

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D111/00

Profits tax – acquisition and sale of property – intention of purchaser at time of acquisition – burden of proof on purchaser – whether tax chargeable on the profits of sale – section 68(4) of the Inland Revenue Ordinance (‘IRO’).

Panel: Ronny Wong Fook Hum SC (chairman), Paul Chan Mo Po and Winnie Lun Pong Hing.

Date of hearing: 10 October 2000.

Date of decision: 21 December 2000.

The taxpayer’s daughter, Ms A, left Hong Kong to study in Australia in October 1995. In April 1996, she returned to Hong Kong and stated that she did not intend to return to Australia. On 11 May 1996 the taxpayer purchased Property 1 to live alone with her daughter. Property 1 was far away from where the taxpayer’s relatives resided but close to Ms A’s intended school. At the end of 1996, Ms A changed her mind and decided to return to Australia for her studies. The taxpayer subsequently purchased Property 5 to live alone in May 1997 and then sold Property 1. Property 5 was close to where the taxpayer’s relatives resided.

The Commissioner held that Property 1 was not purchased for the taxpayer’s personal use and the profits of sale should be chargeable to tax. The taxpayer stated, on her primary case, that Property 1 had been purchased with Ms A’s education in mind. Her secondary case was that Property 1 was sold at the insistence of Company F and although she had not wished to sell at that time, it was a practical decision since she would now be living closer to her relatives with Ms A away.

Held:

1. Upon considering the evidence as a whole, the Board doubted the primary case put forward by the taxpayer in light of her evidence before the Board;
2. Despite the collapse of the primary case, on balance, the objective facts presented did point to an intention by the taxpayer to purchase Property 1 as her residence.

Appeal allowed.

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Wong Kuen Fai for the Commissioner of Inland Revenue.
Lam Chi Wai of Messrs PKF for the taxpayer.

Decision:

Background

1. The Taxpayer appeals before us against the Revenue's assessment of her gains arising from her dealings with Property 1.
2. The Taxpayer has a daughter [' Ms A '] born on 17 January 1980.
3. By an agreement dated 27 May 1988, the Taxpayer purchased Property 2 for \$2,289,200. Property 2 is 1,550 square feet in area with three bedrooms.
4. The Taxpayer held a 55% interest in a company called Company B. Company B purchased Property 3 in 1990. Property 3 is 888 square feet in area with three bedrooms.
5. The Taxpayer first sent Ms A to Australia for her education in October 1995. She sold Property 2 shortly after Ms A's departure on 4 December 1995 for \$8,100,000. This was followed by her purchase on 30 December 1995 of Property 4 for \$3,735,000. Property 4 is 1,134 square feet in area with three bedrooms.
6. Ms A was admitted into Class 10 of School C in Australia on 28 January 1996. She had difficulties in adjusting to life in Australia. By letter dated 23 April 1996, the Taxpayer informed the principal of School C that she had no alternative but to permit Ms A to return to Hong Kong on 29 April 1996.
7. Commencing from 5 May 1996, Ms A attended Class 9 of the Australian International Section of School D Hong Kong.
8. By a memorandum for sale dated 11 May 1996, the Taxpayer purchased Property 1 for \$5,984,800. Under the terms of this memorandum, she had to pay \$650,000 upon signing, \$546,960 on or before 29 May 1996 and the balance of \$4,787,840 on or before 14 June 1996. Property 1 has a saleable area of 1,043 square feet.
9. After completing decoration works in Property 4, the Taxpayer let it out for a two years tenancy commencing from 23 May 1996 at a rent of \$23,500 per month.

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10. The Taxpayer wrote a letter to the principal of a secondary school in Hong Kong, School E dated 2 July 1996 seeking Ms A's admission to Form IV of that school. She submitted a formal application dated 4 July 1996 when Ms A was interviewed by that school. Ms A's application was successful. She was accepted by School E on 17 July 1996. By letter dated 18 July 1996, the Taxpayer informed the principal of School D that Ms A 'will leave your school after she completes year 9. She will continue her study of Form 4 in a local secondary school.' Ms A left School D on 24 July 1996. She started Form IV in School E at the commencement of the new school term on 1 September 1996.

