#### Case No. D15/13

**Profits tax** – conveyancing of property – whether there was intention to trade at the time of acquisition – whether 'badges of trade' existed – sections 2, 14 and 68 of the Inland Revenue Ordinance (Chapter 112) ('IRO'). [Decision in Chinese]

Panel: Chow Wai Shun (chairman), Au Man Yee Teresa and Miu Liong Nelson.

Date of hearing: 17 July 2013.

Date of decision: 17 September 2013.

The Appellant had 2 sons. In 2009, the Appellant purchased Property C which was still under construction. The Appellant subsequent signed a formal agreement for the purchase of Property C. The Appellant then mortgaged Property C for a loan in satisfaction of part of the purchase price and other related expenses of Property C. In 2010, the Appellant sold Property C as a confirmor. In 2011, the Appellant purchased Property F, and later completed the transaction. The Commissioner was of the opinion that the sale and purchase of Property C was a trade in nature, and the profits derived from the sale was assessable with profits tax.

The Appellant opposed the Commissioner's assessment. The Appellant's opposition was rejected. The Appellant therefore appealed to the Board. In the hearing, the Appellant elected not to give evidence on oath, and did not adduce any documentary evidence.

### Held:

1. Trading requires an intention to trade: normally the question to be asked was whether such 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? A permanent investment might be sold in order to acquire another investment thought to be more satisfactory; that did not involve an operation of trade, whether the first investment was sold at a profit or at a loss. It was not possible for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. (Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue 53 TC 461 considered)

- 2. The intention of a Appellant, at the time of acquisition, and at the time when he held the asset was undoubtedly of very great weight. If the intention was on the evidence, genuinely held, realistic and realizable, and if all the circumstances showed that at the time of acquisition of the asset, the Appellant was investing in it, then the asset would be an investment. The stated intention of the Appellant could not be decisive and the actual intention could only be determined upon the whole of the evidence. The burden of disturbing the assessment rested upon the Appellant. (All Best Wishes Limited v CIR [1992] 3 HKTC 750 considered)
- 3. A single, one-off transaction could be an adventure in the nature of trade. The question whether or not there had been an adventure in the nature of trade depended on all the facts and circumstances of each particular case and depended on the interaction between the various factors that were present in any given case. (Marson (H M Inspector of Taxes) v Morton and others 59 TC 381 considered)
- 4. The question whether something amounted to the carrying on of a trade or business was a question of fact and degree to be answered by the fact-finding body upon consideration of all the circumstances. Its application required the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade. The intention to trade was not subjective but objective. It was inferred from all the circumstances of the case, and to consider whether the 'badges of trade' existed. (Lee Yee Shing v CIR [2008] 3 HKLRD 51 considered)
- 5. One could not decide whether Property C was a permanent asset simply by the intention stated by the Appellant. Further, since the Appellant elected not to give evidence on oath, his statement was also of less probative value. The Appellant did state in his Grounds of Appeal that 'he could sell [Property C] at anytime if he did not like it or it was unsuitable'. Based on these 2 reasons, it would suffice to find that the Appellant failed to discharge his burden under section 68(4) of IRO. Alternatively, by considering the evidence adduced, the stated intention by the Appellant also could not stand.
- 6. The Appellant's conduct was more consistent with an intention to resell. The short period of time for holding Property C, although not being the only factor, was a strong badge of trade. The other arguments advanced by the Appellant were neither here nor there. Considering all the evidence and arguments of the parties, the Appellant had failed to discharge his burden under section 68(4) of IRO. The Appellant possessed the intention to resell for profit when he purchased Property C; the Appellant did not consider Property C as a permanent asset, nor did he have the intention to own it on a long term basis.

# Appeal dismissed.

### Cases referred to:

Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue 53 TC 461
All Best Wishes Limited v CIR [1992] 3 HKTC 750
Marson (H M Inspector of Taxes) v Morton and others 59 TC 381
Lee Yee Shing v CIR [2008] 3 HKLRD 51

## Taxpayer in person.

Ong Wai Man Michelle, Chan Siu Ying Shirley and Ng Sui Ling Louisa for the Commissioner of Inland Revenue.

