

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D41/00

**Profits tax** – real property – whether the gains arising from the disposition of a property was liable for profits tax – burden of proof – section 68(4) of the Inland Revenue Ordinance (‘IRO’).

**Extension of time** – notice of appeal filed out of time – section 66(1A) of the IRO.

Panel: Ronny Wong Fook Hum SC (chairman), Charles Chiu Chung Yee and Paul Ng Kam Yuen.

Date of hearing: 15 May 2000.

Date of decision: 19 July 2000.

The taxpayer and Mr A purchased as tenants in common Property 1 on 1 May 1991 and sold it with a gain on 3 March 1992, shortly before the issuance of the occupation permit in respect of the flat on 15 April 1992. The taxpayer contended that Property 1 was purchased for self use. He had to sell the flat as he lost his job and was in no position to meet his mortgage instalments.

Mr A was the boy friend of the taxpayer’s daughter. It was envisaged that Mr A would marry his daughter on completion of Property 1. It was the evidence of the taxpayer that the relationship between Mr A and his daughter turned sour. The breakdown of this relationship was the principal reason leading to the sale of Property 1. The taxpayer accepted that this was not the reason he told the Revenue as he was reluctant to disclose the true reason to avoid embarrassment. The taxpayer previously put forward bad *fung shui* as a reason for sale but admitted that he was not a staunch believer of *fung shui* and he was not aware of any *fung shui* problem in relation to Property 1.

The Commissioner rejected the taxpayer’s contentions by her determination dated 27 October 1999. That determination was sent by registered post to the taxpayer at Property 2. The same was delivered by the General Post Office on 26 November 1999. The taxpayer launched his appeal by letter dated 12 February 2000. The letter was received by the Board on 15 February 2000.

**Held**, dismissing the appeal :

1. The Board accepted the taxpayer’s evidence that he did not realise that his objection was rejected by the Commissioner until receipt of a notice of revised assessment dated 24 January 2000. He discovered the determination when he made enquiries

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about the revised assessment. The taxpayer was prevented by his non-receipt of the determination from giving the notice of appeal. This constituted a ‘reasonable cause’ for the purpose of section 66(1A). The Board extended time in favour of the taxpayer.

2. The Board had to be satisfied that the taxpayer’s intention at the time was to purchase Property 1 as the residence of his family and such intention was on the evidence ‘genuinely held, realistic and realisable’. The onus of proving that the assessment appealed against was incorrect was on the taxpayer. The taxpayer did not produce any documentary evidence in support of his case. The Board was not provided with a full history of the payments made for the purchase of Property 1. The Board was not convinced by the oral evidence of the taxpayer and found it difficult to see why disclosure of the true state of relationship between Mr A and his daughter could be regarded as a source of embarrassment. His casual reference to *fung shui* as a cause leading to sale of Property 1 did not enhance his credibility.

### **Appeal dismissed.**

Case referred to:

All Best Wishes Limited v CIR 3 HKTC 750

Chiu Kwok Tsan for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

#### **Background**

1. By an agreement for sale and purchase dated 1 May 1991, the Taxpayer and Mr A purchased as tenants in common a unit in District B [‘Property 1’] for \$1,574,000. The purchase was financed in part by an advance of \$1,100,000 from a bank repayable by 240 monthly instalments of \$9,908.55 each.
2. By another sale and purchase agreement dated 20 December 1991, the Taxpayer and his two sons Mr C and Mr D purchased a unit in District E [‘Property 2’] as joint tenants for \$925,000.
3. By a sub-sale and purchase agreement dated 3 March 1992, the Taxpayer and Mr A

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sold Property 1 for \$2,340,000. This was shortly before the issuance of the occupation permit in respect of that flat on 15 April 1992.

4. In his letter to the Revenue dated 17 April 1998, the Taxpayer contended that Property 1 was purchased for self use. He had to sell that flat as he lost his job and was in no position to meet his mortgage instalments.

5. The Commissioner rejected the Taxpayer's contentions by her determination dated 27 October 1999. That determination was sent by registered post to the Taxpayer at Property 2. The same was delivered by the General Post Office on 26 November 1999.

