

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D157/01**

**Profits tax** – property – investment or trade.

Panel: Ronny Wong Fook Hum SC (chairman), Roger Leung Wai Man and Francis Lui Yiu Tung.

Date of hearing: 6 October 2001.

Date of decision: 20 February 2002.

The appellant bought and sold seven properties between 1989 and 1995.

The issue is whether two of the properties, that is, Properties 4 and 5, were bought with an intention to trade.

**Held:**

1. The Board found the appellant did not buy Property 4 as capital asset. He did not sell it because of the incinerator nearby and the flat had been flooded.
2. The Board did not accept the appellant bought Property 5 as capital asset but sold it only because he lost confidence in Hong Kong and decided to emigrate to another country.

**Appeal dismissed.**

Cases referred to:

Simmons v IRC (1980) 53 TC 461

All Best Wishes Ltd v CIR (1992) 3 HKTC 750

Leung Wing Chi for the Commissioner of Inland Revenue.  
Taxpayer in person.

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### **Decision:**

### **Background**

1. The Appellants ('Mr and Mrs A' respectively) married each other in 1979. They gave birth to their son on 27 August 1979 and their daughter on 13 December 1982.
2. Mr A, an accountant with Government Department B, received his education in Country C. He also acquired his nationality of Country C prior to his return to Hong Kong in 1977.
3. In about May 1989, Mr A sold his then residence at a flat at Housing Estate D ('Property 1') for \$1,500,000. He then moved in with his parents at a flat at Housing Estate E ('Property 2'). Property 2 is about 1,400 square feet in area.
4. On or about 15 March 1991, Mr and Mrs A acquired a flat at Housing Estate F ('Property 3') through novation of their vendors' contract with the developer. Mr and Mrs A maintain that they paid their vendor a cash premium of \$1,700,000 in order to secure Property 3. Property 3 is about 785 square feet in area.
5. By a provisional agreement dated 5 September 1992, Mr and Mrs A sold Property 3 for \$3,290,000.
6. By a provisional agreement dated 16 January 1993, Mr and Mrs A purchased another flat at Housing Estate F ('Property 4') for \$3,150,000. Property 4 is about 910 square feet in area. It is located in a block right above an MTR exit. On or about 17 February 1993, Mr A obtained a loan of \$1,500,000 from Bank G on security of Property 4. That loan was repayable by 240 monthly instalments of \$12,083.9 each.
7. By a provisional agreement for sale and purchase dated 14 June 1993, Mr and Mrs A sold Property 4 for \$4,050,000.
8. By a provisional agreement for sale and purchase dated 14 August 1993, Mr and Mrs A purchased a flat at Housing Estate H ('Property 5') for \$5,369,000. Property 5 is about 1,068 square feet in area.
9. In about June 1994, Mr A obtained approval from Director of Accounting Services for the grant of a downpayment loan of \$600,000 to finance the purchase of Property 5. The occupation permit in respect of Property 5 was issued on 23 August 1994. Without taking an assignment of that flat, Mr and Mrs A sold the same for \$6,270,000 by a provisional agreement

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dated 8 October 1994. He withdrew his application for the downpayment loan by memo dated 5 December 1994.

10. On or about 10 February 1995, Mrs A purchased a flat in Country C ('Property 6'). Possession of Property 6 was obtained in about September 1996.

11. By an agreement for sale and purchase dated 15 March 1995, Mr and Mrs A purchased a flat at Housing Estate I ('Property 7') for \$4,597,700. This purchase was financed in part by a loan of \$2,300,000 extended by Bank J on 1 April 1995. That loan was repayable by 240 monthly instalments of \$22,577.8 each. Commencing from 19 April 1995, Mr A also obtained a loan of \$690,000 from the Government's home purchase scheme. The occupation permit in respect of Property 7 was granted on 13 September 1995. It has since become their family residence in Hong Kong.

12. In another appeal previously brought before the Board of Review, the Board considered Mr and Mrs A's liability in respect of the gains they made from Property 3. In its decision dated 10 September 1998, the Board observed that 'We have very little evidence from [Mr A] as to why he and his wife believed that [Property 3] would be suitable for their use as a family home. We note also that there was scant evidence on what the Appellants did in and after June 1992 to make the flat ready for occupation'. The Board was not satisfied on a balance of probabilities that they purchased Property 3 with the intention of residing in that flat.

13. The issue before us relates to the taxability or otherwise of the profits made by Mr and Mrs A from Property 4 and Property 5.

### **Case of Mr and Mrs A**

14. Mr A appeared before us. He elected to give unsworn viva voce evidence before us. He further supported his appeal by a written submission received by this Board on 17 October 2001.

