

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D8/97

**Profits tax** – whether profits derived from the sale of three properties assessable to profits tax.

Panel: Robert Wei Wen Nam SC (chairman), Eugene Ho and So Kai Ming.

Dates of hearing: 29 November and 6 December 1996.

Date of decision: 17 April 1997.

The taxpayers, Mr A and Madam B, married in 1988 and divorced in 1995. At all relevant times, both were civil servants. Between May 1987 and May 1996, they purchased and sold 9 properties (3 of which are the subject properties of this appeal and are referred to as Properties Nos 5, 6 and 7 respectively) as joint tenants. The taxpayers' case was that each of the 3 subject properties was acquired sequentially (Property No 6 in place of Property No 5 and Property No 7 in place of Property No 6) for residential use in late 1993 when Mr A would join the Home Financing Scheme (a civil service housing scheme) upon becoming eligible to do so. Having heard and observed both taxpayers, the Board was unable to accept their evidence as to their intention towards the 3 subject properties at the time of acquisition.

Held:

The taxpayers have failed to discharge their onus to prove that the subject properties were acquired for residential use in late 1993 upon Mr A joining the HFS or for such use at any time or for any period.

**Appeal dismissed.**

Cases referred to:

Simmons v IRC STC 350  
All Best Wishes Ltd v CIR 3 HKTC 750  
Cunliffe v Goodman [1950] 1 All ER 720

Tam Tai Pang for the Commissioner of Inland Revenue.  
Taxpayers in person.

**Decision:**

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### Nature of appeal

1. This is an appeal by two individuals (Mr A and Madam B) against the profits tax assessments raised on them for the years of assessment 1990/91, 1991/92 and 1992/93. They contend that profits derived from the sale of three properties should not be assessable to profits tax.

### Property transactions

2. Between May 1987 and May 1995, the Taxpayers entered into the following property transactions:

Locations of properties	Purchase			Sale		
	Date of purchase agreement	Date of assignment	Price \$	Date of sale agreement	Date of assignment	Price \$
Property No 1	-	1-5-87	-	20-10-87	9-11-87	518,000
Property No 2	30-10-87	30-11-87	430,000	5-7-89	7-8-89	700,000
Property No 3	-	29-9-88	250,000	-	10-7-89	316,800
Property No 4	15-5-89	15-6-89	485,000	-	30-11-89	530,000
Property No 5	25-5-89	20-2-90	888,000	1-6-90	16-7-90	1,095,000
Property No 6	8-12-90	31-1-91	1,397,000	8-8-91	14-10-91	1,980,000
Property No 7	12-8-91	10-9-91	2,210,000	7-4-92	25-4-92	3,150,000
Property No 8	22-8-91	4-11-91	1,480,000	26-3-92	6-5-92	1,648,000
Property No 9	7-4-92	11-5-92	3,300,000	21-5-93	1-11-93	3,705,000
Property No 10	14-5-92	15-7-92	1,780,000	17-5-96	12-6-96	2,370,000
Property No 11	1-6-93	6-11-93	4,400,000	-	-	-
Property No 12	5-5-95	21-7-95	5,100,000	-	-	-

### Note

All the above properties were purchased by the Taxpayers as joint tenants except for the following:

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- (1) Property No 3 was purchased by the Taxpayers and Mr K as tenants in common. The Taxpayers each held a 25% share in the property whereas Mr K held a 50% share.
- (2) Property No 4 was purchased by the Taxpayers, Mr L and Mr K as tenants in common. The Taxpayers each held a 30% share in the property whereas Mr L and Mr K each held a 20% share.
- (3) Property No 12 was purchased in the sole name of Mr A.

3. The properties listed in paragraph 2 above are hereinafter referred to by their numbers in the list. The subject properties are Property No 5, Property No 6 and Property No 7.

### **Family background**

4. The Taxpayers were husband and wife, having married in March 1988. They divorced in May 1995. They have two daughters, born on 15 May 1990 and 16 September 1992 respectively. At all relevant times, both the Taxpayers were civil servants.

