were treated as fixed assets in all of the tax computations prepared by the Accountant and submitted to the Revenue. Pursuant to these returns, profits tax was raised against the rental income derived from the unsold units which profits tax was duly paid.

On 4 April 1985, the taxpayer signed a business registration form 1(a) stating that he had carried on a sole proprietorship business in the name of his wife. The business was described as ‘Property Investment’ and the date of commencement of that business was stated as 2 June 1970.

On 8 November 1996, the taxpayer disposed of one of the unsold units. The assessor raised on the taxpayer profits tax assessment on the estimated profit of the sale of the unit. The taxpayer objected but the Commissioner confirmed the profits tax assessment. The taxpayer then appealed to this Board.

The sole question on appeal was whether the taxpayer had carried on a trade of any kind as regards the unsold units and if so whether the sale of the unit was within the trading activities of the taxpayer. In this respect, the Board disregards the Business which is agreed not to have anything to do with the development, sale or letting out of any of the units of the Building.

The Board is satisfied that the taxpayer’s evidence is truthful and finds that there was never any intention to sell any of the unsold units in 1970 or 1973. At the very lowest, the taxpayer clearly had formed an intention not to sell the unsold units after the sale of the 22 units in 1973 and

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thereafter never changed his intention. The Board also finds that the taxpayer did not carry on any business of development and sale of the unsold units. If he is prevented from disputing he had carried on a business of renting out the unsold units, the sale of the unit was a sale of a capital asset and the taxpayer is not liable for profits tax in respect of any profit arising therefrom.

Held:

1. The intention of the taxpayer is to be ascertained objectively from all the surrounding circumstances. In this respect, the declaration of the taxpayer is self-serving and not binding on either the Revenue or this Board (All Best Wishes Ltd v CIR [1992] 3 HKTC 750 applied).
2. Once an intention was formed, it can be changed. What was an investment can thereafter be put into the trading stock and vice versa. Alternatively, an investment can be sold in order to replace it with or to maintain another investment. A sale in these circumstances is not part of any trading activities of a business involving trading stock (Marson v Morton [1986] 1 WLR 1348, Lionel Simmons Properties Ltd v CIR [1980] 53 TC 461 considered).
3. The Board is of the view that it is not bound by the determination of the profits tax arising from the sale of the 22 units for the year of assessment 1973/74 since it was not an assessment either of the income or profits arising from the unsold units and a determination of their nature as to whether they formed a long term investment or part of any trading stock of business of sale of the units. It simply forms part of the circumstances from which the Board must ascertain the intention of the taxpayer but is not conclusive.
4. The failure to obtain the rebuilding allowance is quite equivocal. It could be due to oversight, which was originally suggested; or an acceptance that none would be allowed, or an acknowledgement that the unsold units formed part of the trading stock. However, given the consistent stance of the wife and the firm, the Board thinks that the last alternative is the least likely one. The Board, therefore, simply regards the fact that no allowance was claimed as one of the factors to consider.
5. To hold a property for rental is an investment and is not a trade any more than holding a fixed deposit or a share portfolio is. Furthermore, if there is a business of letting out properties, the properties are capital assets and not trading stocks. Profits arising from sale of properties in these circumstances are not taxable. The Board considered that it was highly questionable that even on the documents before the Board the taxpayer had carried on any trade or business in the sale of any of the unsold units.

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Appeal allowed.

Cases referred to:

All Best Wishes Ltd v CIR [1992] 3 HKTC 750

Marson v Morton [1986] 1 WLR 1348

Lionel Simmons Properties Ltd v CIR [1980] 53 TC 461

Tse Yue Keung for the Commissioner of Inland Revenue.

C Y Li Counsel instructed by Messrs C P Lin & Co for the taxpayer.

