

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D30/98

Profits tax – purchase and sale of residential property under construction – whether profits derived from the sale of a property assessable to profits tax – intention at the time of acquisition – whether quick sale indicative of an intention to trade

Panel: Robert Wei Wen Nam SC (chairman), Raphael Chan Cheuk Yuen and William Tsui Hing Chuen.

Dates of hearing: 27 February and 6 March 1998.

Date of decision: 29 May 1998.

The taxpayer bought Property H by a purchase agreement dated 20 February 1991. Property H was already completed at the time of purchase, but occupation permit was yet to be issued. The taxpayer sold Property H as confirmor and bought Property L. The sale of the Property H was assessed as a trading means.

The taxpayer's case was that, (1) the intention for the purchase of Property H was to use it as own residence; (2) the subsequent sale of the Property H was due to the overstated usable area., irregular interior floor area and unpunctual delivery of vacant possession; (3) Property H did not have parking space while Property L had; (4) the taxpayer could then live with her son in the same estate by the sale of Property H and the purchase of Property L, so that they would be close to each other and could take care of each other and share the service of a maid and cut expenses on food; (5) Property H was developed by Company N and properties developed by that company had limited appreciation and were not worth short-term speculation; (6) Property H was sold and the proceeds of sale were used to purchases Property L which was developed by Company O and was used as self-residence; and (7) the taxpayer and her husband were discriminated and treated unfairly by the Revenue because they had been property agents.

Having heard and observed the evidence given by the taxpayer and her husband, the Board find that the taxpayer acquired Property H for resale at a profit. The Board was unable to accept the taxpayer's evidences to their intention towards the Property H at the time of acquisition.

Held:

1. The question for this appeal is what was the intention of the taxpayer at the time of the acquisition of the property. If the intention was to dispose of it at profit, the property was a trading asset, and the profit arising from the

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subsequent sale is a trading profit and is subject to profits tax. On the other hand, if the property was acquired as a permanent or long-term investment, the profit arising from the subsequent sale is a capital gain and is not subject to profits tax (Lionel Simmons Properties Ltd (In Liquidation) and Others v CIR 53 TC 461 at 491 applied).

2. Under section 68(4) of the Inland Revenue Ordinance, the onus is on the taxpayer to prove that the assessment is excessive or incorrect and for that purpose to prove that the property was acquired with the intention of holding it as a permanent or long-term investment.
3. Intention is a question of fact. The stated intention of the taxpayer cannot be decisive. Intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done at the time, before and after. Often it is rightly said that actions speak louder than words (All Best Wishes Ltd v CIR 3 HKTC 750 at 771 applied).
4. Unless the quick sale is satisfactorily explained away, the quick sale is inconsistent with the taxpayer's stated long-term-investment intention. The proceeds of sale of Property H were used to purchase another Property L which was used as residence does not necessarily show that at the time of purchase of the Property H, the taxpayer had an intention to use the Property H as residence.
5. Since the reason of no car parking space at Property H was an additional reason in the grounds of appeal and the reason of desire to live in same estate as the son was never mentioned in the taxpayer's correspondence with the Revenue during the objection stage, the Board found that these reasons were afterthought and declined to give weight to them.
6. On the evidence, the Board found that the taxpayer had not discharged the onus of proving that she acquired the property for use at residence.

Appeal dismissed.

Cases referred to:

Lionel Simmons Properties Ltd (In Liquidation) and Others v CIR 53 TC 461
All Best Wishes Ltd v CIR 3 HKTC 750

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

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Nature of appeal

1. This is an appeal by Mrs X (the Taxpayer) against the profits tax assessment for the year of assessment 1991/92 raised on her in respect of the profit derived by her from the sale of a property (Property H). She contends that the profit is not subject to profits tax.

Facts agreed or not in dispute

2. Since the year of assessment 1989/90, the Taxpayer has been employed by a property agency company.

3. The Taxpayer's husband, Mr X, was the proprietor of two property agency businesses. The first agency commenced business on 16 July 1990 and ceased business on 1 September 1991, while the second agency commenced business on 8 July 1991 and ceased business on 31 January 1994.

