# NP and Another v Comptroller of Income Tax
# [2007] SGHC 141

**Case Number** : ITA 1/2006

**Decision Date** : 31 August 2007

**Tribunal/Court** : High Court

**Coram** : Judith Prakash J

**Counsel Name(s)** : Nicholas Lazarus (Justicius Law Corporation) for the appellants; Usha Chandradas and Ong Ken Loon (Inland Revenue Authority of Singapore) for the respondent

**Parties** : NP; B — Comptroller of Income Tax

*Revenue Law – Income taxation – Accounting – Husband and wife buying eight residential properties and selling seven of them in eight years – Whether property sales amounting to trading*

*Revenue Law – Income taxation – Appeals – Approach of court – Whether buying and selling properties amounting to trading – Whether issue one of mixed fact and law – Section 81(2) Income Tax Act (Cap 134, 2004 Rev Ed)*

**[EDITORIAL NOTE: The details of this judgment have been changed to comply with s 83(3) Income Tax Act (Cap 134, 2004 Rev Ed)]**

31 August 2007 Judgment reserved.

**Judith Prakash J**

**Introduction**

1 The appellants, NP and XY, are husband and wife. During the eight years between June 1988 and March 1996, they bought eight residential properties ("the properties") and sold seven of them. In 1999 and 2000, the Comptroller of Income Tax ("the Comptroller") issued, in total, three notices of additional assessment against the appellants. These notices of assessment related to the gains made by the appellants when they sold four of their properties. The appellants were dissatisfied with the notices and applied to the Comptroller for the assessments to be reviewed and revised. In July 2004, the Comptroller rejected these applications.

2 The appellants did not accept this decision. Accordingly, on 6 August 2004, they filed a notice of appeal with the Income Tax Board of Review ("the Board") pursuant to s 79(1) of the Income Tax Act (Cap 134, 2004 Rev Ed) ("the Act") in respect of three of the properties. Having heard the parties' submissions, on 12 December 2006, the Board dismissed the appellants' appeals in respect of two of the properties but allowed their appeal in respect of one property. The appellants were still dissatisfied and therefore lodged an appeal to this court against the decision of the Board.

**Background**

3 The notices of additional assessment raised by the Comptroller were issued on the basis that the gains arising out of the sale of the appellants' properties were chargeable to tax under s 10(1)(a) of the Act as profits made from trading activities. This section reads:

> **Charge of income tax**

**10.** – (1) Income tax shall, subject to the provisions of this Act, be payable at the rate or rates specified hereinafter for each year of assessment upon the income of any person accruing in or derived from Singapore or received in Singapore from outside Singapore in respect of–

(a) gains or profits from any trade, business, profession or vocation, for whatever period of time such trade, business, profession or vocation may have been carried on or exercised.

4 An agreed statement of facts was filed before the Board. It was not in dispute that the appellants had bought and sold the properties in question or that they had realised a profit from each of the sales. The stand taken by the appellants was that they were not trading in the properties as the same had each been purchased to provide a residence for themselves and their children. A summary of the transactions carried out by the appellants over the years appears below.

| No. | Property | Purchase | | Sale | | |
|---|---|---|---|---|---|---|
| | | Contract Date | Price ($) | Contract Date | Price ($) | |
| 1 | Greenwood Grove ("Greenwood Grove") | 11/06/88 | 575,000 | 30/11/90 | 725,000 | 2.4 years |
| 2 | Tanjong Rhu Rd ("the Waterside unit") | 31/12/90 | 963,840 | 04/02/93 | 1,340,000 | 2.1 years |
| 3 | Watten Close ("Watten Close") | 22/03/93 | 1,430,000 | 29/07/93 | 1,690,000 | 4 months |
| 4 | Keng Chin Rd ("the Le Marque unit") | 17/05/93 | 1,090,000 | 17/08/94 | 1,400,000 | 1.25 yea |
| 5 | Jalan Sejarah ("Jalan Sejarah") | 27/06/94 | 3,465,000 | 27/01/95 | 4,190,000 | 7 months |
| 6 | Hillcrest Road ("Hillcrest Road") | 06/05/95 | 2,200,000 | 20/08/99 | 2,050,000 | 4.25 yea |
| 7 | Gentle Drive ("Gentle Drive") | 26/05/95 | 1,800,000 | - | - | - |
| 8 | Chatsworth Avenue ("Chatsworth Avenue") | 03/10/95 | 5,950,000 | Feb/March 1996 | 6,270,000 | 5 months |

