Case No. D130/02

Profits tax – sale and purchase of a property – whether profits tax should be assessed – depends on whether the sale of a property was trading in nature – it was crucial to ascertain the intention of the appellant at the time of acquisition of the property – mere declaration of intention was of limited value – subjective intention has to be tested against objective facts and circumstances – burden of proof on the appellant – sections 14(1) and 68(4) of the Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Panel: Anthony Ho Yiu Wah (chairman), Ho Kai Cheong and Ng Ching Wo.

Date of hearing: 6 December 2002.
Date of decision: 15 March 2003.

The appellant signed a sale and purchase agreement in December 1996 for the purchase of Property 1. She sold Property 1 in May 1997 in the capacity of a confirmor.

The IRD imposed profits tax of $477,200 for the year of assessment 1997/98 on the appellant on the ground that the sale of Property 1 was an adventure in the nature of trade.

The appellant objected to the above assessment on the ground that Property 1 was purchased for self use as her residence. Upon considering her objections and the relevant grounds, the Commissioner confirmed the above profits tax assessment for the year of assessment 1997/98 by a determination dated 23 August 2002.

The appellant appealed to the Board against the Commissioner's determination. The appellant's grounds of appeal were: the purchase of Property 1 was for self use as her residence; the sale of Property 1 in the capacity of a confirmor was done at the encouragement of the estate agent; the same estate agent introduced another property in the same building, that is, Property 2, which was larger than Property 1, to her; all the sale proceeds of Property 1 were used to acquire Property 2. The appellant argued that she had not entered into an adventure in the nature of trade and thus she should not be liable for profits tax.

The facts appear sufficiently in the following judgment.

Held:

1. The relevant statutory provisions were contained in section 14(1) of the IRO.

2. According to section 68(4) of the IRO, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

3. In Simmons v IRC (1980) 53 TC 461, Lord Wilberforce pointed out at page 1199:

> *'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 it at a profit, or was it acquired as a permanent investment?'*

4. Mortimer J in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 held (at page 771) that:

> *'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.'*

5. Judging from the said provisions and authorities, it is necessary for the Board to ascertain the intention of the appellant at the time of acquisition of Property 1 and whether she had successfully discharged the burden of proof that Property 1 was acquired with the intention for self use. Mere declaration of intention of the appellant in her acquisition of Property 1 was of limited value and could not be relied on entirely. The stated intention of the appellant had to be tested against objective facts, circumstances and the whole of the evidence.

6. Given the evidence of the appellant, the Board got the impression that the appellant was not satisfied in residing in the quarters provided by Company C, which was owned by her daughter and her son-in-law. The appellant all along wished to hold one or more property in her own name.

7. Although Company C provided quarters to the appellant to live, that did not negate the appellant's intention to acquire a property as her residence.

8. The Board was of the view that the issue of whether the water leakage problem occurred in Property 1 was serious or not was irrelevant to this appeal. Perhaps the appellant used this water leakage problem as an excuse to obtain her children's consent to give her more money to buy a larger property with better environment. This was just the fortune of the appellant.

9. On the day immediately after the sale of Property 1, the appellant, through the same estate agent, acquired Property 2, which was a larger premises in the same building. Therefore, this was clearly indicative of the appellant's intention to exchange Property 1 for Property 2. By reason of this, the Board had no reason to believe the appellant was engaged in the nature of trading in relation to the sale of Property 1 and purchase of Property 2.

10. The appellant contended that she had lived in Property 2 until the end of 1997 when she rented out the premises because of the decrease of her children's income. Regarding this contention, the Board accepted this evidence of the appellant. This strongly indicated that the appellant was not involved in trading when she purchased Property 2. The intention of the appellant at the time of acquisition of Property 2 was a crucial factor for the consideration of the Board.

11. As to whether the building where Properties 1 and 2 were situated was an ideal flat for a patient suffering from stroke, the Board believed that different people would have different views. The appellant claimed that the building was adjacent to a park, which was convenient for her husband to take his morning walk. On the other hand, the Revenue was of the opinion that the building was situated in a rather steep geographical area, and it was therefore not a first choice or suitable residence for a patient suffering from stroke.

12. Even if the view of the Revenue was right, that did not affect the result of this appeal. The fact that the building was not a first choice or suitable residence for a patient suffering from stroke could be attributed to many reasons, including the making of a wrong judgment in the selection of residence by the appellant. Perhaps, due to the constraint of circumstances, the appellant could only buy a second choice of residence. But that did not negate the intention of the appellant to acquire Property 2 as the residence for herself and her husband.

13. Upon considering the evidence of the appellant and the overall circumstances, the Board accepted the contention of the appellant that she bought Property 1 with an intention as her residence. Therefore, the profits received in the sale of Property 1 were profits derived from the sale of a capital asset and as such, it was not chargeable to profits tax.

