

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D3/95

Profits tax – sale of property – whether assessable to profits tax.

Panel: William Turnbull (chairman), Elsie Leung Oi Sie and Nigel A Rigg.

Date of hearing: 16 February 1995.

Date of decision: 26 April 1995

The taxpayer bought a residential flat and sold the same a few months later at a substantial profit. The taxpayer maintained that the profit was a capital gain and not a trading profit. The Commissioner maintained that the profit was a trading profit. The taxpayer appealed to the Board of Review and gave evidence. The evidence was to the effect that she bought the flat for the purposes of her own residence but changed her mind after she had purchased the same.

Held:

The onus of proof is upon the taxpayer. The Board did not accept the evidence of the taxpayer and dismissed the appeal.

Appeal dismissed.

Case referred to:

Lionel Simmons Properties Ltd v CIR 53 TC 461

Wong Kuen Fai for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against a profits tax assessment wherein the Taxpayer was assessed to tax on a profit or gain arising on the sale of certain property. The facts are as follows:

1. The Taxpayer bought a residential flat ('the property') under a sale and purchase agreement dated 29 January 1992 at a price of \$1,570,000. Completion took place on 4 May 1992.

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2. The Taxpayer sold the property under a sale and purchase agreement dated 4 July 1992 at a price of \$1,807,000.
3. The property was an existing flat which had already been occupied by the previous owner.
4. After deducting relevant expenses the Taxpayer realized an assessable profit of \$165,790 when she sold the property being the difference between the price which she paid for the property and the price at which she sold the property after making due allowance for expenses.
5. The assessor made enquiries of the Taxpayer with regard to the purchase and sale of the property and was informed by the Taxpayer, inter alia, that the Taxpayer had purchased the property to be the residence of herself and her daughter together with her mother. This statement made by the Taxpayer was not accepted by the assessor. The assessor was of the opinion that the Taxpayer had purchased the property with the intent of trading therein.
6. For reasons not known the assessor issued an estimated assessment to profits tax dated 25 March 1994 on estimated profits of \$30,000 with tax payable thereon of \$4,500. The Board was informed at the hearing of the appeal that this estimated assessment had been issued in error because the sum stated therein was not correct.
7. In due course the matter was referred to the Commissioner for his determination. By his determination dated 6 September 1994 the Commissioner determined that the provisional assessment to profits tax should be increased to assessable profits of \$165,790 with tax payable thereon of \$24,868. The Commissioner was of the opinion that the sale and purchase of the property by the Taxpayer was a trading transaction.
8. At the time when the Taxpayer purchased the property she and her daughter were residing with her mother in an apartment near to the property and which was owned by her mother and father.
9. After the Taxpayer sold the property she reinvested the money in a commercial unit in Kowloon which she intended to use for business purposes but which remained vacant.
10. By letter dated 23 September 1994 the Taxpayer gave notice of appeal against the determination of the Commissioner.

At the hearing of the appeal the Taxpayer appeared in person and elected to give evidence and be cross examined. She said that she had not bought the property for speculation but for a residence for herself and her daughter. Prior to the purchase she had discussed it with her mother who had agreed to live with her. After she bought the property her mother changed her mind and did not want to stay with her. She said that she went to live in the property with her daughter and 'light luggage'. At that time she employed a domestic helper who had to clean both the property and her mother's apartment. She said that she went to her mother's apartment for dinner and after dinner and after her daughter

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had completed her homework she went to sleep at the property. She said that the property was about 10 minutes away from her mother's apartment. She said that at that time her nephew was staying with her mother but he went home very late at night so that her mother was on her own. Her mother persuaded her to move back to her mother's apartment. The Taxpayer also said that her mother was in poor health. She said that her mother persuaded her to sell the property. As she had only owned the property for a short period before she decided to resell it all of the miscellaneous bills relating to the property were in other people's name and that is the reason why she could not produce the same. She said that after she sold the flat in July 1992 she was still waiting to find another suitable place to purchase as she did not want to stay with other people and wanted to own a flat of her own.

She went on to say that in 1994 her father and her uncle said they would come back and stay in her mother's apartment. Because of that she had changed her plan as she did not have to take her mother into account and could have a smaller flat for herself, her daughter and her domestic helper. On 15 June 1994 she finally bought a small flat which was not expensive and which had a sea view. Because her father and her uncle could keep her mother company she could move away with an easy mind. She said that after she sold the property she had purchased a unit in a commercial building in Kowloon intending to run a small business with her brother. Later they had cancelled the plan and the commercial unit remained vacant up to the present date. She said that she admitted that she bought the commercial unit to make a profit and when she sold it she would have an obligation to pay tax but the commercial unit was different from the property. She said that the original intent of buying the property was to use it as a home.

