

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D34/95

Profits tax – sale of residential flat – whether profit capital gain not assessable to profits tax.

Panel: Maxine Kwok Li Yuen Kwan (chairman), Terence Tai Chun To and Alexander Chung Ho Woo.

Date of hearing: 20 April 1995.

Date of decision: 28 June 1995.

The taxpayer purchased a residential flat which was sold at a profit about one year later. The taxpayer submitted that the residential flat had been purchased for owner occupation. The taxpayer claimed that there was a change of intention due to unforeseeable circumstances.

Held:

The taxpayer had not discharged the onus of proof. The taxpayer had not lived in the residential flat even though it had been available for residential purposes. Taking all of the facts into account the Board was not satisfied that there had been a change of intention.

Appeal dismissed

Case referred to:

Lionel Simmons Properties Ltd v CIR 53 TC 461

All Best Wishes Ltd v CIR 3 HKTC 750

Marson v Morton 59 TC 381

Jennifer Chan for the Commissioner of Inland Revenue.

Taxpayer represented by her daughter.

Decision:

This is an appeal by a taxpayer against profits tax assessments for the year of assessment 1992/93 wherein the Taxpayer was assessed to tax on a profit of gain arising on the sale of Flat A in District I ('the Property'). The facts are as follows:

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1. At all relevant times, the Taxpayer lives with her husband at Flat B in District J which is a government owned low rent housing unit.
2. The Taxpayer is a retired person with no regular income of her own.
3. From December 1982 to January 1987, the Taxpayer and one of her sons, Mr X were joint owners of Flat C in District J.
4. From 28 January 1987 to February 1994 the Taxpayer was the sole owner of Flat C which was occupied by the Taxpayer's other son, Mr Y, and his wife Madam Y.
5. On 25 March 1991 the Taxpayer entered into a provisional sale and purchase agreement for purchase of the Property at the price of \$1,114,000.
6. On 9 March 1992 the Property was assigned to the Taxpayer and mortgaged to Company P for the sum of \$779,800.
7. On 22 June 1992 the Taxpayer entered into a sale and purchase agreement to sell the Property for the sum of \$1,870,000.
8. On 31 July 1992 the sale of the Property was completed.
9. In reply to an enquiry on the Property from the assessor, the Taxpayer by letter dated 22 June 1993 stated that profits from the sale of the Property amounted to \$640,086.30; she alleged that the Property was bought for self-occupation; that she sold the Property because it was far away from where she had to take care of her daughter-in-law and grandson; and she wanted to ease her son's burden; and that the profits was of a capital nature.
10. On 10 August 1993 the Taxpayer offered no profits assessable to tax when she submitted the profits tax return for the year of assessment 1992/93.
11. By letter dated 21 August 1993 the Taxpayer alleged that the Property was originally used for self-occupation; that she had not engaged in property dealing activities; but because she had to take care of her grandson in the day time, travelling between Flat A and Flat C was inconvenient, she sold the Property in July 1993 intending to buy another property in Kowloon accessible to her son's family; and that the sale was of a capital nature.
12. The assessor considered that the buying and selling of the Property amounted to an adventure in the nature of trade and raised the following profits tax assessment on the Taxpayer for the year of assessment 1992/93:

Assessable profits	\$640,086
Tax payable thereon	\$ 96,012

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13. By a notice dated 18 November 1993 the Taxpayer objected to the profits tax assessment raised on her by the assessor for the year of assessment 1992/93. She gave the following grounds of objection:
 - (1) She alleged that the Property was purchased in April 1991 intended for self-occupation; but that she decided to sell the Property in January 1992 after being told that her daughter-in-law was pregnant and she had to take care of her grandson (born in October 1992).
 - (2) She alleged that the Property was financed by the savings of her children, and she could not afford the expenses of buying furniture and decorating the Property.
14. In February 1994 the Taxpayer sold Flat C for \$1,690,000.
15. In March 1994 the Taxpayer and her daughter-in-law Madam Y, purchased Flat D in District K as joint owners at the purchase price of \$2,560,000 with mortgage loan of \$1,000,000 advanced by Bank Q.
16. By the determination dated 12 October 1994 the Commissioner of Inland Revenue confirmed the assessor's profits tax assessment raised for the year of assessment 1992/93 showing assessable profits of \$640,086 with tax payable thereon of \$96,012.
17. By letter dated 11 July 1994 the Taxpayer gave notice of appeal to the Board of Review. The grounds of appeal are as follows:
 - (1) Period of ownership of the Property was 15 months and not less than 5 months as stated in the determination.
 - (2) 3 reasons were given for not moving in to reside at the Property:
 - (i) The Taxpayer alleged that she could not bear the consequences of depriving her daughter-in-law of her companionship and care during her daughter-in-law's pregnancy and confinement period.
 - (ii) She alleged that due to old age and limited physical ability, she could not bear to travel the long distance between District I and District J every day.
 - (iii) She alleged that as she had decided to live in District J with her daughter-in-law and her son, she did not want to waste her children's money in furnishing the Property.
 - (3) She alleged that the location and area of the Property were not suitable for the Taxpayer to live together with her son, daughter-in-law, and grandson, but that her son and daughter-in-law had to wait until after the

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birth of the baby before looking for another property for residence, and that the proceeds from sale of the Property were used to purchase Flat D.