14. For reasons given above, the Board allowed the appeal and withdrew the assessment.

Appeal allowed.

Cases referred to:

Simmons v IRC [1980] 1 WLR 1196
All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750

Tsui Nin Mei for the Commissioner of Inland Revenue.
Taxpayer in person.

案件编号 D130/02

利得税 – 买卖物业 – 应否课缴利得税 – 要视乎买卖物业是否属生意性质的活动 – 关键是上诉人当初购买有关物业的意图 – 不能尽信上诉人陈述她当初购买物业的意图 – 必须考虑所有客观事实及证据 – 举证责任在上诉人 – 《税务条例》第14(1)及68(4)条

委员会：何耀华（主席）、何继昌及吴正和

聆讯日期：2002年12月6日
裁决日期：2003年3月15日

上诉人于1996年12月签订买卖合约购买物业一，并于1997年5月以确认人身份出售该单位。

评税主任认为上诉人买卖物业一属生意性质的投机活动，遂向上诉人作出1997/98课税年度利得税评税477,200元。

上诉人以购买物业一作自住之用为理由反对上述评税。税务局局长考虑过上诉人的反对通知书后于2002年8月23日发出决定书，决定维持上述1997/98课税年度的利得税评税。

上诉人反对税务局局长的决定，并就此提出上诉。上诉人的上诉理据为：购买物业一的意图确实是用作自住；在买卖成交前以确认人身份出售物业一是因为受到地产代理怂恿；该地产代理向上诉人介绍了同一大厦另一较大单位，即物业二；出售物业一所得的款项全数用作购买物业二。上诉人因此坚称本上诉所涉及的买卖并非生意性质的投机活动，无需课税。

本案情详细列于下述裁决书中。

裁决：

1. **有关的法例条文及法律原则见于《税务条例》第14(1)条。**

2. **根据《税务条例》第68(4)条的规定，证明上诉所针对的评税额过多或不正确的举证责任须由上诉人承担。**

3. 在Simmons v IRC [1980] 1 WLR 1196一案中，Lord Wilberforce法官于1199页中指出：

「买卖需要买卖的意图；一般来说，问题是纳税人购入资产时该意图是否已经存在。纳税人购入的意图是转售图利抑或作为永久投资？」

4. Mortimer 法官在 All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750一案中裁定（第771页）：

「 纳税人购入资产和持有该资产时的意图无疑十分重要。假如纳税人的意图证据充分，而意图又是真确的、实际的和可以实现的，而且所有情况均显示纳税人购入该资产时，正在进行投资的话，我便同意纳税人的意图属实。但这是关于事实的问题，因此单一测试不能提供答案。特别需要留意的是纳税人所声称的意图不能作准，实际的意图只可凭整体证据来决定。」

5. 从上述法例条文及案例中委员会得到的启示是：在此宗上诉，委员会要判断究竟上诉人是否成功地举证了她当日购入物业一时抱着购入自住的意图。上诉人自己今天陈述她当日的意图当然不能尽信，她所声称的意图必须凭客观事实、情况及整体证据来验证。

6. 委员会从上诉人的证供得到的印象是上诉人并不满足于居住在大女儿及女婿的公司丙所提供的宿舍，她一直希望能以自己名义拥有物业或更多的物业。

7. 虽然公司丙提供宿舍给她居住，但这并不否定上诉人有购买居所自住的意图。

8. 至于物业一的漏水问题是否严重，委员会认为与本上诉无关。或许上诉人只是利用漏水问题作为藉口，从而成功取得她的儿女同意多花金钱给她购买一间面积较大及环境较好的单位，这是上诉人的福气。

9. 上诉人在出售物业一翌日即经由同一位地产经纪购买同一大厦的较大单位（即物业二），这明显是一个换楼行为。因此，委员会没有理由将上诉人的换楼行为分拆为炒卖头一间再购入下一间。

10. 至于上诉人声称曾入住物业二，直至因为儿女收入减少才于1997年年底把有关单位出租，委员会相信上诉人这方面的证供。这强烈

显示上诉人购买物业二不是作为炒卖之用，而购买物业二的意图是委员会处理此上诉时一重要的考虑因素。

11. 至于有关大厦是否属于一个中风病人首选的安居之所，委员会认为各人可有不同的看法。上诉人声称该大厦邻近公园，方便她的丈夫晨运。但税务局代表则认为该大厦地形微斜，不是一个中风病人居所的首选。

12. 即使税务局代表的看法正确，也不影响本上诉的结果。该大厦不是中风病人居所的首选可以有很多原因，包括上诉人作了错误判断；或由于环境所限，上诉人只能购买一个次选居所。但这并不否定上诉人购买该单位作为她与其丈夫的居所的意图。