15. According to Mr A:

- (a) After selling Property 1, his family moved into Property 2. He deferred his decision to purchase another family home by virtue of the events on 4 June 1989. He looked after his parents' flat as they were spending most of their time with his sister in Country K.
- (b) He purchased Property 3 on the recommendation of an estate agent. He was swayed by the sea view from that unit. Property 3 was in fact too small for his family. He wanted to keep that flat because of its view. He sold the same on a chance visit by the intending purchaser who was also a Government servant

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looking for accommodation.

- (c) He wanted to purchase as replacement a flat in the block of Property 4 of Housing Estate F. A unit became available shortly before Chinese New Year in 1993. He could not gain entry into the unit offered as no key was then available. He inspected a similar unit in the same block.
- (d) After his purchase of Property 4, he discovered that the flat had been flooded by toilet water and the developer had to rectify the damage by replacing the wooden floor. He also observed an incinerator nearby. He was unhappy with the flat and wanted to swap for another unit. He was also on the verge of promotion and could therefore afford a better unit. He disposed of Property 4 in these circumstances.
- (e) Property prices were on the rise. He was anxious to secure a new unit. He tried various sites but was unsuccessful in the ballots. He eventually purchased Property 5 'because of the beautiful showroom exhibited by the developer, and we had confidence about their flats'.
- (f) Property 5 was sold because of his lack of confidence on the future of Hong Kong after 1997. He and his in-laws (five families in all) decided to emigrate to Country C. They purchased five units in Country C in 1994 with the view of moving to that country on a permanent basis in 1996.
- (g) He left for Country C with his son in August 1996. They went into possession of Property 6. He was however dissatisfied with life in Country C. As he already holds the citizenship of Country C, he decided he should continue to work with the Hong Kong Government till his retirement.

### **The law**

16. The intention of Mr and Mrs A at the time of acquisition of Property 4 and Property 5 is crucial in determining whether those units were capital assets or trading assets. As stated by Lord Wilberforce in Simmons v IRC (1980) 53 TC 461

*'Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?'*

17. An intention to hold property as a capital investment must be definite. The stated intention of the taxpayer is not decisive. Actual intention can only be determined objectively. In All

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Best Wishes Ltd v CIR (1992) 3 HKTC 750 Mortimer J gave the following guidance:

*‘ The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence ... 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’.*

18. Under section 68(4) of the Inland Revenue Ordinance (‘IRO’), the onus of proving the assessment appealed against is excessive or incorrect is on the appellant. In order to discharge this onus, it is incumbent on the Appellants to place before this Board supporting materials in support of his assertions. Although the standard of proof is one of balance of probabilities, the Appellants must ensure that the balance be tilted in their favour by furnishing the Board with primary evidence that is within their easy access.

### **Our decision**

19. Property 4 is located in a complex well known to Mr and Mrs A. They acquired Property 3 in March 1991. Mr A told us that he looked for flats in the block of Property 4. The presence of the incinerator should have been apparent to Mr and Mrs A had it been their genuine intention to acquire the unit as their family home. This flat was purchased on 16 January 1993 and sold on 14 June 1993. There is no evidence before us in relation to the promotion prospect of Mr A at the time of the acquisition. It is also unclear to us as to why Mr A should find the replacement floor by the developer unsatisfactory. The purchaser from Mr and Mrs A informed the Revenue that she could not find any water stain after her purchase nor any trace of floor replacement. Mr A explained that repair works were undertaken by him prior to his disposing of Property 4. He did not produce any evidence in support of such repair. In these circumstances, we are of the view that Property 4 was not purchased as capital asset.

20. We have much greater difficulty in relation to property 5. It was purchased on 14 August 1993. It was not sold until more than a year later on 8 October 1994. This purchase was supported in part by a downpayment loan from the Government. It would have been helpful for Mr A to place before us his correspondence with the Government in relation to the grant of this loan. His representations to the Government as to his intention are highly relevant. What turned the scale against Mr and Mrs A is the vague evidence before us as to their decision to emigrate to Country C.

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Was that in contemplation when Property 5 was purchased in August 1993? What step did Mr A take in relation to his employment with the Government in anticipation of the move? The disposal was made shortly after issuance of the occupation permit and without taking an assignment. Mr A asserted that the purchase of Property 6 was made in 1994. The evidence before us suggests that the agreement was not concluded by Mrs A until February 1995. We find it difficult to reconcile this date with the purchase of Property 7 on 15 March 1995. There are too many gaps in Mr A's evidence. We find it unsafe to rely on his bare assertions which have not been tested by cross-examination. For these reasons, we are of the view that Mr A failed to discharge the onus of proof under section 68(4) of the IRO.

21. Given the previous findings by this Board in relation to Property 3, it is regrettable that Mr A did not properly prepare his appeal in relation to Property 4 and Property 5.

22. For these reasons, we dismiss the appeal of Mr and Mrs A.