

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D45/00

**Profits tax** – whether loss from the sale of a property was trading in nature – whether it should be allowed in his personal assessment – sections 2(1), 14, 42(2) and 68(4) of the Inland Revenue Ordinance (‘IRO’).

Panel: Andrew Halkyard (chairman), Edward Chow Kam Wah and Emily Lam Yuet Ming.

Date of hearing: 7 June 2000.

Date of decision: 25 July 2000.

The taxpayer objected to the personal assessment for the year of assessment 1995/96 arising out of the purchase and sale of Property 1 on the ground that the loss incurred by him from the disposal of Property 1 was trading in nature and should be taken into account in determining his net chargeable income. The issue in the appeal was whether the taxpayer was liable to profits tax by having entered into an adventure in the nature of trade jointly with a Ms A, a friend of his former wife (sections 14 and 2(1) of IRO). If so, his share of the loss arising from that adventure should be allowed in his personal assessment (section 42(2) of IRO).

#### **Held :**

1. To determine whether a property is a capital asset or a trading asset, the purchaser's intention at the time of acquisition is crucial: Simmons v IRC (1980) 53 TC 461.
2. An intention to hold property as a capital investment must be definite and not simply a wish incapable of fulfillment. The stated intention of a person is not decisive. Actual intention can only be determined objectively, usually on the basis of the so-called ‘badges of trade’: Marson v Morton [1986] 1 WLR 1343 at 1348-1349.
3. The onus of proving the assessment appealed against is excessive or incorrect is on the taxpayer (section 68(4)).
4. The Board of Review found on the balance of probabilities that Property 1 was used in a manner inconsistent with the taxpayer's professed trading purpose.

**Appeal dismissed.**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Cases referred to:

Simmons v IRC (1980) 53 TC 461  
Marson v Morton [1986] 1 WLR 1343  
All Best Wishes Ltd v CIR (1992) 3 HKTC 750

Chow Cheong Po for the Commissioner of Inland Revenue.  
Taxpayer in Person.

### **Decision:**

1. The Taxpayer has objected to the personal assessment for the year of assessment 1995/96 raised on him. The Taxpayer claims that the loss incurred by him from disposal of a property was trading in nature and should thus be taken into account in determining his net chargeable income.

### **The facts**

2. The following facts are not in dispute.
1. The Taxpayer was divorced from his former wife (‘ the Former Wife ’ ) on 28 September 1995. The Taxpayer and the Former Wife have two sons. The Taxpayer was given custody of the eldest son (born in 1980). The Former Wife was given custody of the youngest son (born in 1982).
  2. On 24 June 1994 the Taxpayer and Ms A entered into a provisional agreement to purchase a property at District B (‘ Property 1 ’ ) for a consideration of \$3,230,000. Property 1 was assigned to the Taxpayer and Ms A as joint tenants on 30 July 1994.
  3. The Taxpayer and Ms A financed the purchase of Property 1 partly by way of a mortgage loan of \$1,800,000 from a finance company. The loan was repayable by 180 monthly instalments of \$18,256.80 each.
  4. By a provisional agreement dated 5 January 1996, the Taxpayer and Ms A agreed to sell Property 1 for \$2,850,000. The sale was completed on 29 February 1996.

INLAND REVENUE BOARD OF REVIEW DECISIONS

5. Other than Property 1, the Taxpayer acquired and disposed of the following properties:

<b>Location</b>	<b>Purchase</b> (a) Date of agreement (b) Date of assignment (c) Purchase price	<b>Sale</b> (a) Date of agreement (b) Date of assignment (c) Sale price
Property 2 District B	(a) 2-8-1971 (b) 11-9-1974 (c) \$220,000	(a) 16-4-1996 (b) 26-4-1996 (c) \$3,280,000
Property 3 District C	(a) 19-4-1996 (b) 30-4-1996 (c) \$2,600,000	(a) 26-6-1997 (b) 26-8-1997 (c) \$3,750,000
Property 4 District D	(a) 19-9-1997 (b) 24-10-1997 (c) \$2,270,000	Not yet sold

