

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D119/98

Profits Tax – sales proceeds from sale and purchase of property – whether the sale of the property amounted to trade.

Panel: Ronny Wong Fook Hum SC (chairman), Vincent Lo Wing Sang and David Wu Chung Shing.

Date of hearing: 17 September 1998.

Date of decision: 24 November 1998.

On 8 November 1996, by a provisional agreement, the taxpayers, purchased a property for \$2,060,000. On 15 December 1996, by another provisional agreement the taxpayers sold the property for \$2,500,000. The issue relates to the taxpayers' liability for profits tax in respect of profits arising from their dealings in the property.

The taxpayers submitted that they have a genuine intention to purchase the property for residential purpose, the subsequent sale was due to the fact that (1) they discovered after residing in the property that the traffic was most inconvenient and (2) they were advised that the fung shui of the property was undesirable.

Held:

The Board found that the taxpayers had discharged the burden on them in demonstrating that they not embarked upon a venture in the nature of a trade on the following grounds:-

- (a) The transaction in question was a one-off transaction. The lack of repetition is a pointer which indicates there might not be trade but something else;
- (b) The transaction is not related to the profession of the taxpayers;
- (c) The taxpayers had a genuine desire to make provision should circumstances prevented one of the taxpayers, that is, the husband, from continuing with the disciplinary force;
- (d) Whilst no work was done to redecorate the flat, they could well have lived in the flat with the fixtures and utensils transferred to them from their vendor;

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- (e) The sale was prompted by fung shui considerations. The Board accepted that evidence of the taxpayers as to the visit of a fung shui master. (Marson v Morton [1986] 1 WLR 1343 applied).

Appeal allowed.

Case referred to:

Marson v Morton [1986] 1 WLR 1343

Cheung Lai Chun for the Commissioner of Inland Revenue.
Taxpayers in person.

Decision:

1. The Taxpayers ['Mr & Mrs A'] are husband and wife. They have been married for 11 years. They have a son arising from their marriage.
2. Mr A is an officer in the disciplinary force. At the material times, he and his family were residing in quarters in District B provided by the Government.
3. By a provisional agreement dated 17 September 1996, Mr & Mrs A purchased a flat in District C ['Property 1'] for \$2,060,000. 30 September 1996 was the date fixed for the signing of a formal agreement and 31 October 1996 was the scheduled date for completion. The keys were to be released to Mr & Mrs A upon their undertaking to pay the management fees. An option was given to Mr & Mrs A to postpone completion to 8 November 1996. They exercised the option and the purchase was completed on 8 November 1996.
4. On 19 November 1996, Mr & Mrs A paid management fees in respect of Property 1 for the period between October to November 1996. They also secured a transfer of the resident membership attached to that flat in their favour.
5. On 30 November 1996, Mr D, a fung shui expert, visited the flat. Mr D advised the couple not to stay in that flat. A sketch drawn by Mr D has been produced before us setting out his advice.
6. By a provisional agreement dated 15 December 1996, Mr & Mrs A sold Property 1 for \$2,500,000.
7. In a letter dated 11 November 1997, Mr & Mrs A explained to the Revenue that their sale was prompted by the following reasons:

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- (a) They discovered after residing in Property 1 that the traffic was most inconvenient. Mr A was working in District E, Mrs A in District B and their son was studying in District F.
- (b) They were advised that the fung shui of Property 1 was undesirable.

The evidence of Mr & Mrs A

8. They were married in 1987. They had been residing in quarters in District B since their marriage.

9. They were on holidays in District C. They inspected the premises in question and resolved to purchase the same as their residence. Mr A was concerned to provide for his family given the risks inherent in his profession.

10. The parents of Mrs A insisted that a fung shui expert should view Property 1. They were uncertain as to the precise date of the visit by Mr D but were definite that the visit must have taken place after 8 November 1996. \$3,000 was paid to Mr D. They do not have Mr D's address or name card.

11. They stayed in Property 1 over weekends. They found out the inconvenience in travelling to and from District C.

12. No notice to vacate the quarters had been served on the Government. By virtue of the rise in property prices, they made no further attempt to locate alternative accommodation.

Our decision

13. Applying the 'badges of trade' as outlined in *Marson v Morton* [1986] 1 WLR 1343 we find the following:

- (a) The transaction in question was a one-off transaction. The lack of repetition is a pointer which indicates there might not be trade but something else.
- (b) The transaction is not related to the profession of either Mr or Mrs A.
- (c) The couple had a genuine desire to make provision should circumstances prevent Mr A from continuing with the police force.
- (d) Whilst no work was done to redecorate the flat, they could well have lived in the flat with the fixtures and utensils transferred to them from their vendor.

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- (e) The sale was prompted by fung shui considerations. We accept the evidence of Mr & Mrs A as to the visit by Mr D.

14. Taking these factors into account, we are satisfied that Mr & Mrs A had discharged the burden on them in demonstrating that they had not embarked upon a venture in the nature of a trade. We allow their appeal and discharge the assessment.