

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D117/01

**Personal assessment** – whether loss sustained from failure to complete the purchase of a property a trading loss – sections 2, 14(1), 42(2)(b) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Lawrence Lai Wai Chung and Albert Yau Kai Cheong.

Date of hearing: 10 October 2001.

Date of decision: 12 December 2001.

The appellant objected to the personal assessment for the year of assessment 1997/98, claiming that the loss he suffered in his failure to complete the purchase of a property was a trading loss which should be deducted from his total income. The loss was made up of deposit paid and forfeited by the vendor, stamp duty and commission paid to the estate agent. The appellant said his intention at the time when he signed the provisional agreement to acquire the property was to speculate in the hope of making a quick profit.

The Commissioner questioned the appellant's intention to speculate on the following grounds:

1. the appellant's assertion that he was 'forced' to sign the provisional agreement;
2. the appellant's assertion that he had difficulty in funding the 30% deposit;
3. the appellant should have tried to sub-sell the property; and
4. the appellant's track record of acquisition of capital assets.

**Held:**

1. The Board questioned how the appellant could have intended to acquire and hold the property on a long term basis if he had been 'forced' to sign the provisional agreement.

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2. If the appellant did not have the financial means to speculate, he could not have the financial means to fund and hold the acquisition on a long term basis.
3. A successful sub-sale by the appellant would have depended on the appellant having the key to the property (which the appellant did not); or having the right (which the appellant did not) to inspect the property with other person(s); or finding sub-purchasers willing to buy without inspecting it at all. If the appellant were an experienced or skilful speculator, he might not have incurred the loss. Not all traders profit from their trade.
4. The appellant's track record of acquisition of capital assets is a relevant factor. But it does not necessarily follow that the appellant intended to acquire the property as a capital asset. Given his track record, there was no reason for him to default if his intention were to acquire the property as another capital asset.

### **Appeal allowed.**

Cases referred to:

Simmons v IRC [1980] 1 WLR 1196  
All Best Wishes Limited v CIR (1992) 3 HKTC 750  
D11/80, IRBRD, vol 1, 374  
Marson v Morton [1986] 1 WLR 1343

Wong Kai Cheong for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 31 May 2001 confirming the personal assessment for the year of assessment 1997/98 under charge number 6-3837730-98A, dated 3 August 2000, showing assessable income of \$723,110 with tax payable thereon of \$120,439.
2. The Appellant had objected to the personal assessment for the year of assessment 1997/98, claiming that the loss he suffered in his failure to complete the purchase of a property was a trading loss which should be deducted from his total income.

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3. The subject property was a flat at Housing Estate A (‘ the Property’ ). The provisional agreement was dated 11 May 1997. The loss totalled \$373,725, made up of the \$160,000 deposit paid on 11 May 1997 and forfeited by the vendor, \$141,625 in stamp duty, and \$51,500 and \$20,600 in commission paid to the estate agent.

4. The Appellant appeared in person at the hearing of the appeal. He told us that his intention at the time when he signed the provisional agreement to acquire the Property was to speculate in the hope of making a quick profit. He confirmed his intention on oath and was cross-examined by Mr Wong Kai-cheong who represented the Respondent at the hearing of the appeal. Mr Wong Kai-cheong cited:

- (a) Simmons v IRC [1980] 1 WLR 1196.
- (b) All Best Wishes Limited v CIR (1992) 3 HKTC 750.
- (c) D11/80, IRBRD, vol 1, 374.
- (d) Sections 14(1), 2(1), 42(2) and 68(4) of the IRO.

5. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellants. Section 2 defines ‘ trade’ as including ‘ *every trade and manufacture, and every adventure and concern in the nature of trade*’ . Section 14(1) excludes profits arising from the sale of capital assets. Section 42(2)(b) provides that the loss computed in accordance with Part IV shall be deducted from the total income.

6. We remind ourselves of what Sir Nicholas Browne-Wilkinson VC said in Marson v Morton [1986] 1 WLR 1343 at pages 1347 to 1349 and [1986] STC 463 at pages 470 to 471; what Lord Wilberforce authoritatively stated in Simmons v IRC [1980] 1 WLR 1196 at page 1199 and (1980) 53 Tax Cases 461 at pages 491 to 492; and the statement of the law by Orr LJ at pages 488 and 489 of the report in Tax Cases, which was approved by Lord Wilberforce as a generally correct statement (WLR at page 1202 and Tax Cases at page 495).

7. We also remind ourselves of what Mortimer J, as he then was, said in All Best Wishes Limited v CIR (1992) 3 HKTC 750 at page 770 and page 771.

8. The facts stated in the determination were admitted by the Appellant and we find them as facts.

9. We have considered the Appellant’ s evidence that his intention at the time when he signed the provisional agreement to acquire the Property was to speculate in the hope of making a

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quick profit with circumspection. We have also carefully considered Mr Wong Kai-cheong's submission. We find the Appellant's evidence on his intention to speculate credible and accept it.

10. The Commissioner gave four reasons for concluding that the Appellant did not have the intention to speculate on the Property.

11. Three days after signing the provisional agreement, the Appellant lodged written complaints, first to the Consumer Council and then to the Independent Commission Against Corruption, against the estate agent and the vendor, repeatedly asserting that he signed the provisional agreement most unwillingly. The Commissioner questioned the Appellant's intention to speculate if the Appellant was, as the Appellant asserted, 'forced' to sign the provisional agreement. With respect, this was at best a neutral factor. We question how the Appellant could have intended to acquire and hold the Property on a long term basis if he had been 'forced' to sign the provisional agreement. In any event, we find that the Appellant exaggerated what was at most a case of aggressive selling.

12. The Commissioner also questioned the Appellant's intention to speculate based on the Appellant's assertion that he had difficulty in funding the 30% deposit. Again, this was at best a neutral factor. If the Appellant did not have the financial means to speculate, he could not have the financial means to fund and hold the acquisition on a long term basis.

13. Based on the vendor's agreement dated 17 June 1997 to sell the Property at \$5,500,000, the Commissioner concluded that the Appellant should have tried to sub-sell the Property if his intention was to speculate. A successful sub-sale by the Appellant would have depended on the Appellant having the key to the Property (which the Appellant did not); or having the right (which the Appellant did not) to inspect the Property with other person(s); or finding sub-purchasers willing to buy without inspecting it at all. We accept the Appellant's evidence that he did try to sub-sell; that his attempts were not successful; and that he had considered the expenses involved in completing the acquisition, including bank interest and penalty, before defaulting. If the Appellant were an experienced or skilful speculator, he might not have incurred the loss. Not all traders profit from their trade.

14. The Commissioner took the Appellant's track record of acquisition of capital assets into consideration. We agree that the Appellant's track record is a relevant factor. But it does not necessarily follow that the Appellant intended to acquire the Property as a capital asset. Given his track record, there was no reason for him to default if his intention were to acquire the Property as another capital asset. The objective fact is that he did default. Moreover, in May 1997, the Appellant was 47 years of age; his wife and two children had emigrated to Canada for more than a year; he was planning to retire shortly; and he already had two residential properties. In our decision, an intention to speculate was not only plausible, but more probable than not.

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15. For the reasons given above, the Appellant has in our decision proved that his intention at the time of signing of the provisional agreement was to speculate on the Property. The loss which he incurred, that is, \$373,725, should be deducted from his total income. We allow the appeal and remit the case to the Commissioner to revise the assessment to give effect to our decision.