

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D26/01

Profits tax – property resold within short time – whether trade.

Panel: Ronny Wong Fook Hum SC (chairman), Albert Yau Kai Cheong and William Zao Sing Tsun.

Date of hearing: 20 March 2001.

Date of decision: 8 May 2001.

The taxpayers were the only two shareholders of Company C. On 6 December 1996, Company C bought a flat for \$1,200,000. On 9 December 1996, they sold their shares in Company C for \$1,260,000.

The main issue is whether they were liable for profits tax in respect of their gain.

Held:

The taxpayers' disposal of their shares within a few days suggests that they were embarking upon a trade. Thus they were liable for profits tax for their gain.

Appeal dismissed.

Cases referred to:

Lionel Simmons Properties Ltd v The Commissioner of Inland Revenue [1980]

53 TC 461

All Best Wishes Limited v CIR 3 HKTC 750

Tse Yuk Yip for the Commissioner of Inland Revenue.

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Taxpayers in person.

Decision:

1. Mr A, Taxpayer in B/R 171/00, is the husband of Madam B (' Mrs A '), Taxpayer in B/R 172/00. The issues in both appeals are identical. Mrs A authorised Mr A to conduct her appeal.
2. On 28 November 1996, Mr and Mrs A each subscribed for one share in Company C.
3. On or about 2 December 1996, Mr and Mrs A submitted in the name of Company C an application to purchase a unit in Housing Estate D. The developer of Housing Estate D was then offering to the public a total of 36 units. Each application had to be accompanied by a cashier order of \$1,200,000 and the priority to be afforded to each application was to be determined by the drawing of lots. The results of such drawing of lots were published on 6 December 1996. Company C secured the first priority.
4. By an agreement dated 6 December 1996, the first priority was sold to Mr E and Madam F for \$1,260,000. By instruments of transfer dated 9 December 1996, Mr and Mrs A each transferred one share in Company C to Mr E and Madam F in consideration of \$630,000. The issue before us is whether they are liable for profits tax in respect of the gains they made in dealing with their Company C shares.
5. Mr and Mrs A contend that they are not liable for profits tax as it was their original intention to jointly invest with an uncle in the purchase of a unit in Housing Estate D. They disposed of their interests in Company C when their uncle refused to proceed with the investment.
6. Mr A gave sworn testimony before us. He told us that:
 - (a) In about August or September 1996, he had a brief discussion with an uncle of his on the possibility of a joint investment in Housing Estate D. No precise figure was mentioned and the discussion was not in depth. No oral agreement was reached. He was however sure that his uncle could come up with one to two million dollars. He refused to identify this uncle of his despite numerous previous requests by the Revenue on the ground that his uncle would not like to be questioned by the Revenue. He did however indicate that his uncle traded in precious stones.
 - (b) He did not earmark any unit in Housing Estate D as the subject matter of his purchase. His sole intention was to submit an application. He did not anticipate such early priority.

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- (c) Estate agents woke him up in the early hours of 6 December 1996. He was offered \$1,000,000 for his priority. He countered asking whether the offer could be raised to \$1,200,000. Other estate agents told him that he could fetch \$1,400,000.
- (d) He visited his uncle at about 10 a.m. on 6 December 1996. He invited his uncle to subscribe for shares in Company C on the basis that the company was then worth \$1,200,000 to \$1,400,000. His uncle was evasive. He left without any agreement.
- (e) He asserted that he had never speculated in real estate and he is still holding various properties for rental purpose.

7. In order for a tax liability to arise, a profit must be derived in Hong Kong from a trade, profession or business carried on in Hong Kong. Section 2(1) of the Inland Revenue Ordinance ('IRO') defines 'trade' to include every '*adventure and concern in the nature of trade*'. The facts of each case must be looked at to see whether a gain was made in the operation of business in carrying out a scheme for profit-making.

8. In Lionel Simmons Properties Ltd v The Commissioner of Inland Revenue [1980] 53 TC 461 at 491, Lord Wilberforce pointed out that trading requires an intention to trade and the question to be asked is whether this intention existed at the time of the acquisition of the asset. We therefore have to ascertain the intention of Mr and Mrs A in early December 1996. We have to be satisfied that their intention was to purchase a unit in Housing Estate D for long term investment and such intention is on the evidence 'genuinely held, realistic and realisable'.

9. 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.'

10. The subject matter in these appeals is the shares in Company C. Those shares carry with them the first priority in selecting a unit in Housing Estate D. The Taxpayers disposed of their shares within a period of ten days. The evidence of Mr A in relation to his discussion with his uncle is vague and inconclusive. We find that there was no such discussion. We further find that there was no genuine intention to acquire any unit in Housing Estate D. He did not identify any unit as the subject matter of his purchase and there is little doubt that he could not support a purchase on his own. Mr and Mrs A had simply embarked upon a scheme to secure an early priority and to reap the profit arising from such priority.

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11. We have no doubt that Mr and Mrs A are correctly assessed and we dismiss their appeals.