

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D139/99

**Profits Tax** – acquisition of property – intention of taxpayer at time of acquisition – burden of proof on purchaser – failure of taxpayer to attend re-fixed hearing – whether fatal to application – sections 68(2B) and 68(2D) of the Inland Revenue Ordinance (‘IRO’).

Panel: Anna Chow Suk Han (chairman), Gerald To Hin Tsun and Mary Teresa Wong Tak Lan.

Dates of hearing: 1 November 1999 and 6 January 2000.

Date of decision: 15 March 2000.

The taxpayer’s appeal to the Board was against the Commissioner’s determination that a recent sale of his property was in the nature of a trade. The taxpayer originally came before the Board on 1 November 1999. He was invited by the Board to seek professional advice in view of certain changes in legislation at the material time to which he was not apprised. The hearing was adjourned to 6 January 2000 and the taxpayer was notified of the same on 5 November 1999. By letter dated 15 December 1999, the taxpayer informed the Board that he would not be able to attend the re-fixed hearing ‘due to his travelling schedule conflicting with the date of the hearing’. He added that he would not seek an adjournment.

The taxpayer failed to attend on 6 January 2000. The Revenue had submitted that the hearing could proceed in the taxpayer’s absence under sections 68(2B) and (2D) of the IRO.

#### **Held** by the Board :

1. Under section 68(2D) of the IRO, the Board was able to hear the application in the taxpayer’s absence if it was satisfied that he was outside Hong Kong at the material time and was not able to attend a hearing before the Board within a reasonable time. There was no evidence, from the taxpayer’s letter of 15 December 1999, that this was the case. Hence, there was no alternative but to refuse to hear the taxpayer’s application.
2. Under section 68(2B) of the IRO, since there was no reasonable cause for the taxpayer’s failure to attend, there was no choice but to dismiss the appeal.
3. If the taxpayer wanted to appeal against the findings of the Board, he had 30 days in which to do so. If he was able to satisfy the Board that his failure to attend was due to

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illness or any other reasonable cause, it would set aside the order for dismissal and proceed to hear the appeal.

### **Appeal dismissed.**

Chow Chee Leung for the Commissioner of Inland Revenue.

Taxpayer in person for the first hearing and in absentia for the second hearing.

### **Decision:**

#### **The appeal**

1. This is an appeal by the Taxpayer against the determination made by Commissioner of Inland Revenue of 20 May 1999 in respect of the personal assessment raised on the Taxpayer for the year of assessment 1996/97 dated 3 October 1997 showing reduced total income of \$3,315,256 with tax payable thereon of \$497,289 being confirmed. The Taxpayer claimed that the loss he incurred when he sold a property at District A (‘ the Subject Property’ ) should be allowed for deduction against his total income. This turns on whether the Subject Property was acquired by the Taxpayer as a trading asset or a capital asset.
2. The hearing of the appeal was on 1 November 1999 when the Taxpayer appeared in person and was underrepresented. The Taxpayer chose to give evidence under oath.
3. The Taxpayer began his case by outlining his objections against the determination as follows.
4. Firstly, the Taxpayer bought a property at District B (‘ Property 1’ ) in June 1993 and sold it in November 1994. He made a profit from the sale and was assessed to profits tax in the year of assessment 1994/95 because Property 1 was taken by the Revenue as a trading asset. Secondly, in 1994, the Taxpayer bought the Subject Property and sold it at a loss in September 1996. However, the Revenue treated the Subject Property as a capital asset and rejected the Taxpayer’s claim that the loss incurred, should be allowed as a deduction against his total income. Thirdly, he had not been given a reply since 15 April 1998 on his request to the Revenue for the criteria on trade and capital investment in properties by individuals. Fourthly, the long delay on the part of the Revenue served to prove its inability to reach a proper judgment and the Taxpayer should therefore be given the benefit of the doubt. Fifthly, the Taxpayer was unhappy with some statements made by the Commissioner in the determination.
5. The Taxpayer vented his grievances over the procrastination and the ways in which his case had been handled by the Revenue. He felt aggrieved that he was taxed when a profit was made and no deduction was allowed in the case of a loss.

