

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D70/94

Profits tax – purchase and sale of residential apartment – whether trading or capital investment.

Panel: T J Gregory (chairman), John C Broadley and Jao Yu Ching.

Date of hearing: 13 January 1995.

Date of decision: 27 February 1995

The taxpayer purchased an uncompleted residential apartment. She sold the residential apartment and immediately thereafter purchased another residential apartment together with her brother. The taxpayer gave evidence which was accepted by the Board. The Board accepted the reasons given by the taxpayer for her purchase and sale of the property in question and also the subsequent purchase jointly with her brother of another apartment.

Held:

Assessment annulled.

Appeal allowed.

Cases referred to:

Simmons v CIR 53 TC 461

Rees Roturbo v Ducker 13 TC 366

All Best Wishes Limited v CIR 3 HKTC 750

Shadford v H Fairweather & Co Limited 43 TC 291

Ng Yuk Chun for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. THE SUBJECT MATTER OF THE APPEAL

The Taxpayer appealed against the determination of the Commissioner issued on 3 August 1994 ('the determination') in which he reduced but upheld an assessment to profits tax on the net surplus received by the Taxpayer on the sale of a residential apartment.

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2. THE FACTS

The facts which were agreed were:

- 2.1 On 27 September 1990 a memorandum for the sale of a residential apartment in a [identified] building in course of construction in Place A ('the first property') was signed between an identified vendor and the Taxpayer. The sale price was \$623,100.
- 2.2 The 'gross' and 'net' floor areas of the first property are 409 square feet and 300 square feet, respectively.
- 2.3 On 11 October 1990 the Taxpayer entered into an equitable mortgage of the first property to secure the sum of \$560,790 which was repayable by 180 monthly instalments of \$6,374.
- 2.4 On 7 August 1991 a provisional agreement for the sale and purchase of the first property was entered into with the Taxpayer's name stated as vendor and [individual named] as purchaser. The sale price was \$938,000. At this date the first property was still under construction.
- 2.5 After deduction of solicitors' fees and mortgage loan interest the Taxpayer derived a gain of \$243,728 from this sale and it was this gain which had been taxed and was the subject matter of the appeal.
- 2.6 On 12 August 1991 the Taxpayer, together with her younger brother, contracted to purchase a residential apartment in a different [identified] building under construction in Place A ('the second property'). The sale price was \$1,530,000. The 'gross' floor area of this apartment is 641 square feet.
- 2.7 The Taxpayer and her brother completed the purchase of the second property on 12 February 1992. Their purchase was financed by a mortgage loan of \$1,050,000 repayable by 180 monthly instalments of \$11,444.50. The second property was leased to a tenant from 11 April 1992 when the monthly rent was \$7,700.

3. THE CASE FOR THE TAXPAYER

The Taxpayer appeared in person. The Board explained that, under section 68(4) of the Inland Revenue Ordinance ('the IRO'), it was for her to establish that the appealed assessment was wrong. Although she was affirmed in the Punti Dialect and although she was advised to give her evidence in that dialect she gave her evidence in English, a language which she spoke fluently. With the agreement of the Revenue, the Board, having first ascertained her residential address, occupation and age, questioned her to establish her case. Her evidence may be summarised as follows:

