

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D65/98

Profits tax – assessable profits – profits arising from purchase and sale of properties by husband and wife.

Panel: Ronny Wong Fook Hum SC (chairman), Chiu Chun Bong and David Wong Pui Hon.

Date of hearing: 6 May 1998.

Date of decision: 27 July 1998.

On 21 February 1990, Mr and Mrs A purchased Property 1 for \$742,000. On 7 September 1990, Mr and Mrs A purchased Property 2 for \$1,381,300. On 9 July 1991, Mr and Mrs A sold Property 1 for \$1,410,000. On 25 October 1991, Mr and Mrs A purchased Property 3 for \$2,881,400. On 30 December 1991, Mr and Mrs A sold Property 2 for \$2,800,000. On 11 May 1992, Mr and Mrs A purchased Property 4 for \$4,427,850. On 23 November 1992, Mr and Mrs A sold Property 3 for \$3,980,000.

The issue relates to Mr and Mrs A's liability for profits tax in respect of profits arising from their dealings in Property 1, Property 2 and Property 3.

Mr A's submission was that each of Properties 1, 2, 3 and 4 was purchased with the view of satisfying Mrs A's ego in moving to greater pasture.

Held:

1. The Board has to ascertain the intention of Mr and Mrs A at the time when the properties in question were purchased. The Board has to be satisfied that the intention of Mr and Mrs A was to purchase each of these properties as their residence and that such intention is on the evidence 'genuinely held, realistic and reliable.' (All Best Wishes Limited v CIR 3 HKTC 750 considered and applied).
2. The Board accepted the evidence of Mr A and find that the purchase of each of Properties 1, 2, 3 and 4 was with the full intention of using the same as the matrimonial home. Whilst the family finance was tight, the Board was satisfied on a chronological view of the case that Mr A did have the financial capability in attaining his goal.

Appeal allowed.

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Case referred to:

All Best Wishes Limited v CIR 3 HKTC 750

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer represented by his tax representative, Yu King Yin.

Decision:

The appeal

1. This is a sad appeal. We are touched by the sincerity displayed by the first named Taxpayer ['Mr A'] and his complete devotion to his wife the second named Taxpayer ['Mrs A']. We hope one day such devotion is appreciated and reciprocated by Mrs A.

2. Mr A came from very humble background. He was brought up in District B, a place well known for the vice and crime perpetrated therein prior to its demolition. Mr A was not involved in any those activities. He earned his living selling potted Chinese pastries. He had to work from night till dawn to get his pastries ready for early morning workers. Whilst these virtues might receive quick recognition in other sectors of our society, Mr A was at pains to point out that they can easily be overshadowed by the stigma attached to District B origin.

3. In 1989, Mr and Mrs A were residing at a flat in District B. They were offered compensation of \$275,414 by the Building and Lands Department to vacate from this flat. Mr A was further offered compensation in the sum of \$280,000 in respect of his Chinese pastries business which he carried on at District B.

4. By an agreement dated 21 February 1990, Mr and Mrs A purchased Property 1 for \$742,900. An initial deposit of \$20,000 was paid on the signing of this agreement. A further deposit of \$54,290 was paid on 26 February 1990. The balance of the consideration of \$668,610 was paid on completion on 17 March 1990 with the help of a 15 11/12 years mortgage of \$600,000 from Company C, a credit company. This mortgage loan was repayable by 412 instalments of \$2,945 every fortnight. Property 1 is of an area of about 478 square feet.

5. By an agreement dated 7 September 1990, Mr and Mrs A purchased Property 2 for \$1,381,300. A total of \$138,130 was paid by 10 September 1990. A sum of \$1,243,170 was paid on completion on 29 September 1990 also with facilities extended by Company C. This loan of \$1,243,170 was repayable by 405 instalments of \$6,416 each repayable at two weeks interval. Partial repayments of \$170,000 and \$112,635.14 were made in about December 1990 and March 1991 reducing the fortnightly instalments to \$6,091.2 each. Property 2 is of an area of about 645 square feet.

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6. By an agreement dated 9 July 1991, Mr and Mrs A sold Property 1 for \$1,410,000. \$50,000 was paid to them on the signing of this agreement. A further \$90,000 was paid on 23 July 1991. The balance of \$1,260,000 was paid on completion on 9 August 1991.

7. On 25 October 1991, Mr and Mrs A purchased Property 3 for \$2,881,400. The purchase was supported by a mortgage loan of \$1,900,000 from the bank which called for monthly repayment instalment of \$18,651.2 each.

8. By an agreement dated 30 December 1991, Mr and Mrs A sold Property 2 for \$2,800,000.

9. On 11 May 1992, Mr and Mrs A purchased Property 4 for \$4,427,850. This purchase was supported by a mortgage loan which called for monthly repayment instalment of \$24,454 each.

10. Property 3 was sold on 23 November 1992 for \$3,980,000.

11. As from 11 July 1994, Mr and Mrs A started to live apart. Although Mrs A threatened dissolution of their 17 April 1975 marriage by a letter dated 3 August 1995, she has yet taken any step towards that end.

12. The issue before us relates to Mr and Mrs A's liability for profits tax in respect of profits arising from their dealings in Property 1, Property 2 and Property 3.

Case of Mr A

13. Only Mr A appeared at the hearing. He was accompanied by his son. His case was presented by his tax representative Mr YU King tin ['Mr Yu'] who argued Mr A's case with care and passion.

14. Mr A's case is a simple one. His marriage with Mrs A was on the rock. Mrs A was ashamed of Mr A's humble origin and had established acquaintance with another man. Mr A was anxious to save the marriage and was prepared to take steps to sever his tie with District B. Each of Properties 1, 2, 3 and 4 was purchased with the view of satisfying Mrs A's ego in moving to greener pasture. He was in a financial position to cater for her wishes. The compensation from his flat in District B and the earnings from his Chinese pastry business were sufficient to meet the initial and subsequent instalments. He is still deeply in love with Mrs A and look forward to their re-union.

15. Mr Yu offered to call Mr A's son and his sister-at-law to back up Mr A's evidence. As Mr A's evidence was not seriously challenged, we indicated to Mr Yu that their evidence would not be necessary.

The applicable principles

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16. The principles are clear. We have to ascertain the intention of Mr and Mrs A at the time when the properties in question were purchased. We have to be satisfied that the intention of Mr and Mrs A was to purchase each of these properties as their residence and that such intention is on the evidence ‘genuinely held, realistic and realisable’.

17. 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.’

Our decision

18. We must admit that we entertained serious reservations on the bona fide of this appeal before commencement of our hearing. The simple and spontaneous manner whereby Mr A gave his evidence completely dispelled all our disquiets. Having heard and seen Mr A, we have no doubt that his pleas are genuinely held.

19. We accept the evidence of Mr A and find that the purchase of each of Properties 1, 2, 3 and 4 was with the full intention of using the same as the matrimonial home. Whilst the family finance was tight, we are satisfied on a chronological view of the case that Mr A did have the financial capability in attaining his goal.

20. For these reasons, we would allow the appeal and discharge the assessment.