

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D30/84

Board of Review:

William Turnbull, *Chairman*; Chan Cheuk-yuen, Raphael and Karl Kwok Chi-leung, *Members*.

12 March 1985.

Profits Tax—trading of shares—**CIR v. Dr. Chang Liang Jen** (1977) HKTC 975 considered.

The Appellant appealed against the assessment for the year 1980/81 which related to the sale of certain shares in three public companies from which she made a profit or gain over HK\$1.3 million. The Appellant had for the years 1972/73 to 1976/77 conceded that she had embarked on share trading by signing the agreed Assets Betterment Statements accepting liability to tax and paying tax assessed thereon. The majority of the shares sold in 1980/81 were acquired during those years.

Held:

The Appellant failed to discharge the onus of proof. On the facts, there was no strong evidence of change of intention and it would be hard to say that the transactions were anything other than share trading transactions.

Appeal dismissed.

Luk Nai Man for the Commissioner of Inland Revenue.

Brian W. K. Chan of Messrs. Fan, Chan & Co. for the Appellant.

Reasons:

The Appellant is a lady who it is claimed was carrying on a business in the trading of shares. The case has a long and complex history going back very many years. The assessment appealed against was for the year 1980/81 and related to the sale by the Appellant in the year in question of certain shares in three public companies from which she made a profit or gain totalling HK\$1,361,228.13. By far the largest part of this profit or gain arose on the sale of certain shares in the Hong Kong & Kowloon Wharf and Godown Co., Ltd. amounting to HK\$1,228,688.48. The balance of the profit or gain arose from the sale of some shares in Trafalgar Housing Limited and in the Hong Kong Land Company Limited. The Appellant herself gave evidence before the Board of Review. She explained that the Wharf Company shares were shares which she had held for some years. In the middle of 1980 an unexpected offer to acquire these Wharf Company shares was made at a most attractive price. Believing that the company would cease to be a public company she accepted the offer and subsequently it transpired that the company was not completely taken over by a third party. As it remained a public company she decided to re-acquire shares in

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the company and she subsequently purchased during the tax year in question considerably more shares than she had sold or transferred.

The Trafalgar Housing Limited were bought as part of the Appellant's policy of investing surplus cash in good quality (blue chip) shares as a hedge against inflation. Having acquired these shares she then learnt that Trafalgar Housing Limited was not considered to be a high quality risk free investment and accordingly she disposed of the shares realising a profit or gain.

The Hong Kong Land Company Limited shares were sold because the Appellant said she needed the money. She confirmed on a number of occasions that when she purchased shares she only did so to invest surplus moneys with a view to hedge against inflation and preserving the value of her money.

The Board found the Appellant to be a truthful witness and on the basis of what she said would have had no hesitation in finding in her favour. Unfortunately for the Appellant those were not the entire facts before the Board. For reasons not explained the Commissioner investigated the affairs of the Appellant at first during the years 1964/65 to 1970/71 and subsequently for the years 1971/72 to 1976/77. Because of the lack of financial records asset betterment statements were prepared leading ultimately to assessments to tax. The profits assessed as a result of the assets betterment statements included profits arising from the sale of quoted securities in Hong Kong and the Appellant signed statements accepting liability to tax on the basis that the profits arose from share trading activities conducted by her. She stated that she had never admitted that she did carry on such trading activities and had always maintained that it was her policy to invest surplus moneys from time to time in quoted blue chip shares as capital investments to preserve the value of her money.

This appeal is unsatisfactory when read in the light of the decision of the Supreme Court (on appeal from the Board of Review) in **CIR v. Dr. Chang Liang-Jen** (1977) HK TC 975. In that case the Commissioner attempted to upset a decision of the Board of Review that the Appellant was not carrying on business in share trading. If the activities of Dr. Chang did not constitute trading in shares then the isolated transactions of the Appellant in this case could hardly constitute share trading. The problem arises because of the statements which the Appellant signed as a result of the asset betterment statement enquiries instigated by the Commissioner. Whilst it is apparent from the face of the agreed note of interview and the evidence given by the Appellant that the Appellant never really accepted the claim that she was trading in shares the fact is that she agreed to settle the matter with the Commissioner on the basis that she was so trading and she proceeded to pay tax on this basis. She could and should then have appealed to this Board of Review if she really felt and considered that she was not trading in shares.

The basis of the case of the Commissioner can be summarized by saying that the Commissioner considered that the Appellant was a habitual trader in shares all of whose subsequent activities were tainted by this fact. Although the Appellant had totally ceased

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any share trading activities for two years the Commissioner maintained that this did not affect the nature of her activities and that she was still trading in shares.

With some reluctance the Board of Review finds in favour of the Commissioner and dismisses this appeal. The onus of proof is clearly placed on the Appellant by section 68(4) of the Ordinance and the Board finds that the Appellant has failed to satisfy this onus of proof.

It is not possible to totally disregard the fact that for the years 1972/73 to 1976/77 the Appellant had conceded, albeit reluctantly, that she was liable to pay tax in respect of share trading profits and had proceeded to do so. Had she appealed at that time it may be that the Commissioner would have been proved to be wrong but the fact is that she failed to do so and accepted that she was liable to be taxed on trading profits. The Wharf Company shares which were sold had been acquired during the period of time when the Appellant had been taxed as a share trader and had constituted part of her stock in trade at that time. Thus at the time of acquisition of those shares it must be inferred that the Appellant had the intention of trading in those shares. There is good legal authority for the statement that tax payers may change their intention but strong evidence of such change of intention is necessary. In this case there is no such strong evidence of change of intention. The Appellant maintained that as she had never traded in shares a change of intention could not arise. Unfortunately for the Appellant she had, rightly or wrongly, conceded that she had embarked on share trading by signing the agreed Assets Betterment Statement and paying tax assessed thereon. These facts cannot be ignored. It is not true to say "once a trader, always a trader;" but where an asset has been acquired as stock in trade and conceded so to be, there must be some clear evidence that the asset has become a capital asset.

In this case there is no such evidence but only the fact that the asset was held for some time before sale.

On the assumption that the Appellant had previously traded in shares and that the profit arising from the Wharf Company shares was a trading profit it would be artificial to attempt to differentiate the profit arising on the sale of the Trafalgar shares and the Hong Kong Land shares. The Trafalgar shares were purchased at the end of 1979 and sold some six to twelve months later in 1980 on various dates. The Hong Kong Land shares were purchased in 1980 and sold a few months later. Looked at objectively and in the light of the history of the Appellant it would be hard to say that these transactions were anything other than share trading transactions.

As mentioned above, on the evidence before the Board and with some reluctance the Board decides that the Appellant has failed to discharge the onus of proof placed upon her and dismisses the appeal.