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6. It was explained to the Taxpayer that the purpose of the hearing was not to adjudicate his grievances but to find out the facts upon which the Board would determine whether a deduction of the loss he incurred, should be allowed. The Taxpayer expressed his dissatisfaction over the fact that the Revenue had not given him the criteria on trading and investment in property transactions. It was further explained to the Taxpayer that the Revenue was under no obligation to give him the criteria and that in order that we could determine the issue, the Taxpayer should tell us the truth of the matter and the purpose for which the Subject Property was purchased.

7. The Taxpayer explained to the Board that Property 1 was acquired for the purpose of trade and the Subject Property was acquired for the same purpose. During the course of investigation by the Revenue, he had argued with the Revenue that if Property 1 was taken as a trading stock, the Subject Property should be treated similarly.

8. Upon being questioned by the Revenue as to whether he raised any objection to the assessment to profits tax on the profit from the sale of Property 1, it transpired that the Taxpayer had a misunderstanding that there were new measures about six or seven years ago which affected the law relating to profits tax assessment in property transactions. He explained to the Board that he withdrew his objection to the determination, because he believed his case was a borderline case which was caught by the new measures introduced in Hong Kong in 1992. As he understood it, prior to the new measures, the Revenue never charged profits tax on profits from property transactions whether they were in the nature of trade or investment. It was explained to the Taxpayer that there had not been any changes in legislation as suggested by him, but the new measures which he referred to, could well be the new measures regarding the payment of stamp duties which were to curb property speculations and that such measures had not affected the assessment to profits tax in property transactions.

9. It was explained to the Taxpayer that profits tax would not be levied on the profit from the sale of a property which was acquired as a capital investment while the profit from a property acquired as a trading stock, would. The Taxpayer again asked for the criteria for property transactions to be treated as adventures in the nature of trade and investment. The Taxpayer was told that each case had its own merits, and the Board could not advise him on facts which would fit a case of a property being acquired as a capital investment or for trading purposes. He needed only to tell the true facts for the Board to make a decision.

10. As the hearing progressed, it was apparent that the Taxpayer was not receptive to the explanation that there was no change in legislation about seven years ago, which affected the assessment to profits tax in property transactions. In view of his misconception, this Board invited the Taxpayer to consider whether he should seek professional advice. The Taxpayer then asked for an adjournment for him to consider whether legal advice should be sought. This Board duly granted the application.

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11. Throughout the hearing, the Taxpayer expressed his concern over the lack of information on the criteria on trading and capital investment in property transactions. The Taxpayer was taxed under the provisions of the Inland Revenue Ordinance (the IRO)(Chapter 112). However, there are no rules or guidelines in the IRO for property transactions to be classified as in the nature of trade or of capital investment. The test will be the intention of the taxpayer at the time of acquisition of the property in question and the purpose for which it was acquired. The Taxpayer did not understand that not only the Revenue was under no obligation to give him the criteria he asked for, it would be inappropriate for the Revenue to do so because there was a conflict of interests between them. The Taxpayer should explain to this Board the purpose for which the Subject Property was acquired and this Board would decide the case upon the facts found. However, to ensure that his interests are fully protested, the Taxpayer should seek independent professional advice. By granting him an adjournment, we hoped that the Taxpayer would seize the opportunity to seek proper advice on the matter.

12. The hearing was adjourned to 6 January 2000 and the Taxpayer was notified of the date of the hearing by a letter from the clerk of the Board on 5 November 1999.

