

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D148/00

Profits tax – whether profits from the sale of a property assessable to profits tax – onus of proof resting upon taxpayers to displace the inference of trade arising from the rapid succession of purchase and sale – gross abuse of the appeal mechanism – section 68(4) and 68(9) of the Inland Revenue Ordinance (‘IRO’).

Panel: Ronny Wong Fook Hum SC (chairman), William Cheng Chuk Man and Michael Seto Chak Wah.

Date of hearing: 9 January 2001.

Date of decision: 24 March 2001.

This was an appeal by the taxpayers, a couple, against the relevant profits tax assessment relating to the sale of a property (‘the Property’). The Property was sold within six months of its purchase. The main issue was whether it was acquired by the taxpayers as a capital asset or a trading stock.

Held:

1. The taxpayer failed dismally to discharge the onus of proof resting upon them to displace the inference of trade arising from the rapid succession of purchase and sale.
2. The debit notes allegedly issued by a company for the decoration of the Property were not genuine. The taxpayer’s readiness to put forward such documents indicated that he was not a man of truth. The Board took a very dim view of the taxpayer’s attempt to mislead the Revenue by such alleged debit notes.
3. It was a gross abuse of the appeal mechanism when the taxpayer indicated that he did not want to appeal but was perturbed by the assessment which he was unable to pay.

Appeal dismissed and a cost of \$3,000 charged.

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Lau Fu Wah for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. The Taxpayers Mr A and Madam B are husband and wife. By a provisional agreement dated 28 January 1997, Mr A and Madam B purchased Property 1 in Housing Estate C for \$3,000,000. \$80,000 was payable upon signing of this provisional agreement. An additional \$220,000 was payable on 17 February 1997. The balance of \$2,700,000 was payable on completion scheduled on 3 April 1997.
2. By a facility letter dated 6 March 1997 and addressed to Mr A, Bank D granted a loan of \$2,100,000 in favour of Mr A and/or Madam B and/or Ms E and/or Mr F as borrowers and secured by Property 1. We do not know the relationship between Mr A and Madam B with the other named borrowers and the extent of interest of each of them in Property 1. The loan from Bank D was repayable by instalments commencing on 8 May 1997. The first instalment was \$15,442.20. Subsequent instalments were \$18,894.25 each.
3. By a provisional agreement dated 27 July 1997, Mr A and Madam B sold Property 1 for \$3,760,000. The issue before us is whether Mr A and Madam B are liable for profits tax on the gains they made as a result of their dealings with Property 1.
4. In correspondence between Mr A and the Revenue, Mr A asserted that:
 - (a) He was unemployed as from February 1997.
 - (b) He was residing at Property 2 at Housing Estate C. He wanted to sell Property 2 and reside in the smaller Property 1.
 - (c) He failed to sell Property 2 in view of its poor location.
 - (d) He spent about \$2,000,000 decorating Property 1. In support of this contention, he submitted debit notes issued by Company G and signed by one Mr H as evidence of the decorations effected on Property 1.
 - (e) Due to his failure to sell Property 2, he also offered Property 1 for sale. He succeeded in locating a purchaser for Property 1.
5. The Revenue made inquiries with Company G in relation to the debit notes tendered by Mr A in support of his case. Company G informed the Revenue that Mr H had never been their

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employee and Company G had never performed the work nor received the payments as depicted in those debit notes.

6. According to the return of Mr A and Madam B for the year of assessment 1996/97 dated 18 May 1997, their total income for the year of assessment 1996/97 was \$195,360.

7. Only Mr A appeared at the hearing before us. Mr A elected to make an unsworn statement in support of this appeal. He repeated what he told the Revenue as summarised in paragraph 4 above. He gave no explanation on the following:

- (a) The history of his ownership of Property 2.
- (b) The relationship among the four borrowers named in the facility from Bank D.
- (c) His financial capability to hold Property 1 on a long-term basis.
- (d) The nature of decorations effected on Property 1.
- (e) The genuineness of the debit notes from Company G.

8. We are of the view that the Taxpayers failed dismally to discharge the onus of proof resting upon them to displace the inference of trade arising from the rapid succession of purchase and sale. The debit notes allegedly issued by Company G are not genuine. Mr A's readiness to put forward such documents indicates that he is not a man of truth. We dismiss the appeal of the Taxpayers.

9. We invited Mr A to make representations as to why this Board should not exercise its power under section 68(9) of the IRO and order the Taxpayers to pay costs not exceeding \$5,000. Mr A told us that he did not want to appeal but was perturbed by the assessment which he was unable to pay. We are of the opinion that this is a gross abuse of the appeal mechanism. We also take a very dim view of Mr A's attempt to mislead the Revenue by the alleged debit notes from Company G. We order the Taxpayer's to pay costs in the sum of \$3,000.