

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D52/98

Profits tax – acquisition and sale of property – intention of purchaser at time of acquisition – burden of proof on purchaser – whether tax chargeable on the profits of sale – section 68(4) Inland Revenue Ordinance.

Panel: Christopher Chan Cheuk (chairman), Christopher Henry Sherrin and Gerald To Hin Tsun.

Date of hearing: 5 March 1998.

Date of decision: 29 June 1998.

The taxpayers completed the purchase of a property on 25 September 1991 which they subsequently sold on 28 April 1992. The Commissioner determined that the assessable profits arising out of the sale was HK\$458,719. The taxpayers appealed. They averred that the property had been purchased for their own use as a future residence and they had no intention of trading in property or speculation on it. Accordingly, they challenged the Commissioner's determination.

Held :

1. It was for the taxpayers to prove that the property was acquired as a future residence. The stated intention of the taxpayers was not decisive but must be viewed in the light of all the facts presented to the Board (All Best Wishes Limited v CIR 3 HKTC 750, 771 per Mortimer J., followed);
2. Upon considering the evidence as a whole, the Board doubted the assertion made by the taxpayers as to their intention at the material time. Hence, the taxpayers had failed to discharge their burden of proof. The Commissioner's determination was affirmed.

Obiter :

The Board acts as a fact-finding body and has to hear all the evidence *de novo* if the facts are not agreed between the parties. The Board is not affected or influenced by the Commissioner's previous decision in any way (CIR v The Board of Review ex parte Herald International Limited [1964] HKLR 224, 236 per Blair Kerr J., followed).

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Appeal dismissed.

Cases referred to:

CIR v The Board of Review Ex Parte Herald International Ltd [1964] HKLR 224
All Best Wishes Ltd v CIR 3 HKTC 750

Chan Tak Hong for the Commissioner of Inland Revenue.
Anthony Chiang of Messrs Anthony S L Chiang & Co for the taxpayer.

Decision:

Appeal

1. This is an appeal by Mr A and Ms B ('the Taxpayers') against the determination by the Commissioner of Inland Revenue, dated 12 September 1997 in respect of the profits tax assessment for the year of assessment 1992/93 arising out of the purchase and sale of the property known as the Subject Property.

Proceeding

2. Both the Taxpayers were present at the hearing and were represented by Mr Anthony CHIANG of Anthony S L Chiang & Co, Certified Public Accountants. Ms B chose not to give evidence whilst her husband Mr A testified under oath.

Grounds of Appeal

3. The grounds of appeal were set out in the letter dated 11 October 1997 from Mr CHIANG for the Taxpayers to the Clerk of the Board which can be briefly summarised as follows:

- (a) The Taxpayers acquired the Subject Property for their own use and they had no intention of trading in property or speculation on it.
- (b) The Commissioner failed to take into consideration the following facts:
 - (i) the Subject Property had carried out extensive decoration;
 - (ii) the decoration was made with an intention that they would move in and live there as their future matrimonial home; and
 - (iii) the decoration was not made to enhance the value for sale.

Law

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4. Section 68(4) of the Inland Revenue clearly states: *'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'* Therefore, the burden is on the Taxpayers to show to us that they acquired the Subject Property as their future residence. We are not interested what has or has not been taken into consideration by the Commissioner. The Board acts as a fact-finding body and has to hear all evidence de novo if the facts are not agreed between parties as described by Mr Justice Blair Kerr in CIR vs The Board of Review Ex Parte Herald International Ltd [1964] HKLR 224 at 236:

'...The Commissioner in his reasons may give his view of the law, and the appellant may appeal to the Board of Review if he considers that the Commissioner's view is erroneous. To that extent, the Board is truly a reviewing body. But I do not agree that the Board sits as an appellate tribunal from "findings of fact" made by the Commissioner; and, in so far as the facts are not agreed by the parties when the case has been dealt with by the Commissioner, in my view the Board is the fact-finding body.'

In other words we have to make our own fact-finding and do not rely on the Commissioner's. In this case, the Taxpayers have to show us that they intended to use the Subject Property for themselves and their family and we are not affected or influenced by the Commissioner's decision in any way.

5. To examine the intention of the Taxpayers Mr Justice Mortimer in All Best Wishes Limited v CIR 3 HKTC 750 at 771 has suggested the way to deal with the evidence: *'The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of the acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence.'* We intend to adopt this approach: we shall assess the weight of the evidence before us and to look at the evidence as a whole. We shall consider the overall cumulative effects of the different facts presented to us and come to our own conclusion.

The Taxpayers' Case

6. At the time of acquisition of the Subject Property Mr A of the Taxpayers worked and lived at Company C at District D as an apprentice earning \$4,500 a month.

7. In 1991 his mother who worked in a real estate development company informed him that the project in which the Subject Property was located had units to be offered for sale. As she was an employee of the company, she had the advantage of buying before offering to the public. The Taxpayers agreed to buy the Subject Property and planned it to be their future home after marriage.

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8. On 25 September 1991 they completed the purchase and obtained a mortgage loan of \$580,000 to be repaid by 180 monthly instalments of \$6,321 each. In November 1991 decoration commenced and was carried out by a decoration firm operated by his friend.

9. In March 1992 he had a quarrel with Mr E, the brother of Ms B and resigned from the work. Mr A referred to Mr E as his boss but documentary evidence as found on pages 37 to 39 of Exhibit 'R1' reveals that the registered owner of Company C at the material time was Ms B's mother. This is immaterial and we accept as fact that he was out of employment after the quarrel and remained unemployed for two years up to April 1994 when he returned to work for the firm again.