### **Finance**

5. The purchases of Properties Nos 5, 6, 7 and 9 were respectively financed by the following mortgage loans:

	\$
Property No 5	799,000
Property No 6	1,000,000
Property No 7	1,878,000
Property No 9	2,000,000

### **Assessments**

6. The assessor considered that the profits derived by the Taxpayers from the sale of Properties Nos 5, 6 and 7 (see paragraph 2 above) were trading profits. In the absence of profits tax returns, the following assessments were raised on the Taxpayers:

(a) Year of assessment 1990/91	\$
Estimated assessable profits (in respect of Property No 5)	90,000

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Tax payable thereon 13,500

**(b) Year of assessment 1991/92**

Estimated assessable profits 480,000  
(in respect of Property No 6)

Tax payable thereon 72,000

**(c) Year of assessment 1992/93**

Estimated assessable profits 650,000  
(in respect of Property No 7)

Tax payable thereon 97,500

### Notice of objection

7. By a letter signed by Madam B, the Taxpayers lodged objections against the assessments in the following terms:

‘I bought (Property No 5) in June 1989 and sold it in July 1990 because I want to move to Hong Kong side. In January 1991 I bought (Property No 6) and sold it in September 1991 because I want to buy a bigger flat. In the same month (same date) I bought (Property No 7). After decoration, I found (Property No 7) very dark and wet, so I decided to sell it and buy a flat on upper floor and so I sold it and bought (Property No 9). When the time I bought Property No 9, it was under the rental contract so that I have to wait until its contract expiry in December 1992...

Moreover, all the flats I bought and sold because I want to find the suitable environment and improve my living condition. The money I spent in buying the flats every time was more and more because I believed I was able to afford a bigger and nicer flat.’

### Tenancies and quarters

8. The Taxpayers provided the following information:

- (a) Property No 9 was acquired with an existing two-year tenancy which was due to expire on 6 November 1992. By a tenancy agreement dated 24 June 1992, the Taxpayers renewed the tenancy for further two years to 6 November 1994;
- (b) the Taxpayers, being civil servants, lived in the government quarters at Quarter X as from July 1990 to April 1992 and at Quarter Y as from April 1992 to April 1993. They then moved to live in Property Z as from 1 May 1993 up to present;

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- (c) the Taxpayers' present residence at Property Z is a rented property. There is a tenancy agreement covering the period from 1 May 1993 to 30 April 1995.

### **Notice of appeal and statement of grounds of appeal**

9. The Taxpayers' notice of appeal and statement of grounds of appeal are in the following terms:

' This is to serve as our "Notice of Appeal" in response to the profit tax assessment for selling and buying of properties for the years 1990 to 1993.

First of all, I have to reiterate that the property transactions in the past few years from 1990 to 1993 in our case are not conducted with the intention of profit making, in other words, such cannot be determined as a trading activity.

In this appeal, I am going to furnish further statements which are to supplement those given by my wife in lodging the objection against the assessment. My wife's statements in the last objection are far from comprehensive as she had made it in the absence of my knowledge, that is why she could not depict the genuine intention in respect of the repetitive buying and selling of properties.

### **Statement of Grounds of Appeal**

(a) During the period between 1990 to 1995, I have been provided by my employer, Hong Kong Government, with different housing benefits such as government quarters and Private Tenancy Allowance, hence, there was actually no imminent need for my family to move into those properties as mentioned in the attached Commissioner's written determination of 15 January 1996;

(b) In mid 1989, the Hong Kong Government had introduced a new housing scheme called "Home Finance Scheme" for all eligible civil servants to buy properties as their residence. Although I would not be eligible to join this scheme till end of 1993, it could be anticipated that it would not be affordable for me to join this scheme in late 1993 unless I have purchased a property in advance when the property cost was still not that high. Therefore, we had purchased a small property, Property No 5, in mid 1989 as a long term investment with the intention to live in by joining the scheme in late 1993.

(c) Since we were both posted to work on the Island side in late 1989 and would work there for some more years, we then started to plan to live in Hong Kong side by eventually trading in Property No 5 to Property No 6 on the Island side in early 1991 at \$1,397,000.

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(d) A few months later, my wife was found pregnant again. For the sake of planning for our second baby, we decided that we need a bigger house. Again, we had changed to a bigger flat nearby, Property 7, at \$2,210,000 in late 1991. Unfortunately, some times later after the decoration, we desperately discovered that rain water would easily flood the premises which was on the lowest level when the drainage was getting a bit poor for whatever reasons. In view of such ill reason, we then changed to a upper floor unit, Property 9, which was also in the estate of Property 7 in mid 1992 at \$3,300,000. As I have stated in (a) and (b) above, all those properties I bought and sold are for the purpose of long term investment with the intention to live in by joining the Home Finance Scheme in late 1993 and there was in fact no imminent need for my family to move in these properties, hence I did not mind to buy Property 9 with tenancy agreement not yet expired or even to renew the tenancy for a further two years to late 1994.

