

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D119/99

Profits Tax – real property – whether the gains arising from the disposal of a property was liable for profits tax.

Panel: Ronny Wong Fook Hum SC (chairman), Herman Fung Man Hei and Winnie Lun Pong Hing.

Date of hearing: 30 December 1999.

Date of decision: 14 February 2000.

The taxpayers, Mr and Mrs A, are husband with wife. Between January and August 1996, the taxpayers resided in Property 1 which was assigned in favour of Mr A in August 1987.

In August 1991, Mr A and his brother Mr C purchased Property 2. Mr and Mrs A resided in this flat between August 1996 and June 1997. Property 2 was sold to Mr C as sole owner in May 1998.

By a provisional agreement for sale and purchase dated 31 March 1996, Mr and Mrs A purchased Property 3 in District E. According to a medical certificate dated 29 April 1996, Mrs A was then pregnant and 21 December 1996 was given as the baby's estimated date of birth. Mr and Mrs A completed the purchase of Property 3 on 5 August 1996. They took possession of this property on 10 August 1996. Mrs A gave birth to a baby daughter on 5 January 1997. By a provisional agreement for sale and purchase dated 8 December 1996, Mr and Mrs A sold Property 3 with a gain. The sale was completed on 14 January 1997.

On or about 14 December 1996, Mr and Mrs A purchased Property 4 in District F. The property was sold on 28 February 1997 with a gain.

On or about 27 January 1997, Mr and Mrs A purchased Property 5 and they have been residing therein ever since.

The issue before the Board was whether the taxpayers were liable for profits tax in respect of the gains they made from their dealings with Property 3 and Property 4.

INLAND REVENUE BOARD OF REVIEW DECISIONS

Held:

- (1) We have to be satisfied that their intention was to purchase the properties as their residence and such intention is on the evidence ‘genuinely held, realistic and realisable’.
- (2) No cogent explanation has been furnished as to why Property 2 was unsuitable for their needs after their marriage. Indeed they moved into Property 2 in August 1996. At no time did they seek to move into Property 3. We are not satisfied that Mr and Mrs A have duly discharged their onus of proof in relation to Property 3.
- (3) In respect of Property 4 we accept the evidence of Mrs A that she inspected other alternatives in District F as she was due to give birth to her first child and the need to find somewhere close to her mother-in-law was pressing. Whilst we see the force of the Revenue’s contention stemming from the limited duration of Mr and Mrs A’s ownership, we are of the view that Mrs A has satisfactorily explained her rapid disposal after purchase.

Appeal allowed in part.

Case referred to:

All Best Wishes Limited v CIR 3 HKTC 750

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayers in person.

Decision:

Background

1. The Taxpayers [‘Mr and Mrs A respectively’] are husband and wife. Their marriage took place in December 1995.
2. Prior to his marriage, Mr A resided with his mother at a unit in a public housing estate [‘the Estate Unit’].

INLAND REVENUE BOARD OF REVIEW DECISIONS

3. By an assignment dated 27 August 1987, a unit at District B [' Property 1 '] was assigned in favour of Mr A for \$191,600. Between January and August 1996, Mr and Mrs A resided in Property 1 which had a construction area of 465 square feet comprising of 1 sitting room and 1 bedroom.
4. By an agreement for sale and purchase dated 15 August 1991, Mr A and his brother Mr C purchased a unit at District D [' Property 2 '] for \$1,230,000. That flat had a construction area of 551 square feet made up of 1 sitting room and 2 bedrooms. It was mortgaged on 25 September 1991 in favour of a bank. Mr and Mrs A resided in this flat between August 1996 and June 1997. By a further agreement for sale and purchase dated 20 May 1998, Property 2 was sold to Mr C as sole owner at a consideration of \$900,000.
5. By a provisional agreement for sale and purchase dated 31 March 1996, Mr and Mrs A purchased a unit at District E [' Property 3 '] for \$1,698,000. According to the terms of that provisional agreement, \$169,800 was payable on signing of the provisional agreement; a further \$169,800 was payable on or before 17 April 1996 and the balance of \$1,358,400 was payable on or before 1 May 1996. The construction area of Property 3 was 709 square feet with 2 sitting rooms and 3 bedrooms.
6. By a facility letter dated 24 April 1996, a second bank extended in favour of Mr and Mrs A an instalment loan of \$1,220,266.4 repayable by 240 monthly instalments of \$11,177 each and secured by an equitable mortgage over Property 3.
7. According to a certificate issued by a medical doctor dated 29 April 1996, Mrs A was then pregnant and 21 December 1996 was given as the baby's estimated date of birth. Mrs A gave birth to a baby daughter on 5 January 1997.
8. Mr and Mrs A completed the purchase of Property 3 on 5 August 1996. They took possession of the same on or about 10 August 1996.
9. By a provisional agreement for sale and purchase dated 8 December 1996, Mr and Mrs A sold Property 3 for \$2,330,000. This sale was completed on 14 January 1997.
10. On or about 14 December 1996, Mr and Mrs A purchased a unit at District F [' Property 4 '] for \$2,130,000. The purchase was supported by a loan of \$1,490,000 from a third bank repayable by 240 monthly instalments of \$13,168 each. The construction area of Property 4 was 507 square feet with only 2 bedrooms. By a provisional agreement for sale and purchase dated 28 February 1997, they sold Property 4 for \$2,500,000.
11. By an agreement for sale and purchase dated 27 January 1997, Mr and Mrs A purchased a unit in Housing Estate G at District F [' Property 5 '] for \$2,500,000. They have been residing in Property 5 ever since.