6. The Taxpayer launched his appeal by letter dated 12 February 2000. That letter was received by this Board on 15 February 2000.

### **The issues**

7. We have to consider two issues : first, whether we should extend time in favour of the Taxpayer pursuant to section 66(1A) of the IRO and secondly, whether the Taxpayer is correctly assessed to profits tax in respect of his gains arising from his disposition of Property 1.

### **Extension of time**

8. The Taxpayer maintained that he had no notice of the determination. He did not realise that his objection was rejected by the Commissioner until receipt of a notice of revised assessment dated 24 January 2000. He discovered the determination when he made enquiries about the revised assessment.

9. We accept the evidence of the Taxpayer in relation to this issue. He was prevented by his non-receipt of the determination from giving the notice of appeal. We are of the view that this constitutes a 'reasonable cause' for the purpose of section 66(1A). We extend time in favour of the Taxpayer.

### **The Taxpayer's liability to tax**

10. The Taxpayer's evidence before us may be summarised as follows:

- (a) He carried on a plastic bag business. Business was steady at the time when he purchased Property 1. His annual net profit was about \$30,000. He also had rental income of about \$4,000 to \$5,000 per month from a flat in Kowloon registered in the name of his wife. He allegedly had savings in the region of \$200,000.

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- (b) Prior to the purchase of Property 1, he was residing in another unit in District E [ ' Property 3' ] with his two sons, his daughter and his wife. Property 3 was about 300 square feet with no partition.
- (c) Mr A was the boy friend of his daughter. Mr A was then working in Company F. The Taxpayer has no knowledge of the precise position that Mr A held nor Mr A' s earnings from that post. His daughter was a clerk with Company G. It was envisaged that Mr A would marry his daughter on completion of Property 1.
- (d) Property 1 was about 600 square feet in area with two bedrooms. He intended to send his second son to occupy his share of that flat.
- (e) Property 2 was purchased for use by his two sons and his daughter. Property 2 was about 600 square feet. Property 2 was registered in the names of Mr C, Mr D and the Taxpayer himself as he did not have sufficient fund to effect the purchase on his own. His two sons contributed towards the purchase.
- (f) The relationship between Mr A and his daughter turned sour. Mr A lost his job with Company F and had to earn his livings in China. The breakdown of this relationship was the principal reason leading to the sale of Property 1. The Taxpayer accepted that this was not the reason he told the Revenue in his letter of 17 April 1998. The Taxpayer explained that he was reluctant to disclose the true reason to avoid embarrassment. The Taxpayer also accepted that he previously put forward bad *fung shui* as a reason for sale. The Taxpayer admitted that he was not a staunch believer of *fung shui* and he was not aware of any *fung shui* problem in relation to Property 1.

### **The applicable principles**

11. The principles are clear. We have to ascertain the intention of the Taxpayer at the time when Property 1 was purchased. We have to be satisfied that his intention was to purchase the same as the residence of his family and such intention is on the evidence ' genuinely held, realistic and realisable' .

12. As pointed out by Mortimer J (as he then was) in All Best Wishes Limited v CIR, 3 HKTC 750 :

*' It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'*

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13. Under section 68(4) of the IRO, the onus of proving that the assessment appealed against is incorrect is on the Taxpayer.

### **Our decision**

14. The issue is one of credibility. The Taxpayer did not produce any documentary evidence in support of his case and we are in effect being asked to act simply on his oral evidence.

15. We are not convinced by the oral evidence of the Taxpayer. His financial position in 1991 is crucial in considering the viability of his alleged long term plan. His letter dated 17 April 1998 is a weighty pointer against the Taxpayer. We find it difficult to see why disclosure of the true state of relationship between Mr A and his daughter could be regarded as a source of embarrassment. His casual reference to *fung shui* as a cause leading to sale of Property 1 did not enhance his credibility.

16. We have not been provided with a full history of the payments made for the purchase of Property 1. The little we know about Mr A indicates that he would have difficulties in sustaining the purchase on a long term basis.

17. In these circumstances, we are of the view that the Taxpayer failed to discharge the onus that the assessment appealed against is incorrect. We dismiss the Taxpayer's appeal.