Decision:

Agreed facts

1. The background facts to this appeal are largely agreed.
2. The taxpayer is now 79 years old. He was educated in China up to the level of secondary school. He is married to one Ms A ('the Wife').
3. In 1953, the Taxpayer started his import and export business under the name of Company B ('the Business'). He is still carrying on the Business to date.
4. The Wife was the owner of a plot of land in District C and, after several exchanges with the Government, was subsequently granted a piece of land registered as District C town lot number XX ('the Lot') in 1969.
5. The Lot was eventually developed with the money of the Taxpayer and in this appeal, he is treated as the owner of both the Lot and the development thereat.
6. Towards the end of 1972, a building known as Building D ('the Building') was constructed on the Lot. The Building consisted of a total of 30 units: some of them are shop units, others are residential units.
7. Between 6 July 1972 and 1 March 1973, 22 of the 30 units were sold leaving eight units ('the Unsold Units'):
 - (a) Shops B, C and D of ground floor;

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- (b) The whole of first floor;
- (c) Flat B of fourth floor; and
- (d) Flats A, B and C of fifth floor.

8. All of the units of the Building were offered for sale but at the same time, a poster was displayed at a conspicuous place in the sales office to attract potential tenants.

9. On 23 July 1974, Messrs W M Sum & Co (‘the Accountant’) prepared a tax computation of a ‘Property Trading Account’ of the Wife (‘the 1974 Tax Computation’). The 1974 tax Computation has a number of curious features. It purports to account for the profits of the sale of the 22 units but expenditure relating to the Unsold Units were taken out of the computation. It gave a ‘Date of Commencement of Business: 2 June 1970 (being date of submission of building plan to Building Authority)’, without specifying what that ‘business’ was. It also gave a ‘Date of Cessation of Business: 1 March 1973 (being date of last sales of flats)’.

10. On 15 September 1975, the assessor issued a profits tax assessment for the year of assessment 1972/73 based on the 1974 Tax Computation against the Wife and sought to revalue both the cost of land and the Unsold Units.

11. By a letter dated 8 October 1975, the Accountant objected to the profits tax assessment for the year of assessment 1972/73 on two alternative grounds:

- (a) the Wife had not carried on a business in respect of the development of the Building;
- (b) alternatively, if she did, the development was for ‘investment purpose’ and the business did not cease on 31 March 1973.

Most important of all, it was stressed that there never was an intention to sell the Unsold Units.

12. We note in passing, although this is not an agreed fact, that the letter of 8 October 1975 was completely inconsistent with the 1974 Tax Computation.

13. The assessor then proposed in a letter of 3 June 1976 to revise the profits tax assessment for the year of assessment 1972/73 to nil but to raise a profits tax assessment for the year of assessment 1973/74 on the Wife at \$694,346. There was a ‘Note’ in the said letter which indicated that the Wife’s business was treated as ‘continuous’ and any sales of the Unsold Units in future would be subject to profits tax assessment.

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14. By a letter dated 5 June 1976, the Accountant offered to accept the assessment of \$694,346 'provided that [the assessor] would concede that':

- (a) the Unsold Units 'never formed part of the trading stock from the very inception'; and
- (b) the Wife would not be liable for profits tax in respect of the rental income of the Unsold Units.

15. The offer was not accepted by the assessor. It followed that there was never any agreement as to whether:

- (a) there was a business;
- (b) the Unsold Units were part of a trading stock.

16. On 1 March 1977, the assessor did raise the profits tax assessment for the year of assessment 1973/74 on the Wife with assessable profits of \$694,346.

17. On 3 March 1977, the Accountant objected against the profits tax assessment for the year of assessment 1973/74 on the grounds that the profits tax assessed was excessive and that the business 'had already ceased' in the year of assessment 1972/73. He did not contend that there was no business.

18. It is important to note here that the profits tax assessment for the year of assessment 1973/74 was based on the 1974 Tax Computation save for the cost of land which the Revenue revalued downwards to \$240,000. In particular, the taxable profits were arrived at by deducting a fraction of the cost of the development attributable to the 22 units only. In other words, the Wife did not obtain any tax advantage as regards the cost of the Unsold Units. Furthermore, there was no determination as to whether the Unsold Units were part of any trading stock.

