Case No. D127/99

Profits Tax – indigenous villager right – whether deductible costs.

Panel: Ronny Wong Fook Hum SC (chairman), Gidget Lun Kit Chi and Yeung Kwok Chor.

Date of hearing: 17 January 2000.
Date of decision: 24 February 2000.

The taxpayer is an indigenous villager of the New Territories. He exercised his right as an indigenous villager to construct a village house on a land lot in March 1995. He then sold the units at substantial profits.

The main issue is whether the taxpayer is entitled to deduct from his profits a sum of $3,000,000 as the value of his right as indigenous villager to build a small house in accordance with Chinese customary law.

Held :

The Board did not prepare to express any view on the point whether the indigenous villager right constitutes opportunity costs of the taxpayer and should not be taken into consideration. Even if the value of the indigenous villager right should be taken into account into reckoning, there is no evidence on the value of such right.

Appeal dismissed.

Wong Ki Fong for the Commissioner of Inland Revenue.
Taxpayer represented by his representative.

Decision:

Background

1. The Taxpayer is an indigenous villager of the New Territories.

2. On 25 September 1991, the Taxpayer applied to Tai Po District Lands Office for a licence to build a village house on two land lots [' the Old Lots']. The Old Lots were duly assigned in favour of the Taxpayer on 3 October 1991.

3. On 19 February 1993, Tai Po District Lands Office gave the Taxpayer approval to construct a house on a land lot [' the New Lot'] by way of an exchange.

4. The Taxpayer duly completed construction of a house on the New Lot in about March 1995. Tai Po District Lands Office issued a certificate of compliance on 2 November 1995. Shortly thereafter, the Taxpayer applied on 22 November 1995 for assessment of premium so as to enable the Taxpayer to dispose of various units in the house in favour of interested purchasers. Tai Po District Lands Office assessed premium at $1,423,000 on 17 April 1996. After discharging the premium so assessed, the Taxpayer succeeded in selling the units at substantial profit.

5. Two issues are before us:

a) whether the Taxpayer is entitled to deduct from his profit a sum of $3,000,000 said to be the value of his right as an indigenous villager [' the Indigenous Villager Right'] to build a small house in accordance with Chinese customary law and

b) whether the Taxpayer is entitled to deduct $250,000 said to comprise of expenses that he incurred in the course of his redevelopment. Those expenses were said to include consultation and other fees.

The hearing before us

6. The Taxpayer did not appear at the hearing. He authorised a Mr A to act on his behalf. We do not know the precise relationship between Mr A and the Taxpayer.

7. Mr A did not seriously pursue the claim for deduction of $250,000. He pointed out that the real grievance of the Taxpayer is that his neighbour was permitted by the Revenue to deduct a sum of $3,000,000 in respect of the Indigenous Villager Right in the computation of the neighbour's profit. Mr A was initially reluctant to disclose the identity of the neighbour. In the course of his final submission, he produced for our perusal a computation of profit in respect of the development at a land lot [' the Neighbouring Lot']. $3,000,000 was deducted from the profits on sale of units in the Neighbouring Lot. That sum was said to be in respect of ' land and indigenous villager right' . We do not know whether the Neighbouring Lot was developed by another indigenous villager or by a developer in conjunction with an indigenous villager which is all too common in the commercial exploitation of the Indigenous Villager Right.

Our decision

8. We have no hesitation in rejecting both heads of claims of the Taxpayer. The onus rests squarely on him to prove by cogent evidence his entitlement to have both heads taken into account in the computation of his profit.

9. The Taxpayer made no effort at all to prove any of the items making up the sum of $250,000. We hold that he is not entitled to deduct the same.

10. As far as the Indigenous Villager Right is concerned, the Revenue argued that the same constitutes opportunity costs of the Taxpayer and should not be taken into consideration. The Revenue further contended that there is no evidence in support of the $3,000,000 figure put forward by the Taxpayer as the value of the Indigenous Villager Right. We are not prepared to express any view on the former point as Mr A gave us very little assistance on that issue. We would rest our decision on the basis that even if the value of the Indigenous Villager Right should be taken into reckoning, there is no evidence before us on the value of such right. The computation in respect of the Neighbouring Lot sheds no light as the figure of $3,000,000 was in respect of ' land and indigenous villager right' . As pointed out above, it is also unclear whether the computation was made by a developer at the conclusion of his exploitation of the Indigenous Villager Right.

11. For these reasons, we dismiss the Taxpayer' s appeal.