6. Property 2 was purchased by the Taxpayer and thereafter used by him and his family (namely, the Former Wife and their two children) for residential purposes. Under a separation deed dated 4 November 1992, the Taxpayer agreed to provide a cubicle in Property 2 for use and occupation as a residence by the Former Wife and their youngest son.<sup>1</sup>
7. On 20 March 1995, in accordance with a further and separate agreement, the Taxpayer transferred one-half of Property 2 to the Former Wife. Thereafter, the Taxpayer and the Former Wife owned Property 2 as joint tenants.<sup>2</sup>
8. Property 3 and Property 4 were solely owned by the Taxpayer and were used as his residence.

<sup>1</sup> In evidence the Taxpayer stated that at all relevant times until 1999, and notwithstanding his divorce, the Former Wife and their youngest child lived with him in the same premises. They continued to live in Property 2 after the divorce (see note 2 below) and later moved with him to Property 3 and then to Property 4.

<sup>2</sup> In evidence the Taxpayer stated that facts 6 and 7 are explicable because the Former Wife wanted to protect the interests of her youngest son and did not want him to live apart from the Taxpayer.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

9. In their property tax return for the year of assessment 1994/95 issued in respect of Property 1 the Taxpayer and Ms A declared the use of Property 1 as follows:

‘ Wholly used by owners for residential purposes from June 1994 to present.’

In this property tax return Ms A declared her ‘ residential address’ to be Property 1; the Taxpayer declared his ‘ residential address’ to be Property 2.

10. The Taxpayer filed his tax return for individuals for the year of assessment 1995/96 on 17 May 1996. In this tax return the Taxpayer claimed that his share of the loss incurred on the sale of Property 1 amounted to \$380,082. He elected to be assessed under personal assessment.

11. The assessor was of the opinion that Property 1 was acquired by the Taxpayer and Ms A as a capital asset and therefore the loss on sale of Property 1 was capital in nature. The assessor thus raised on the Taxpayer the following personal assessment for the year of assessment 1995/96:

Net chargeable income (total income less allowances and donation):

\$420,406

Tax payable thereon: \$76,281

12. The Taxpayer objected to the personal assessment on the ground that his share of the loss on disposal of Property 1 should be allowed for deduction against his total income because Property 1 was acquired for a trading purpose.
13. The assessor maintained that Property 1 was acquired as a capital asset and refused the Taxpayer’s claim that his share of the loss should be allowed in his personal assessment for the year of assessment 1995/96.
14. In correspondence with the assessor the Taxpayer claimed:
- (a) His intention for acquiring Property 1 was to hold it for a short period and to sell it for profit.
  - (b) Property 1 was left vacant during the period of ownership because he intended to sell it in the market and the selling price of rented property is less than that of a vacant property.
  - (c) Property 1 was sold in order to cut his losses because the market price of the property had dropped.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- (d) Ms A was a friend of the Former Wife.
  - (e) The Taxpayer and Ms A contributed \$930,000 and \$500,000 respectively towards the downpayment for Property 1. For his share the Taxpayer contributed \$300,000 from his own resources. He borrowed the balance of \$630,000 from his sister.
  - (f) The monthly mortgage payments made to the finance company were borne by the Taxpayer and Ms A in equal shares.
  - (g) The Taxpayer's sister allowed him to repay \$2,500 monthly as loan interest. She also allowed him to repay the principal after Property 1 was sold. In view of the loss incurred on the sale of Property 1 the payments of \$2,500 per month made to his sister were agreed to represent part repayment of the loan.
15. The assessor obtained from The Hongkong Electric Company Limited, the Director of Water Supplies and The Hongkong and China Gas Company Limited details of the utilities consumption at Property 1 for the period July (end) 1994 to February (end) 1996.
16. The Taxpayer's employment income for the years of assessment 1993/94 to 1995/96 was:
- |         |           |
|---------|-----------|
| 1993/94 | \$393,526 |
| 1994/95 | \$501,909 |
| 1995/96 | \$583,706 |
17. In her tax returns for the years of assessment 1994/95 and 1995/96 submitted in 1996 Ms A declared her residential address to be Property 3.
18. On 21 December 1999 the Commissioner issued a determination rejecting the Taxpayer's objection. She concluded that the purchase and sale of Property 1 was not a trading transaction and confirmed the personal assessment raised on the Taxpayer for the year of assessment 1995/96.
19. On 17 January 2000 the Taxpayer lodged a valid appeal to the Board of Review against the Commissioner's determination. The Taxpayer contended that he did purchase Property 1 for the purpose of resale at a profit and therefore his share of the loss should be allowed as a deduction in his personal assessment.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### **The Taxpayer's evidence**