19. By a determination dated 30 March 1978 ('the Determination'), the Commissioner of the Inland Revenue ('the Commissioner') determined against the Wife's objections by annulling the profits tax assessment for the year of assessment 1972/73 but confirming the profits tax assessment for the year of assessment 1973/74. In the Determination, the Commissioner ruled that:

- (a) the *development and sale of the flats* in the Building was an adventure in the nature of trade;
- (b) the contention that the Unsold Units were not part of any trading stock was rejected on the ground that all units were offered for sale in the sale brochures;

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- (c) the Wife carried on 'one composite trade of selling and letting the units in [the Building]' and there was no cessation of business on or before 31 March 1973.

20. The Wife did file a notice of appeal against the Determination but the appeal was withdrawn thereafter so that the profits tax assessment for the year of assessment 1973/74 became final and conclusive under section 70 of the Inland Revenue Ordinance ('IRO') 'as regards the amount of such assessable income or profits of net assessable value'.

21. Thereafter in 1978, the Wife filed profits tax returns for the years of assessment 1974/75, 1975/76, 1976/77, 1977/78 and 1978/79 in relation to the rental income received from the Unsold Units. In each of the returns, the business of the Wife was stated as 'Property Investment'. At all times, the Unsold Units were treated as fixed assets in all of the tax computations prepared by the Accountant and submitted to the Revenue.

22. Pursuant to these returns, profits tax was raised against the rental income derived from the Unsold Units which profits tax was duly paid.

23. On 22 November 1979, the Taxpayer applied for personal assessment and stated that he and the Wife were 'proprietors or partners' in the firms of 'Madam A' and the Business.

24. On 4 April 1985, the Taxpayer signed a business registration form 1(a) stating that he had carried on a sole proprietorship business in the name of the Wife ('the Firm'). The business was described as 'Property Investment' and the date of commencement of that business was stated as 2 June 1970.

25. On 8 November 1996, the Taxpayer disposed of one of the Unsold Units known as Flat B, fourth floor of the Building ('the Unit') at a consideration of \$710,000. In his tax return for the year of assessment 1996/97, he did not report any profit or loss of the Firm.

26. The assessor raised on the Taxpayer profits tax assessment on the estimated profit of the sale of the Unit. The Taxpayer objected but the Commissioner confirmed the profits tax assessment for the year of assessment 1996/97 as subsequently revised by the assessor. The Taxpayer then appealed to this Board.

27. Finally, we should record that it is not in dispute that the Taxpayer and his Wife were in fact not in Hong Kong throughout the material period having left Hong Kong for Country E from 1970 to 1996.

28. Throughout this material period, all the affairs of the Taxpayer including the dealings with the Revenue were conducted by the Accountant on instructions from the Taxpayer's brother who passed away in 1996.

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The question on appeal

29. The sole question on appeal was whether the Taxpayer had carried on a trade of any kind as regards the Unsold Units and if so whether the sale of the Unit was within the trading activities of the Taxpayer. In this respect, we disregard the Business which is agreed not to have anything to do with the development, sale or letting out of any of the units of the Building.

The law

30. The law as regards the aforesaid question is well settled and there does not appear to be any dispute between the parties to this appeal.

31. The relevant legal principles can be summarized as follows. The intention of the taxpayer is to be ascertained objectively from all the surrounding circumstances. In this respect, the declaration of the taxpayer is self-serving and not binding on either the Revenue or this Board.

32. Mortimer J (as he then was) in All Best Wishes Ltd v CIR [1992] 3 HKTC 750 summed up the position well (at page 771):

‘ The Taxpayer submits that this intention, once established, is determinative of the issue. That there has been no finding of a change of intention, so a finding that the intention at the time of acquisition of the land that it was for development is conclusive.

I am unable to accept that submission quite in its entirety. I am, of course, bound by the Decision in the Simmons case, but it does not go quite as far as is submitted. This is a decision of fact and the fact to be decided is defined by the Statute – was this an adventure and concern in the nature of trade? 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. Indeed, decisions upon a person’s intention are commonplace in the law. It is probably the most litigated issue of all. 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.’