5 The four properties in respect of which the notices of additional assessment were issued were the Waterside unit, Watten Close, Jalan Sejarah and Chatsworth Avenue. The appellants appealed to the Board on all except Chatsworth Avenue. The Board allowed the appellants' appeal in respect of Jalan Sejarah but dismissed the appeals relating to the Waterside unit and Watten Close.

**Appeals against the Board**

6 The law relating to appeals from decisions of the Board is not in dispute. The applicable legislation is found in s 81 of the Act. Under s 81(2), an appeal from a decision of the Board to the High Court may be made by the taxpayer or the Comptroller provided that the amount of tax involved is more than $200 and that the question arising in the appeal is one of law or one of mixed fact and law. Appeals on questions of fact alone are not permitted. There is a similar rule in the United Kingdom and the rationale for the same was well explained by Lord Radcliffe in the case of *Edwards v Bairstow & Harrison* [1955] 36 TC 207 when he said (at 231):

> As I see it, the reason why the Courts do not interfere with Commissioners' findings or determinations when they really do involve nothing but questions of fact is not any supposed advantage in the Commissioners of greater experience in matters of business or any other matters. The reason is simply that by the system that has been set up the Commissioners are the first tribunal to try an appeal and in the interests of the efficient administration of justice their decisions can only be upset on appeal if they have been positively wrong in law. The Court is not a second opinion, where there is reasonable ground for the first. But there is no reason to make a mystery about the subjects that Commissioners deal with or to invite the Courts to impose any exceptional restraints upon themselves because they are dealing with cases that arise out of facts found by Commissioners. Their duty is no more than to examine those facts with a decent respect for the tribunal appealed from and, if they think that the only reasonable conclusion on the facts found is inconsistent with the determination come to, to say so without more ado.

It is clear from the above passage that whilst the findings of fact made by the Board must generally be respected, the court is free to decide whether the conclusion reached by the Board is consonant with the facts found and to reject the Board's conclusions if the same are unreasonable.

7 In the local case of *Mount Elizabeth (Pte) Ltd v Comptroller of Income Tax* [1986] SLR 421, Chan Sek Keong JC (as he then was) considered *Edwards v Bairstow* and commented at 136:

> In the context of Lord Radcliffe's speech in *Edwards v Bairstow & Harrison*, at pages 227-8 and the Court of Appeal's decision in *CBH v Comptroller of Income Tax* as to the test an appellate body must apply in hearing an appeal of this nature, the submissions of counsel for the applicant can be distilled and encapsulated into one contention, and that is, the Board erred in law in that no reasonable body of members constituting an Income Tax Review Board could have reached the findings reached by the Board in this instance.

The learned judge accepted that contention and went on to state that in the appeal before him, the appellant had a heavy burden to discharge before achieving lift off because the Board had had ample evidence before it to make the findings that it did. After considering the evidence, Chan Sek Keong JC held that not only had there been sufficient evidence for the Board to reach the conclusion it did but there was also other evidence which the Board could have relied upon or drawn inferences from to reinforce its conclusions. It should also be noted that when the Court of Appeal's decision in *CBH v Comptroller of Income Tax* [1980-1981] SLR 238 was appealed against to the Privy Council, that body observed ([1985] MJL 6), in dismissing the appeal, that the Court of Appeal had asked itself the right question which was whether a reasonable tribunal could have reached that decision of fact.