# 案件编号 D15/13

**利得税** - 物业买卖 - 购买资产时有否经营生意的意图 - 生意的标记是否存在 - 《税务条例》(第112章)第2、14及68条(下称《税例》)

委员会:周伟信(主席)、欧敏仪及缪亮

聆讯日期:2013年7月17日 裁决日期:2013年9月17日

上诉人育有两名儿子。在2009年,上诉人订购当时仍在兴建中的C物业。 上诉人其后签订正式买卖合约,购入C物业。其后,他以C物业作楼花按揭,向银行借取贷款,以支付部分楼价及相关费用。其后,上诉人在2010年以确认人身分出售 C物业。在2011年,上诉人订购F物业。物业的买卖交易在其后完成。评税主任认为 上诉人买卖C物业属于营业性质,所获得的利润须课缴利得税。

上诉人反对税务局向他作出的利得税评税。税务局副局长发出决定书,裁定上诉人反对无效。上诉人不服,向委员会提出上诉。在委员会聆讯上,上诉人选择不宣誓作供。上诉人亦无提出任何其他呈堂文件证供。

# 裁决:

- 1. 经营生意须有经营生意的意图。在决定纳税人买卖资产时是否在经营生意,关键在他购买资产时的意图。纳税人的意图是转售资产图利,还是作为永久投资?纳税人可能为购入更理想的投资而出售现有的永久投资项目,不论纳税人出售原先的投资项目是获利或亏损,也不涉及生意的运作。一项资产不可能同时是营业资产及资本资产,亦不可能具有不确定的状态,即同时非营业资产或资本资产。(参考Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue 53 TC 461)
- 2. 纳税人在购买及持有资产时的意图无疑是十分重要,假如有证据证明该意图为真正持有、实际及可实现的,而所有情况均显示纳税人在购买资产时的用意是投资,那么该资产便属投资项目。由于这是关乎事实的问题,没有单一测试可提供答案,尤其是纳税人所声称的意图并非决定性,而真正的意图只能以整体证据和情况来判断。推翻评税责任在于纳税人。(参考All Best Wishes Limited v CIR [1992] 3 HKTC 750)

- 3. 单一、一次的交易亦可构成生意性质的投机活动。个案是否属生意性质 的投机活动,取决于该个案的所有事实及情况和不同因素之间的互相影 响。( 参考Marson (H M Inspector of Taxes) v Morton and others 59 TC 381)
- 此外,某些活动是否构成行业或生意,是事实和程度的问题,应交由专 4. 责寻找事实真相的机构,在考虑整体客观情况后作出决定。经营生意的 意图不是主观性,而是客观性的,要从个案的全面情况推断,并考虑到 生意的标记是否存在。(参考Lee Yee Shing v CIR [2008] 3 HKLRD 51)
- 5. 单凭上诉人申述的意图,不能决定C物业是否属于资本性质的资产。而 由于上诉人选择不宣誓作供,他说法的说服力亦相应打折扣。况且, 上诉人在其上诉理由陈述书中,确曾写下「若真的不喜欢或不适合,可 随时出售」。这两项因素足以裁定上诉人未能履行《税例》第68(4)条推 翻评税的举证责任。即若不然,从已呈堂证据考虑,上诉人陈述的意图 亦站不住脚。
- 上诉人的行径与转售意图更为吻合。上诉人就C物业的短促持有时间, 6. 纵不能被视为是唯一主要的因素,亦是一个甚为强烈的生意标记。 上诉人其他辩称和理据同样似是而非。考虑到所有证据和双方陈辞, 上诉人未能履行《税例》第68(4)条的举证责任。上诉人于购入C物业时, 确有转手图利的意图,并非将之视为资本性质资产,打算长期持有。

### 上诉驳回。

## 参考案例:

Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue 53 TC 461 All Best Wishes Limited v CIR [1992] 3 HKTC 750 Marson (H M Inspector of Taxes) v Morton and others 59 TC 381

Lee Yee Shing v CIR [2008] 3 HKLRD 51

上诉人亲自出席聆讯。

王慧敏、陈筱莹及吴瑞玲代表税务局局长出席聆讯。

# 决定书:

1. 上诉人反对税务局向他作出 2010/11 课税年度利得税评税,税务局副局长于 2013 年 4 月 18 日发出决定书,裁定上诉人反对无效。上诉人不服,遂向本委员会提出上诉。