11. The occupation permit in respect of Property 1 was issued on 23 December 1996. The Revenue produced a letter before us from a property agency company, Company F dated 22 September 2000. Company F stated that:

‘ According to our record, the vendor called by phone and asked to sell [Property 1] at 12,800,000 dollars on 22 February 1997. The asking price reduced to 11,370,000 dollars on 4 March 1997 and increased to 13,500,000 dollars on 19 May 1997 respectively.’

12. By an agreement dated 21 March 1997, the Taxpayer sold Property 4 for \$5,700,000.

13. The certificate of compliance in respect of Property 1 was issued on 27 March 1997. According to her statement dated 3 October 2000, the Taxpayer said Ms A told her in April 1997 of her (Ms A's) wish to return to Australia to further her education.

14. By a provisional agreement dated 8 May 1997, the Taxpayer purchased Property 5 for \$5,580,000. The purchase of this flat was completed on 5 July 1997.

15. By a provisional agreement dated 29 May 1997, the Taxpayer sold Property 1 for \$12,200,000. Company F acted as the agent in this sale. The sale was duly completed on 29 September 1997.

16. By letter dated 16 October 1997, School G offered Ms A a place in Year 11 1998. By an application form dated 20 October 1997, Ms A further applied for a place in School H in Australia. According to this application form, Ms A was then residing with her parents in Property 5. Both her parents were said to be businessman/businesswoman working with Company B. Ms A's application with School H was successful. As from February 1998, she attended Class 11 of School H.

The Taxpayer's case as per her correspondence with the Revenue

17. In response to a questionnaire dated 24 November 1997, the Taxpayer informed the

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Revenue that :

- (a) Property 4 was purchased with the view of personal use. \$371,909 was spent in decorating this flat. It was subsequently let out. The flat was sold as it was too far away. Property 1 was purchased in its stead.
- (b) Property 1 was also purchased with the view of personal use. 'Traffic inconvenience' was given as the reason for sale. Property 5 was purchased in its stead.

18. In response to queries from the Revenue dated 9 April 1998, the Taxpayer informed the Revenue by letter dated 4 May 1998 that:

- (a) Property 4 was purchased when 'my daughter scheduled to leave Hong Kong for further study abroad in Australia. From October 1995, I through (*sic*) that I did not need to live in big apartment of Property 2. Hence, I decided to sell my apartment and made by (*sic*) decision purchasing the apartment of Property 4. After I made the decoration of my new apartment (Property 4), my daughter insisted to quit her study in Australia because of loneliness and homesick. She returned to Hong Kong in March of 1996 and refused to move in Property 4 as it is very much inconvenience (*sic*) for her to go to school. Hence, I leased out my flat and looked for our future home in Kowloon.'
- (b) After selling her Property 2, she moved into Property 3. 'Unfortunately, the return of my daughter from Australia forced me to look for apartment and I made a trail (*sic*) to [Property 1] and did not really think that I would be selected by the computer draw. However, I was picked and therefore I decided to purchased [Property 1] and hoping it will be our future home. Stepping in the mid of 1997, daughter realized that she is capable to take care (*sic*) herself and decided to go back to Australia carrying on her studying dream. She requested me to live closer to my mother so that we can take care of each other during her absence. For that reason, I sold out all apartments and purchased [Property 5].'

Testimony adduced on behalf of the Taxpayer

19. The Taxpayer submitted a written statement to this Board dated 3 October 2000. The Taxpayer informed this Board in her written statement the following:

- (a) She decided to arrange for Ms A' s return to Hong Kong in early April 1996. She made intensive search for a Form IV place for Ms A but her efforts were in vain. She contacted the Education Department for assistance and was advised

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to approach School D. Ms A's stay in School D was intended to be a temporary measure pending her search for a Form IV place.