3. The Taxpayer appeared before us and gave sworn evidence. In relevant part, that evidence was as follows:

#### 3.1 The Taxpayer's occupation (fact 16)

At all relevant times the Taxpayer was in full time employment. He was an administration manager of a local company.

#### 3.2 Ms A (facts 2 and 17)

Ms A was a friend of the Former Wife. The Taxpayer has known her since about the end of 1992. Prior to the purchase of Property 1 the Taxpayer had no previous commercial dealings with Ms A.

The Taxpayer could not state specifically where Ms A lived other than to state that this 'was in or around Location D' and 'somewhere in District E'. He reiterated that Ms A was a friend of the Former Wife. The only other information he ventured about Ms A was that she was married with children.

The Taxpayer was asked why Ms A declared her residential address to be Property 3 in her tax returns for the years of assessment 1994/95 and 1995/96. He replied that her mother lived in the same building in which Property 3 was located and that when mail arrived for Ms A he would give it to Ms A's mother. The Taxpayer did not explain why Ms A did not designate her family home in District E, or even her mother's address, as her 'residential address'.

#### 3.4 The purchase of Property 1 (fact 2)

A few weeks before the purchase of Property 1 the Taxpayer talked to Ms A and told her he wanted to earn more money. They discussed the possibility of purchasing a property. Ms A suggested the purchase of Property 1. Ms A handled all the steps taken to purchase Property 1 because the Taxpayer stated she was quite experienced in property dealing matters for many years. For example, she viewed the property and took care of the purchase negotiations. Although the Taxpayer viewed the property on one occasion (together with Ms A and the real estate agent) he did not pay much attention to the state of the property.

The Taxpayer stated that he was not aware of the property market conditions at the time of the purchase although in cross examination his answers did indicate

## INLAND REVENUE BOARD OF REVIEW DECISIONS

that he was certainly not ignorant in these matters. Indeed, some of his answers showed more than a passing familiarity with property conditions in District B, the area where Property 1 was located.

After considering the situation, he agreed with Ms A to purchase Property 1 jointly. This was on a 50/50-ownership basis. The Taxpayer was influenced in this decision by Ms A's statement that the property was being offered for sale at about \$200,000 lower than the market price. The Taxpayer reiterated that he purchased Property 1 to hold short term and for resale at a profit.

Included in the purchase price were some items of furniture. After the purchase the Taxpayer did not decorate Property 1; neither did he purchase any additional furniture or electrical equipment.

### 3.5 Financing the purchase of Property 1 (fact 14(e) and (g))

In evidence the Taxpayer gave a slightly different version from that appearing at fact 14. He said that the contribution of each party towards the downpayment was \$500,000. Because Ms A did not have enough money to finance her share of this payment, she also borrowed from his sister. Presumably (this was not clear in evidence) the balance of the downpayment was financed by his sister. Although his sister did not take any share in Property 1 the Taxpayer stated that if he had made a profit on resale he would have given her some extra payment in addition to the interest payment (which was low) to which she was entitled. He stated that he told his sister that he wanted to sell Property 1 quickly.