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- 3.1 In-chief:
- 3.1.1 Since her marriage on 14 March 1992 she had been living with her husband at his mother's residence in Place A. Prior to that she had lived at her own mother's residence in Place A.
- 3.1.2 She and her husband had known each other since 1984. Although they had not been formally engaged, they had intended to marry in 1989 but because of the death of his father they had postponed the wedding until 1992 to conform to Chinese tradition.
- 3.1.3 She confirmed the accuracy of the facts stated in sub-paragraph 2.1 above and added that the deposit was \$62,310. At the time she entered into this contract she was committed to living with her husband's mother after they were married and she wanted a flat which she and her husband could occupy if, after she moved in, she and her mother-in-law did not get on.
- 3.1.4 She also confirmed the accuracy of the facts stated in sub-paragraphs 2.2 and 2.3 above and that she was aware of the 'gross' and 'net' floor areas of the first property at the time she contracted to purchase it.
- 3.1.5 She confirmed the accuracy of the facts stated in sub-paragraph 2.4 above. She stated that her mother and brother had gone to the property company and were told they could sign a contract of sale on her behalf. When she entered into the purchase contract her brother had lent her some 50% of the down-payment and she expressed the belief that they thought they could make the decision on her behalf. She countersigned that agreement on 7 August 1991. She stated that if she had not done so her mother and brother would have been liable to pay a penalty of double the deposit.
- 3.1.6 She confirmed the accuracy of the facts stated in sub-paragraph 2.5 above.
- 3.1.7 She confirmed the accuracy of the facts stated in sub-paragraph 2.6 above and added that the brother referred to was the same brother who had signed the agreement referred to in sub-paragraph 3.1.5 above.
- 3.1.8 She confirmed the accuracy of the facts stated in sub-paragraph 2.7 above and added that possession of the second property had been recovered on 31 December 1994. This was because she was pregnant, her baby is due on 14 March 1995, and her mother is to move into the second property where she will look after the baby. This was because her mother-in-law had declined to allow the baby to live with her husband and herself at her home.
- 3.1.9 The purchase and sale of the first property and the purchase of the second property were the only property transactions with which she had been involved.
- 3.1.10 The selection of the first property was dictated by what she herself could afford to repay out of her own income.

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- 3.1.11 She concluded by stating that if she had entered into these transactions to make profits she could have made a considerable profit by selling the second property at any time between contracting to purchase and the date of the hearing of the appeal.
- 3.2 Cross-examination:
- 3.2.1 She confirmed that she knew her mother-in-law well and stated that she was a very traditional person. She would not say that she was a difficult person but added that there was always the possibility of conflict and/or that they may not get on. She confirmed that she had lived at her mother-in-law's residence since her marriage.
- 3.2.2 When asked to confirm that there had been no urgency to find a new home at the time of their marriage, she stated that her husband wanted her to live at his mother's home. When pressed she stated she had already purchased the second property. She reiterated that she had purchased the apartments in case she and her mother-in-law did not get along.
- 3.2.3 She confirmed that the first property was a small apartment and when asked why she had not saved up and purchased something better later she stated that she did not know if her future earnings would support higher instalment repayments. She added that they could live in the first property and it was in Place A which was where her family lived. When the question was repeated she asked what amount could she save and added that she was able to afford the instalments for the first property.
- 3.2.4 She confirmed that about half of the deposit for the first property had been lent to her by her brother and that her mother had made no contribution. This loan was repayable by monthly instalments. She stated that the amount of the monthly repayment was not fixed but she had repaid about \$3,000 each month.
- 3.2.5 She stated that her brother had not been a co-owner of the first property and that he was a co-owner of the second property as she would have been unable to support the monthly mortgage payments at the time of the purchase without his financial contribution. The profit on the sale of the first property and some of her mother's savings were used to finance the down payment for the second property. The monthly mortgage payments are funded by her brother and herself. She added that she did not consider it fair to borrow money from her family to purchase a property exclusively for herself.
- 3.2.6 When the representative for the Commissioner suggested that her brother had been a co-owner of the first property she said that that was not the case. All she had done was to borrow so that she could make the down payment. She could afford the monthly mortgage payments. However, for the second property she needed his financial assistance to meet the monthly mortgage payments.

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Because she was now pregnant he had agreed that she could have the use of the second property.