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33. Furthermore, once an intention was formed, it can be changed. What was an investment can thereafter be put into the trading stock and *vice versa*. Alternatively, an investment can be sold in order to replace it with or to maintain another investment. A sale in these circumstances is not part of any trading activities of a business involving trade stock. In Marson v Morton [1986] 1 WLR 1348, Sir Nicholas Browne-Wilkinson V-C said (at page 1348 of the report):

‘ It is clear that the question whether or not there has been adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case. The most that I have been able to detect from the reading of the authorities is that there are certain features or badges which may point to one conclusion rather than another. ’

34. The learned Judge then went on to list out (at pages 1348 to 1349 of the report) some of these features or badges, which are of course by no means exhaustive:

- (a) Whether the transaction was a one-off transaction?
- (b) Was the transaction related to the trade which the taxpayer otherwise carries on?
- (c) What is the nature of the subject matter?
- (d) What was the way in which the transaction was carried out?
- (e) What was the source of finance of the transaction?
- (f) Was work done to the item purchased before it was resold?
- (g) Was the item resold in one lot or broken down into saleable lots?
- (h) What were the purchasers’ intentions at the time of purchase? And
- (i) Did the item provide enjoyment for the purchaser?

In approaching these questions, common sense must be applied.

35. In Lionel Simmons Properties Ltd v CIR [1980] 53 TC 461, Lord Wilberforce said (at page 491G):

‘ 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

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acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss. Intentions may be changed. What was first an investment may be put into the trading stock – and, I suppose, vice versa. If findings of this kind are to be made precision is required, since a shift of an asset from one category to another will involve changes in the company's accounts, and possibly, a liability of tax (cf Sharkey v Wernher [1956] AC 58). What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It must be one or other, even though, and this seems to me legitimate and intelligible, the company, in whatever character it acquires the asset, may reserve an intention to change its character. To do so would, in fact, amount to little more than making explicit what is necessarily implicit in all commercial operations, namely that situations are open to review.'

Effect of the Determination

36. Our difficulty in this appeal, however, is not confined to ascertaining the intention of the Taxpayer in accordance with the legal principles recited above. The Revenue strongly relies on the Determination. It is said that it conclusively determined that the Unsold Units formed part of the trading stock. This arose out of the rejection of one of the objections of the Wife at the time.

37. It is important to see exactly what the Determination is. It is a determination of the profits tax assessment for the year of assessment 1973/74. That assessment was an assessment of the profits arising from the sale of the 22 units and nothing else. The Unsold Units were not sold and no income had been derived from them up to that point. Indeed, the tax computation prepared by the Accountant and accepted by the assessor and the Commissioner, apart from the valuation of the cost of the land, was on the basis that the cost of the Unsold Units were excluded from the computation so that the assessment had strictly speaking little to do with the Unsold Units.

38. In any event, we are of the view that we are not bound by the Determination. The Revenue is not suggesting that the Taxpayer is precluded from arguing the case that there was no trade carried on in relation to the Unsold Units but even if it were, it would not be right for us to ignore all the surrounding circumstances as regards intention.

39. Section 70 was prayed in aid. But all that section provides is that *the assessment* is deemed to be final and conclusive 'as regards the amount of such assessable income or profits or net assessable value'.

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40. As we have noted above, the profits tax assessment for the year of assessment 1973/74 was not as assessment either of the income or profits arising from the Unsold Units and a determination of their nature as to whether they formed a long term investment or part of any trading stock of a business of sale of the units was not necessary for the Determination of the profits tax assessment for the year of assessment 1973/74.

41. It is also important to bear in mind the extent of informed consent of the Taxpayer in making any 'admission or acceptance' of any ruling as regards the Unsold Units, a topic to which we will return later.

42. Nevertheless, it is a fact that the Wife (if there was indeed a trading firm in the name of the Wife) abandoned an appeal from the Determination wherein the Commissioner had rejected an objection that the Unsold Units were not part of the trading stock of a business. The abandonment of the appeal can amount to evidence of an intention that the Unsold Units were, after all, intended to be sold and an acceptance that any appeal would be fruitless at least in relation to this issue.