- (b) She was informed by a friend that School E had Form IV places available. She was put in touch with the principal of School E. The principal told her that she could make application in July for a Form IV place.
- (c) Units in the housing estate of Property 1 were offered for sale in early May 1996. School E is a short distance from Property 1. Property 1 would be a suitable home for Ms A to continue her education in Hong Kong.
- (d) Ms A told her in April 1997 that she would like to return to Australia for her education. She acceded to her request. Property 1 therefore lost its original purpose. She therefore decided to sell Property 1 and to acquire a flat near her mother so that they could take care of each other.

It is therefore clear that the Taxpayer tied her whole case prior to commencement of her cross examination to the progress of Ms A's education.

20. Mr Wong for the Revenue cross-examined the Taxpayer with care and patience. He took the Taxpayer through the tendering process for units in the housing estate of Property 1. The Taxpayer admitted that she tendered for a unit in early May 1996. She was amongst the first 50 given the right to select a unit in that complex. This scenario sits ill with the Taxpayer's attempt to associate her purchase of Property 1 with Ms A's admission into School E. The Taxpayer was further cross-examined on the date of Ms A's decision to resume her studies in Australia. She told us that she made an error in her statement. Instead of April 1997, she was told by Ms A in April 1996 of her wish. Ms A was also called to give evidence. She said her wish to return to Australia was a gradual process commencing from around the end of 1996. The Taxpayer was eventually forced to concede that the sale of Property 1 was also unrelated to Ms A's education. The original case of the Taxpayer was therefore completely destroyed.

21. The Taxpayer further told us the following:

- (a) She had been working in District I since at least 1985.
- (b) After leaving Property 2, she shared Property 3 with her mother, her sister, Ms A and a maid. She wanted some change.
- (c) She bought Property 4 as her own residence as she had a niece living nearby. She decorated that flat but felt a sense of loss when making journeys to that flat.
- (d) It had always been her intention to acquire her own flat so as to give herself

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more room.

- (e) She did not give any instruction to Company F for sale of Property 1. It was Company F who pestered her with offers. She succumbed to such persistence.
- (f) She has been residing in Property 5 ever since its acquisition. It is near her mother's residence and her brother also lives in the housing estate of Property 5. Her desire to be near her relatives was also a reason leading to the sale of Property 1.

22. In assessing this alternative case of the Taxpayer, we have borne in mind the following factors:

- (a) Her tarnished credibility as a result of demolition of her original case.
- (b) The Revenue's tacit acceptance that Property 4 was purchased as her residence.
- (c) Ms A returned to Hong Kong on 29 April 1996. There was then no question of resuming her studies in Australia. It is therefore probable that the Taxpayer wanted to acquire a unit for use with her daughter. As she would be sharing this flat with her daughter, proximity with her other relatives would not be a major consideration.
- (d) We have very little information as to the Taxpayer's relationship with her husband. Our overall impression is that their marriage had encountered difficulties. Ms A was the Taxpayer's principal source of comfort.
- (e) We accept Ms A's evidence that she manifested an intention to return to Australia at the end of 1996.
- (f) We accept the Taxpayer's evidence that she did not initiate any discussion with Company F. She sold Property 1 after acquiring Property 5.
- (g) She purchased Property 5 as her residence and is still residing in that flat. When that flat was purchased in May 1997, Ms A had manifested an intention to resume her studies in Australia. It was therefore natural for the Taxpayer to select a flat close to her other relatives.
- (h) The case is consistent with what she informed the Revenue in the questionnaire of 24 November 1997.

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23. Whilst we deprecate the Taxpayer's attempt in putting forward her original case, we are of the view that it would not be right to permit that factor to overshadow the objective facts which we summarised above. On balance, we are persuaded that the Taxpayer did intend to purchase Property 1 as her residence. We would allow her appeal and discharge the assessment.