- 3.2.7 When the representative for the Commissioner suggested that her brother knew that the second property was to become her matrimonial home she answered in the negative. She stated that so far as the first property was concerned the decision was hers alone. However, for the second property they both had to agree on the use to which it was to be put.
- 3.2.8 When asked for a reason for purchasing the second property she stated she needed the apartment for 'insurance', in case she and her mother-in-law did not get along, and she had agreed with her brother to apply the funds from the sale of the first property towards the purchase of the second property.
- 3.2.9 When asked how much she owed her brother at the time of the sale of the first property she stated that she was unable to recall.
- 3.2.10 In response to the question, she categorically stated that the purchase of the first property was not a joint venture with her brother. She stated that this was confirmed by the Land Office Register. However, he had insisted in being a co-owner of the second property.
- 3.2.11 She confirmed that the building of which the first property forms part was not completed at the time of the contract to purchase but added that that also applied to the second property.
- 3.2.12 It was put to her that her brother believed he had an interest in the first property, hence the signing of the sale agreement. This was denied and she stated that her mother and brother probably thought they were doing something good for her by agreeing to the sale.
- 3.2.13 She confirmed that the first property was purchased as a matrimonial home and that she had discussed the matter with her husband-to-be. She had not asked him to contribute to the cost as he was paying for his own flat. Further, he had no right to do anything to prevent her from doing something which she considered was for her own protection.
- 3.2.14 She could not remember her monthly salary in September 1990. However, having been handed a copy of her salaries tax return for the year of assessment 1992/93, she was able to say that in that year it was \$11,000. Her monthly salary with effect from the 1995 lunar new year would be \$22,000. She agreed that there was not much left out of her \$11,000 salary after payment of the monthly mortgage repayment of \$6,374 for the first property. However, she reminded everyone that at the time she was still unmarried and able to allocate her entire income as she determined.
- 3.2.15 She agreed that in her written objection to the profits tax assessment, her letter dated 7 April 1994, she had not mentioned the fact that the agreement for the

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sale of the first property had been signed, initially, by her mother and brother and added that she had thought that the information provided by her was sufficient to support her objection. When asked, she denied that she had authorised them to effect the sale. When asked if she had indicated to them that she wanted to sell she gave a categorical 'No' and added that she believed that they thought they were doing the best thing for her.

3.2.16 She was again asked why she had not saved up for another year, the savings on the mortgage instalments would have amounted to some \$70,000, and purchased something better. She stated that the first property was in Place A, where she wanted to live, and was affordable. She asked who would know what the position would be a year later.

3.2.17 When reminded that apartments in the development in which the second property is located were available at the time she purchased the first property she stated that they were more expensive and she did not consider that at that time she could support the monthly instalments.

3.3 Re-examination

The Board advised the Taxpayer that there was no need for her to reiterate the information she had already provided and she confirmed that there was nothing she would like to add at that time.

4. THE CASE FOR THE REVENUE

4.1 Having identified the issue before the Board the relevant provisions of the IRO were read to the Board.

4.2 The Commissioner's submission was that the purchase and sale of the first property was an adventure in the nature of trade whereby the profit gained was correctly assessable to profits tax.

4.3 If the Taxpayer was to succeed it would be necessary for her to satisfy the Board that at the time she contracted to purchase the first property her intention was to hold it as a long term investment. The Board was referred to Simmons v CIR 53 TC 461 at 491:

'One must ask, first, what the commissioners were required or entitled to find. 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?'

4.4 The Board was then referred to Rees Roturbo v Ducker 13 TC 366 which is authority for the proposition that the contemplation of the possibility of the sale of an asset at the time of acquisition was an indicator pointing towards the conclusion that the asset was not acquired as an investment.

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- 4.5 A self-serving statement by a person is of limited value until it has been tested against the objective facts. In All Best Wishes Limited v CIR 3 HKTC 750 at page 771, Mortimer J stated:

'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 simple 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. Indeed, decisions on a person's intention are commonplace in the law. It is probably the most litigated issue of all. 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.'

- 4.6 If the Board were to find that the evidence in support of the appeal was inconclusive the assessment under appeal should be allowed to stand, refer Shadford v H Fairweather & Co Limited 43 TC 291.
- 4.7 The Board was then reminded of the facts.
- 4.8 The Taxpayer's arguments could be summarised as follows:
- 4.8.1 In her letter of 7 April 1994 objecting to the assessment she had stated that:
- 4.8.1.1 The sale of the first property and the purchase of the second property was to acquire a property in a better environment.
- 4.8.1.2 The first property was too small and was sold for that reason.
- 4.8.2 In her notice of appeal she stated that:
- 4.8.2.1 The sale was not initiated by her and that this was done by her mother and brother.
- 4.8.2.2 The profit on the sale of the first property was applied towards the purchase of the second property whereby the profit was only a 'book profit' and not real income.
- 4.8.2.3 Because the second property had always been leased out this established that her intention had been to hold the property for investment.
- 4.8.2.4 The sale of the first property was a change of investment.

