

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D37/87

Board of Review:

Charles A. Ching, *Chairman*, David A. Morris and Lawrence H. L. Fung, *Members*.

1 October 1987.

Profits tax—whether profits derived from the sale of property were capital or revenue.

The Appellant together with another person purchased a property in March 1979 and continued to rent out the premises except the third floor. In January 1980 the Appellant acquired the other person's interest and in April 1980 he sold the property. The Appellant had a history of property purchases for resale.

Held:

The Appellant's intention in purchasing the property was not to hold the property as a long term investment.

Appeal dismissed.

D. J. Gaskin for the Commissioner of Inland Revenue.
Yeung Kam-yuen of Messrs. K. C. Cheng & Co. for the Appellant.

Reasons:

The facts in this appeal were largely not in dispute. We find them to be as follows. In March of 1979 the taxpayer and a Mr. P purchased No. 171, PAS Street, Kowloon, for the sum of \$1,400,000. They purchased it as tenants in common, the taxpayer's interest being 60% while Mr. P's interest was 40%. At the time of purchase the ground floor was rented out at \$390 per month. The third floor fell vacant about six months after the purchase and was not rented out again. The first and second floors were and continued to be rented out at \$577 and \$507 per month respectively. The purchase was assisted by a bank loan of \$800,000 for which the taxpayer and Mr. P were jointly liable in equal shares. At the time the rate of interest was about 10% per annum. In January of 1980 the taxpayer acquired Mr. P's interest in the property for the sum of \$720,000. In April of 1980 the taxpayer sold the property to S Ltd., a company of which he had been a director since 12th February 1980, for a consideration of \$2,800,000. That consideration was satisfied by payment in cash in the sum of \$1,200,000, the allotment of \$50,000 of shares in the company and a loan of \$1,580,000 to the company. No part of that loan has been repaid and no interest was payable. Each shareholder in the company had to put up the same amount. The property was to be redeveloped by the company and units were to be sold. If and when redevelopment costs were met by those sales there would be a distribution. By a deed of assignment dated 13th September 1983, the taxpayer assigned his entitlement to the debt to

INLAND REVENUE BOARD OF REVIEW DECISIONS

three creditors who were pressing him for payment of a total of \$410,000 for a consideration of \$510,000. The taxpayer thus received a net consideration of \$100,000.

The taxpayer admitted that he had, in the past, entered into property transactions both on his own and as an equal partner with Mr. P, particulars of the latter of which being as follows:—

<i>Property</i>	<i>Date of Purchase</i>	<i>Date of Sale</i>
(a) 11-13, W. N. Street	15-11-75	17-7-76
(b) 20, P. W. Road	14-2-78	29-8-78
(c) 500, S. Centre	28-12-78	29-3-80
(d) 28, F. T. Street	24-3-79	30-4-80

One other property was mentioned during the taxpayer's evidence being 40, H Street. That property was kept for three years before it was sold. That property had always been shown in the taxpayer's records as stock in trade. The taxpayer stated that the only difference between the property presently in question and the others was that in the present case Mr. P objected to let out the various floors as they were.

The taxpayer claimed that he had been getting on in years and that he had purchased the property as a long term investment either for rental income or for redevelopment. We do not accept this for the following reasons:—

- (1) The taxpayer has a history of purchases for resale. We accept that it is possible for, say, a sharebroker to purchase shares as a long term investment. However, it is the taxpayer's evidence that the purchase of this property differed from the others only in that Mr. P disagreed with its redevelopment.
- (2) At no time before the purchase did the taxpayer discuss with Mr. P the purpose of the purchase although he claims to have told Mr. P his own intention.
- (3) When asked if between the time he and Mr. P had acquired the property and the time when it was assigned to S Ltd., any architects had been approached and any plans drawn up the taxpayer simply replied that he had made attempts to do so. Although the taxpayer was a building contractor we cannot accept this as evidence of an intention of a long term investment for rental income.
- (4) The taxpayer claimed that he had bought out Mr. P from money out of his accumulated savings. He said that he would have had sufficient funds to redevelop with Mr. P and that it would have cost about \$1,100,000. No documentary evidence was shown to us to say that the taxpayer would have had sufficient funds with or without Mr. P. It is to be noted that a bank loan of \$800,000 was used to assist the original purchase. The taxpayer's explanation

INLAND REVENUE BOARD OF REVIEW DECISIONS

was that since the property was purchased in joint names the bank loan was necessarily in their two names. We reject that explanation.

- (5) It was submitted to us that the taxpayer continued to intend to hold his interest in the property through the company. We reject that argument. The assets of a limited company are wholly different from those of its shareholders. Cases where cited to us where property was conveyed to a company controlled by the shareholder. These cases are irrelevant since the taxpayer did not control the company.

In these circumstances we find as a fact that the taxpayer's intention in purchasing the property was to redevelop for sale, an intention which continued throughout.

The other point argued on behalf of the taxpayer was that the whole of the consideration from the company had not been received by him for the tax year in question. We reject that argument. The \$1,500,000 was lent by the taxpayer to the company. He could not have lent it unless he had been paid it or otherwise credited with it.

We therefore dismiss the appeal.