

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D144/99**

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

Panel: Ronny Wong Fook Hum SC (chairman), Arthur Chan Ka Pui and Albert Yau Kai Cheong.

Date of hearing: 19 February 2000.

Date of decision: 21 March 2000.

The taxpayer purchased a property in 1991 and sold it in 1993. He had property dealings other than the Subject Property. The issue was whether the taxpayer was liable of profits tax in respect of the gains he made arising from his dealings with the Subject Property. The taxpayer gave different explanations as to his intention in the acquisition of the Subject Property and as to his reasons to its sale. He also gave a sworn testimony.

**Held**, dismissing the appeal :

1. The principles are clear. The Board has to be satisfied that the taxpayer had a settled intention to acquire the Subject Property as his long term investment and such intention is on the evidence ‘ genuinely held, realistic and realisable’ .
2. The Board totally rejected the taxpayer’s self-serving assertion that the Subject Property was purchased as his long term investment.
3. As the appeal was frivolous, the taxpayer was ordered to pay costs in the sum of \$2,000.

**Appeal dismissed and a cost of \$2,000 charged.**

Case referred to:

All Best Wishes Limited v CIR 3 HKTC 750

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Wong Yu Sui Ying for the Commissioner of Inland Revenue.

Taxpayer in person.

### **Decision:**

### **Background**

1. The issue in this appeal is whether the Taxpayer is liable for profits tax in respect of the gains he made arising from his dealings with a unit in District A [‘ the Subject Property’ ].
2. According to the Land Register in relation to the Subject Property, the Taxpayer purchased the same for \$2,310,600 by an agreement for sale and purchase dated 11 October 1991. The purchase was supported by an equitable mortgage in favour of a bank. The occupation permit in respect of the Subject Property was granted on 30 October 1992. He sold the Subject Property for \$3,705,000 by an agreement dated 22 June 1993.
3. The Taxpayer had property dealings other than the Subject Property. Those identified by the Revenue are summarised in Schedule I annexed to this decision. It will be seen that prior to the Subject Property, the Taxpayer dealt with four properties in District B. After he disposed of the Subject Property, he held at various times four properties in District C.
4. According to an employer’s return by an investment company dated 21 April 1997, the Taxpayer earned a total of \$6,290 by way of commission/fee during the period between 1 April 1992 to 31 March 1993.
5. The Taxpayer submitted a tax return dated 20 May 1994 in respect of the year of assessment 1993/94. He informed the Revenue that he was employed and had no income that year.

### **Correspondence with the Revenue prior to the hearing**

6. The Taxpayer gave the following explanations as to his intention in the acquisition of the Subject Property and as to his reasons leading to its sale:
  - (a) ‘ I want to have my Capital to be in the form of Property which I may live in by myself or to let to my relatives to live in. Due to condition change, mainly economic condition, I want to sell the capital and want to buy another one which may be bigger or smaller.’ [per letter dated 9 November 1996].

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- (b) The Subject Property was intended for 'self residence'. It was sold 'due to economic situation. I want to have more bank saving at this moment.' [per questionnaire dated 9 November 1996].
- (c) 'I like this CAPITAL very much. From my own memory I have let one of my friend to live in for three months free of charge i.e. I paid the electricity expense, the cooking gas expense, the management and rate etc.'. 'I sold the property because at that time I did not have enough money'. [per letter dated 27 February 1997].
- (d) 'I want to have more than one flat to live in. In order to enjoy life, I try to have more than one flat to live in ... I have arrange (sic) my female friend, not my wife, to live in (this is secret) ... In order to minimise the sorrow and unhappiness of losing my GIRL FRIEND, I indeeded (sic) to sold (sic) my flat ...' [per letter dated 15 July 1997].

7. The Taxpayer submitted to the Revenue billing issued by the Hongkong Electric Co Ltd. An account in respect of the Subject Property was opened on 28 October 1992. That account was closed on 15 July 1993. Minimal units were consumed between 19 March 1993 and 20 May 1993. 205 units (for \$158.04) and 232 units (for \$178.67) were consumed by 18 June 1993 and 15 July 1993.

### **Sworn testimony of the Taxpayer**

8. He left Government employment about ten years ago. Apart from acting as a photographer as a matter of hobby, he held no job. At all material times, his wife was a housewife with no income. They have a son born on 29 September 1989.