The Taxpayer stated that no documentary evidence was available concerning the arrangement with his sister. The arrangement was concluded orally. He also did not enter into any formal agreement with Ms A (apart from the agreements for sale and purchase and the deed of mortgage) to evidence the nature of their joint purchase, ownership and disposal of Property 1.

The Taxpayer's evidence generally in relation to financing was not particularly clear. On one occasion he stated that only he borrowed money from his sister and that he then on-lent some of these funds to Ms A. The reason for this, he stated, was that he approached his sister and his sister trusted him. On another occasion, as indicated above, he stated that Ms A also borrowed money from his sister. Later in cross examination he said he did not know how Ms A settled her debt to his sister because his sister did not live in Hong Kong and only returned for periodic visits.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The Taxpayer stated that he borrowed money from his sister, rather than borrow more money from the bank, because a larger bank mortgage would have meant that he would have to pay more interest.

The Taxpayer paid the mortgage loan from the finance company monthly by autopay. Ms A paid her share by making a cash payment to him every month. Sometimes he just pocketed this cash payment. Sometimes he put this money into his bank account if he did not have sufficient funds therein to make the monthly payment. No records were available to substantiate the claims relating to this arrangement with Ms A.

### 3.6 Ownership of Property 1

The Taxpayer stated that he wanted to sell Property 1 immediately after he purchased it and for this reason it was not leased. He said that once the purchase was completed he immediately asked Ms A to sell the property. No documentary evidence of any sales advertisements or dealings with real estate agents was produced by the Taxpayer.

The Taxpayer acknowledged that he purchased Property 1 with Ms A as joint tenants, and not as tenants in common. He professed not to know the difference between these forms of joint ownership and he assumed that a joint tenancy simply meant joint ownership on a 50/50 basis. He stated that the law firm (or, more accurately, the conveyancing clerk) handling the purchase for him had not explained the difference.

### 3.7 The sale of Property 1 (fact 4)

As with the purchase, all the steps taken to sell Property 1 were handled by Ms A. Although the Taxpayer stated that he wanted to sell before Property 1 was ultimately sold he explained that this was not possible because no one wanted to pay the asking price. Eventually the Taxpayer stated that he had to reduce the price and cut his loss.

From the money received from the sale the Taxpayer repaid his sister who helped finance the purchase of the property.

### 3.8 The utilities consumption at Property 1 (fact 15)

The Taxpayer stated that he did not know anything about this matter until notified and queried by the assessor. He then asked Ms A to explain. She told him that the utilities were consumed when she (together with a friend(s)) waited



## INLAND REVENUE BOARD OF REVIEW DECISIONS

for buyers to inspect the property. Sometimes several potential buyers inspected the property on the same day. Sometimes they arrived later than the appointed time so she had to switch on the lights and air-conditioner. Ms A paid all the electricity bills.

The Taxpayer did not know how many potential buyers came to inspect the property. Ms A handled this matter.

Although the Taxpayer was the registered consumer for water supply, the bills were sent direct to the address of Property 1. He assumes Ms A paid them.

The Taxpayer could not explain the low gas consumption at the property.

Overall, we find that the Taxpayer could not justify either the general or specific levels for utilities consumption. He merely repeated that Ms A told him that this was all due to inspections by potential buyers. He did however reiterate that Ms A could not have lived in Property 1 because she should have paid rent and she had her family residence in District E.

### 3.9 Post sale activities

After the sale of Property 1 the Taxpayer did not enter into any property trading transactions. He explained that he had already lost money on the Property 1 transaction.

