

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D108/98

Profits tax – profit arising from sale of property – lived there for less than 10 days – whether acquired for own use as residence.

Panel: Christopher Chan Cheuk (chairman), Charles Graeme Large and Vernon F Moore.

Date of hearing: 10 September 1998.

Date of decision: 4 November 1998.

In September 1990, the taxpayers, both were in their early twenties and worked in the same company, purchased a flat in District C (Property 1). They lived there for about half a year and sold it. A few days after sale of Property 1, they purchased another flat in the same district (Property 2), which would be completed in July 1991. They then moved into Property 2, lived there for less than 10 days and they sold it at a profit. On 25 July 1991, they purchased a flat in District D (Property 3).

The Revenue raised assessment on the profits made on Properties 1 to 3. Upon objection by the taxpayers, the Commissioner cancelled the profits tax assessments on Properties 1 and 3 but confirmed the assessment on Property 2.

The taxpayers gave evidence that they purchased Property 1 for self-use and had used it. They sold it because preferred a more spacious flat and it was also far away from their place of work. After sale of Property 1, they were led by an estate agent to Property 2. They liked the flat and purchased it. Though Property 2 was also in District C and thus far away from their place of work, they knew a bus route would provide a direct service to their office. In July 1991, they moved in Property 2 but realised that they needed to wait in a long queue for more than 45 minutes before being able to board the bus. They lived there for less than 10 days and decided to sell the flat.

Held:

1. The Board accepted the taxpayers' evidence and found that it was not unreasonable for a couple of their young age to decide that they had made a wrong decision and wished immediately to rectify it.
2. Looking at all the circumstances of the case, the Board found the original intention of acquiring Property 2 was for their own use as a residence. (D8/90 considered, All Best Wishes Limited v CIR applied).

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Appeal allowed.

Cases referred to:

D8/90, IRBRD, vol 5, 113
All Best Wishes Limited v CIR [1992] 3 HKTC 750

Fung Chi keung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by Mr A and Ms B (both collectively referred to as ‘the Taxpayers’) against the determination by the Commissioner of Inland Revenue in respect of the assessment of profits tax on the Taxpayers for the year of assessment 1991/92 relating to the profits arising out of the sale of a flat in District C (‘Property 2’).

Proceeding

2. The Taxpayers acted in person and only Mr A appeared before us. He claimed that he was also authorised to appear on behalf of Ms B, his former wife. He produced a letter of authorization written in Chinese which had been duly filed with the Board. We accepted it and proceeded in her absence.

3. Mr A gave evidence on oath and during the cross-examination Mr Fung for the Revenue questioned why he was so late in filing the notice of appeal. The Chairman immediately stopped Mr Fung and asked him whether he wanted to raise the late filing as an issue. If so, he should have raised it as preliminary issue before the Board proceeded to hear the evidence. Mr Fung expressly told us that he did not intend to pursue the matter further. As there was no evidence before us that the notice of appeal was late in filing we took it that there was no such issue before us.

Primary facts

4. In September 1990 Mr A and Ms B who were at the respective ages of 24 and 20 both worked in the same company, and agreed to purchase a flat in District C (‘Property 1’). They were required to pay a deposit of \$65,000 and the balance by instalments.

5. They lived there for about half a year and sold it. After sale Mr A and Ms B moved into the home of the latter’s family. They continued to look for another flat and purchased Property 2 a few days after the sale of Property 1. The purchase had a long completion time because the vendors planned to emigrate in July 1991.

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6. The Taxpayers moved into Property 2 and lived there for less than 10 days in the month of July. For reasons which we will later consider, they decided to sell it and readily found a buyer. They sold the property at a profit and on 25 July 1991 purchased a flat in District D ('Property 3'). The Revenue raised assessments not only on the profits made on Property 2 but also on profits derived from the sale of Property 1 as well as that from sale of Property 3.

7. On objection by the Taxpayers and before the Commissioner made his determination as aforesaid the assessor in charge accepted that the purchase and sale of Property 1 and Property 3 by the Taxpayers did not constitute adventures in the nature of trade. The profits by the Taxpayers derived therefrom were not liable to tax. Accordingly the Commissioner cancelled the profits tax assessments on those profits but confirmed the assessment in respect of the subject matter of the present proceedings (Property 2).