# 有关事实

- 2. 响应本委员会主席的询问,上诉人表示不会宣誓作供。本委员会主席遂向上诉人解释宣誓作供的意义和程序,上诉人表示明白,但仍选择不会宣誓作供。上诉人陈词及响应委员查问后,本委员会主席再次询问上诉人会否选择宣誓作供,上诉人表示在聆讯前已多次书面邀约评税主任等会面解释本个案案情,但不得要领,他不愿意在聆讯中像犯人般接受对方盘问,所以坚持不宣誓作供。上诉人亦无提出任何其他呈堂文件证供。
- 3. 根据上述决定书内决定所据事实,与及双方在聆讯前呈堂的文件证供, 本委员会裁定与本上诉的有关事实如下:
  - (1) 上诉人已婚,与配偶育有两名儿子,分别在 1996 年 11 月及 1998 年 3 月出生。在有关期间,上诉人及其家人居于 C 物业。
  - (2) 上诉人在 2009 年 5 月 31 日与发展商签订临时合约,以 2,113,000 元 订购位于 B 地址 C 物业。
  - (3) 当时 C 物业仍在兴建中,示范单位及售楼处设于 D 地址。发展商提供两种付款办法:
    - (a) 现金/即供(照订价)

	楼价
于签署临时合约时缴付	5%
于签署临时合约后3天内签署正式买卖合约时付清	5%
于签署正式买卖合约后45天内付清	90%

(b) 建筑期付款计划(照订价+5%)

	楼价
于签署临时合约时缴付	5%
于签署临时合约后3天内签署正式买卖合约时付清	5%
于签署正式买卖合约后90天内付清	5%
于发展商发出入伙通知书14天内付清	85%

- (4) 根据该临时合约,上诉人须在签约时支付临时订金 105,650 元,并须在 2009 年 6 月 3 日或之前支付次期订金 105,650 元,及于 2009 年 7 月 18 日或之前支付楼价余额 1,901,700 元。
- (5) 上诉人于 2009 年 6 月 2 日签订正式买卖合约,购入 C 物业。他于 2009 年 7 月以 C 物业作楼花按揭,向银行借取贷款 1,479,100 元 (下称该按揭贷款),以支付部份楼价及相关费用。该按揭贷款分 20 年合共 240 期摊还,首月还款额为 6,225.88 元。
- (6) 上诉人在 2010 年 8 月 19 日签订物业临时买卖合约,以 2,580,000 元出售 C 物业。该合约叙明 C 物业须于发展商发出入伙通知书十四天内完成交易。
- (7) C物业的完工证在 2010 年 10 月 18 日发出。上诉人于 2010 年 11 月 3 日以确认人身份完成 C物业的出售交易。
- (8) 上诉人在 2011 年 4 月 14 日与发展商签订临时合约,以 3,745,800 元 订购位于 E地址的 F物业。F物业的完工证在 2012 年 5 月 30 日发出,物业的买卖交易于 2012 年 6 月 27 日完成。
- (9) 上诉人出售 C 物业所获纯利计算如下:

售价(第3(6)项事实) 减:买入价(第3(2)项事实) 毛利	元	元 2,580,000 <u>2,113,000</u> 467,000
<u>减</u> :支出一 买楼律师费	14,842	
印花税 银行利息 卖楼律师费	11,000 2,547 6,500	
头做件师页 卖楼代理佣金 银行费用及杂费	25,800 21,207	82,296
纯利		384,704

(10) 评税主任认为上诉人买卖 C 物业属于营业性质,所获得的利润须课缴利得税。评税主任根据第 3(9) 项事实的资料向上诉人作出下列 2010/11 课税年度利得税评税:

元五应评税利润384,704应缴税款57,705

- (11)上诉人反对上述评税。
- (12)根据 G 公司及 H 公司就评税主任查询而提供的数据:
  - (a) 上诉人没有书面委托他们代理出售或出租 C 物业及 F 物业。
  - (b) G公司只有与上诉人就出售或出租F物业的通话记录。
  - (c) H公司则有与上诉人就出售 C 物业,与及出售或出租 F 物业的通话记录。其中就 C 物业而言,该等记录显示上诉人的出售意向,与及整体而言上诉人向上调整叫价的趋势。
- (13) J 巴士线为循环线,由 2009 年 10 月 12 日起绕经 K 位置及 L 位置前往 M 位置,并于 N 位置及 P 位置增设分站,乘坐该路线巴士可前往 O 车站及 R 车站。
- (14)任何以个人或公司名义,在2010年11月20日或以后取得住宅物业,并在取得物业后24个月内将其处置(包括出售或转让),须缴交额外印花税。

