Current Controversies in Profits Tax

Andrew Halkyard takes a look at some recent cases involving profits tax and the ownership of property for the purposes of trading versus investment

Burden of proof where jointly owned property sold for profit

A contentious issue arising in cases before the Board of Review relates to co-ownership and whether, in a trading versus investment dispute, the co-owners must prove individual and collective intention that property was not acquired for a trading purpose.

This issue was answered affirmatively in *D 121/95* 11 IRBRD 183 at 189, (1996) HKRC §80-444. In this case one of four co-owners of residential property had reluctantly agreed to take a 25% share of the property without being able to finance her share of the mortgage repayments. In this event, the Board concluded that the taxpayers' (ie the four co-owners assessed as a partnership) claim that the property was acquired for long-term investment failed because they could not prove that the co-owners individually and collectively had a genuinely held and realistic investment intention.

D 121/95 can be contrasted with *D 77/96* 11 IRBRD 698, (1997) HKRC §80-492. This latter case involved three co-owners who bought and sold property within a short period of time. They were assessed as a partnership. Two of the co-owners did not appear before the Board. However, the Board accepted the evidence of the third co-owner, who explained that the transaction was a financing arrangement for him to ultimately own the property and to occupy it as a residence. On this basis, the Board concluded that the third co-owner was not carrying on a trade of property dealing and it must follow that the assessment raised collectively upon the three co-owners as a partnership should be annulled. The Board left open the question of whether the Commissioner could re-assess the remaining co-owners on the basis that a partnership existed between them alone.

Application of *Sharkey v Wernher* in Hong Kong

The landmark decision of the House of Lords in *Sharkey v Wernher* [1956] AC 58 has routinely been applied in Hong Kong by the Board of Review to tax unrealised profits upon reclassification of assets from trading stock to investment (see, eg, *BR 21/76* 1 IRBRD 291 and *D 55/90* 5 IRBRD 420, (1991) HKRC §80-086).

The above cases can be contrasted with that in *D 75/96* 12 IRBRD 19, (1997) HKRC §80-491. In the latter case, the Board refused to apply *Sharkey v Wernher* to tax a notional profit, even though it accepted that there had been a change of intention relating to property held by a company from trading stock to capital asset upon a change of shareholding in the company. Given that the property had never been disposed of by the company — indeed, there was no evidence that the company ever put up or advertised the property for sale — the Board decided that it did not carry on any trade as did the taxpayer in *Sharkey v Wernher*. In short, the Board decided that, although the company might have had the intention to trade, it had not taken any steps to deal in the property. The Board also rejected the suggestion in *D 55/90* that

'the change of intention can itself bring into existence a new and distinct line of activity'.

The Commissioner, being dissatisfied with this decision, has lodged an appeal to the Court of First Instance.

Deductibility of interest expenses by property developers

For accounting purposes, interest incurred on loans borrowed for property developed for resale is generally capitalised. In other words, it is carried forward as part of the costs of the development and then taken into account as forming part of the cost of property sold in each year of assessment. In *Secan Ltd v CIR* (1998) HKRC §90-097, and notwithstanding the accounting practice described above, the taxpayer sought to deduct all of its interest expenses incurred on the property development as soon as sales commenced and profits were derived. Cheung J, in the Court of First Instance, upheld the taxpayer's claim. He held that the accounting practice did not involve deducting the whole of the interest incurred in each year of assessment and then crediting the relevant sum as part of the closing figure for unsold stock and for work-in-progress as part of a notional receipt. On this basis, Cheung J allowed the taxpayer to deduct the full amount of interest incurred when the sales of trading stock commenced.

The Commissioner, being dissatisfied with this decision, has lodged an appeal to the Court of Appeal.