4. During the years of assessment 1988/89 to 1990/91, the Taxpayer sold the following properties:

Location	Purchase		Sale	
	Date	Price \$	Date	Price \$
Property A	April 1988	551,000	25-5-1988	600,000
Property B	May 1988	358,000	17-6-1988	380,000
Property C	2-9-1988	780,000	20-12-1988	880,000
Property D	6-7-1988	420,000	31-5-1989	650,000
Property E	January 1989	1,330,000	22-4-1989	1,520,000
Property F	7-2-1990	71,250	9-2-1991	89,000
Property G	28-6-1990	500,000	30-8-1990	535,000

Note: Properties A, B and E were sold by the Taxpayer as confirmor.

5. The Taxpayer offered the profits from the sales of Properties A, B, C and G for assessment to profits tax. The assessor conceded that the profit from the sale of Property D was not assessable. On the other hand the Taxpayer subsequently agreed that the profit from the sale of Property E was assessable. The Taxpayer had also objected against the assessment of the profit from the sale of Property F. However the objection was invalid as it was not lodged within the statutory time limit.

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6. During the year of assessment 1991/92, the Taxpayer sold the following properties:

Location	Purchase			Sale		
	Date of purchase agreement	Date of assignment	Price \$	Date of sale agreement	Date of assignment	Price \$
Property H	20-2-1991	-	1,668,700	3-8-1991	26-10-1991	2,380,000
Property I	16-7-1991	-	720,000	14-8-1991	10-9-1991	818,000
Property J	28-8-1991	9-9-1991	753,000	25-9-1991	30-10-1991	865,000

7. The Taxpayer sold Properties H and I as confirmor.

8. In her profits tax return for the year of assessment 1991/92, the Taxpayer did not disclose that she had sold Properties H, I and J during the year. Upon the assessor's inquiry, the Taxpayer reported that she had made the following profits from the sale of those properties:

	Property H \$	Property I \$	Property J \$
Selling price	2,380,000	818,000	865,000
Purchase price	<u>1,668,700</u>	<u>720,000</u>	<u>753,000</u>
Gross profit	711,300	98,000	112,000
Expenses –			
Solicitor's fees and stamp duty	11,170	4,668	16,988
Instalments for mortgage loan	105,578		6,950
Penalty for early repayment	14,086		8,888
Insurance and miscellaneous	3,141		
Agent's commission		7,200	7,530
Net profit	<u>577,325</u>	<u>86,132</u>	<u>71,644</u>

9. In a letter dated 29 September 1993 to the assessor, the Taxpayer gave the following explanations for the purchase and sale of Property H:

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- (a) ‘When I first purchased Property H, I supposed to use it as own residence with my family; but as I discovered later the flat was not an ideal one mainly due to (i) its overstated actual usable area; (ii) irregular interior floor area; (iii) late and unpunctual delivery of vacant possession of the flat which was previously supposed to have occupation permit in June/July 1992, but such permit was postponed and there was no sign indicating exact time when the permit would be available.’
- (b) ‘As my son was going to marry and we rather urgently need a place for his new home; it so happened that we found a flat at Private Housing Estate 1 immediately available ([Property L] where we are now residing) asking for a price more or less equivalent to that of Property H. (Finally we bought it at \$2,380,000.)’
- (c) ‘As such I attempted to sell Property H and preferred to buy another flat somewhere nearby and left my existing premises [Property K] for my son who would get married shortly after. Finally we purchased a flat at Private Housing Estate 1 [Property L] (which is next to Property H) under the name of my husband as purchasers for own residence weeks later.’

10. The assessor raised on the Taxpayer the following profits tax assessment for the year of assessment 1991/92:

	\$	\$
Profits from the sales of:		
Property H		
Profit per computation (paragraph 8)	577,325	
<u>Add:</u> Principal portion of mortgage loan (say 20% of \$105,578)	21,115	
		598,440
Property I (paragraph 8)		86,132
Property J (paragraph 8)		<u>71,644</u>
Assessable Profits		<u>756,216</u>
Tax payable thereon		<u>113,432</u>

11. By a letter dated 12 June 1994, the Taxpayer objected against the profits tax assessment for the year of assessment 1991/92 in the following terms:

- (a) ‘It is very unfair to consider my sale of Property H as a trading means, though my ownership of the said property is not sufficiently long.’

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- (b) 'I did not really make profit from the sale of Property H as I have ploughed back the proceeds in selling the flat to purchase another property at the price more or less similar to that of Property H. The property I bought at Private Housing Estate 1 [Property L] is wholly used for my family's residence till now.'