(c) Although it was our intention to move to the Hong Kong side as mentioned in my wife's objection, we had decided to remain living in Kowloon side after my first baby girl had successfully enrolled in a famous kindergarten in late 1992. We decided not to move to Hong Kong side because we did also want to let our second new born baby girl to get into her sister's kindergarten in the future. Hence we had sold Property 9 after the tenancy agreement was terminated by the tenant in mid 1993 and then bought another property, Property 10 on the Kowloon side. Since I was by that time receiving the Government Private Tenancy Allowance for a 2-year period commencing from mid 1993, I had not joined Home Finance Scheme and lived in Property 10 until August 1995.

### **Conclusion**

From the above statements, we cannot see why we have to be subject to the payment of profits tax in respect of the buying and selling of the properties which are in fact regarded as our long term investment. All proceeds generated from each property transaction was in fact all used for the next purchase.

In our case, it is highly unjustifiable to conclude that the buying and selling of the properties amount to a trade or an adventure in the nature of trade just because of the facts that we only held the properties for a brief period and sold them without moving in.

### **Relevant legal principles**

10. The relevant legal principles may be summarised as follows.

10.1 The taxability or otherwise of a profit derived by a person from the sale of an asset turns on his intention at the time of its acquisition. If the intention was to dispose of it at a profit, the asset was a trading asset, and the profit is a trading profit and is taxable. If the

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intention was to hold it as a long-term investment, the profit is a capital gain and is not taxable. At any given time, an asset is either a trading asset or a long-term investment; it cannot be both; it cannot be neither (see Simmons v IRC STC 350 at 352).

10.2 On the question of intention, Mortimer J said in All Best Wishes Ltd v CIR 3 HKTC 750 at 771:

*‘... 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. Indeed, decisions upon 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...’*

10.3 Intention is different from mere contemplation. Asquith, LJ said in Cunliffe v Goodman [1950] 1 All ER 720 at 724-5:

*‘Not merely is the term “intention” unsatisfied if the person professing it has too many hurdles to overcome or too little control of events; it is equally inappropriate if at the material date that person is in effect not deciding to proceed but feeling his way and reserving his decision until he shall be in possession of financial data sufficient to enable him to determine whether the project will be commercially worth while. A purpose so qualified and suspended does not, in my view, amount to an “intention” or “decision” within the principle. It is mere contemplation until the materials necessary to a decision on the commercial merits are available and have resulted in such a decision.’*

10.4 The onus of proving that the assessments under appeal are excessive or incorrect is on the Taxpayers (section 68(4) of the Inland Revenue Ordinance). It is their case, as appears from the statement of grounds of appeal, that, at the time of the acquisition of each of the three subject properties, that is, Property No 5, Property No 6 and Property No 7, the Taxpayers’ intention in each case was to hold the property as a long-term investment, and for residential use as from 1993 when Mr A would join the Home Financing Scheme upon becoming eligible to do so. The onus is on the Taxpayers to prove that intention.

### **Home Financing Scheme**

11. The Home Financing Scheme (HFS) was first announced in a government circular on 14 July 1990 as part of a new civil service housing benefits package. The main features of the HFS, so far as they are relevant, are as follows.

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11.1 The HFS will be introduced for the following officers on Pay Scale ... and above or equivalent –

- (a) ...
- (b) officers appointed before 1 October 1990 who have not joined the Home Purchase Scheme (HPS) or Housing Loan Scheme (HLS).

11.2 HFS participants will be eligible for the following assistance to acquire residential property in Hong Kong –

- (a) a monthly allowance up to the rates set in Annex A for a maximum period of 10 years; and
- (b) a downpayment loan at a concessionary interest rate (normally about 2% to 3% below market mortgage interest rate) on a one-off basis for acquiring a property. The loan will be up to 20% of the property price, or 18 months' salary, whichever is the less (for officers on the Old Pension Scheme), or up to the earned maximum commuted pension gratuity (for officers on the New Pension Scheme with at least 10 years' continuous service).

### 11.3 **Live-in requirement**

HFS participants will be required to live in the property acquired under the HFS during the 10-year entitlement period.