13. 在考虑过上诉人的证供及整个案情后，委员会接纳上诉人购买物业一的意图是用作自住。因此，本上诉所涉及的利润并非源自生意活动，而是属于资产增值，无需课税。

14. 基于上述原因，委员会裁定上诉得直，撤销有关的评税。

上诉得直。

参考案例：

Simmons v IRC [1980] 1 WLR 1196
All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750

徐年美代表税务局局长出席聆讯。
纳税人亲自出席聆讯。

裁 决 书：

背景

1. 甲女士（「上诉人」）于1996年12月签订买卖合约购买大厦乙一单位（「物业一」），并于1997年5月以确认人身份出售该单位。

2. 评税主任认为上诉人买卖物业一属生意性质的投机活动，遂向上诉人作出下列1997/98课税年度利得税评税：

	元	元
售价		3,080,000
减：买入价	2,480,000	
买楼律师费	15,000	
印花税	37,200	
买楼代理佣金	24,800	
卖楼律师费	15,000	
卖楼代理佣金	30,800	2,602,800
应评税利润		477,200
应缴税款（已扣减应徵收的税项款额的10%）		64,422

3. 上诉人以购买物业一作自住之用为理由反对上述评税。税务局局长在考虑过上诉人的反对通知书后于2002年8月23日发出评税决定书，决定维持上述1997/98课税年度的利得税评税。

4. 上诉人反对税务局局长的决定，并就此提出上诉。上诉人的上诉理据为：购买物业一的意图确实是用作自住，在买卖成交前以确认人身份出售物业一是因为受到地产代理怂恿。该地产代理向上诉人介绍了同一大厦另一较大单位，即物业二。出售物业一所得的款项全数用作购买物业二，因此本上诉所涉及的买卖并非生意性质的投机活动，无需课税。

案情事实

5. 上诉人向委员会作供，委员会从证供及双方呈交的文件中得悉以下事实。

6. 在1997至1998年期间，上诉人曾拥有下列物业：

物业项目	拥有人	购买 正式合约日期 转让契约日期* 买价	出售 正式合约日期 转让契约日期* 卖价
物业三	上诉人	- 30-10-1993* 上诉人获丈夫送赠物业	18-2-1997 27-3-1997* 1,880,000元
物业一	上诉人	6-12-1996 -* 2,480,000元 上诉人以确认人身份 出售物业	10-4-1997 31-5-1997* 3,080,000元

物业二	上诉人	11-4-1997 8-7-1997* 4,700,000元	不适用

7. 除了上述第6段所列举的物业外，上诉人与其女儿曾联名持有一住宅物业。上诉人又曾与其女儿男友联名持有一商铺，有关商铺已出售，售价低于买价。

8. 上诉人是一位低教育程度的家庭主妇，丈夫于1994年中风，已退休，家庭经济完全倚赖几位儿女，特别是三位女儿。

9. 上诉人于1996年12月6日签合约购买物业一，并于1997年4月10日签订合约以确认人身份出售该单位。在出售物业一翌日，即1997年4月11日，上诉人签订合约购买物业二，并一直持有该单位。

10. 上诉人声称她购买物业一作自住用途，因为大厦乙邻近公园，方便她的丈夫晨运，但在成交前发觉该单位有漏水情况。在向地产经纪查询时，地产经纪一方面说可以维修，而另一方面又向她推介转买高层一单位，即物业二。在取得家人的支持后，上诉人选择了转买物业二。

11. 上诉人声称于1997年7月与家人搬入物业二居住，直至1997年年底因金融风暴儿女经济出现问题时，才将该单位出租。

12. 对于上诉人声称物业一有漏水情况一事，评税主任曾向该单位买家查询。该单位的买家证实于1998年在睡房冷气机位置的空隙有漏水，使墙身大部份湿透，维修费约用了800元。根据这些资料，漏水问题确是存在，但并不严重。

13. 税务局代表并向委员会提供了资料，显示上诉人一直享有由公司丙提供的董事宿舍：先在物业四；其后由1996年12月开始在物业五。一切有关宿舍开支如电费、水费、煤气、差饷及管理费皆由公司丙支付。

上诉人的证供

14. 上诉人在作供时承认公司丙向她提供免费宿舍。她向委员会解释她只是公司的挂名董事，公司是她的大女儿及女婿的，所以一有经济能力，她就希望不用再住公司物业，搬入自己名下的物业。她又重申在1997年7月购入物业二后，她和家人搬入该物业居住。当时该物业每月供款两万多元，至1997年年底因金融风暴，她的儿女收入减少，因此只好搬回大女儿及女婿公司名下的物业五居住，并把物业二出租，帮补供款。

15. 至于物业一的漏水问题，上诉人强调这是她转买物业二的原因之一。此外，物业二的面积、环境及空气都比物业一好，而儿女又愿意多付金钱购买，所以她便售出物业一而购入物业二。