## 上诉理由及陈词

- 4. 上诉人的陈词,与他的上诉理由没有分别。结合上诉人对本委员会提问的响应,归纳而言,他的上诉理据如下:
  - (1) C物业是上诉人购买给儿子作将来打算,或作出售或出租用途:
    - (a) 上诉人偶然行经商场,被地产代理游说看了C物业的示范单位,认为很好,特别是有多用途室内球场/室内篮球场/羽毛球场,十分适合儿子。当时没有和儿子商量,因他们年纪还小,也不担心交通,因有铁路到达,地产代理表示从铁路步行前往只需十多分钟,若真的不喜欢或不适合,可随时出售或出租。
    - (b) 上诉人签订临时合约后,签署正式买卖合约前,和小儿子视察C物业,发现从R车站步行前往,需时15至20分钟,加上烈

日当空, 感到辛苦和不便, 但当时仍打算出租物业作投资用途。

- (2) 在收楼前两个月,地产代理前来询问,上诉人想及曾出租物业的经验,当租客要求他处理有关物业的问题时,他便须亲身前往,令他感觉烦扰。为了不重蹈覆辙,于是决定出售 C 物业,并找寻较理想的物业。当时正值楼价上升,但不代表他意图转售图利。
- (3) 其后上诉人购入 F 物业,同样是为儿子将来打算。收楼后地产代理不断致电询问他可会放售或出租物业,他只是随口说了价钱,以免地产代理再不断来电游说,另一方面亦可从代理获得市场信息。即若是他久居的 C 物业,亦不时有地产代理致电问价,他亦如是回复。然而,他从没有签署任何代理委托书,也没有带代理或买家视察物业。何况至目前为止,他未有出售 F 物业,而事实上,上诉人一家因装修 C 物业,现正居于 F 物业,感觉正面而良好,其中大儿子已是一名中五学生,较喜爱自由空间,亦较意识到香港的住房问题严重,对上诉人手持超过一个物业的原因,应更能理解。
- (4) 购买物业存在一定风险,上诉人只是为儿子打算,才愿意承受风险。

# 《税务条例》的有关规定和案例

- 5. 上诉人没有反对答辩人代表引用下列《税务条例》条文:
  - (a) 第 14 条:
    - 「(1) 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征收其在每个课税年度的利得税。」
  - (b) 第2条:
    - 「(1) 在本条例中,除文意另有所指-

. . . . .

行业、生意(trade)包括每一行业及制造业,亦包括属生意性质的所有投机活动及项目;

- (c) 第 68 条:
  - 「(4) 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。」
- 6. 上诉人亦没有反对答辩人代表引用以下案例和解释:
  - (1) 购买资产时的意图

Lord Wilberforce在Lionel Simmons Properties Limited (in liquidation) and others v Commissioners of Inland Revenue 53 TC 461一案表示,经营生意须有经营生意的意图。在决定纳税人买卖资产时是否在经营一项生意,关键在他购买资产时的意图。纳税人的意图是转售资产图利,还是作为永久投资?纳税人可能为购入另一更理想的投资而出售现有的永久投资项目,不论纳税人在出售原先的投资项目是获利或亏损,也不涉及生意的运作。一项资产不可能同时是营业资产及资本资产,亦不可能具有不确定的状态,即同时非营业资产或资本资产。原文判词节录如下:

'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? Often it is necessary to ask further questions: a permanent investment may be sold in order to acquire another investment thought to be more satisfactory; that does not involve an operation of trade, whether the first investment is sold at a profit or at a loss ... What I think is not possible is for an asset to be both trading stock and permanent investment at the same time, nor to possess an indeterminate status – neither trading stock nor permanent asset. It must be one or other ...'

(2) 意图须依整体情况及客观证据来决定

在 All Best Wishes Limited v CIR [1992] 3 HKTC 750一案中,Mortimer法官指出,纳税人在购买及持有资产时的意图无疑是十分重要,假如有证据证明该意图为真正持有、实际及可实现的,而所有情况均显示纳税人在购买资产时的用意是投资,那么他便同意该资产属投资项目。由于这是关乎事实的问题,没有单一测试可提供答案,尤其是纳税人所声称的意图并非决定性,而真正的意图只能依整体证据和情况来判断。原文判词节录如下:

'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 realizable, 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. 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.'

