

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D25/95

**Profits tax** – purchase and sale of property – whether subject to profits tax.

Panel: Maxine Kwok Li Yuen Kwan (chairman), Sydney Leong Siu Wing and Andrew Wang Wei Hung.

Dates of hearing: 7 and 20 March 1995.

Date of decision: 7 June 1995.

The taxpayer purchased and sold a number of properties. The taxpayer submitted that the profits were capital profit and not assessable to tax.

Held:

On the evidence before it the Board was satisfied that the profit should be assessed to profits tax.

**Appeal partly allowed.**

Cases referred to:

Lionel Simmons Properties Ltd v IRC 53 TC 461  
Cunliffe v Goodman [1950] ALL ER 720  
Hillerns and Fowler v Murray 17 TC 77

Mei Yin for the Commissioner of Inland Revenue.

Taxpayer represented by her husband.

**Decision:**

The Taxpayer appealed against the determination of the Commissioner of Inland Revenue dated 15 September 1994 wherein the profits tax for the year of assessment 1991/92 was increased from \$31,350 to \$36,173 arising from the sale of two properties, and the profits tax for the year of assessment 1992/93 was reduced from \$14,550 to \$7,950 arising from the sale of the third property. The facts are as follows:

1. At all relevant times, the Taxpayer has been residing at a temporary housing area.

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2. On 5 July 1991, the Taxpayer entered into a provisional sale and purchase agreement for the purchase Property A at \$1,022,000. On 13 July 1991, the Taxpayer entered into a provisional sale and purchase agreement for the sale of Property A at \$1,150,000.
3. On 20 July 1991, the Taxpayer entered into a provisional sale and purchase agreement for the purchase of Property B at \$1,280,000. On 8 September 1991, the Taxpayer entered into a provisional sale and purchase agreement for the sale of Property B at \$1,500,000.
4. On 9 September 1991, the Taxpayer entered into a provisional sale and purchase agreement for the purchase of Property C at \$1,170,000. On 15 July 1992, the Taxpayer entered into a provisional sale and purchase agreement for the sale of Property C at \$1,350,000.
5. On 15 September 1991, the Taxpayer entered into a provisional sale and purchase agreement for the purchase of Property D at \$1,312,000. On 10 November 1993, the Taxpayer entered into a provisional sale and purchase agreement for the sale of Property D at \$1,370,000.
6. In reply to an enquiry on Property A from the assessor, the Taxpayer by letter dated 8 January 1993, stated the reason for selling Property A being that there was leakage of water on the ceiling of the bathroom and that the Taxpayer was not allowed to inspect the property before purchase.
7. By letter dated 22 March 1993, the Taxpayer stated that the usage of the above four properties was for own residence, with the following reasons for sale of Properties A, B and C:

Property A	water leakage in the bathroom
Property B	leakage in master bedroom
Property C	too noisy at lower floor

8. The assessor considered that the nature of acquisition and resale of Properties A, B and C amounted to trade and issued profits tax returns to the Taxpayer for compliance. The Taxpayer failed to file returns within the stipulated period. On 1 February 1994, the assessor raised on the Taxpayer the following profits tax assessments for the years of assessment stated below in the absence of a return:

1991/92  
estimated profits at \$209,000                      tax payable thereon at \$31,350

1992/93  
estimated profits at \$97,000                      tax payable thereon at \$14,550

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9. By a notice dated 1 March 1994, the Taxpayer objected to the assessments and on 14 March 1994 submitted returns declaring that there was no trading and no assessable profits for the years of assessment 1991/92 and 1992/93. The reasons stated in the notice are as follows:
  - (1) The properties were purchased as homes, and used as a hedge against inflation
  - (2) Property A was sold because of structural defects
  - (3) Property B was sold because cracks were found on the walls in the rooms just before moving in
  - (4) Property C was sold after the Taxpayer's relative vacated the premises in mid-1992.
  - (5) Property D was sold because the water pipe had burst and no repair was made after 6 months
10. By the determination of the Commissioner of Inland Revenue dated 15 September 1994, the Taxpayer's objection was rejected. The properties were treated as having been acquired as trading stock, and the gains on disposal were chargeable to revised profits tax of \$36,173 for the year of assessment 1991/92 and \$7,950 for the year of assessment 1992/93. In respect of the expenses claimed, the decoration costs of \$100,000 and \$58,882 were disallowed, and the legal fee of \$11,534 for Property B being the balance of purchase price was therefore also disallowed.
11. By letter of 5 October 1994, the Taxpayer filed notice of appeal with the Board of Review against the determination of the Commissioner on the following grounds:
  - (1) that the receipt for decoration expenses in the sum of \$100,500 for Property B was mislaid and now submitted for reassessment;
  - (2) that the legal fees in the sum of \$5,375 for Property A not previously claimed was also submitted for reassessment.