12. In a letter dated 30 August 1994 to the assessor, the Taxpayer stated the following:

- (a) She and her family members, including her husband, two sons, one daughter and her parents, had lived in a property at Private Housing Estate 1 (Property K) which was purchased in the name of her son Mr Y who worked in a bank and who could obtain a bank loan at a low interest rate.
- (b) Her son, Mr Y, got married on 14 November 1992.
- (c) After her son's marriage, she and her family members moved from Property K to Property L. Property L was purchased in the name of her husband and her daughter Miss Z and the mortgage loan of this property was guaranteed by her and her son.
- (d) She was not sure about the date of issue of the occupation permit in respect of Property H because when she sold it in August 1991, she had not yet received notice from the developer on the date when possession of the property could be delivered. The occupation permit was possibly issued in the latter part of the year 1992.
- (e) The down payment of about \$160,000 for Property H was contributed by her family members. A mortgage loan of about \$1,620,000 was obtained from the bank and was repayable by 180 monthly instalments of about \$17,000.

13. In a letter dated 17 August 1995 to the assessor, the Taxpayer stated the following:

- (a) About one month before the issue of the occupation permit in respect of Property H, she had already been allowed to enter the premises. That was why she could find out that the actual usable area of the property was much less than that stated in the sale brochure before she took possession of the property.
- (b) Her son's marriage was originally scheduled to take place in 1991. When they wanted to fix the day, they were advised by a fortune teller that the son's fiancée should not get married in that year. They therefore postponed the marriage until one year later.

14. Certificate of compliance in respect of Property H was issued on 10 September 1991.

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15. Property L was acquired by the Taxpayer's husband and their daughter, Miss Z, as joint tenants on 31 October 1991 at a price of \$2,380,000 and was disposed of by them on 29 September 1994 at a price of \$3,800,000.

Determination

16. On 28 July 1997, the Commissioner of Inland Revenue determined the objection against the Taxpayer and confirmed the profits tax assessment for the year of assessment 1991/92 as shown in paragraph 10 above.

Grounds of appeal

17. The Taxpayer's grounds of appeal are mainly to the following effect:
- (a) Her intention in purchasing Property H was to use it for self-residence. For reasons already stated in correspondence with the Revenue, she sold it, but she used the proceeds of sale to purchase Property L.
 - (b) Additional reason for selling Property H and buying Property L. Property H had no parking space while Property L had. She had bought a car and was in need of a parking space.
 - (c) Her son resided in Property K at Private Housing Estate 1. If she moved into the same estate, they would be close to each other and could take care of each other and share the services of a maid. They could cut expenses on food.
 - (d) Property H was developed by Company N. Properties developed by that company had limited appreciation and were not worth short-term speculation. But then in the middle of 1991, the Middle East war stopped and the property market in Hong Kong rocketed. Property H also rose with the market. It was by coincidence that she could sell it at the price that she did. In any event, she used the proceeds to purchase Property L which was developed by Company O.
 - (e) It was said that she could not have entered Property H to inspect the size of the apartment before the issue of occupation permit. But it was not difficult to do so. For at that time there were lots of vacant units and the developer was promoting them. One only had to communicate with the management staff to gain entry. This could be done easily.
 - (f) It was said that she and her husband had been property agents. The IRD officials therefore regarded them with discrimination. This is unfair.

Hearing and parties

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18. At the hearing, the Taxpayer appeared in person, while Mr Tam Tai-pang, assessor, appeared as the Commissioner's representative. Her husband Mr X and her son Mr Y were in attendance. As Mr X was going to be called as a witness, he withdrew from the hearing. The Taxpayer and Mr X gave evidence for the Taxpayer. No other witness was called.

Evidence

19. The Taxpayer's evidence may be summarised as follows:

In chief

19.1 She bought Property H in January/February 1991 for \$1,668,000. She paid a 10% deposit. Her intention was self-residence. So immediately she started paying mortgage instalments. The intention was to repay the loan in 15 years by monthly instalments of \$17,265.

19.2 The developer was Company N. At the time of purchase, there were a lot of vacant units. Property H had three rooms with an area of 1,100 square feet. The price seemed reasonable. She chose to start repaying loan at once. She was going to move in and live there.

