

**Case No. D8/10**

**Profits tax** – calculation of profits – limited company selling a landed property – whether cost should be based on the price paid by current shareholders to acquire shares in the limited company. [Decision in Chinese]

Panel: Kenneth Kwok Hing Wai SC (chairman), Lee Fen Brenda and Wong Fung Yi.

Date of hearing: 29 April 2010.

Date of decision: 14 May 2010.

The Appellant was a limited company. The Appellant used \$8,778,000 to purchase a property in 2003. In 2004, the Appellant sold the property for \$12,000,000. The Inland Revenue gave notice of profits tax assessment. The Appellant claimed that the calculation of profits from the sale of the property should be based on the price paid by the current shareholders to acquire the shares of the appellant of \$10,600,000, but not the price paid by the previous shareholders to acquire the property. Otherwise it would cause the problem of double taxation and violate the principle of fairness.

The Deputy Commissioner of Inland Revenue refused to accept the viewpoints of the Appellant and gave the following reasons:

1. The limited company and the shareholders were separate legal entities. The property transaction of the limited company and the shares transaction of the shareholders involved different dealers and different legal rights and responsibilities. Therefore, the tax assessment criteria would be different. Whether or not the previous shareholders had paid profits tax for the profits gained from the sale of the shares of the Appellant was irrelevant to the profits tax assessment in the sale of the property by the Appellant. The problem of double taxation does not exist.
2. Although the Appellant alleged that the purpose of the present shareholder to buy the shares of the Appellant was to purchase the property, the agreement of the transfer of shares and the deed of the loan for the shares transfer showed clearly that the present shareholder bought the shares and the liability from the previous shareholder, while the ownership of the property still belonged to the Appellant. Even though the property was an inseparable and important element in the transaction, the Revenue should consider the fact that at the time of shares transaction, the property was not yet sold. The Appellant's argument of substance over form could not sustain.
3. The Appellant used a price of \$8,778,000 to purchase the property.

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

Therefore, when calculating the profits from the sale of the property, that purchase price should be considered as the cost.

The Appellant's ground of appeal was that the assessment was excessive. The cost of the property should be the price paid by the current shareholders to acquire the shares of the Appellant. This was a substance over form transaction. There was no reason for the current shareholders to pay the tax on the profits earned by the previous shareholders of the Appellant. The Appellant's representative attended the hearing. He called no witness. He did not quote any authorities and had not made any understandable submission.

**Held:**

In profits tax assessment, the cost should be the purchase price of the property. The price paid by the shareholders in the subsequent shares transaction is irrelevant. The cost could not be adjusted subsequently as well. The Appellant disregarded the reasons and authorities relied on by the Deputy Commissioner. The representative of the Appellant failed to provide any evidence to show that the property was a capital investment, therefore the ground of appeal cannot be sustained. The appeal was frivolous and vexatious, and was an abuse of the tax appeal procedure. The Board considered the present case a waste of resources of the Board. The Board ordered the taxpayer to pay \$5,000 as cost before the Board.

**Appeal dismissed and costs order in the amount of \$5,000 imposed.**

Chow Mo Lam, Certified Public Accountant (Practising), for the taxpayer.  
Chan Wai Yee, Chan Tsui Fung and To Yee Man for the Commissioner of Inland Revenue.

案件编号 D8/10

**利得税** – 计算所得利润 – 有限公司出售地产物业 – 成本是否根据现股东购买有限公司股份的价格计算

委员会：郭庆伟资深大律师（主席）、李帆及王凤仪

聆讯日期：2010年4月29日

裁决日期：2010年5月14日

上诉人是一有限公司。上诉人于2003年以8,778,000元购入一物业。上诉人于2004年把物业以12,000,000元出售该物业。税务局向上诉人作出利得税评税。上诉人声称在计算出售地产物业所得的利润时，应以现股东购入上诉人股份的代价10,600,000元作计算，而不是上诉人购入物业价格，否则这会引起双重征税的问题，有违公平的原则。

税务局副局长不能接纳上诉人的观点和提出以下理由：

1. 有限公司及股东为独立法人，有限公司就其物业的交易，与股东就其股份的交易，涉及不同的交易者，各产生不同的法律权利及责任，因此评税的基准亦有所不同。前股东有否就出售上诉人股份所得的利润课缴利得税，与上诉人出售物业的应课税利润无关，当中不涉及双重征税的问题。
2. 虽然上诉人声称现股东购买其股份的目的是购买该物业，但《有限公司股份转让协议》及贷款转让契约均清楚显示，现股东是向前股东购买他的股份及债权，而该物业的业权仍由上诉人持有。即使物业是有关交易中不可分割的重要因素，本局仍须根据上诉人当时没有出售该物业的事实去处理上诉人的税务事宜。上诉人提出实质重于形式的论点是不成立的。
3. 上诉人是以8,778,000元的价格购入该物业，因此在计算其出售该物业的利润时，应以该价格作为成本。

上诉人的上诉理由是评税过高，购买物业的成本应以购买该公司的价值计算，这是一宗实质重于形式的交易，他们没理由要负担上一手所赚的利润的税款。上诉人代表出席聆讯，并无传召任何证人，没有引述任何有关典据，亦没有作出任何可理解的陈词。

**裁决：**

在评定上诉人的利得税时，成本价是上诉人购买地产物业的成本价。与股东后来买卖股票的代价无关，亦不能随后调整。上诉人漠视副局长所列出的理由及典据。上诉人代表完全没有提出任何有关典据或理据支持明显不能成立的上诉理由。委员会认为上诉人提出这琐屑无聊或无理取闹的上诉绝对是滥用税务上诉程序。委员会认为本案浪费委员会资源，对其他纳税人不公平。委员会命令上诉人缴付5,000元作为委员会的讼费。