### 11.4 **Option to join HFS**

- (a) Officers who –
  - (i) are appointed before 1 October 1990;
  - (ii) are on Pay Scale Point ... and above or equivalent; and
  - (iii) have not joined the HPS or HLS,

may opt to join the HFS or retain their eligibility for PTA (Private Tenancy Allowance)...

- (b) The action should be made within the following option period –

<b>Officers</b>	<b>Option Period</b>
-----------------	----------------------

...

- |                               |                           |
|-------------------------------|---------------------------|
| (ii) who have not yet reached | Five years from 1 October |
|-------------------------------|---------------------------|



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the above pay points on 1 October 1990      1990 (that is, 1 October 1990 to 30 September 1995), or three years after reaching the pay points, whichever is the earlier

...

(d) An option to join the HFS is irrevocable.

### 11.5 **Reg 1610 (b) of the Civil Service Regulations**

(b) Subject to the approval of the Secretary for the Civil Service, the assistance under the scheme (that is, HFS) may be used by an officer to ... acquire a new property, or refinance a property already acquired by him, or finance the outstanding balance of a mortgage loan on a property already acquired by him.

### **Evidence**

12. Both Taxpayers gave evidence, which is summarised below. No other witness was called.

### **Evidence of Mr A in chief**

12.1 He lives in Property No 12 with his two daughters, but not with his former wife Madam B. He has been living there since May 1995. The property was bought in his sole name in May 1995.

12.2 If he lives in a rented property under the Private Tenancy Allowance (PTA), he cannot join the Home Financing Scheme (HFS).

12.3 To be eligible for HFS, he had to reach a certain Point on the Pay Scale. In mid-1989, he was in a junior post. Now he is in a senior post. He reached the Point in August 1993.

12.4 A participant in HFS could get (1) 10 years' monthly allowance at stipulated rates and (2) a downpayment loan at a concessionary interest rate. One could join the scheme to acquire a new property or refinance a property already acquired. He was thinking of joining the scheme with a property already acquired.

12.5 They bought Property No 5 in mid-1989. They were then living in Kowloon.

12.6 You must live in the property acquired under the HFS.

12.7 In August/September 1989, they were both transferred to work on the Hong Kong side. Madam B at that stage was also in a junior post. It is the policy of the

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department to rotate staff's post every 6 or 7 years. So he predicted they would work on Hong Kong Island for some 7 years. There was nothing in writing, just policy. He was first employed by the department in 1981. There was a three-year probationary period during which he was frequently transferred to various places, various posts. After the probationary period, they usually stay in a post or place for 6 or 7 years. So they sold Property No 5 and bought Property No 6 which was on Hong Kong side.

12.8 They continued to live in government quarters in Kowloon. They could not get quarters in Hong Kong in July 1990 because the appropriate grades were all taken. He knew about this from a circular, but he did not keep a copy. The same applied to April 1992.

12.9 A few months after they purchased Property No 6 in early 1991, Madam B was found pregnant again. For the sake of planning for a second baby, they thought they needed a bigger flat, so they changed to Property No 7. After some decoration, they found that rain water would easily flood the premises which were on the lowest level, because of heavy rain or because the drainage was no good. For those reasons, they changed to an upper floor flat which was Property No 9 in mid-1992.

12.10 At this point, Madam B interjected. She stated that the cost of the decoration of Property No 7 was about \$50,000. She could not produce any receipt issued by the contractor or the relevant cheque counterfoil or bank statement. She stated that during that period she used her bank account to pay out about a thousand cheques to her officers who had spent money in carrying out their duties. She used her personal cheques to pay for the expenses of the department and the government would pay the money into her bank account. She had only one bank account which was used for that purpose and also for her personal purposes.

12.11 Mr A then continued his evidence. He stated that rain water would come in from a small courtyard. He did not take any photographs. One more reason which he had not mentioned in the notice of appeal – Property No 7 was haunted. The contractor saw something there. Their daughter cried when she visited the flat.

12.12 There was no fixed term for government quarters. You can live there for as long as you like and leave anytime you like.

12.13 The Taxpayers granted or renewed a tenancy of Property No 9 for 2 years from 7 November 1992 upon the expiry of the previous tenancy. Mr A understood that by doing that he put it beyond his power to join the HFS in late 1993 because Property No 9 would not be available for that purpose.