8 Thus, while the Comptroller contended that the appeal brought by the appellants was purely on factual issues and should not be allowed on that basis, I cannot accept that submission because what I have to determine is whether a reasonable tribunal could, on the evidence before it,

have reached the conclusions that the Board did. Further, the question of whether a trade has been carried on has been determined to be a question of law on the one hand and of fact on the other: see *Simon's Income Tax* Vol 1 at 21. Thus, in any event, the issue of whether the appellants were trading in properties in relation to the Waterside unit and Watten Close would be a question of mixed fact and law.

**The law on "trading" under s 10(a) of the Act**

9 Whilst, there is no definition of "trade" in the Act, it is common ground that in determining whether a trading activity has been carried on or whether a particular transaction was a trading transaction, the court examines various characteristics of trading activities (referred to as "badges of trade") and the extent to which the transaction in question reflects those characteristics. In his article "Badges of Trade Revisited" (Singapore Journal of Legal Studies [1996] 43-78), Prof Teo Keang Sood stated that there was no single indicium that was determinative of the question whether the activities of a taxpayer in real property transactions amounted to the carrying on of a trade or business or were simply investment activities. He went on to identify 11 factors or characteristics that would be taken into account when such a question was being determined. Some of those characteristics related specifically to corporations but the following characteristics are common to both individuals and corporations. These are:

(a) the motive of the taxpayer;

(b) the nature of the subject matter;

(c) the method of financing;

(d) whether there has been a multiplicity of similar transactions;

(e) the duration of ownership;

(f) the application of special skill/supplementary work; and

(g) reasons for realisation.

The above badges of trade are similar to those found in the *Final Report of the 1954 UK Royal Commission on the Taxation of Profits and Income* ("the Report"). The guidelines in the Report were cited with approval and applied by the Board in the local case of *W Holdings Pte Ltd v CIT* [1992] MSTC 5135 at 5151. The badges identified by the Report are subject matter of realisation, length of period of ownership, supplementary work on or in connection with the property realised, the circumstances that were responsible for the realisation and the motive of the transaction. These are practically identical to those identified by Prof Teo. The only difference is that the Report does not include method of financing as a badge of trade.

10 While the appellants quoted Prof Teo's article and the Comptroller relied on the Report, there was no dispute that the test for determining whether a particular transaction was a trading transaction or an investment is an objective test. Indeed, Prof Teo stated as much in his article (at 51).

11 The submissions of the parties turned on whether in this case in respect of either of the relevant properties, an analysis of the transactions in the light of the various badges of trade would show that the transactions were trading transactions. The primary submission of the Comptroller was

that on an objective assessment of the facts and circumstances surrounding the sales of the properties in the instant case, with a particular focus on the badges of trade, it was clear that the appellants were engaged in the trading of real properties. The appellants, of course, submitted that a proper analysis of the facts and circumstances would lead inevitably to the opposite conclusion. The Board in coming to its decision that the appellants had been trading, had considered all of the badges of trade noted by Prof Teo apart from that relating to the application of skills/supplementary work which was not relevant to the facts of the case. In this connection, I must note that the onus lies on the appellants to establish that the Board had erred in its findings and that their activities in relation to the Waterside unit and Watten Close were not trading activities (see *CEC v CIT* [1971] 2 MLJ 43).

**The proceedings before the Board**

12 As can be seen from the table above, the Waterside unit was the second property purchased by the appellants. They bought it in December 1990, just after contracting to sell their first property at Greenwood Grove. At the time of purchase, the Waterside unit was still under construction and when the appellants moved out of Greenwood Grove, they moved into rented accommodation which they had leased to reside in until the Waterside unit was completed.