The Revenue's argument

8. The Revenue challenged the Taxpayers' intention at the time of purchase of Property 2. It doubted whether the Taxpayers ever lived in the property as evidence produced showed that it had a very low record of electricity consumption. The Taxpayers purchased the property in March and completed the transaction on 1 July 1991 and sold it 13 days later on 14 July 1991. The period of ownership was very short. The Taxpayers gave various reasons for sale at different times. At first Mr A said that the property was far away from their working place and that it was not propitiously located, being adjacent to a cemetery. Later, he said that the public transport service was not convenient. At the hearing he added one more reason – that is, that he wanted to improve his relationship with his wife.

Evidence and analysis

9. At the material times both Taxpayers were in their early twenties. They worked together and lived together. They were formally married in 1996 and are now divorced. This marital history sets the background for us to consider this case.

10. The Revenue accepted that the Taxpayers purchased Property 1 for self-use and also accepted that they had used it. Neither did the Revenue challenge the Taxpayer's reason for sale: to improve their living condition. Property 1 had only one room and they preferred a more spacious apartment. Property 1 was also far away from Mr A's place of work.

11. The Revenue argued that Property 2 was equally far away from the couple's place of work. Property 1 was in the northwest and Property 2 was in the southeast but both were in District C. Mr A's testimony is that after sale of Property 1 he continued to look for a flat. He and Ms B went to an estate agency and met a person whom they trusted to be honest. The agent led him to Property 2; they viewed the flat and looked at the surroundings. They initially liked the place and immediately paid a deposit and entered into

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a preliminary agreement. For young people of their age it is understandable that they would make impetuous decisions on the spur of the moment. They knew that a bus route would provide a direct service to their office then at District E. They did not realise that every morning they would be obliged to wait in a long queue for more than 45 minutes before being able to board the bus. They entered into the agreement in March, completed the transaction and moved into the flat in July. It was hot and the long delays became unbearable for them. They decided to move out and sell the flat. For a couple of their young age, we find it not unreasonable for them to decide that they had made a wrong decision and wished immediately to rectify it. That is what had happened : they move in and lived there for less than 10 days and then decided to sell it.

12. As they lived there for less than 10 days it was not surprising that the electricity consumption was low but the evidence did show that some electricity had been used in the month of July. This seems to be consistent with what the Taxpayers claimed the position to be. They sold the flat and almost immediately purchased another one with the sale proceeds. We accept the Revenue's proposition that trading profit from sale of a property does not become a capital gain simply because it is subsequently used in a capital investment. This proposition is well supported by many former decided cases as well as by the decision of another Board in the tax case D8/90, IRBRD, vol 5, 113, the one cited by Mr Fung. But this does not prevent us from looking at all the circumstances of the case. As Mr Justice Mortimer in the well known judgment, All Best Wishes Limited v CIR [1992] 3 HKTC 750, at page 771, puts it, *'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.'*

13. The Revenue accused the Taxpayers of giving different reasons at different times for sale of Property 2. We find that the various reasons which Mr A adduced are not inconsistent with each other. In the Board's view, these reasons were sufficient to justify his decision to sell the property.

14. Having considered all the circumstances of the case we are convinced that what Mr A told us is the truth. The Revenue's standard test criteria to support an assessment in such cases (such as a short period of ownership) are in our view not conclusive in this case. They did justify the Revenue's initial suspicions but after hearing Mr A's what we believe to be honest and frank evidence of the problems of a young couple in their early twenties and having regard to the amount of tax under appeal, we take the view that this case should not have come to the appeal stage but should have been resolved at the level of the Commissioner if not earlier. Mr A did not mince his words in expressing his exasperation with the length of the investigation, and at the number of visits to the Revenue which he was required to make, despite doing his best to respond to the Commissioner's enquiries. The Board's sympathies are entirely with the Taxpayers.

Decision

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15. The burden is on the Taxpayers to show that the Commissioner was wrong in his decision and the Board finds that the Taxpayers have successfully proved that their original intention of acquiring Property 2 was for their own use as a residence. Accordingly we allow the appeal.