12.14 He had a contingency plan: in case he had to join the scheme in late 1993, he still had a choice to negotiate with the tenants for them to move out. If he had not renewed the tenancy for 2 years, he would have had no rental income for one year.

12.15 The most important reason why they did not move to Hong Kong is that by late 1992 their first daughter had enrolled in a kindergarten on Kowloon side. Further, they

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wanted their second daughter to get into the same kindergarten. So when the tenancy was terminated by the tenant in May 1993, they sold Property No 9 and bought Property No 11. At about the same time, Mr A also took a two-year private tenancy of Property Z under the PTA.

12.16 As to why he did not take steps to join the HFS in late 1993, the tenant having terminated the tenancy of Property No 9 in May 1993, while he had in mind 'some designs joining the HFS', he still had another thought, because the PTA entitled an officer to the allowance for as long as he remained in the service, not just 10 years' allowance, so he was still struggling between opting for the HFS and joining the PTA. He could have continued under the PTA for the rest of his service in the government, but in the end he did not do that. In mid-1995 he joined the HFS with Property No 12, which was solely owned by him. They divorced at that period.

12.17 The allowance under the PTA fully covered the rent of the tenancy, so that he lived rent-free in fact. The PTA was more flexible: if he joined the PTA for 2 years, he could still go back and join the HFS, but not the other way round.

12.17A He moved into a rented property under the PTA and bought Property No 11 which he let out. He was still struggling between the two alternatives, the HFS and the PTA, to see which was the better. The market rental was always changing. Four years ago it was totally different from four years later. Their decision turned on the state of the rental market. In 1993, the market rental for Property No 11 was much higher than the allowance he could have got under the HFS.

### **Evidence of Mr A in cross-examination**

12.18 From mid-1989 until he moved into Quarter X, he lived in rented accommodation in Estate C, which was close to the Properties on Kowloon side he bought later.

12.19 He had lived in Property No 2. It was sold because he knew or he thought that he could get quarters in about a year.

12.20 At about the same time, Property No 5 was purchased.

12.21 Property No 2 was too small, about 300 to 400 square feet gross. Property No 5 was about 600 square feet gross.

12.22 Rent for quarters was 7.5% of salary. Rent for rented property under the PTA was also 7.5%, but with an allowance from the government.

12.23 He could not explain how it was that he had first heard about the HFS in 1989 from the same circular produced by the Revenue which was dated 14 July 1990. He admitted that he did not know about the HFS when he bought Property No 5. He agreed that ground (b) (see paragraph 9 above) was wrong.

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12.24 As to why he purchased Property No 5 since he had no idea of the HFS at the time, it was because he wanted a bigger house. Property No 5 was not a completed building when he bought it. They did not live in that property when it was completed, because Madam B had got pregnant with their first daughter who was born on 15 May 1990. She went to the United States to give birth. He went with her. They stayed in the US for one and a half months. When he came back to Hong Kong the property was already sold by Madam B's bother. He forgot what instructions, if any, he had given to his brother-in-law regarding Property No 5. He did have the intention to live in that property. Before he went to the US, he had signed a provisional sale and purchase agreement.

12.25 As to why he decided to sell Property No 5 (long pause) perhaps it was because they needed money, because Madam B went to America to have a baby – it cost a lot of money.

12.26 Property No 6 was about 700 square feet.

12.27 The second daughter was born on 16 September 1992.

12.28 In ground (d) (see paragraph 9 above), he had stated that they sold Property No 6 because his wife was found pregnant again and they needed a bigger flat. When asked how he could have learned about his wife's pregnancy in August 1991 when he sold Property No 6, he admitted after a long pause that the first line in ground (d) 'A few months later my wife was found pregnant again' was wrong. The true reason for selling Property No 6 and buying Property No 7 should be that they were planning to have a second baby.

12.29 They did not live in Property No 6. They lived in quarters and were not eligible for the HFS yet. Nor did they rent it out. There was no suitable tenant.

12.30 Property No 7 was 1,000 square feet gross. At the time when he bought it, he was still waiting for the day when he would become eligible for the HFS in late 1993.

12.31 Property No 9 was intended to replace Property No 7. Property No 9 was 700 something square feet. The market had gone up.

12.32 Properties Nos 3 and 4 were bungalows, bought for use on holidays. They found them boring after a few months. So they sold them.

12.33 Property No 8 was a shop bought for investment purposes. They intended to rent it out but were unsuccessful. It was inconveniently located. They bought it because the price was cheap.