13 NP, the first appellant, gave evidence before the Board as to the reasons why the appellants had sold Greenwood Grove and purchased the Waterside unit and why they subsequently sold the latter. It was all to do with *feng shui*. When the appellants' second child was born in November 1989, she was found to have a rare medical condition. Some months later, the appellants consulted a geomancer, one Mr Lim Khoo Hian, on the *feng shui* of Greenwood Grove and were advised that it was not good for the health of their family. The appellants took this advice seriously in view of their daughter's condition and sold Greenwood Grove. When they decided to purchase the Waterside unit as a replacement home, they asked Mr Lim for his advice again and were advised that the *feng shui* at the development was generally good.

14 Subsequently, when the flat was completed (late 1992), they tried to contact Mr Lim for advice on the arrangement of the furniture but found out that he had left Singapore. They then consulted another geomancer, one Mr Chua Chong San of Mystery Chinese Geomancy Centre, who advised that the Waterside unit was not only bad for the careers of both appellants but was also bad for the health of their unborn child (the second appellant was then pregnant). They accordingly sold the Waterside unit on 28 January 1993. When their third child was born subsequently, he had a knot on his umbilical cord and the appellants felt that his medical condition would have been far worse had they moved into the Waterside unit.

15 NP asserted that the appellants' intentions and motives in selling Greenwood Grove and the Waterside unit arose from the bad *feng shui* situation in respect of these properties and not from a desire to trade in them. To support their case, the appellants obtained the testimony of one Ms Tew Choon Yien who described herself as a practising *feng shui* consultant. Ms Tew made an affidavit in which she described in detail why she considered the *feng shui* of Waterside to be bad for the appellants' family. NP explained that he had not been able to adduce testimony from Mr Chua as the latter was not willing to give evidence "against" the income tax department.

16 The appellants further contended that had they purchased the Waterside unit for the purpose of trade, they would have sold it at an earlier stage. NP stated that a few months after they had purchased the Waterside unit, the second phase of this project was launched at much higher prices. The appellants were then approached by a property agent, one Mr Colin, and were informed that an Indonesian buyer was willing to buy their unit at a price that was $250,000 higher than the price that they had paid. This offer was turned down because, according to NP, the Waterside unit

was meant to be the family home and had not been bought as an investment.

17 The appellants contracted to sell the Waterside unit on 4 February 1993. Shortly thereafter, on 22 March 1993, they contracted to purchase Watten Close. At that time, according to NP, there was an urgent need to find a family home given that the tenancy of their then residence was due to end in early September 1993. On purchasing Watten Close, the appellants decided to renovate the premises and for that purpose they entered into a contract with a decorating firm called Interics Décor ("Interics") based on an initial quotation of $200,000 for the work needed. The appellants paid a deposit of $20,000. Subsequently, however, Interics inflated their quote to double the original price. An acrimonious dispute over the contract price followed. NP testified that the appellants believed that Interics was taking advantage of the appellants' need to move into Watten Close quickly. Interics then threatened the appellants with legal action for breach of contract and told the appellants that they knew judges and judicial officers. The appellants were concerned that they would be liable for up to $400,000 for breach of contract and also thought that they did not have any "black and white" evidence to support their case. It was their word against that of Interics. The appellants therefore decided to resolve the problem by selling Watten Close and, on that basis, they reached a compromise with Interics. The dispute with Interics precipitated the sale of Watten Close such that the appellants had to auction it hurriedly and sold it below the reserve price because they were eager to end their entanglement with Interics. The property was sold on 29 July 1993 at a gross profit of $260,000.

18 In coming to its decision that the appellants had been trading in Waterside and Watten Close but not in the third property, Jalan Sejarah, the Board noted that the indicia referred to in Prof Teo's article and in the Report were similar and overlapped. It therefore decided to take both sets of indicia into account in its consideration.