The Taxpayer was cross examined with regard to when she had originally moved to stay with her mother and with regard to family details relating to her brothers and her nephew. The cross examination cast doubt on the authenticity of certain receipts which the Taxpayer had provided to the assessor relating to alleged expenses which she had incurred when she purchased the property or which were intended to indicate that she had lived there. The Taxpayer was also cross examined at some length with regard to her claim that she had resided in the property with her daughter.

The representative for the Commissioner submitted that the purchase and sale of property by the Taxpayer amounted to an adventure in the nature of trade and accordingly the profit was taxable. We were referred to the relevant provisions of the Inland Revenue Ordinance (the IRO) and to the case of Lionel Simmons Properties Ltd v CIR 53 TC 461. The representative for the Commissioner referred us to the facts and the alleged reasons which the Taxpayer had given for acquiring the property and then selling it. He submitted that it was inconceivable that the Taxpayer would not have asked her mother with regard to living in the property before she acquired it. As the property was near where her mother was already living her mother would know all about the district. The representative for the Commissioner also pointed out that many of the other relatives of the Taxpayer's mother were living or working in the vicinity. With regard to the claim by the Taxpayer that she had temporarily lived in the property the representative for the Commissioner pointed out that the Taxpayer had stated when claiming a dependent parent allowance in respect of her mother that she had been residing continuously with her mother at her mother's apartment. The representative referred to various bills which the Taxpayer had produced to the Commissioner in support of the claim that she had been residing in the property and pointed

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out that they antedated her purchase of the property. Our attention was drawn to the fact that the property was purchased on mortgage with monthly repayments of approximately \$8,900 at a time when the monthly salary of the Taxpayer was about \$10,000. The representative submitted that this indicated that the Taxpayer did not have the financial ability to hold the property as a capital asset without selling it.

With regard to the purchase by the Taxpayer of another apartment in which she is not living the representative said that this cast no light on the reason why the Taxpayer purchased the property.

Taking into account the short period of ownership, the absence of evidence of actual occupation and the absence of independent evidence that the mother of the Taxpayer had played any role in influencing the Taxpayer to purchase and sell the property the representative for the Commissioner submitted that this was no more than a property trading transaction.

It is well known that the onus of proof is upon the Taxpayer to prove her case. In the appeal now before us the Taxpayer has failed to discharge this burden of proof.

The Taxpayer clearly stated to the Board and based her case on the fact that she and her daughter had resided in the property for a period of time. However an inspection of such utilities and other receipts as were produced to the Board indicated that during the period of ownership of the Taxpayer no outgoings had been incurred. For example it would appear that no electricity had been used even though the property was allegedly used for sleeping at night. We do not accept the evidence of the Taxpayer that she and her daughter were residing in the property during the period of her ownership. This is in accord with the Taxpayer's own claim with regard to the dependent parent allowance.

As we do not accept the evidence given by the Taxpayer with regard to her living in the property, it then raises a serious doubt with regard to her other evidence. Here again we find it difficult to believe what she said. She indicated that she had discussed with her mother about her mother living with her in the property prior to its purchase. However as soon as she had purchased the property her mother had 'changed her mind' and decided not to stay with the Taxpayer. There is no evidence before us other than that given by the Taxpayer herself. If it was the truth that the mother of the Taxpayer had agreed to stay with her in the property then the question arises with regard to what would have happened to the apartment in which the mother was then living. The mother was not called to give evidence before the Board.

Where someone purchases and immediately sells the property, as the Taxpayer did, there must be a prima facie inference that the property was bought with the view to its sale at a profit. If it was the intention of the Taxpayer to purchase the property as a residence for herself and her daughter then much clearer evidence of such intention is necessary. We do not accept the evidence given by the Taxpayer.

We find that the Taxpayer has failed to discharge the onus of proof placed upon her and we confirm the determination of the Commissioner. Accordingly we direct that the assessment which is the subject matter of this appeal be increased as stated by the

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Commissioner of Inland Revenue in his determination form assessable profit of \$30,000 with tax payable thereon of \$4,500 to assessable profit of \$165,790 with tax payable thereon of \$24,868.