10. Because he was out of work and could not find other employment it was difficult for them to continue to hold the Subject Property. They decided to sell it which they did on 28 April 1992 at a price of \$1,285,000. The Commissioner determined that the assessable profits arising out of the sale was \$458,719. The Taxpayers appealed against such determination.

Financial Position of the Taxpayers

11. According to his testimony at the material time Mr A earned a monthly salary of \$4,500 with food and lodging provided while Ms B, at that time they were not married, was earning a salary of \$7,000 as a shopkeeper. They had limited saving as evidenced by the fact that in order to pay the deposit and part of the purchase price they borrowed from their respective families substantial sums of money. With a total income of \$11,500 they had to make a monthly repayment of \$6,321 to the bank. We wonder how they planned to repay their respective families. Under such tight financial situation Mr A still told us that they spent a total sum of \$162,000 on decoration representing over 20% of the purchase price. It was also in his evidence that Mr A could pay parts of the decoration fee in the sums of \$40,000 and \$20,000 on 6 December 1991 and 24 April 1992 respectively before the sale of the Subject Property. These together cast doubt on the Taxpayers' actual financial position whether it was the same as Mr A described to us and wanted us to believe.

Decoration

12. Mr A produced to us a copy of the statement dated 14 November 1991 in the form of a quotation written on paper with the letter head of a decoration company. In cross-examination Mr A admitted that the statement was made after the event for the purpose of answering enquiry by the assessor. The statement did not give detail description of the works carried out by the decorator.

13. The total charges for the decoration was \$162,000, of which \$125,000 was attributable to the decoration of the interior of the Subject Property and the remaining \$37,000 to erection of railing for the garden. The Taxpayer substantiated his payment by producing a copy of his saving passbook which showed that payments were made on 6 December 1991 (\$40,000), 24 April 1992 (\$20,000), 20 May 1992 (\$60,000) and 21 May

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1992 (\$40,000) amounting to a total sum of \$160,000 and not \$162,000. We were not told how and when he made the payment of the remaining \$2,000. The method of payment was not agreed beforehand; he explained that the proprietor of the decoration company was his friend and did not care too much about payment. When his friend was in need of money he would ask for it and the Taxpayer would pay him. If this was the case Mr A failed to explain to us why he made the two payments on two consecutive days, 20 and 21 May 1992 for the sums of \$60,000 and \$40,000 respectively all drawn from the same account. It is difficult for us to understand why he did not pay his friend in one lump sum as by that time all the decoration work had been completed and the Taxpayers had sold the Subject Property and received the sale proceeds in full.

Work History

14. At the time of acquisition Mr A was working as an apprentice at the car repairing company operated by Ms B's family. In March 1992 because of the quarrel with Ms B's brother he resigned and from then onward he remained unemployed for a period of two years. During the period of unemployment the Taxpayers were married on 30 March 1993. Then, Mr A travelled to Country F and stayed there for a period of almost four months from December 1993 to 4 June 1994. According to what he told us he was in financial difficulty after resignation and he had to sell the Subject Property. After sale he was able to repay the money owing to the two families which he borrowed at the time of purchase of the Subject Property and also to pay the decoration charges. In addition, he was able to remain unemployed, marry and travel abroad. Later, he built a house for the family.

The Small House

15. Mr A was an ethnic inhabitant in New Territories and was entitled to build a small house under the existing Government policy. Mr A told us that he was rather reluctant in making the application but being asked by his mother he complied with the request. A New Grant was issued on 8 April 1989 whereby he was required to complete the new building in accordance with its terms within 36 months of the date of the grant. He applied for several extensions of time and did not commence construction until he had completed the sale of the Subject Property. The profits he had made from the sale was not sufficient for the purpose. His sister-in-law paid the balance who lived with them and took one of the storeys. We do not understand why he did not build the house earlier. Instead he bought the Subject Property. According to his evidence he did not like the idea of building a new house but he always wanted to live with his parents, sister, brothers, niece and nephew in the Subject Property. We doubt whether the Subject Property was a more suitable accommodation for the family than the small house which he was allowed to build. Further he did not tell us why he later changed his mind and started the construction. After completion he and his whole family moved in and lived there. The only explanation he gave was that the building covenant had been extended for a number of times that the Government would allow no further extension. As the small house was not what he wanted why did he use the sale proceeds for the construction?

The Subject Property

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16. Possession of the Subject Property was given to the Taxpayers on the day of assignment, that is, 25 September 1991. The Taxpayers did not move in but waited for decoration which commenced almost two months later. After completion of the decoration his mother occasionally stayed there over night. Mr A told us that his mother also moved into the Subject Property the wood cabinet where the ancestor tablets were placed for worship. If that were true it showed that they wanted to use the place as their permanent home and why didn't the Taxpayers or at least Mr A move in? If the tablet cabinet was moved in after she knew that the Subject Property would be sold then such evidence has no bearing whatsoever.

Decision

17. We have considered the evidence as a whole and we doubt that the intention of using the Subject Property was genuinely held for the purpose as claimed. We are not satisfied that the Taxpayers have discharged their burden of proof. For this reason we dismiss the appeal. As in the course of hearing we had the verbal confirmation from Mr CHIANG for the Taxpayers that he did not dispute the quantum therefore we have no alternative but to uphold the determination by the Commissioner that the assessable profits for the year of assessment of 1992/93 be increased to \$458,719 and the tax payable thereon shall be \$68,807.