43. In other words, the Determination simply forms part of the circumstances from which we must ascertain the intention of the Taxpayer but is not conclusive.

Rebuilding allowance

44. Another fact the Revenue relied on heavily is the failure on the part of the Accountant to apply on behalf of the Wife for a rebuilding allowance ('the Allowance') in respect of the Unsold Units. It is said that if the Unsold Units were truly capital assets, the Wife would be entitled to the Allowance and there was no reason why she should not claim the benefit of the Allowance.

45. We do not agree this is a valid point to make. All of the tax computations show the Unsold Units were treated as capital assets. In all of the correspondence and tax returns, 'the business' of the Wife and subsequently the Firm was described as 'Property Investment'. The stance taken by the Accountant on behalf of the Wife and subsequently the Firm was clear. The Revenue, however, determined against the Wife in the Determination and ruled that the Unsold Units formed part of the trading stock of 'the business'. In these circumstances, it is difficult to see how the Accountant would have been able to obtain the Allowance on behalf of the Wife or the Firm.

46. In any event, the failure to obtain the Allowance is quite equivocal. It could be due to oversight, which was originally suggested; or an acceptance that none would be allowed, which is the evidence of Mr F, a representative of the Accountant, who gave evidence; or an acknowledgement that the Unsold Units formed part of the trading stock. However, given the consistent stance of the Wife and the Firm, we think the last alternative is the least likely one.

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47. We, therefore, simply regard the fact that no Allowance was claimed as one of the factors to consider.

What business?

48. One thing is clear from the facts. From the very first document right up to this appeal, over a span of some 28 years, the Taxpayer and his Wife had steadfastly maintained that they intended to keep part of the Building and, after the sale of the 22 units, the Unsold Units as long term investment and not for sale.

49. Even the Accountant, confused in his submissions to the Revenue as he was, never once conceded that the Unsold Units were originally intended to be sold. Nor indeed were they sold until the Unit was sold in 1996. The remaining units are still held by the Taxpayer as in investment.

50. The 'business' of the Firm or the Taxpayer, if ever there was one, was always stated to be that of 'Property Investment'.

51. What business is 'Property Investment'? Is it a trading business? No one seemed to have considered this question. The Revenue was treating the business of the Taxpayer as one of development of property for sale, albeit the property is let out for the time being. But that is a business of sale not a business of 'Property Investment'.

52. If a business of 'Property Investment' meant investing in property in order to receive rental out of it, how is it different from collecting interest out of a fixed deposit account? Or collecting dividends and bonus shares out of a share portfolio? Is such activity trading activity from which profits tax can be levied?

53. Section 14 of the IRO provides that profits tax shall be charged on every persons '*carrying on a trade, profession or business ... from any trade, profession or business (excluding profits arising from the sale of capital assets)*'. 'Business' is defined under section 2(1) as including letting of any premises and 'trade' is defined as including every adventure and concern in the nature of trade.

54. To hold a property for rental is an investment and is not a trade any more than holding a fixed deposit or a share portfolio is. Furthermore, if there is a business of letting out properties, the properties are capital assets and not trading stocks. Profits arising from sale of properties in these circumstances are not taxable.

55. In our view, it is highly questionable that even on the documents before us the Taxpayer had carried on any trade or business in the sale of any of the Unsold Units.

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The Taxpayer's evidence

56. We have carefully observed the Taxpayer's demeanor in the witness box. We are satisfied his evidence is truthful. He was internally consistent throughout. His evidence really is very simple and can be summarized in a few key points.

57. First, his intention has always been that he would like to keep whatever units of the Building he could as a long term investment. This is supported by the facts. He only sold so many units of the Building as was sufficient to repay the mortgage. He was therefore selling not for a profit in a trade but selling in order to maintain an investment. He admitted also selling two more units to cover losses he suffered from the stock market. In our view, that was merely a sale in relation to an investment in shares. That was not trading either.