### **Evidence of Madam B in chief**

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12.34 Properties Nos 1 and 2 were purchased for their marriage. They moved out of Property No 1 and purchased Property No 2 because they wanted to move out of the New Territories to Kowloon.

12.35 Properties Nos 3 and 4 were purchased for holiday purposes. Property No 3 had no seaview, while Property No 4 had.

12.36 They sold Property No 2 and bought Property No 5 because they wanted to live in a bigger flat.

12.37 They were married on 3 March 1988 in Hong Kong.

12.38 Property No 5 was uncompleted when they bought it. While waiting for possession, they lived in a rented room in Estate C at the very cheap rent of \$1,300 per month.

12.39 Within one month after purchasing Property No 5, she realised she was pregnant.

12.40 She had the intention to live in Property No 5.

12.41 Reason for selling Property No 5. 5 months into the pregnancy, because of the 4 June 1989 incident, she suddenly found courage to go to the US to have the baby. It would cost HK\$100,000 to 200,000. Mr A joined her in the US a week before the birth. He stayed on for another month. They had thought of selling Property No 5 as an option. Since her departure was in such a hurry, she signed to sell in the US through a notary public. In fact she spent HK\$100,000. She paid the hospital bill with funds from the sale of Property No 5.

12.42 At 4 months' pregnancy, they were entitled to 5 marks and that entitled them to the lowest grade of quarters, for which they needed only pay \$300 to \$500 per month for rent and not 7.5% of salary.

12.43 She learned that they had got quarters while still in the US. They moved into quarters in July 1990 upon return from the US.

12.44 They had not spent all of the proceeds of sale of Property No 5, so they decided to buy another property in the longer run. At that time, they already knew that HFS was in existence and she knew that Mr A would get to the Point in 1993 which would entitled him to join the Scheme.

12.45 They sold Property No 6 and bought Property No 7 because they wanted to buy a bigger place. Both of them were working on Hong Kong side.

12.46 At that time, she would like her daughter to study in her old school on Hong Kong side. As the daughter of a former graduate, her daughter would stand a greater chance of getting admitted.

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12.47 Why sell Property No 7? Because her daughter cried everytime they went there. There was also the flooding problem.

12.48 As for Property No 8, that was for investment.

12.49 Profit from the sale of Property No 6 plus their back pay was enough to cover the downpayment for Property No 7 and Property No 8.

12.50 Why sell Property No 7? Because daughter cried everytime she got in and the environment was not generally as good as Property No 9. Property No 9 had seaview, floor was higher, and building was younger.

12.51 Upon the purchase of Property No 9, they moved to Quarter Y, 2 grades better than previous quarters. Area was 1,400 square feet. Purchase of Property No 9 and notice that they had got Quarter Y were almost at the same time.

12.52 They had no immediate need to move into Property No 9 for they had bigger quarters. Mr A was only eligible to join the scheme in 1993. When the time came, he still had 3 years to decide whether to join the scheme. Whether he made a decision in 2 or 3 years' time, it would not affect his entitlement. So they renewed the tenancy with the former tenant.

12.53 Mr A was to make his decision whether to join the scheme; the deadline was 1996.

12.54 The reason why they renewed the tenancy with the former tenant was because a school in Kowloon had already admitted their daughter. Earlier on she had stated that she would like her daughter to join her old school on the Hong Kong side. At the time they were struggling whether to live in Hong Kong or Kowloon, but it was for sure that the apartment was going to be for their long-term residence and for him to join the scheme after 1993.

12.55 Reason why they joined the PTA and lived in the rented Property Z was because there was not adequate facilities for children at Quarter Y. At that time, she was transferred to another post. She had to work shifts, sometimes early in the morning, sometimes late at night. She had no private car. Because of short distance most taxis did not like to carry her. Further, her mother was in ill health, and it was not convenient for her mother to visit her there. For these reasons they joined PTA and rented Property Z.

12.56 They paid rent equal to 7.5% of salary whether they took a tenancy under the PTA or lived in government quarters.

12.57 She knew that her elder daughter had a greater chance of getting into a famous school in Kowloon. So they found peace of mind about the arrangement to live in Kowloon.

12.58 Mr A joined the scheme in May 1995, that is, before the deadline.

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12.59 At the time of the purchase of Property No 11, they had already rented Property Z. They still had the deadline of 1995/96 in mind. At the time, they still wanted to buy a bigger flat nearby. In the end Property No 12 was purchased; it had an area of over 900 square feet, whereas Property No 11 was some 890 square feet.