### (3) 生意的标记

- (a) 在 Marson (H. M. Inspector of Taxes) v Morton and others 59 TC 381 一案,Sir Nicolas Browne-Wilkinson V-C 在参考过多个案 例后说,单一、一次的交易亦可构成生意性质的投机活动。 个案是否属生意性质的投机活动,取决于该个案的所有事实 及情况和不同因素之间的相互影响。原文判词节录如下:
  - 'Like the Commissioners I have been treated to an extensive survey of authorities. But as far as I can see there is only one point which as a matter of law is clear, namely that a single, one-off transaction can be an adventure in the nature of trade....

It is clear that the question whether or not there has been an adventure in the nature of trade depends on all the facts and circumstances of each particular case and depends on the interaction between the various factors that are present in any given case.'

- (b) Lee Yee Shing v CIR [2008] 3 HKLRD 51 一案,涉及股票买卖交易,终审法院的判词指出,某些活动是否构成行业或生意,是事实和程度的问题,应交由专责寻找事实真相的机构,在考虑整体客观情况后作出决定。原文判词节录如下:
  - 'The question whether something amounts to the carrying on of a trade or business is a question of fact and degree to be

answered by the fact-finding body upon consideration of all the circumstances.... No principle of law defines trade. Its application requires the tribunal of fact to make a value judgment after examining all the circumstances involved in the activities claimed to be a trade.'

(c) 其中 McHugh NPJ 指出, <u>Simmons</u> 一案所指经营生意的意图 不是主观性,而是客观性的,要从个案的全面情况推断,并 考虑到生意的标记是否存在。原文判词节录如下:

'The intention to trade to which Lord Wilberforce referred to is not subjective but objective: Iswera v Commissioner of Inland Revenue [1965] 1 WLR 663 at p.668. It is inferred from all the circumstances of the case, as Mortimer J pointed out in All Best Wishes Ltd v Commissioner of Inland Revenue (1992) 3 HKTC 750 at p.771.... However, in cases where the taxpayer is claiming that a loss is an allowable deduction because he or she had an intention to resell for profit or where the taxpayer has made a profit but denies an intention to resell at the date of acquisition, the tribunal of fact determines the intention issue objectively by examining all the circumstances of the case. It examines the circumstances to see whether the "badges of trade" are or are not present. In substance, it is "the badges of trade" that are the criteria for determining what Lord Wilberforce called "an operation of trade".'

(4) 举证责任在于纳税人

在<u>All Best Wishes Limited</u>一案中,Mortimer法官指出,推翻评税责任在于纳税人。原文判词节录如下:

'It must be remembered that the burden of disturbing the assessment rests upon the Appellant.'

# 案情分析

7. 根据 Mortimer 法官在 All Best Wishes Limited 一案所言,单凭上诉人申述的意图,是不能决定 C 物业是否属资本性质的资产。而上诉人因主观感受而选择不宣誓作供,其声称的意图因此没有经过答辩人代表质询的测试,说服力亦相应打了折扣。况且,答辩人代表正确地指出,上诉人在其上诉理由陈述书中,确曾写下「若真的不喜欢或不适合,可随时出售」,本委员会认为,这两项因素足以裁定上诉人未能履行《税务条例》第 68(4)条推翻评税的举证责任。即若不然,从已呈堂证据作客观的考虑,上诉人申述的意图亦站不住脚。