有关的法例条文及法律原则

16. 《税务条例》（第112章）第14(1)条规定：

> 「除本条例另有规定外，凡任何人在香港经营任何行业、专业或业务，而从该行业、专业或业务获得按照本部被确定的其在有关年度于香港产生或得自香港的应评税利润（售卖资本资产所得的利润除外），则须向该人就其上述利润而按标准税率徵收其在每个课税年度的利得税。」

17. 《税务条例》第68(4)条规定：

> 「证明上诉所针对的评税额过多或不正确的举证责任，须由上诉人承担。」

18. 在Simmons v IRC [1980] 1 WLR 1196一案中，Lord Wilberforce法官于1199页中指出：

> 「买卖需要买卖的意图；一般来说，问题是纳税人购入资产时该意图是否已经存在。纳税人购入的意图是转售图利抑或作为永久投资？」

以下是所节录的判词的英文原文：

> *'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 it at a profit, or was it acquired as a permanent investment?'*

19. Mortimer法官在All Best Wishes Ltd v Commissioner of Inland Revenue 3 HKTC 750一案中裁定（第771页）：

> 「纳税人购入资产和持有该资产时的意图无疑十分重要。假如纳税人的意图证据充分，而意图又是真确的、实际的和可以实现的，而且所有情况均显示纳税人购入该资产时，正在进行投资的话，我便同意纳税人的意图属实。但这是关于事实的问题，因此单一测试不能提供答案。特别需要留意的是纳税人所声称的意图不能作准，实际的意图只可凭整体证据来决定。」

以下是所节录的判词的英文原文：

> *‘ 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.’*

20. **从上述法例条文及案例中我们得到的启示是：在此宗上诉，我们要判断究竟上诉人是否成功地举证了她当日购入物业一时抱着购入自住的意图。上诉人自己今天陈述她当日的意图当然不能尽信，真确的、实际的和可以实现的意图必须在考虑所有证据（包括有关人等曾经说过的话及曾经做过的事）后，方可作出裁决。**

案情分析及总结

21. **税务局代表对于上诉人购买物业一的意图提出以下的质疑：**

(a) **上诉人一直享用由公司丙提供的董事宿舍，因此上诉人购买物业一作为与丈夫养老居所的声称并不可信。**

(b) **物业一的漏水问题并不严重，不足以构成上诉人出售该物业的原因。**

(c) **上诉人在购买物业一的正式转让日期前已迅速将它出售，这强烈显示该物业是作炒卖之用。**

(d) **上诉人没有提交任何证据来支持她与丈夫曾入住物业二的声称。即使上诉人购买物业二不是作炒卖之用，这也不能引申为她购买物业一不是作炒卖之用。**

(e) **大厦乙的地下出入口处设有一狭窄铁门供住户出入，又因那里地形微斜，故设有多级石阶，对一名中风后要用拐杖步行的老人家来说，这楼宇的单位不会是他首选的安居之所。**

22. **我们不同意税务局代表上述观点。从上诉人的证供，我们得到的印象是上诉人并不满足于居住在大女儿及女婿的公司丙所提供的宿舍，她一直希望能以自己名义拥有物业及更多的物业。虽然公司丙提供宿舍给她居住，但这并不否定上诉人有购买居所自住的意图。至于物业一的漏水问题是否严重，我们认为与本上诉无关。或许上诉人只是利用漏水问题作为藉口，因而成功取得她的儿女同意多花金钱**

给她购买一间面积较大及环境较好的单位，这是上诉人的福气。既然上诉人在出售物业一翌日即经由同一位地产经纪购买同一大厦的较大较高单位，即物业二，这明显是一个换楼行为。我们没有理由将上诉人的换楼行为分拆为炒卖头一间再购入下一间。至于上诉人声称曾入住物业二，并在1997年年底时因为儿女收入减少才把有关单位出租，我们相信上诉人这方面的证供。这强烈显示上诉人购买物业二不是作为炒卖之用，而购买物业二的意图也是我们处理此上诉时应考虑的因素。至于大厦乙是否属于一个中风病人首选的安居之所，我们认为各人可有不同的看法。上诉人声称大厦乙邻近公园，方便她的丈夫晨运。但税务局代表则认为大厦乙地形微斜，不是一个中风病人居所的首选。即使税务局代表的看法正确，也不影响本上诉的结果。因为大厦乙不是中风病人居所的首选可以有很多原因，包括上诉人选错了；或由于环境所限，上诉人只能购买一个次选居所。但这并不否定上诉人购买该单位作为她与其丈夫的居所的意图。

23. 在考虑过上诉人的证供及整个案情后，我们接纳上诉人购买物业一的意图是用作自住。因此，本上诉所涉及的利润并非源自生意活动，而是属于资产增值，无需课税。

裁决

24. 基于上述原因，我们裁定上诉得直，撤销有关的评税。