### 3.10 The property tax return for the year of assessment 1994/95 (fact 9)

The Taxpayer stated that he declared Property 1 was ‘wholly used by owners for residential purposes from June 1994 to present’ because he thought that the return required him to clarify the nature of Property 1 and, in this regard, there were only two categories of property, ‘commercial’ and ‘residential’. He stated he had to choose one category so he chose ‘residential’. The Taxpayer contended that the word ‘residential’ simply means ‘place to live’ and does not mean ‘self-occupied’.

The Taxpayer could not explain why in choosing ‘residential’ he then added ‘from June 1994 to present’. When it was put to him that period of use was irrelevant if he simply thought he had to state the nature of the property as either residential or commercial, the Taxpayer replied that ‘I may have got this wrong’.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The Taxpayer could not explain why Ms A declared her 'residential address' to be Property 1 other than to say that Ms A told him that this does not matter and that Property 1 was simply a mailing address for her and she kept the mail box key. The Taxpayer could not explain why Ms A did not distinguish, as the property tax return required, between her 'residential address' and her 'postal address'.

### **The Taxpayer's contentions**

4. (1) The Taxpayer reiterated his ground of appeal that at the time of purchase he intended to sell Property 1 for a profit within a short period of time.
- (2) He then noted that the Commissioner had accepted that he acquired Property 2 for residential use (fact 6) and asked rhetorically how he could then have used Property 1 for residential purposes, given that Property 2 was always his residence during his ownership of Property 1.
- (3) He also argued that if Property 1 was not purchased for trading, then he would have no need to sell it in order to cut his loss.
- (4) Finally, he noted that all his other property purchases, which had been accepted by the Commissioner as not involving trade (facts 5 to 8), were all made by him personally. By way of contrast, his dealing with Property 1 was made together with Ms A as joint tenants. In this regard, the Taxpayer emphasised that Ms A was an experienced property trader.

### **The Commissioner's contentions**

5. The Commissioner's representative, Mr Chow Cheong-po, contended that the Taxpayer did not purchase Property 1 with the intention of resale at a profit. He argued that the Taxpayer's submissions as to his intention for purchasing Property 1 for resale at a profit should not be accepted and that the objective facts show that the property was purchased for beneficial use. Mr Cheong supported his contention by relying on various facts, including: the length of holding of Property 1; the utility consumption; as well as the declaration by the Taxpayer and Ms A in their property tax return for the year of assessment 1994/95 that Property 1 was 'wholly used by owners for residential purposes from June 1994 to present'.

### **The relevant law**

6. The question for decision is whether the Taxpayer is liable to profits tax by having entered into an adventure in the nature of trade jointly with Ms A (section 14, section 2(1) definition

## INLAND REVENUE BOARD OF REVIEW DECISIONS

of ‘ trade’ ). If so, his share of the loss arising from that adventure should be allowed in his personal assessment (section 42(2)).

7. To determine whether a property is a capital asset or a trading asset, the purchaser's intention at the time of acquisition is crucial. In Simmons v IRC (1980) 53 TC 461, Lord Wilberforce stated at 491:

*‘ Trading requires an intention to trade: normally the question to be asked is whether this intention existed at the time of the acquisition of the asset. Was it acquired with the intention of disposing of it at a profit, or was it acquired as a permanent investment?’*

8. An intention to hold property as a capital investment must be definite and not simply a wish incapable of fulfilment. Moreover, the stated intention of a person is not decisive. Actual intention can only be determined objectively, usually on the basis of the so-called ‘badges of trade’ , see Marson v Morton [1986] 1 WLR 1343 at 1348-1349.

9. In All Best Wishes Ltd v CIR (1992) 3 HKTC 750, Mortimer J stated at 771:

*‘ 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.’*

10. The onus of proving the assessment appealed against is excessive or incorrect is on the Taxpayer (section 68(4)).

### **Analysis**

11. Taken at face value the Taxpayer’ s case is clear, if not compelling. However, his claim that his intention to purchase Property 1 was to hold short term for resale at a profit must be tested objectively by reference to known facts. We must also examine his claims in the round, and consider his overall demeanour both in giving direct evidence and during cross examination. In the result we were not satisfied, on the balance of probabilities, that (1) considering the Taxpayer’ s evidence as a whole he intended to purchase Property 1 for trading purposes and (2) in any event, the objective facts sufficiently supported his claimed intention.