### **Evidence of Madam B in cross-examination**

12.60 She was transferred to another post end of 1992.

12.61 When they sold Property No 5, she thought about moving to the Hong Kong side, but she was not so keen about it.

### **Findings and reasons**

13. By their notice of appeal and statement of grounds of appeal, the Taxpayers stated in effect that each of the 3 subject properties, that is, Properties Nos 5, 6 and 7, was acquired sequentially for residential use in late 1993 when Mr A would join the HFS upon becoming eligible to do so. However, that is only a self-serving statement; the actual intention can only be judged by considering the whole of the surrounding circumstances, including things said and done at the time, before and after (see paragraph 10.2 above).

13.1 The letter of objection signed by Madam B, whereby the Taxpayers lodged objection against the assessments in question, made no mention of the HFS (see paragraph 7 above). In the notice of appeal and the statement of grounds of appeal, the Taxpayers stated that 'My wife's statements in the last objection are far from comprehensive as she had made it in the absence of my knowledge, that is why she could not depict the genuine intention in respect of the repetitive buying and selling of properties' (see paragraph 9 above). We are unable to accept that explanation. Joining the HFS was the backbone of the Taxpayers' case. She was a co-owner of all those properties and took part in the repetitive buying and selling of them. We would have expected her to mention their intention of joining the HFS in the letter of objection to the Commissioner of Inland Revenue if that was their true intention.

13.2 In cross-examination, Mr A could not explain how he could have heard about the HFS in 1989 from the government circular which was dated 14 July 1990 (see paragraph 12.23 above). He admitted that when he bought Property No 5 in May 1989, he did not know about the HFS. It follows that the Taxpayers' case that Property No 5 was acquired for the purpose of joining the HFS in late 1993 collapsed completely.

13.3 Mr A then gave another reason for buying Property No 5, which he had not mentioned before, that is, that he wanted a bigger property (see paragraph 12.24 above). In this connection, we find the following proved: (1) Property No 5 was about 600 square feet gross; (2) Property No 2, where they had lived previously, was 300 to 400 square feet gross; (3) Property No 2 was sold in July 1989 (see paragraph 2 above); (4) they then lived in rented accommodation in Estate C until July 1990 when they moved to Quarter X (see

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paragraph 12.18, 12.19 and 12.21 above); (5) Property No 2 was sold because Mr A knew that he could get quarters in about a year, that is, in July 1990 (see paragraph 12.19 above). From those facts we find, as a matter of inference, that Property No 5 was not acquired as a replacement of Property No 2 or for any residential purpose, and we decline to accept the evidence of Mr A and Madam B that they had intention to live in Property No 5.

13.4 There was evidence from both Taxpayers that part of the proceeds of sale of Property No 5 was used to pay the hospital bill in respect of the birth of their elder daughter in the US (see paragraphs 12.25 and 12.41 above). We accept that part of the proceeds of sale was used to pay the hospital bill, but that does not in our view prove that the profit on the sale of Property No 5 was a capital gain and not taxable.

13.5 In our view, the Taxpayers have failed to prove their case in respect of Property No 5.

13.6 The reason given for selling Property No 5 and buying Property No 6 in the notice of appeal and statement of grounds of appeal (see paragraph 9, ground (c) above), and in the evidence of Mr A in chief was that both Taxpayers were transferred to work on the Hong Kong side in August 1989 and that they expected to stay on the Hong Kong side for six to seven years because it was the department's policy to rotate staff posts every six to seven years, so they sold Property No 5 and bought Property No 6. The implication was that Property No 6 took the place of Property No 5 as the property to be financed by the HFS in late 1993. However, in cross-examination Mr A stated that Property No 5 was sold because they needed funds to pay for Madam B's trip to the US to have a baby. Madam B also gave evidence to a similar effect. She further stated that, as they did not spend all the proceeds of sale of Property No 5, they decided to buy another property, that is, Property No 6 'in the longer run' (see paragraph 12.44 above). She also stated that she knew that Mr A would reach the Point of the eligibility criterion for HFS (see paragraph 11.4(a)(ii) above).

13.7 We do not accept that Property No 6 was bought because the Taxpayers were posted to the Hong Kong side or that Property No 6 took the place of Property No 5 to be financed by the HFS in late 1993. On the other hand, we accept that the Taxpayers used part of the proceeds of sale of Property No 5 in purchasing Property No 6.