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- 4.9 The Revenue's case was:
- 4.9.1 At all relevant times the Taxpayer had no fixed intention to hold the first property as a long term investment and was always ready to sell it at the opportune moment.
- 4.9.2 The first property was extremely small and this was known to the Taxpayer at the time of purchase.
- 4.9.3 Whilst the Taxpayer had said that it was her intention to improve her living environment there was no evidence to show that she had ever regarded the first property as her ultimate home. Further, the size of the unit would indicate that that was most unlikely.
- 4.10 The simple facts were that the Taxpayer had purchased an apartment which she would not use as a residence and which would not generate any net rental income.
- 4.11 The fact that the Taxpayer sold the first property shortly before the issuance of the occupation permit was strongly indicative of the fact that the purchase had been an adventure in the nature of trade. It is common knowledge that a sale at that time saves legal fees and stamp duty and this practice resulted in the amendment of the Stamp Duty Ordinance in January 1992 when the Government decided to take measures to drive speculators out of the property market.
- 4.12 It is inconceivable that the Taxpayer's mother and brother acted without her prior knowledge and/or approval. She must have given them some prior indication that that was what she wanted to do.
- 4.13 The application of the gain on the sale of the first property towards the purchase of the second property was irrelevant to the appeal. Whether or not the second property had been acquired as an investment was yet to be seen. In any event, the individual who applies taxable profits in the purchase of an investment does not thereby render the taxable profits untaxable.
- 4.14 The Taxpayer's submission that the transaction was no more than a change of investment was also suspected. The first property was hers alone. The second property is jointly owned by the Taxpayer and her brother. Accordingly, she had switched from a 100% interest to a 50% interest which makes her far worse off. This casts doubts on her submission that she was an investor.
- 4.15 The fact that the Taxpayer had never been involved with any properties other than the first property and the second property was also irrelevant. The transaction was an adventure in the nature of trade which, necessarily, means that it was an isolated transaction.

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5. **REPLY OF THE TAXPAYER**

When asked if there was anything she would like the Board to consider in light of the Revenue's submission she stated that if it had been her intention to sell the first property there would have been no need for her to authorise some one to do it on her behalf. Property companies were open late in the evening and she would have had adequate opportunity to visit one after she had finished work for the day.

6. **REASONS FOR THE DECISION**

6.1 Onus of proof:

Section 68(4) of the IRO imposes the onus of proving that an appealed assessment is incorrect on the taxpayer.

6.2 The determination:

6.2.1 In his determination the Commissioner reduced the assessment to allow the deduction of the interest element of the mortgage repayments and legal fees which had been incurred by the Taxpayer and which the appealed assessment had not taken into account.

6.2.2 In giving his reasons for his determination, refer sub-paragraph 3(2) thereof, the Commissioner concluded that the purchase and sale of the first property amounted to an adventure in the nature of trade whereby the profits derived were assessable to profits tax. He included the following:

‘In reaching this conclusion, I have had particular regard to the short period of ownership and that the property was sold before the issue of the occupation permit. The lack of any compelling reason to sell the property also does not support the Taxpayer's alleged intention to hold the property on a long term basis. In this regard, I do not accept the Taxpayer's claim that the small size of the property prompted her to sell since the size would have been known to her at the time she bought the property.’

6.2.3 The determination was reached after consideration of the Taxpayer's letter of 7 April 1994 setting out her reasons for objecting to the assessment. The two important paragraphs in this letter read:

‘I purchased the above-mentioned property on 27 September 1990 at a consideration of \$670,000. During the pre-sale of the property, 7% discount was granted by applying for immediate payment of instalments from a bank and the consideration was the \$623,100. I had paid 10% of the consideration as deposit and applied for mortgage loan for the remaining amount of \$560,790 from Bank B. The loan would be repaid by 180 instalments. However, as the construction area of the unit was

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only 409 square feet and the usable area was only 300 square feet, it was very small. Therefore, I disposed of the unit, about one year later, on 7 August 1991 at a consideration of \$938,000. The book profit was \$314,900. After deducting the legal fee of \$19,304 and the expenses of bank interests of \$51,867.30, the net profit was only \$243,728.70.