12. We considered very carefully the evidence of the Taxpayer, particularly as it was given in the absence of corroborating evidence from Ms A. We must state at the outset that the details he provided about Ms A and his relationship with her were very sketchy. She was clearly the key player in the Property 1 transaction. But she did not appear before us to give evidence. No explanation was given.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

13. The only details the Taxpayer provided about Ms A were that she was married with children, lived in or around Location D, was an experienced property trader, was a friend of the Former Wife and that the Taxpayer had known her since around the end of 1992. Why was the Taxpayer compelled to enter into a commercial deal with her when he volunteered so little information about her? What was her background other than the vague and unsupported claim that she was an experienced property trader who, we note in passing, seemingly had to borrow the downpayment for Property 1 from the Taxpayer's sister? Why did Ms A declare her 'residential address' to be Property 1 in the property tax return for the year of assessment 1994/95 when in her other tax return for that year she declared her residential address to be Property 3? The Taxpayer's replies to these questions were patently unsatisfactory. In no way did they dispel our concerns that there was much more to this transaction than the Taxpayer cared to tell.

14. The Taxpayer's explanation as to Ms A's source of funds for the downpayment to finance Property 1 (coming either directly or indirectly from his sister) was confusing. We can appreciate why the Taxpayer may not have any documentary evidence concerning his arrangement with his sister (a very close family member). But it does seem strange that there was nothing to evidence the arrangement between the Taxpayer and Ms A. This issue is particularly poignant when details of the mortgage repayments are examined. In this particular, if the Taxpayer's evidence is to be believed, without any formal agreement he simply trusted Ms A to pay him her share in cash even though he was obliged to make a monthly autopayment to the mortgagee and sometimes had insufficient funds in his bank account for this purpose. Even stranger is the absence of any formal arrangement between the Taxpayer's sister and Ms A. In the result, the fact is that no records were made available by the Taxpayer to substantiate the claims relating to any part of the arrangement concluded with Ms A, apart from the formal agreement showing them to have purchased Property 1 as joint tenants.

15. We now turn to the Taxpayer's evidence as to the purchase of Property 1 with Ms A as joint tenants, and not as tenants in common. In this regard we cannot dispel a lingering doubt. It may be, as the Taxpayer explained, he assumed that a joint tenancy simply meant joint ownership on a 50/50 basis. But the fact remains that they did purchase Property 1 as joint tenants and this could have had significant and serious financial implications for the Taxpayer if the parties really did purchase the property in the course of a trading transaction.

16. We now deal with the issue of the utilities consumption at Property 1. We will not repeat the evidence given by the Taxpayer other than to state our finding that, taken overall, the Taxpayer simply could not justify either the general or specific levels for utilities consumption. He merely repeated that Ms A told him that this was all due to inspections by potential buyers. In our view, however, the level of utilities consumption – including significant amounts for water and gas that were totally unexplained – is much more consistent with normal residential use of the property rather than itinerant use when potential buyers were involved. Also, if a real estate agent were

## INLAND REVENUE BOARD OF REVIEW DECISIONS

involved in the sale (the Taxpayer claims that a sales commission was paid), we were not clear why on each occasion Ms A needed to be present to introduce potential buyers to the property.

17. We now turn to the property tax return for the year of assessment 1994/95. In that return the Taxpayer and Ms A declared that Property 1 was ‘wholly used by owners for residential purposes from June 1994 to present’. The Taxpayer attempted to explain this declaration by stating he thought the return required him to clarify the nature of Property 1. We find his explanation improbable. Not only was it unresponsive to the question asked, we note also that the Taxpayer could not adequately explain why Ms A declared her ‘residential address’ to be Property 1 when the return form clearly distinguished between ‘residential address’ and ‘postal address’.