- 8. 上诉人声称他购买 C 物业给他的儿子( 姑且不论是大儿子, 还是小儿子, 甚至一如他所说,可以是两名儿子),是作日后居住或结婚新居之用,所以他考虑 的因素,主要是 C 物业的实用面积、间格、材料设备,特别是多用途室内球场及价 钱,对于交通问题,他不太担心,因有鐡路到达,他亦已得地产代理知会,鐡路下 车后尚需步行十数分钟,而且不认为有必要与儿子商量,因为儿子当时年纪小,分 别只得十二及十一岁,不会明白个中意义云云,所以儿子的喜好虽是考虑因素,但 决非主要因素。然而视察当日,他只与小儿子同往,据他所言,在没有遮荫的情况 下,从鐡路站得行上接近二十分钟才到 C 物业,父子二人都汗流浃背,便觉得不太 方便,对交通不大满意。即若上诉人并非以小儿子的意愿为主要依归,但上诉人尚 可选择与他申述的意图较符合的做法多的是,或则取消购买(虽然这会招致损失), 或则下回天气稍凉时再带小儿子,甚至带同大儿子看看如何,或则等候以看清交通 配套会否日臻完备等等,特别是他两名儿子距离成年尚有数年,根本无需急于一时, 或单凭一次视察的有限经验,便全盘否决原先未雨绸缪的大计,大可谋定而后动。 而事实上在2009年10月12日,即上诉人购入C物业数月后,已有港鐵接驳巴士增 设邻近分站,问题纵不能迎刃而解,亦应得以改善。
- 9. 上诉人声称他放弃以 C 物业作为儿子将来居所的计划,便打算收楼后出租物业作投资用途。然而,答辩人呈堂的文件中,没有上诉人对地产代理的放租指示及对话记录,反之却有 H 公司的计算机记录,显示上诉人早于 2010 年 3 月开始,不时向代理透露他拟出售 C 物业的意愿及整体而言向上调整叫价等,与转售意图更为吻合的行径。至于上诉人声称,因为过往出租物业曾带来的不便,与及不愿因租务事宜而需往返 C 物业,他没有提何任何具体和实质证据左证和说明,本委员会认为纯属托辞。
- 10. 上诉人在 2009 年 5 月 31 日购入 C 物业时,该物业仍未建成,他于尚未收到收楼通知书,已于 2010 年 3 月 14 日通过电话指示 H 公司代理放售,并于 2010 年 8 月 19 日以确认人身份签订临时买卖合约,出售物业。上诉人在完成他与 C 物业发展商的交易前已将他项下的权益售予他人,上诉人从没有自用 C 物业、享乐或收入之用,如此短促的持有时间,纵然不能被视为是唯一或主要的因素,亦是一个甚为强烈的生意标记。
- 11. 上诉人其他辩称和论据,同样似是而非。
- 12. 他声称以往并没有频繁买卖物业,然而,单一、一次的交易亦可构成生意性质投机活动。
- 13. 上诉人亦提到并非以公司名义购买 C 物业,并选择以即供按揭贷款方式,而非于入伙前付款来减低成本,所以他购买 C 物业并非作营业用途。可是,在衡量纳税人购买资产的意图,以个人名义或是以其他形式持有,根本不是相关考虑因素。至于两种付款方法,哪一方案更有效减低成本,见仁见智,建筑期付款楼价加5%,

虽然较迟支付楼价余款,但90天内需付款15%,相等于原订价的15.75%,若转售价不变,毛利亦将相应下降,纯利亦然,一旦需付利得税,税款或会减少;然而,利得税税款多少,绝不是考虑因素之一,而减低成本亦充其量只属中性考虑,因为无论长线投资或是短线炒卖,均可适用。关于上诉人因选择即供付款而向银行借贷及承造按揭,亦纯为履行发展商要求的付款条件及买卖合约内的条款,与C物业是否属资本性质资产,沾不上边际。

- 14. 上诉人又声称若他以转售图利,理应选择市区较易转售或热门炒卖的物业,聆讯时他以 S 屋苑作例子。然而,他能否负担价钱是一项重要考虑,上诉人亦没有异议,据他所言,以相同价钱购买一个全新六百多呎的单位,T 地区是当时唯一可以考虑的地区。他提出 S 屋苑为例,不过是穿凿附会,顾左右而言他,试图转移视线。至于 C 物业是否地处偏远,又或者因地区问题而难以易手,亦非需要考虑的因素,因为无论是近是远,既是相对的问题,对某些人远,对另一些人或是便捷,同时亦既可作长线投资,又可作短线炒卖,不能一概而论。
- 15. 最后,上诉人声称他在出售 C 物业后,购入 F 物业为替代,直至现时仍然持有,聆讯时上诉人更提出因装修原居的 C 物业,所以近期正居于 F 物业;然而,这些与 C 物业是否资本性质物业都没有必然关系。

## 结论

16. 经详细考虑所有证据和双方的陈词,与及基于上文的分析,上诉人未能履行《税务条例》第68(4)条的举证责任,本委员会从客观事实上亦认为,上诉人于购买C物业时,确有转售图利的意图,并非将之视为资本性质资产,打算长期持有。所以,委员会驳回上诉人的上诉,并确定上文第3(10)段的评税。