19.3 She was living with her son. He was going to get married. The idea was to get married at the end of 1991. However, when choosing the date, they found that 1991 was not a suitable year of his fiancée. He then got married on 14 November 1992. The date was chosen in January 1992.

19.4 Property H was already completed at the time of purchase, but occupation permit was yet to be issued. The developer said occupation permit would be available anytime. So she went to the bank to apply for mortgage and started paying instalments immediately.

19.5 A few months after the purchase, the occupation permit had still not been issued. They had been waiting for 6 or 7 months. Then they purchased a flat at Private Housing Estate 1. The two families could share a maid and her son could come over for meals.

19.6 The size of Property H was exaggerated. The partitioning was not practical. The materials used were not very good quality. Then they decided to sell Property H and buy a unit at Private Housing Estate 1. That would be around July/August 1991. She was living in Property K with her son. She was selling Property H and buying Property L.

19.7 When she purchased Property H, there was a war in the Middle East. When she decided to buy Property L, the market was rising rapidly. They sold Property H for \$2,380,000 and bought Property L also at \$2,380,000. Property L was only 781 square feet.

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19.8 She wanted to live in Property H. Everyone knew Company N did not use very good materials. \$1,700,000 for over 1,000 square feet. Generally people would not speculate in such property. Property H was cheap. Although they used bad materials, they would not be so bad as to collapse. She only meant that external walls and paintwork outside were not very good; the toilet was not very good; also, the floors were not good.

19.9 She was trying to sell Property H before she purchased Property L. In fact Property H was cheap. Profit was unexpected. Market was rising rapidly during this period.

19.10 From the records, she only operated on a small scale.

In cross-examination

19.11 At the time of purchase, she knew the developer did not use very good materials, but it was so cheap.

19.12 At the time of purchase, construction was completed but there was no occupation permit. She did not inspect any units in Private Housing Estate 2 before she bought Property H. They did not allow visits before completion. A few months after the purchase, she could take clients to inspect units by obtaining consent from management staff.

19.13 From the sales brochure, she found 1,100 square feet with three rooms at such a price. She found it very cheap.

19.14 From the brochure, she knew the layout.

19.15 As for actual usable area, they describe it as more than 80% but actually it was not. At the time she purchased Property H, she knew by their general reputation that actual usable areas of properties built by Company N would be much less than advertised.

19.16 She bought Property H because she found it worth buying such an area at such a price.

19.17 Before selling Property H, she inspected a flat next floor above or below Property H, but not Property H, because she went to floors that were not locked. Occupation permit had not yet been issued. They allowed viewing at that time; it should be the end of June 1991, she could not recall exactly. She only went there once. She did not like it.

19.18 They said vacant possession could be given anytime. Her son was getting married; she needed a place to move to. Only learned about the issue of occupation permit in September from the Revenue.

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19.19 At the time of selling Property H, her son was getting married at the end of 1991. No date had yet been chosen. Fortune teller objected to 1991. So it was deferred to 1992.

19.20 Grounds of appeal. The availability of a car parking space for Property L was not a main reason.

19.21 She never mentioned the car parking space before, because she forgot. But it was true. She could not recall the year in which she bought the car.

19.22 One of the important reasons for selling Property H was that she wanted to live in the same housing estate as her son. It was not mentioned before all along she thought she would purchase the property for self-residence. She did not buy a property in Private Housing Estate 1 in the first place because Property H has got three rooms and 1,100 square feet and she had a lot of children.

19.23 At the time she purchased Property H, she knew Company N did not have a good reputation regarding the actual usable area of its properties.

19.24 She agreed that the profits from Properties I and J should be assessed to profits tax.

In re-examination

19.25 When buying Property H, she was told by her son that he was getting married at the end of 1991. Later in August 1991, she was told about the fortune teller's advice that 1991 was no good.

19.26 As to the contents of her letter reproduced in paragraph 9(a) above, the developer did not say for sure that the occupation permit would be issued in June or July but they only said it was going to be soon. She was sorry. At the time she wrote the letter, she remembered the developer said it would be June or July 1992. She had made a mistake just now. There was no mistake with the letter.

19.27 Property L is in the same estate as Property K where her son lived. It is a 10-minute walk from Property H to Property K. Properties H, L and K are all on the same street.

19.28 The developer allowed a 10% discount of the purchase price, whatever the method of payment. No advantage in starting repayment instalments immediately. She wanted Property H for self-residence, so she chose immediate repayment by instalments.