9. He had other property dealings apart from those outlined in Schedule I. He referred in particular to two flats. The first was a unit in District B. The second was a piece of property in District C which he purchased with his wife. He has three brothers. They shared in the acquisition of various properties. Some of those properties were not registered in his name.

10. The Subject Property is about 1,000 square feet in area. He did not intend to acquire such sizeable unit as his residence. His choice was however limited and the Subject Property was amongst the units offered by the developer. He intended to purchase the Subject Property as his residence as he longed to live in a flat with sea view.

11. After he picked the Subject Property, he realised that he could not afford the monthly instalments on his own. He therefore shared the Subject Property with his brother. He retained 75% whilst his brother took 25%. His brother eventually complained about the heavy instalment burden. He had to shoulder his brother's portion.

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12. He did not envisage any difficulty in meeting the monthly instalment of \$15,877.30. In any event, his parents were ready to help. He could not be specific about his parents' source of income. He speculated that they might have reaped profits from their share dealings or his brothers might have given them funds for their maintenance.

13. He tried to let out the Subject Property. Rental market for first hand property was poor.

14. He made no attempt to sell the Subject Property prior to issuance of the occupation permit. The market was on the rise. He could have cashed in easily had it been his intention to speculate.

15. He was in need of cash. He could not sell part of the Subject Property. This is the reason why after the sale of the Subject Property, he invested in much smaller units in District C. He could dispose of those smaller units much more easily.

16. He suggested that the Revenue could verify his case by making direct contact with his banker. He is however not prepared to pay any bank charge in order to obtain document for the advance of his case.

### **The applicable principles**

17. The principles are clear. We have to ascertain the intention of the Taxpayer at the time when the Subject Property was purchased. We have to be satisfied that he had a settled intention to acquire the Subject Property as his long term investment and such intention is on the evidence 'genuinely held, realistic and realisable'.

18. 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**

19. We take a very dim view as to the quality of the Taxpayer's testimony. His lack of affinity with the truth is only matched by the absence of any civic conscience on his part to contribute towards the Revenue of the community.

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20. We totally reject his self serving assertion that the Subject Property was purchased as his long term investment. He said he had been unemployed for a long time. He did not place any evidence before us as to his financial ability. As soon as he purchased the Subject Property, he said he had to look to his brother to share this sizeable flat. This is totally inconsistent with any settled intention to use the Subject Property as his own residence.

21. Wholly inconsistent explanations were given as to the reasons leading to the sale of the Subject Property. Sorrow arising from sudden departure of his girl friend and urgent need of cash were put forward at different stages of the proceedings.

22. We have no doubt that the Taxpayer was, at the material times, a regular trader of properties. Schedule I only sets out part of his dealings. Apart from his own residence, the units set out therein were his inventory or his stock in trade. He knew full well that he was trading in properties. On his own admission, he was unemployed for well over ten years. There is no evidence, apart from his property trading profits, of any independent source of income to support his family of three.

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

24. We are of the further view that this appeal is frivolous. We order the Taxpayer to pay costs in the sum of \$2,000.

**Schedule I**

**Property Transactions of the Taxpayer**

Property	Purchase			Sale		Period of ownership	Difference between the purchase and the sale price
	Date	Registered owner apart from the Taxpayer	Price	Date	Price		
Property 1, District B	31-3-1989		\$1,540,000	3-6-1991	\$2,450,000	2 years and 3 months	\$910,000
Property 2, District B	18-3-1991		\$1,880,000	28-6-1991	\$2,290,000	3 months	\$410,000
Property 3, District B	4-4-1991	with Ms D	\$1,880,000	5-6-1991	\$2,155,000	2 months	\$355,000
Property 4, District B	15-8-1991		\$2,750,000	23-5-1995	\$5,900,000	Over 3.5 years	\$3,150,000
Subject Property	11-10-1991		\$2,310,600	22-6-1993	\$3,705,000	About 1 year and 8 months	\$1,394,400
Property 5, District C	22-7-1993	Mr E and Mr F  No reference to the Taxpayer	\$1,450,000				
Property 6, District C	24-8-1993		\$1,455,000				
Property 7, District C	3-2-1994	with Mr F	\$1,640,000	18-8-1996	\$2,150,000	Over 2.5 years	\$510,000
Property 8, District C	4-2-1994		\$1,645,000	11-3-1996	\$1,850,000	Slightly over 2 years	\$205,000