19 The Board dealt first with the characteristics of intention and motive and reasons for realisation which it considered together. With regard to the Waterside unit, the Board did not accept that this property was sold because the appellants were advised by a geomancer that it had bad *feng shui*. Whilst accepting that bad *feng shui* could in appropriate circumstances provide a legitimate basis for the sale of a property so as to negative any element of trading, the Board found that the evidence before it on this aspect could not be relied upon. It considered that the only evidence of this before it was the bare assertion of NP unsupported by any documents. Ms Tew's evidence was, in the view of the Board, of little weight as she was not the geomancer who had advised the appellants in the first instance and also she based her opinion on a study of the floor plans of the unit and had never actually visited the Waterside unit. The Board took the view that without the evidence of Mr Chua, the geomancer who had originally advised the appellants on the bad *feng shui* of the Waterside unit, they were unable to prove on the balance of probabilities that they had sold this property for *feng shui* reasons. In the absence of a plausible reason for selling the Waterside unit other than dealing in the property, the Board found that it was more likely than not that the appellants sold it because of the relatively good gain ($376,160) the sale yielded.

20 In relation to Watten Close, the Board found that on the balance of probabilities, it was more likely that the motive for the sale was to make a profit rather than that the appellants were too afraid to litigate the dispute they had with their contractor. The Board did not find NP's evidence on this issue believable. Apart from the bare assertions of NP, there was no evidence to show that the appellants were under such a threat whether real or otherwise from the contractor that they had to sell Watten Close. There was not even any evidence of the kind of dispute with the contractor that the appellants alleged existed. The appellants had been unable to produce the original quotation setting the price of the works at $200,000 and the Board did not believe NP's evidence that this was because the contractor had refused to give them a copy of that document.

21 In relation to Jalan Sejarah, the Board noted that after the appellants purchased this property, they found that it had serious inherent defects which would have required extensive and expensive work to remedy. The Board accepted NP's evidence that the primary and predominant reason for the sale of this property was the existence of the defects and that if the same had not been discovered, the property would not have been sold.

22 Moving to the next badge, that of the nature of the subject matter, the Board stated that it had considered this factor in the past and had stated quite clearly that real property was often the subject matter of a taxpayer's trading or dealing for profit. Citing the decision of *DHSO v CIT* [2004] MSTC 5313 ("the *DHSO* case"), it noted that a taxpayer could be found to have traded in real property without necessarily being in the business of property development.

23 On the third factor, multiplicity of similar transactions, the Board found that on the evidence, it was clear that the appellants had purchased and sold properties numerous times and that they had engaged in these dealings in connection with properties they had bought and sold during the period from 1988 to 1999. The evidence was clear that the dealings in question were far from the case of an isolated property transaction and therefore, save for Jalan Sejarah, the Board found that the evidence pointed to trading on the part of the appellants with respect to the properties in question. In respect of Jalan Sejarah, the Board found that this badge of trade had been negatived by the predominant reason for the sale of the said property.

24 As for the fourth factor, duration of ownership, the Board was aware that the principle that the fact that a property is held but for a short time after its acquisition may tend to indicate that the purpose of acquisition was resale at a profit, had been applied to individual taxpayers in Singapore (not only to corporate taxpayers): see the *DHSO* case. In the present case, the Waterside unit had been held for 2.1 years while Watten Close had been held for only four months and the Board considered that these were relatively short periods of time. It therefore found that there was evidence tending to indicate that these two properties, being held for relatively short periods of time, were held more for resale at a profit rather than for investment. In respect of Jalan Sejarah, although it was held for only seven months, the Board found that this badge of trade was negatived by the reason for the sale.

25 The Board also noted that while the short duration of the ownership was a factor tending to indicate dealing in the properties, this tendency may be negatived if proceeds of sale are reinvested. In the instant case, the appellants had contended that the proceeds of sale of one property had been used to furnish the next and so on. The Board rejected this contention because there were no documents or other evidence of how the purchases of the properties were financed. Secondly, there was no evidence of how the respective proceeds had been applied beyond NP's own assertions which had sometimes been unclear and confusing.