19.29 Property K was still in her son's name. Its size was 659 square feet with 3 bedrooms. At that time, she and her husband shared one room, her parents had one room and her daughter had one room. Younger son was studying overseas. Elder son who was getting married slept in the living room.

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19.30 Property H was 1,113 square feet with 3 rooms and 2 living rooms. At that time, the other daughter also got married. It was intended that she and her husband have one room, her parents one room and younger son the third room. He had come back from overseas. Elder son would stay behind in Property K.

19.31 Property L. bought in the name of husband and daughter, had an area of 781 square feet with 3 rooms. It had the same arrangement for the use of rooms as had been intended for Property H. Property L was more expensive, but the developer of Property H was not much good. They could only afford a smaller flat built by a better developer.

19.32 As for payment for Property H, she got a 10% discount on the purchase price. Every purchaser got a 10% discount, whatever the method of payment. The brochure mentioned two methods of payment: to pay the whole price by one payment or to pay immediately by instalments. She thought there might be a third method. At that time there were lots of flats available. She thought even if she did not start paying the instalments immediately, they would still allow her the 10% off, but she did not try that. She agreed with Mr Chan, member of the Board, that, had she chosen to pay the 90% at the time the occupation permit was issued, she would have deferred paying interest until then and she would have been much better off. Because she wanted the flat for residential purposes, she did not mind starting repayments immediately.

19.33 When she sold Property H, she had not yet found Property L. Between the time she sold Property H and the time her family bought Property L, she could not recall clearly whether she bought any other property. There should be no other property than this one she now lived in. As to why she entered into the transaction regarding Property J, she did not intend to use Property J for residence.

19.34 She did not deny that she possessed other small flats, but what they were talking about was properties that were for her residential purposes. Although she was in the estate agent's trade, she still needed a place to live in. She needed to have a three-room flat.

20. The evidence of Mr X, the Taxpayer's husband, may be summarised as follows:

In chief

20.1 The purchase of Property H was for residence purpose. They did not mind paying monthly instalments because they intended to live there long-term. Had they intended the flat for short-term purposes, they would not have chosen such a method of payment because it was more costly.

20.2 Company N's reputation was not very good. They did not use quality materials. At the time, 80% of the flats were still available for sale. It would have been a great risk to invest in a property like that for a short-term purpose.

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20.3 They bought Property H because their son intended to get married by the end of 1991. For lack of space, they had to move out by the time he got married. They bought Property L and lived in it.

20.4 They had to sell Property H for the following reasons. The developer told them that the occupation permit would be issued soon. They waited for a few months; still they had not got any notice of the availability of the occupation permit. They went to the site in June 1991 to make enquiries. The management office only allowed them to see the floor above and below Property H. They were shocked at the small size of the flat. It was miles away from their expectation and the developer failed to let them know the exact date of the availability of the occupation permit. Upon discussion, they decided to buy another flat for residence and sell property H.

20.5 They purchased Property L in the vicinity. It was the same estate as their son. Their son could save money because he did not need to cook and they could help him with the washing, ironing and also there was a parking lot.

20.6 His son intended to get married by the end of 1991. They tried to choose a date in August. They were advised by a fortune teller that the bride should not get married in that year. The marriage was postponed to the following year.

20.7 After the sale of Property H, property prices were rising rapidly. They might not be able to buy another property with the same amount of money. That was why they chose Property L quickly.

20.8 During 1989 and 1990, although there were a few property transactions by his wife on a short-term basis, they should not prejudice this case.

In cross-examination

20.9 As to the property in Private Housing Estate 1 (Property M), he could not recall when he owned it. Not sure whether it was 1992.

20.10 (Shown Land Registry record marked Exhibit B) Yes, he acquired Property M on 28 December 1989 and disposed of it on 7 February 1991. During the period of his ownership, it was left vacant.

20.11 Sometimes 6 or 7 family members lived in Property K which was owned by his son. He did not consider whether some of the family members should move to Property M. His son intended to get married in 1991. They intended to buy a bigger one than Property K to move to. Property M was some 700 square feet.

20.12 (To Mr Tsui) His wife purchase Property H on 20 February 1991. They did not use Property M instead of selling it and buying Property H. That property was at a lower floor and noisy. They had purchased it in a hurry.