18. None of the matters dealt with in the previous paragraphs are conclusive against the Taxpayer. But in total they illustrate the concerns and uncertainties and, in the result, the improbability of accepting the Taxpayer’s testimony at face value.

19. In conclusion, having heard and considered the Taxpayer’s evidence and demeanour, we find on the balance of probabilities that Property 1 was used in a manner inconsistent with the Taxpayer’s professed trading purpose. More generally, and on the same basis, we find that the Taxpayer has not persuaded us that he purchased Property 1 for the short term with the intention to sell at a profit.

20. Although the above reasoning is sufficient to dispose of this appeal, we appreciate that intention must be tested objectively. We thus propose to test our conclusions by examining certain badges of trade that were relevant to the specific arguments advanced by the Taxpayer. These arguments and our comments thereon are as follows.

1. Argument. At the time of purchase the Taxpayer intended to sell Property 1 for a profit within a short period of time.

Comment. The Taxpayer’s stated motive and self-serving statements must be tested objectively by reference to known facts. Not only do we have serious concerns overall about many aspects of the Taxpayer’s evidence (see above), but the following badges of trade support the inference that the Taxpayer was not engaged in any trading transaction: no trading history, reasonable length of ownership of Property 1 (19 months), clear evidence of use of the property for an unexplained purpose which seems inconsistent with trading and no supplementary work to enhance the value of the property.

2. Argument. The Commissioner accepted that the Taxpayer had acquired Property 2 for residential use. Therefore how could the Taxpayer have used Property 1 for residential purposes, given that Property 2 was always his residence during his ownership of Property 1?

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Comment. We accept this argument but note that one of the main implications from the facts we have found is that Property 1 was used for an unexplained purpose, which seems inconsistent with the Taxpayer's professed trading intention.

3. Argument. If Property 1 were not purchased for trading, then he would have no need to sell it in order to cut his loss.

Comment. The argument can be turned the other way. If Property 1 were purchased for trading, then why was it not sold earlier when the trend of the market appeared to be downward? In any event, a non-trading asset can also be sold to avoid further loss.

4. Argument. He made all his other property purchases, which had been accepted by the Commissioner as not involving trade, personally. By way of contrast, his dealing with Property 1 was made together with Ms A as joint tenants.

Comment. We agree that these facts support the Taxpayer but note that they then form part of the overall picture and cannot be looked at in isolation. Apart from being neutralised by other factors (see 1. above) we reiterate our lingering concerns that the property was purchased in joint tenancy as distinct from a tenancy in common and that no evidence was produced to support the contention that Ms A was an experienced property trader.

21. Finally, we come to the key role played by Ms A in this transaction. Even if we accepted all the Taxpayer's evidence and argument (which we do not), the fact remains that at all relevant times, from purchase to sale of Property 1, Ms A seemingly was in control of everything that happened. In our view she clearly used the property in a way that was inconsistent with the trading intention which the Taxpayer alleges. What that use was, the Taxpayer, when pressed, says that he could not know. He finally suggested 'maybe it was used by Ms A and her friends for mahjong'. It is well established that the essence of trading is to show an intention (tested objectively) at the time of purchase for the purpose of resale at a profit. If the owner who appeared to make all the decisions (Ms A) purchased and used Property 1 for some other purpose, then the Taxpayer, having failed or simply neglected to stop her in this endeavour, cannot insist that his intention must be accepted as paramount and realistically held.

### **Conclusion**

22. Having heard and considered the Taxpayer's evidence, and on the facts found by us, we conclude that his stated reason for purchasing Property 1 has not been substantiated. We thus

## INLAND REVENUE BOARD OF REVIEW DECISIONS

conclude that, in purchasing Property 1, the Taxpayer had not engaged in an adventure in the nature of trade. The appeal is hereby dismissed.