I have real intention to purchase my own flat. However, the unit of 300 square feet was not big enough and thus, I disposed it. After five days of disposal, that is, 12 August 1991, I purchased another unit at [second property identified] at a consideration of \$1,530,000 at once. The area of the unit was 641 square feet and its location and area were much better. I needed to pay 20% of the consideration as deposit to the owner. Besides, I had applied for a mortgage loan from a bank and only \$1,056,000 was loaned. Apart from the profit previously gained from the disposal, I also needed to borrow money from my brother for the remaining amount. Therefore, we became the co-owners of the unit at [development identified]. However, as the burden for the monthly repayment of \$11,444.50 was still very heavy, we had no alternative but to let out the flat so as to finance the repayment. The unit at [development identified] had been let out for over two years.'

- 6.2.4 On the basis of that letter it is, perhaps, understandable why the Commissioner came to his determination to uphold the assessment after adjustment.
- 6.2.5 When asked in cross-examination why she had not mentioned in her letter the matters addressed in her evidence to the Board, refer particularly sub-paragraph 6.3.2 and 6.3.3 below, her answer was that she considered the reasons she had given in her objection were sufficient.
- 6.3 The evidence at the appeal:
- 6.3.1 The Taxpayer's notice of appeal, which contains her grounds of appeal, is dated 8 August 1994. In this she mentions the intervention of her mother and brother, and refer sub-paragraph 3.1.5 above.
- 6.3.2 The Taxpayer's evidence was that she was to marry but because of the death of her prospective husband's father their plans were put on hold. As, when they did marry, she was to move into her husband's family's home she felt it important to have a home they could use in case she and her mother-in-law to be were unable to live comfortably under the same roof. Hence the purchase of the first property.
- 6.3.3 Her explanation of the sale of the first property was not, as she stated in her objection to the assessment, because it was too small but was because she was put in the position of having to confirm a decision taken by her mother and brother or expose them to a financial penalty if she did not countersign the document they had already signed. The Board had a photocopy of the original

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document, which is in Chinese, and a translation. The information in sub-paragraph 6.3.4 below is extracted from the translation.

6.3.4 The document initially signed by her mother and brother is a printed document under the name of the property company and is headed ‘provisional agreement for sale and purchase’. It identifies the Taxpayer as the vendor and identifies the property being sold as the first property. It requires the parties to contact the developer ‘to settle the transfer procedures’. It contains the following clauses:

6.3.4.1 ‘(5) This agreement will be valid upon the signing by the purchaser and the vendor. Where the vendor fails to sign this agreement with any reasons, our company will refund the received deposit to the purchaser without interest.’

‘(6) Upon signing of the agreement by the both parties, where the purchaser fails to execute this agreement, the vendor shall have the right to forfeit the deposit and resell the said property. Where the vendor fails to execute this agreement, it shall pay the purchaser damages twice the amount of the deposit received, that is HK Dollars: \$40,000.’

6.3.4.3 The translation of a manuscript addition at the foot of the document reads:

‘The vendor [the Taxpayer’s brother named], [the Taxpayer’s mother named] agree and sign this provisional agreement for sale and purchase on behalf of [Taxpayer named] and held responsibilities for all the terms and conditions stated in this agreement.’

6.3.4.4 It was not in dispute that this document was signed by the Taxpayer’s brother and mother initially and that she signed it at a later time.

6.3.5 There was no submission from the Revenue as to the legality of this document or whether the Taxpayer’s interpretation of the effect of Clause 6 and/or the manuscript addition was correct.