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20.13 (To Chairman) They thought of moving into Property M before the purchase. Because it was on a lower floor, it was relatively cheap. It was not a short-term speculation, but he did sell it within a short time.

20.14 (To Mr Tsui) He and his daughter bought Property L which was only two floors higher than Property M. Property L faced the river and it was quieter. It also had a better view. Its size was about 781 square feet. It did not occur to him that he and his family members could move into Property M instead of selling it in February 1991.

Findings and reasons

21. The question for this appeal is what was the intention of the Taxpayer at the time of the acquisition of Property H. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment? (See Lionel Simmons Properties Ltd (In Liquidation) and Others v CIR 53 TC 461 at 491.) If the intention was to dispose of it at a profit, Property H was a trading asset, and the profit arising from the subsequent sale is a trading profit and is subject to profits tax. On the other hand, if Property H was acquired as a permanent or long-term investment, the profit arising from the subsequent sale is a capital gain and is not subject to profits tax.

22. The assessment under appeal was raised by the assessor on the basis that Property H was acquired by the Taxpayer with a trading intention, that the property was a trading asset and that the profit on its sale was subject to profits tax.

23. Under section 68(4) of the Inland Revenue Ordinance, the onus is on the Taxpayer to prove that the assessment is excessive or incorrect, and for that purpose to prove that Property H was acquired with the intention of holding it as a permanent or long-term investment.

24. Intention is a question of fact. The stated intention of the Taxpayer cannot be decisive. Intention can only be judged by considering the whole of the surrounding circumstances, including thing said and things done at the time, before and after. Often it is rightly said that actions speak louder than words. (See All Best Wishes Ltd v CIR 3 HKTC 750 at 771.)

25. The Taxpayer's case is that she purchased Property H for long-term investment, that is, for use by herself and her family as a residence. That is a stated intention and has to be tested against the surrounding circumstances, and more particularly against the following:

25.1 The Taxpayer never used Property H at all. She held it for some six months and sold it as a confirmor before the purchase was completed. (See paragraphs 6 and 7 above.) The quick sale is inconsistent with her stated long-term-investment intention. Unless the quick sale is satisfactorily explained away, this appeal cannot succeed.

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25.2 According to her letter dated 29 September 1993 (see paragraph 9 above), she discovered, after she had purchased Property H, that the flat was not an ideal one mainly due to three reasons which are dealt with below:

(i) Overstated actual usable area

This contrasts sharply with her admission in evidence that, when purchasing Property H, she already knew by their general reputation that the actual usable area of properties built by Company N would be much less than advertised (see paragraph 19.15 above).

(ii) Irregular interior floor area

In evidence, she added that the partitioning was not practical (see paragraph 19.6 above). But later, she admitted that she knew the layout from the sales brochure (see paragraph 19.14 above).

(iii) Late delivery of vacant possession

The complaint was that at first the occupation permit was supposed to be available in June/July 1992, but the issue of the permit was delayed with no indication as to when it would be available. But vacant possession must have been delivered by 26 October 1991 the date of assignment of Property H, the Taxpayer having sold as a confirmor on 3 August 1991. If she was expecting vacant possession in June/July 1992, she had no cause for complaint because vacant possession was delivered well before that period.

25.3 No car parking space at Property H This was an additional reason for selling Property H and buying Property L first mentioned in the grounds of appeal. She stated that she had forgot to mention it and that it was not a main reason. (See paragraphs 19.20 and 19.21 above.) We think that this reason was an afterthought and we decline to give any weight to it.

25.4 Desire to live in same estate as son Property H is not in Private Housing Estate 1 where Property K, where the son lived, was located, although they are on the same street. Ground of appeal (c) (see paragraph 17 above) states that, if she moved into Private Housing Estate 1, they could share the services of a maid and cut expenses on food. She stated in evidence that her wish to live in the same estate as her son was an important reason for selling Property H (see paragraph 19.22 above). But she failed to explain why she had never mentioned this 'important' reason in her correspondence with the Revenue during the objection stage. It seems to us that this is yet another afterthought.

25.5 Son's marriage – reason for purchasing Property H This was dealt with in evidence by both the Taxpayer and her husband Mr X.