58. Secondly, the fact that he had kept seven of eight of the Unsold Units for 28 years speaks volumes about his true intention as regards the Unsold Units. There is no suggestion or evidence that he was waiting for the market to improve. There is no suggestion or evidence that he could not sell any of the Unsold Units over this long period of time. Indeed, there is independent evidence from property agents that he refused to sell despite being asked to do so on quite a few occasions.

59. As for the sale of the Unit, he told us that was to raise money to purchase his own office premises. In our view, that was merely to replace one investment by another.

60. Thirdly, he was not in Hong Kong between 1970 and 1996 when his brother died. He cannot read English. He never properly understood any of the documents generated by the Accountant, which we must say, are confusing at times and inapt at others. He was never sent any drafts and certainly left everything to his brother and the Accountant. The only thing he insisted was that he was holding the Unsold Units for the purpose for long term holding. He never changed his instructions to the Accountant. When the appeal in 1978 was abandoned he was simply told that the Determination would not in any case matter as far as his holding went. All the representations were no doubt made by the Accountant and the Taxpayer either did not appreciate the significance of such representations or simply went along with it at the advice of the Accountant.

61. For example, the Accountant represented there was a 'business' which commenced in 1970 and 'ceased' in 1973. There never was any evidence that there was any business being undertaken by either the Wife or the Taxpayer or both other than the Business at any time let alone such business 'ceasing' in 1973. The Taxpayer was never properly explained any of the tax computations. He simply signed them as advised by the Accountant.

62. Another example is that the Taxpayer signed a business registration form 1(a) in 1985 stating that the Firm had traded from 1970 to date. But he never understood what was the nature

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of the business stated therein. He understood simply that he was asked to sign the document for the purpose of making representations to the Revenue.

63. Likewise, when the Accountant represented recently that the Taxpayer had 'changed his intention on 10 October 1979' that was a complete fabrication no doubt to suit some argument which the Accountant, for some reason which we can never understand, thought appropriate to put to the Revenue.

64. In our view, other than relaying the Taxpayer's intention to hold on to the Unsold Units, none of the things said by the Accountant was really supported by the true circumstances.

Estoppel?

65. Nevertheless, these representations were made by the Accountant as agent of the Taxpayer. What then are the consequences? In our view, if the Revenue was misled, it was because it refused to consider the true facts. We must say, however, that the Revenue's reaction is entirely understandable in view of the 1974 Tax Computation. The Revenue did not in any event suffer any disadvantage as a result of these representations. Indeed, the Government had benefited in one sense in that profits tax over the years had been collected where it was questionable whether they were due in the first place.

66. We do not think any estoppel can arise in these circumstances if the Revenue never suffered any detriment as a result of the representations made by the Accountant.

Other evidence of trade

67. Apart from the documents generated by the Accountant, there really was little to support there was a trade of some kind being carried on by the Taxpayer in relation to the Unsold Units.

68. It was said by the Revenue that all the units of the Building were put up for sale in 1973. So they were. But the Revenue also accepted that at the time of promotion for sale, there was also a poster displayed at a conspicuous place in the sales office to attract potential tenants and indeed the Unsold Units were thereafter let out on long term basis. So plainly, there was no intention to sell *all* the units.

69. In our view, the fact that all the units were offered for sale in these circumstances is at best a neutral or equivocal fact in ascertaining what was the true intention of the Taxpayer as regards the Unsold Units.

Conclusion

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70. We have considered the evidence very carefully and in particular that of the Taxpayer. We find there was never any intention to sell any of the Unsold Units in 1970 or 1973.

71. At the very lowest, the Taxpayer clearly had formed an intention not to sell the Unsold Units after the sale of the 22 units in 1973 and thereafter never changed his intention.

72. We also find that the Taxpayer did not carry on any business of development and sale of the Unsold Units. If he is prevented from disputing he had carried on a business of renting out the Unsold Units, the sale of the Unit was a sale of a capital asset and the Taxpayer is not liable for profits tax in respect of any profit arising therefrom.

73. We are therefore of the view that the appeal must be allowed and the profits tax assessment for the year of assessment 1996/97 as well as the determination below confirming the assessment must be set aside.