13.8 As to why they sold Property No 6 and bought Property No 7, different reasons were put forward at different stages: (1) at the objection stage, the reason given was that Madam B wanted to buy a bigger flat (see paragraph 7 above); (2) in the grounds of appeal, the reason given was that Madam B was found pregnant again, so they sold Property No 6 because they decided that they would need a bigger house (see paragraph 9, ground (d) above); and (3) in cross-examination, when asked how he could have learned about his wife's pregnancy in August 1991 when Property No 6 was sold, bearing in mind that their second daughter was only born on 16 September 1992, Mr A admitted (after a long pause) that ground (d) was wrong. He then stated that the true reason should be that they were planning to have a child (see paragraph 12.28 above).



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13.9 In other words, Mr A was saying that his wife was not pregnant at the time when Property No 6 was sold or, for that matter, when Property No 7 was bought, but that those property transactions were carried out in order to provide accommodation for a child whom they were not expecting, but hoping to have. We were struck with the ingenuity of the explanation, but we find it far-fetched and unconvincing.

13.10 The Taxpayers gave two reasons for selling Property no 7. First, it was said that rainwater would flood the premises from the small courtyard. But flooding was not mentioned in the letter of objection (see paragraph 7 above). Second, it was said that the property was haunted. Again, the haunted quality was not mentioned in the letter of objection or the grounds of appeal (see paragraphs 7 and 9 above). It was alleged at the hearing that the decoration contractor saw something in the premises. Madam B interposed while Mr A was giving evidence (see paragraph 12.10 above). She told us a story about how she issued her personal cheques from time to time, totalling about one thousand, to her fellow officers who had incurred expenses in carrying out their duties. The story is so bizarre that we are unable to give it any weight at all. In any event, we fail to see how that story can explain why she was unable to produce any receipt of the contractor's fee or the relevant cheque counterfoil or bank statement.

13.11 For all those reasons, the Taxpayers have failed in our view to discharge their onus to prove that the subject properties, that is, Properties Nos 5, 6 and 7, or any of them was acquired for residential use in late 1993 upon Mr A joining the HFS or for such use at any time or for any period. That disposes of this appeal.

13.12 It follows that this appeal is dismissed and the three assessments under appeal are hereby confirmed.

### **Property No 9**

14. The taxability of the profit on the sale of Property No 9 is not a question within the purview of this appeal. However, as there is a body of evidence relevant to this matter, we shall briefly state our views.

14.1 The Taxpayers acquired the property with a sitting tenant whose tenancy was expiring on 6 November 1992. They renewed the tenancy for two years thereby making it impossible for Mr A to join the HFS in late 1993 because Property No 9 would not be available for participation in the HFS until 6 November 1994. However, under the provisions of the HFS (see paragraph 11.4 above), Mr A would have until 30 September 1995 to exercise his option to join the scheme. Madam B stated (see paragraphs 12.52 and 12.53 above) that, when Mr A became eligible for the HFS in 1993, he would still have 2 to 3 years to decide whether to join the scheme, that they therefore renewed the tenancy of the sitting tenant and that Mr A was to make his decision whether to join the scheme before the deadline. Further on in her evidence she stated that at the time they were struggling whether to live in Hong Kong or Kowloon, but it was for sure that the apartment was going to be for their long-term residence and for Mr A to join the scheme after 1993 (see paragraph 12.54

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above). That statement was inconsistent with the previous statements in paragraphs 12.52 and 12.53 above, and was, in our view, an afterthought, and we can give no weight to it.

14.2 The tenancy was terminated by the tenant in May 1993, but Mr A did not take the opportunity to join the HFS in late 1993. Instead he took a two-year private tenancy of a flat under the PTA (see paragraph 12.15 above) from 1 May 1993 to 30 April 1995. Mr A's evidence is that he was still struggling between opting for the HFS and joining the PTA, to see which was the better, that their decision would depend on the state of the rental market, that in the end he joined the HFS in mid-1995 with Property No 12 which was solely owned by himself.

14.3 On the evidence, we would have found, had it been within our jurisdiction to do so, that, during the period of their ownership, the Taxpayers never reached a decision, and never formed a settled intention, to hold Property No 9 as a long-term investment or for the purpose of joining the HFS (see paragraph 10.3 above).