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- (i) The story is to this effect. They bought Property H because their son, Mr Y, intended to get married by the end of 1991 (see paragraphs 19.25 and 20.3 above). When purchasing Property H, the developer had told them that the occupation permit would be available anytime (see paragraphs 19.4 and 20.4 above). The intended arrangement was that the Taxpayer and all the members of her family, except Mr Y, should move out of Property K and into Property H, leaving the whole of Property K to Mr Y (see paragraph 19.30 above). They had to sell Property H because of the delay in the issue of the occupation permit and the discovery in June 1991 of the small size of the flat (see paragraph 20.4 above).
- (ii) The story is inconsistent with the Taxpayer's letter dated 29 September 1993. According to the letter, she had understood that the occupation permit would be available in June/July 1992, whereas, at the hearing of this appeal, it was alleged that the developer had told her that it would be available anytime (see paragraphs 9(a) and 19.4 above). She was referred to the discrepancy, and her first response was to deny that the developer had said that the occupation permit would be available in June or July 1992. However, after some prevarication, she confirmed that the developer had said it would be June or July 1992 (see paragraph 19.26 above).
- (iii) If, at the time of the purchase, she had expected vacant possession in June/July 1992, then the purchase of Property H could not have been for the purpose of providing accommodation to herself and members of her family, except Mr Y, so that Mr Y could have the whole of Property K for his matrimonial home by the end of 1991.

25.6 No urgent need for housing in February 1991 During cross-examination, the Taxpayer's husband Mr X admitted with much hesitation that he once owned a property in Private Housing Estate 1 (Property M) which he purchased on 28 December 1989 for \$1,266,000 and resold on 7 February 1991 for \$1,400,000. During his ownership, the property was left vacant (see paragraph 20.10 above). It had an area of some 700 square feet and was in the same estate as Property K. It did not occur to him that he and some of his family members could move to Property M (see paragraphs 20.11 and 20.14 above), even though, according to their story, they were supposed to be looking for a flat to move to so that his son might have the whole of Property K to himself. It seems to us that 700 square feet in the circumstances was not such a small area, considering that Property L, which they eventually acquired in October 1991 (see paragraph 15 above) and moved to, was only 781 square feet (see paragraph 19.7 above). Mr X's explanation was that they intended to buy a bigger place to move to, but we find it hard to accept that they would have chosen Property H which was advertised to have an area of 1,100 square feet when, by reason of the developer's general reputation, they claimed they knew that floor areas of Company N's properties would be much less than advertised (see paragraph 19.15). In our view, Mr X sold Property M because he had no intention to keep it as a residence, whereas the Taxpayer purchased Property H, not for the purpose of using it as a residence, but for trading purposes.

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26. It was argued that properties developed by Company N, including Property H, were of inferior quality and therefore not worth having for short-term speculation purposes. But, assuming that the allegation about inferior quality is true, the argument is defeated by the fact that Property H was quite able to rise with the market and bring in a sizable profit.

27. It was said that, in any event, the proceeds of sale of Property H were used to purchase Property L. However, as Mr Tam pointed out, the subsequent purchase of Property L and the use of it as residence by her family does not necessarily show that, at the time of purchase of Property H, the Taxpayer also had an intention to use Property H as residence.

28. Regarding the terms of payment for Property H, the Taxpayer had this to say. The developer through the sales brochure was offering two methods of payment: to pay the whole price by one payment or to start paying by instalments immediately. Both methods attracted a 10% discount. She thought there might be a third method which would allow a deferment of the payment of instalments as well as a 10% discount, but she did not try that and she did not mind starting paying instalments immediately because she wanted Property H for residential purposes. We find that reasoning very difficult to accept. Surely one should always strive for the best terms of payment no matter whether one is acquiring the property for long-term investment purposes or for trading purposes.

Letter after hearing

29. After the conclusion of the hearing of this appeal, the Taxpayer wrote a letter dated 6 March 1998 to the Board, setting out a number of arguments in support of this appeal. This is tantamount to re-opening the case – a course which should not be open to an Taxpayer except for good reasons, and we have not spotted any. Nor have we found anything which can change our views.

Decision

30. The Taxpayer does not dispute the assessment under appeal regarding the profits from Property I and Property J.

31. For the reasons stated in paragraphs 25 to 28 above, we are not satisfied that the Taxpayer has discharged the onus of proving that she acquired Property H for use as a residence. On the contrary, we find that she acquired it for resale at a profit.

32. It follows that this appeal is dismissed and that the profits tax assessment for the year of assessment 1991/92 is hereby confirmed.