13. By a letter of 15 December 1999, the Taxpayer informed this Board that he would not be able to attend the hearing on the scheduled date ' due to his travelling schedule conflicting with the date of the hearing' . He further added that he would not seek an adjournment as it would be the second time that he could not attend the hearing. He requested that the hearing should be heard in his absence. He enclosed in his letter his ' rationale for the objection' . In his rationale, he did not put forward any grounds or new grounds for his objection but essentially repeated his dissatisfaction over the delay of his case and his failure to receive criteria for ' trade' and ' capital' nature of property transactions since 15 April 1998. A copy of the Taxpayer' s letter was sent to the Revenue for its information.

14. By a letter dated 17 December 1999, the Revenue submitted to this Board that this Board should invite the Taxpayer to withdraw his appeal, in view of sections 68(2B) and (2D) of the IRO.

15. This Board directed the clerk of the Board to write a letter to the Taxpayer indicating that this Board might, if satisfied that he would be or was outside Hong Kong on the date of the hearing and was unlikely to be in Hong Kong within such period thereafter as this Board considered reasonable, proceed to hear his appeal in his absence under section 68(2D) of the IRO. However, if this Board was not satisfied that his application complied with the requirement of section 68(2D), this Board might dismiss his appeal under section 68(2D)(c) of the IRO. A letter of 3 January 2000 was sent to the Taxpayer.

16. On the date of the adjourned hearing on 6 January 2000, the Taxpayer did not appear at the appointed time at 9:30 am. When the Taxpayer did not turn up after 15 minutes of the appointed time, this Board commenced the hearing in his absence.

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17. This Board proceeded to consider the Taxpayer's request as contained in his letter of 15 December 1999.

18. Section 68(2D) of the IRO provides:

*'The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable, on the application of the appellant made by notice in writing addressed to the clerk to the Board and received by him at least seven days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorised representative.'*

19. By his letter to the clerk of the Board of 15 December 1999, the Taxpayer filed his notice in writing, which was more than seven days prior to the date fixed for the hearing of the appeal. He had therefore filed his notice within the time as specified under section 68(2D). However, the Board under the same provision is empowered to grant the application only if it is satisfied firstly that the Taxpayer will be or is outside Hong Kong on the date fixed for the hearing of the appeal and secondly that the Taxpayer is unlikely to be within Hong Kong within such period thereafter as the Board considers reasonable. We then carefully considered the Taxpayer's letter to this Board of 15 December 1999. By only saying that 'I shall not be able to attend the hearing you have scheduled due to my travelling schedule conflicting with the date of the hearing', the Taxpayer did not inform this Board as a matter of fact that he would be outside Hong Kong on the date of the hearing nor the time he would return to Hong Kong. In view of the Taxpayer's failure to satisfy us on the two conditions imposed under section 68(2D), we had no alternative but to refuse the Taxpayer's application.

20. Having rejected the Taxpayer's application, we then turned to consider the provision of section 68(2B) of the IRO which reads:

*'If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative, the Board may-*

- (a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;*
- (b) proceed to hear the appeal under subsection (2D); or*
- (c) dismiss the appeal.'*

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21. Since we could not proceed to hear the appeal under subsection (2D), we were only left with the other two alternatives under section 68(2B). As there was no evidence before us that the Taxpayer's failure to attend the hearing was due to illness or other reasonable cause, we could not postpone or adjourn the hearing under subsection (2B)(a). Thus we were only left with subsection (2B)(c), which was, to dismiss the appeal.

22. Accordingly, we hereby order this appeal to be dismissed.

23. While we make this order of dismissal, we would draw the Taxpayers attention to section 68(2C) of the IRO which provides that if an appeal has been dismissed by the Board under subsection (2B)(c), the Taxpayer may, within 30 days after the making of the order for dismissal by notice in writing addressed to the clerk to the Board, apply to the Board to review its order and the Board may, if satisfied that the Taxpayer's failure to attend at the meeting of the Board for the hearing of the appeal was due to sickness or any other reasonable cause, set aside the order for dismissal and proceed to hear the appeal.