- (4) She alleged that as the down payment and monthly instalments of the Property were borne by her children, she wanted to dispose of the Property as soon as possible, so that she and her son could find another property.

At the hearing of the appeal, the Taxpayer, her husband, and her daughter Miss Z were present. The Board was informed that both the Taxpayer and her husband spoke Chiu Chow dialect, but she could understand Cantonese dialect spoken by her daughter. The Taxpayer was asked if she would like to give evidence in Chiu Chow dialect, but the Taxpayer elected not to give evidence, and designated Miss Z, her daughter, as her authorized representative. Miss Z also gave evidence as a witness and was cross examined. Miss Z alleged that the Taxpayer purchased the Property with the intention of residing there, but due to unforeseeable circumstances, she and her family members decided to sell the Property and buy another property. The unforeseeable circumstances as alleged by Miss Z were as follows: in January or February 1992 the Taxpayer's son informed her that his wife was pregnant, the Taxpayer and her family members (consisting of the Taxpayer's husband, 2 sons and 1 daughter) realized that the Property was not yet due for completion, and since the distance between District I and District J was quite far apart, and the Taxpayer was not in very good health, they decided to sell the Property so that the Taxpayer could live in District J to take care of her daughter-in-law and her grandson.

The following documents were tabled by Miss Z at the hearing:

- (1) A brochure of the Flat A development showing the size and the environment of the Property.
- (2) Provisional sale and purchase agreement of the Property dated 25 March 1991.
- (3) Invoice and receipt from legal firm dated 26 March 1991 in respect of sale and purchase agreement of the Property.

The representative for the Commissioner Mrs Jennifer Chan submitted that the Taxpayer was never firmly committed to hold the Property as an asset for her own use and enjoyment; and that in disposing of the Property within 3 months from taking possession, the Taxpayer has embarked upon an adventure in the nature of trade and accordingly the profit was taxable. Mrs Chan referred the Board to the relevant provisions of the Inland Revenue Ordinance (IRO), and to the following authorities:

Lionel Simmons Properties Ltd v CIR 53 TC 461
All Best Wishes Ltd v CIR 3 HKTC 750
Marson v Morton 59 TC 381

Mrs Chan also made submission on the relevant facts of this appeal and the alleged reasons which the Taxpayer gave for purchase and sale of the Property.

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Having heard the parties and having considered the whole of the evidence and submissions, the Board finds that the Taxpayer has not discharged the onus of proof under section 68(4) of the Inland Revenue Ordinance (the IRO) that the assessment appealed against is incorrect.

The issue before us is the intention of the Taxpayer at the time of purchase of the Property. Was it acquired with the intention of disposing it at a profit, or was it acquired as a permanent residence? The self-serving statements of subjective intention of the Taxpayer should be tested against objective facts and the objective circumstances surrounding the purchase and sale of the Property.

As can be seen from the facts above, the Taxpayer chose to live in Flat B during the period that she owned the Property from March 1991 to July 1992. This is consistent with owning the Property for trade and not for self-occupation.

There was no evidence that the Taxpayer attempted to move out of Flat B, a resettlement estate permanently, even after the Property was ready for occupation in April 1992. There was also no evidence that she attempted to move permanently into the Property at all. This is consistent with an intention to hold the Property for disposal as trading stock.

As the Taxpayer was a retired person with no regular income, and as there was no evidence that she had adequate savings to live on, it is reasonable to infer that she would be totally dependent on her children for monthly maintenance, and perhaps even for payment of rental of the low cost government housing. There was also no clear evidence, prior to or at the time of the purchase, of long term arrangement or commitment on the part of her children in term of amounts to be contributed by each child to pay for furnishing of the Property and the monthly instalments on the mortgage. The Taxpayer's lack of financial ability to carry out any alleged intention of purchasing the Property for her own permanent residence becomes obvious. This is consistent with an intention to dispose of the Property as trading stock.

At the time of purchase of the Property, the long distance between District I and J would have been known by the Taxpayer. The Taxpayer's wanting to take care of her daughter-in-law and grandson should not have come as a surprise to her, for her son was already married and residing at Flat C at the time. We could infer from the brochure on the Property tabled at the hearing that the Taxpayer should be familiar with the location and suitability of the Property prior to and/or at the time of the purchase. Disposal of the Property without moving in would be consistent with disposal of the Property as trading stock.

For the reasons given, we find that on a balance of probabilities that the Taxpayer has failed to discharge the onus of proof placed upon her and we confirm the determination of the Commissioner in treating the purchase and sale of the Property as an adventure in the nature of trade.