6.4 The Taxpayer’s stated intentions:

These have to be considered in light of two of the authorities cited by the Revenue:

6.4.1 **Simmons v CIR**

6.4.1.1 This case is authority for the proposition that an asset is either an investment asset or a trading asset; that it must be one or the other as it cannot be both or have an intermediate status. It is also authority for the proposition that an investment may become trading stock or trading stock an investment. It is also authority for the proposition that the disposal of an investment to acquire another is not trading.

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6.4.1.2 It is to be expected that a corporation, drawing on the extensive professional expertise available to it, will be well aware of the requirement to categorise assets on acquisition. However, the Board takes the view that there is a distinct difference between a corporation and the ordinary man in the street who may make no more than one major investment in his lifetime – the purchase of a home. The Board would be unable to accept and, no doubt, the Commissioner would not seek to argue that the individual who sells his first home on the purchase of a replacement home, be it a better or more modest home, is embarking on a trading transaction and that that also applies to the more fortunate individual who, as his career prospers and as an expanding family requires, moves from a smaller home to a larger home and who, perhaps reverses the process as his obligation to accommodate children reduces and who, after his retirement, periodically sells to acquire less spacious accommodation which he perceives to be more suitable to his reducing needs as advancing years restrict his activities and/or his requirement to retain or accommodate material possessions.

6.4.1.3 The Board would not expect the ordinary man in the street to appear and say that at the time he had decided to commit to a purchase of his personal residence he had consciously decided that the purchase was being made for investment purposes and/or that that decision had been formally recorded somewhere. The truth of the matter is that, invariably, such purchases, if affordable, are dictated by necessity, namely the need to accommodate a wife and, perhaps, children and, locally, to escape the clutches of Hong Kong's rapacious landlords. On occasions it is not always possible to acquire a desirable apartment with vacant possession and a purchase may be made subject to the existing tenancy with a view to occupancy when the tenancy can be determined. Should another apartment in the same development then become available with vacant possession and should the purchaser buy that apartment and sell that which he purchased subject to the existing tenancy, no one would seriously suggest on those facts alone that the sale was a trading transaction.

6.4.1.4 Individuals are not obliged to keep minutes or diary entries of such decisions and it would be unrealistic for the Board to be expected to require an individual in the position of the Taxpayer to do more than assert that the property was acquired for personal occupation and was so used. However, where there has been a sale before personal occupation the taxpayer will be required to provide a credible explanation which withstands searching cross-examination.

6.4.2 **All Best Wishes Limited v CIR**

In reaching its decision the Board is mindful of the cited passage from the judgment of Mortimer, J in this case. It is necessary for the Board to test the credibility of the Taxpayer's evidence in light of all of the other information available to it.

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6.5 Credibility:

6.5.1 The Board is obliged to consider very carefully whether or not the Taxpayer's own evidence, which has to be described as having the appearance of being entirely self-serving, must for that very reason be ignored save to the extent that it is supported by other evidence. However, uncorroborated evidence is not uncommon and there is no rule which requires it to be automatically excluded because it is uncorroborated. The Board is entitled to accept and rely on uncorroborated evidence if it is satisfied a witness has been telling the truth, in other words if the demeanour of the witness indicates that he or she was truthful. The Board was very impressed with the way in which the Taxpayer gave her evidence and, particularly, the way she responded to what was an excellent and searching cross-examination. Her replies to the Board's questions and when being cross-examined were neither hesitant or evasive and her answers were uncomplicated and entirely consistent throughout. Further, although advised to give her evidence in the Puntí Dialect she gave her evidence in English and thereby denied herself the opportunity to consider her responses to questions as they were being translated. For the foregoing reasons the Board is satisfied that she was telling the truth.

6.5.2 Nevertheless, the Board has to recognise that the Taxpayer in her letter of 7 April 1994 objecting to the assessment did not address certain of the matters dealt with in her evidence to the Board, particularly:

6.5.2.1 Her explanation that she needed her own home if, after due trial, she were to find that she could not live with her mother-in-law. The Board's opinion is that this evidence is very credible and may have influenced the Commissioner when he was considering her objection.