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有關利得稅爭議的近況

近期有一些案例，涉及了利得稅和以貿易（以別於投資）為目的而擁有業權。賀雅德作出探討

為賺取利潤而出售共同擁有之業權的舉證責任

稅務上訴委員會審理的案件中，其中一項具爭議性的問題，是在究屬貿易或者投資的糾紛中，業權的共同擁有人是否要證明他們的共同及個別意圖乃並非以貿易為目的而取得業權。

在 *D 121/95* 11 IRBRD 183 (見第 189 頁), (1996) HKRC §80-444 案中，稅務上訴委員會對上述問題作出了肯定的答案。案中住宅物業由四名人士共同擁有，但其中一人是在不願意的情況下同意了接受物業的四分之一份數，而她不能就按揭還款作出財務安排。在這情形下，稅務上訴委員會裁定納稅人（該四名共同擁有人作為合夥被評估稅項）所作的聲稱 — 即物業乃為長線投資目的而取得 — 不能成立，原因是他們未能證明其共同及個別地確實有著投資的意圖。

上述一案與 *D 77/96* 11 IRBRD 698, (1997) HKRC §80-492 成了對比。該案涉及三名共同擁有人，他們在一段短時間內購入和出售物業。他們作為合夥被評估稅項。在聆訊期間，其中兩名共同擁有人沒有出庭。第三名共同擁有人作供時解釋有關交易其實是一項財務安排，以使他能最終擁有物業及使用物業作為住所。稅務上訴委員會接納了此等證供，並裁定第三名共同擁有人並沒有從事買賣物業貿易，故此對於三名共同擁有人作為合夥方式而作出的評估必須予以廢止。但對於稅務局局長可否基於其餘兩名共同擁有人之間存在著合夥關係而對他們作出評估的問題，稅務上訴委員會沒有提供答案。

Sharkey v Wernher 案在香港的適用性

英國上議院在 *Sharkey v Wernher* [1956] AC 58 案中所作的極為重要的判決，在香港慣常地被稅務上訴委員會引用，以於把資產由營業存貨被重新分類為投資時，就未實現利潤徵稅。以下案例是一些好例子：*BR 21/76* 1 IRBRD 291 及 *D 55/90* 5 IRBRD 420, (1991) HKRC §80-086。

上述兩案與 *D 75/96* 12 IRBRD 19, (1997) HKRC §80-491 案成了對比。該案中稅務上訴委員會雖然認定，當持有物業公司的持股出現變動時，公司的意圖被視為由持有物業作為營業存貨轉變為持有物業作為資本資產，但卻拒絕援用 *Sharkey v Wernher* 案以就假定的利潤徵稅。鑒於公司從來沒有售賣有關物業（案中確沒有證據顯示公司曾以廣告或其他方式嘗試售賣物業），故稅務上訴委員會裁定公司並沒有像 *Sharkey v Wernher* 案的納稅人一樣從事任何有關貿易。簡言之，稅務上訴委員會裁定，縱使公司可能有意從事貿易，它從未採取任何步驟以處置物業。稅務上訴委員會亦拒絕接納 *D 55/90* 一案的以下建議：「意圖的改變本身即可構成一項全新和獨立的行動」。

稅務局局長不滿上述裁決，已向原訟法庭提出上訴。

物業發展商的利息開支可否予以扣減

就會計帳目而言，為發展轉售物業而貸款因而招致的利息，一般來說會被資本化。換言之，利息會被處理為發展成本的一部分，並在每個評稅年度被當作為售出物業成本的一部分作評估。縱是如此，在 *Secan Ltd v CIR* (1998) HKRC §90-097 案中，納稅人在已發展物業開始出售並賺取利潤時，已尋求把發展物業招致的一切利息開支列入扣減項目內。原訟法庭法官張澤祐判納稅人勝訴，並裁定有關的會計做法並不涉及扣減每個評稅年度內招致的利息的全部，繼而把有關款額作為未售出存貨結餘的一部分及未完成工作（作為部分的假定收入）的一部分記入貸方帳目。在這基礎上，法官容許納稅人在開始售賣貿易存貨時扣減利息的全額。

稅務局局長不滿上述裁決，已向上訴法庭提出上訴。

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