**上诉驳回及判处港币5,000元的讼费命令。**

纳税人由周武林执业会计师代表出席聆讯。  
陈慧仪、陈翠凤及陶绮雯代表税务局局长出席聆讯。

**决定书：**

**事关重要的事实**

1. 税务上诉委员会(「委员会」)作出以下事实的裁断。
2. 上诉人于2003年9月1日在香港注册成立为有限公司。
3. 上诉人于2003年9月27日与一地产发展商签订临时买卖协议，以8,778,000元购入当时尚在兴建中的地产物业。上诉人于2004年9月14日签署转售合约，以12,000,000元出售该地产物业，交易于2005年4月26日完成。
4. 税务局向上诉人作出2005/06课税年度利得税评税。
5. 上诉人声称在计算出售地产物业所得的利润时，应以现股东购入其股份的价格作为地产物业的成本。
6. 税务局副局长维持2005/06课税年度利得税评税。

**副局长的决定理由**

7. 副局长所持的决定理由为：

- 「(1) 在本个案中，本人须决定〔上诉人〕从出售物业所得的应评税利润的款额，当中本人须确定该物业的成本价格。
- (2) 〔上诉人〕声称出售该物业的成本应以现股东从〔前股东〕购入〔上诉人〕股份的代价 10,600,000 元作计算，而不是〔上诉人〕向发展商购入该物业的价格 8,778,000 元，否则这会引起双重征税的问题，有违公平的原则。就本个案的事实而言，本人不能接纳〔上诉人〕的观点。
- (3) 有限公司及股东为独立法人，有限公司就其物业的交易，与股东就其股份的交易，涉及不同的交易者，各产生不同的法律权利及责任，因此评税的基准亦有所不同〔可参考 Beautiland Co Ltd v CIR, 3 HKTC 520<sup>1</sup>及 Hong Wah Investment Co Ltd v CIR, HCIA 1/1986, 5 November 1986<sup>2</sup>〕。〔前股东〕有否就出售〔上诉人〕股份所得的利润课缴利得税，与〔上诉人〕出售物业的应课税利润无关，当中不涉及双重征税的问题。
- (4) 虽然〔上诉人〕声称现股东购买其股份的目的是购买该物业，但〔现股东〕或〔另一人〕签订的『有限公司股份转让协议』及贷款转让契约均清楚显示，现股东是向〔前股东〕购买他的股份及债权，而该物业的业权仍由〔上诉人〕持有。即使该物业是有关交易中不可分割的重要因素，本局仍须根据〔上诉人〕当时没有出售该物业的事实去处理〔上诉人〕的税务事宜。〔上诉人〕提出实质重于形式的论点是不成立的。在 Harley Development Inc. & Trillium Investment Ltd v CIR 4 HKTC 91<sup>3</sup>一案中，法官指出即使纳税人可藉着不同方式的交易达致相同的结果，纳税人仍受到其交易的形式约束。有关判词的原文如下：
- ‘Here it may be that the appellants could have achieved the same result by going about the transactions in a different way but they have not done so. The appellants are bound by the form of their transactions.’
- (5) 〔上诉人〕是以 8,778,000 元的价格自发展商购入该物业，因此在计算其出售该物业的利润时，应以该价格作为成本。此外，〔上诉人〕是于 2005/06 课税年度的评税基期内出售其物业，因此它从中赚取的利润须全数于 2005/06 课税年度内评定。
- (6) 基于上述理由，〔上诉人〕的反对无效。2005/06 课税年度利得税评税现予维持。」

<sup>1</sup> 参阅第 526 页。

<sup>2</sup> 参阅第 4 页。

<sup>3</sup> 参阅第 110 页。

## 上诉理由

8. 上诉人的上诉理由陈述书的内容如下:

「该评税过高，因为我们认为我们购买物业的成本应以我们购买该公司的价值计算，这是一宗实质重于形式(Substance Over Form)的交易，我们没有理由要负担上一手所赚的利润的税款。」

## 聆讯过程

9. 上诉人所有董事、股东及员工全部缺席聆讯。上诉人派遣周武林执业会计师代表出席。

10. 周武林执业会计师并无传召任何证人，没有引述任何有关典据，亦没有作出任何可理解的陈词。

11. 周武林执业会计师说：

「我哋唔同意。睇吓你哋点讲。」

12. 委员会邀请周武林执业会计师就《税务条例》第 112 章第 68(9)条作出陈词。然后委员会告知双方税务局没有必要响应。

## 琐屑无聊或无理取闹的上诉

13. 显而易见，在评定上诉人的利得税时，成本价是上诉人购买地产物业的成本价。与股东后来买卖股票的代价无关，亦不能随后调整。

14. 上诉人漠视副局长所列出的理由及典据。周武林执业会计师完全没有提出任何有关典据或理据支持明显不能成立的上诉理由。

15. 委员会认为上诉人提出这琐屑无聊或无理取闹的上诉绝对是滥用税务上诉程序。

## 个案的处置

16. 委员会驳回上诉，并确认上诉所针对的评税额。

17. 委员会认为本案浪费委员会资源，对其他纳税人不公平。委员会命令上诉人缴付 **5,000 元** 作为委员会的讼费，**该笔款项须加在所确认的税款内一并追讨**。