INLAND REVENUE BOARD OF REVIEW DECISIONS

12. The issue before us is whether Mr and Mrs A are liable for profits tax in respect of the gains they made from their dealings with:

(a) Property 3 and

(b) Property 4.

The sworn evidence of Mrs A

13. At the material times, Mrs A was an accountant earning \$15,000 per month and Mr A was a salesman earning \$25,000 per month. Between 1996 and 1998, Mr A's work place was in District H and her work place was in District I.

14. When she purchased Property 3 in March 1996, it was her intention to become a full time housewife. Travelling to and from Property 3 in District E was therefore not a matter of concern. The purchase was supported by a loan from her parents.

15. She and her husband went for holidays in April 1996. She was with child after their holidays. Her initial plan in relation to Property 3 was therefore frustrated. She had to rely on her mother-in-law to look after her baby. Her mother-in-law was still living in the Estate Unit. She therefore had to seek accommodation near her in District F.

16. She commenced her search in early December 1996. She had to sell Property 3 first before she could commit herself on any fresh purchase. Two estate agents were engaged and she inspected at least 5 to 6 units.

17. She visited Property 4 prior to her purchase. She knew it was small for her needs. However her budget was confined to the proceeds arising from her sale of Property 3. She also had to ensure that her purchase was close to her mother-in-law's Estate Unit.

18. Shortly after her purchase of Property 4, she was contacted by estate agent indicating availability of a bigger unit in Housing Estate G. Although she could not afford to keep Property 4 and Property 5 at the same time, she decided to take the risk hoping to dispose of Property 4 as soon as possible. Her gamble paid off. She managed to sell Property 4 on 8 January 1997.

The applicable principles

19. The principles are clear. We have to ascertain the intention of Mr and Mrs A at the time when Property 3 and Property 4 were purchased. We have to be satisfied that their intention was to purchase the same as their residence and such intention is on the evidence 'genuinely held, realistic and realisable'.

INLAND REVENUE BOARD OF REVIEW DECISIONS

20. As pointed out by Mortimer J (as he then was) in All Best Wishes Limited v CIR 3 HKTC 750:

‘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.’

Our decision

21. We are not satisfied that Property 3 was purchased by Mr and Mrs A with the intention of using the same as their matrimonial home. That flat was far removed from their place of work. Given their level of earnings, it is unrealistic to expect Mrs A to give up her job and become a full time housewife. No cogent explanation has been furnished as to why Property 2 was unsuitable for their needs after their marriage. Indeed they moved into Property 2 in August 1996. At no time did they seek to move into Property 3. We are not satisfied that Mr and Mrs A have duly discharged their onus of proof in relation to Property 3.

22. We are however persuaded that Property 4 was purchased as their intended residence. Mrs A was due to give birth to her first child. The need to find somewhere close to her mother-in-law was pressing. Given her advance pregnancy, we can well understand her anxiety to secure a unit in District F as soon as possible. We accept her evidence that she inspected other alternatives in District F. We are sympathetic to her plea that her choice was dictated by her resources. Whilst we see the force of the Revenue’s contention stemming from the limited duration of Mr and Mrs A’s ownership, we are of the view that Mrs A has satisfactorily explained her repid disposal after purchase.

23. For these reasons, we allow the appeal of Mr and Mrs A in relation to Property 4. We dismiss their appeal in relation to Property 3.