At the hearing of the appeal, the Taxpayer elected not to give evidence, and designated Mr X, the Taxpayer's husband, as her authorized representative. On the two points raised in the Taxpayer's statement of the grounds of appeal of 5 October 1994, Mr X stated that the Taxpayer did not wish to be reassessed for the decoration fee of \$100,500, while the representative for the Commissioner conceded the Taxpayer's claim for legal fees of \$5,375.

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The Board then consented to allow Mr X to make submission relying on other grounds to support the Taxpayer's claim that all the properties purchased during the period from 1991 to 1994 were for self-use:

1. that the Taxpayer could not have been trading in property while living in temporary housing area at the same time;
2. that the Taxpayer followed common practice in rising market of purchasing property without inspection;
3. that the defects were true;
4. that it was the Taxpayer's continuous intention to purchase property for residence.

In addition, Mr X gave further explanation as to the nature of the receipt for decoration fee of \$58,882 for Property C, made comments on the submission of the representative of the Commissioner, and answered questions posed by the Board.

The representative for the Commissioner submitted that the frequency of the transactions when considered together with objective facts supported an intention of trading, and that the claim for having incurred decoration fee of \$58,882 was not substantiated. The representative for the Commissioner referred to the following authorities in her submission on law:

Lionel Simmons Properties Ltd v IRC 53 TC 461

Cunliffe v Goodman [1950] ALL ER 720

Hillerns and Fowler v Murray 17 TC 77

She also set out the issues under appeal, referred to the relevant statutory provisions, and made submission on the relevant facts.

Having heard the parties and having considered all the facts and submissions, the Board finds that the Taxpayer has not discharged the onus under section 68(4) of proving on a balance of probabilities that the intention at the time of purchase of Properties A, B and C under appeal was for use as own permanent residence.

In arriving at this decision, the Board gave consideration in particular to the following factors:

1. Due weight was given to the Taxpayer's allegation of limited finances, undesirable home environment, common practice in sale and purchase of properties, own inexperience, and net loss in sale of Properties C and D.

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2. The Taxpayer purchased 4 properties between 5 July 1991 and 15 September 1991, all within a period of two and a half months. Properties A, B and C were disposed of within 8 days, less than 2 months, less than 11 months, and less than 2 years 2 months respectively. This is consistent with the nature of trade.
3. In spite of the discomfort of living in temporary housing area as alleged by Mr X, according to him, the Taxpayer has not resided in any of the properties under appeal except for a few nights at Property C. This is consistent with holding the properties as trading stock.
4. The period of ownership of each of these properties can be considered as more short term than long term, and is consistent with buying the properties for disposal as trading stock.
5. The actions of the Taxpayer as alleged by the Taxpayer of buying Property A without inspection, buying Property D within a week of buying Property C instead of repaying a debt of \$100,000 to the relative, and holding two properties at the same time, all are consistent with the nature of trade.

However, the Board is satisfied that the claim for decoration fee of \$58,882 were properly incurred by the Taxpayer in the production of profits chargeable to tax.

For the reasons given, the Board confirms the decision of the Commissioner in treating Property A, B and C as having been acquired as trading stock, and the gains on disposal to be chargeable to profits tax, and direct that Taxpayer's profits tax for the year of assessment 1991/92 be revised to \$235,452 with tax payable thereon of \$35,317; and that the Taxpayer's profits tax for the year of assessment 1992/93 be revised to a loss of \$5,882.