6.5.2.2 Her explanation that she was put in the position of having to countersign the provisional sale and purchase agreement. The Board's opinion is that this evidence is also very credible and that also may have influenced the Commissioner when he was considering her objection. Whether or not a lawyer would have been able to advise her that she could ignore that document is not, in the view of the Board, relevant and, further, it was not the Revenue's case that the document was not binding on her.

As already noted, when asked by the representative for the Commissioner why those matters were not mentioned in her letter of 7 April 1994 her answer was that she thought she had given a sufficient explanation which, fundamentally, was the smallness of the unit and its location. It would be unrealistic for the Board to expect a lay person to be aware of the approach of the Revenue to the on-sale by an individual of a unit in a development immediately prior to the issuance of the occupation permit and it is understandable that such an individual would consider that a subsequent decision that the size was inadequate and/or that the location was less than ideal would be accepted as sound reasons for a disposal. It is also understandable that at the time of receipt

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of the assessment the Taxpayer could well have been reluctant to confide in complete strangers by revealing that before her marriage she had been concerned about having to live with her mother-in-law and/or that she had been compelled to sell the first property as she had been committed so to do by members of her own family without her prior agreement. Accordingly, the Board does not consider that those omissions are fatal to the appeal.

6.5.3 Evidence which supports the Taxpayer's case are the fact that within five days she committed the yet to be received gain on the disposal of the first property to the purchase of the second property, albeit in co-operation with her brother, the fact that it is still so owned, notwithstanding that after almost three years of living with her mother-in-law she appears to have overcome the concerns she had prior to her marriage, and the fact that it will soon be occupied for her benefit, a requirement which she could not have anticipated at or at any time prior to the time of her objection to the assessment.

6.6 There is further and independent support for the Taxpayer's case.

6.6.1 There is no dispute that the sale of the first property was effected by the document dated 7 August 1991, that the contract to purchase the second property was entered into five days later, that is on 12 August 1991 and that formal completion of that purchase took place on 12 February 1992. That the assessment under appeal was raised on 28 March 1994 and was expressed to relate to the year of assessment 1991/92 is also not in dispute. Those dates establish that there was a gap of over two and a half years between the date of the transaction the Revenue has assessed to tax and the date on which the assessment was raised. There was no evidence of any communications between the Taxpayer and the Revenue prior to the raising of the assessment and the fact that the assessment, notwithstanding the Revenue's own Land Office search discloses the equitable mortgage referred to in sub-paragraph 2.3 above, made no allowance for interest and legal fees, refer paragraph 6.2.1 above, is strongly indicative of the fact that the assessment was raised without there having been any such communications.

6.6.2 In her objection to this assessment, in a paragraph preceding those quoted in sub-paragraph 6.2.3 above, the Taxpayer stated:

‘The disposal of the unit in the [building in which the first property is located named] was only a change of investment. The money gained was used to invest in purchasing another place in which the location or the return was much better.’

The Revenue accept that this other ‘place’ is the second property and, presumably for the entire period between acquisition and receipt of the assessment the Taxpayer and her brother, the former no doubt in blissful ignorance of the fact that an assessor was combing Land Office records to look for transactions which involved a purchase and an on-sale shortly before the issuance of the occupation permit, retained this property and received the rental

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income. Accordingly, there can be no suggestion that the retention of the second property throughout that period was influenced by the assessor's view that the acquisition and disposal of the first property was an adventure in the nature of trade. These, indeed, are actions which 'speak louder than words'. The Board's view is the facts set out in sub-paragraph 6.6.1 above independently corroborate the Taxpayer's evidence that the sale of the first property was to enable a change to a better investment to be effected. That reason, applying Simmons v CIR refer sub-paragraph 6.4.1 above, is a complete answer to the question before the Board.

- 6.7 The Board accepts the Taxpayer's evidence and is satisfied that she has discharged the onus on her, namely that her purchase of the first property was not an adventure in the nature of trade.

7. DECISION

For the reasons given the Board allows this appeal and directs that the profits tax assessment for the year of assessment 1991/92 under charge number XX dated 28 March 1994, revised in accordance with the determination, be annulled.