26 The Board next considered the appellants' argument that if they had been trading in properties, they would have purchased them using very heavy financing and paying only a very small deposit from their own resources. The Board held that the use of external financing was but one factor for it to consider and it was not conclusive as to whether or not the appellants were in fact trading in the properties.

27 It can be seen from the above summary of the Board's decision that in this case, it found that generally, with one exception, the badges of trade indicated trading activity on the part of the appellants. The Board, however, placed special weight on the reason for the sale of the property in deciding whether a particular sale was a trade or not. As far as Jalan Sejarah was concerned, it concluded that the indications of trading appearing from the other badges had been negatived by the

motive for the sale, *i.e.*, that it would not be an economic proposition for the appellants to rectify the defects in the property and therefore it was reasonable for them to sell the property instead. For the other two properties, the Board, in rejecting the appeals against the additional assessments, emphasised that it did not believe in the appellants' stated motives for the two sales. It would appear from the decision of the Board therefore that even if everything else indicates that a trade has taken place, a genuine reason for sale that is unrelated to making a profit from the sale will nullify the other factors. It can also be inferred that whilst the Board may have accepted that the initial intention of the appellants in making each of the purchases was to provide a home for themselves and their family (the Board did not directly doubt the intention), the Board considered that the motive for realisation (or lack of a non commercial one) was what provided the reliable indication of the true object of the transactions. In the light of this inclination, it was not surprising that on appeal the appellants focussed their arguments on attempting to demonstrate that the Board had wrongly rejected their reasons for the sales.

**The arguments on appeal**

28 The appellants submitted that as regards the Waterside unit, the Board had misconstrued Ms Tew's evidence. Her evidence was that of an expert and not of a witness of fact. She had carefully analysed the *feng shui* aspects of the Waterside unit in relation to the appellants. The Comptroller had not called any expert to establish that Ms Tew's evidence was incorrect and the Board should therefore have held that Ms Tew's evidence established that the *feng shui* of the Waterside unit was bad for the appellants.

29 The appellants also cited *Hong Kong Inland Revenue Board of Review Decisions Case No. D124/99* ("HK D124/99") The tribunal in that case had accepted the taxpayer's testimony as to the advice given to him by the *feng shui* expert. In this case, the appellants had taken the additional step of obtaining expert evidence from Ms Tew and had not relied only on their own assertions. Ms Tew's evidence had established that the appellants' reason for selling the Waterside unit was not a commercial one and therefore they should not be subject to tax on the gains from the sale.

30 In response, the Comptroller submitted that the appellants' arguments were flawed as the same presupposed that as long as Ms Tew's testimony was accepted as proving that the Waterside unit had had bad *feng shui* for the appellants, this alone would show that there was no intention to trade when the unit was sold. Secondly, the Comptroller asserted that the Board had properly weighed Ms Tew's testimony against the other circumstances at hand and had come to the correct conclusion. Additionally, the stated intention of the taxpayer could not be conclusive evidence as to what his intentions truly were. Thus, the Board taking into consideration the glaring lack of evidence tendered by the appellants was correct in ruling that it was more likely than not that the appellants had sold the Waterside unit because of gains to be made from it. Thirdly, Ms Tew had admitted to the Board that she had acquired her *feng shui* knowledge by perusing online materials from an institute in the United States of America and had had no formal training in *feng shui*. She had referred to a book entitled "Feng Shui for Beginners" to explain her interpretation of the *feng shui* of the Waterside unit. The Comptroller submitted that the lack of proper training cast doubt on Ms Tew's ability to give correct *feng shui* advice.

31 Given that the Board's decision centred around whether the appellants had trading intentions, it is relevant to note that such intention has to be inferred objectively from the surrounding circumstances and even, if necessary, in the face of the taxpayer's own evidence. In this connection, the following judicial observations are relevant.

32 In *Simmons v Inland Revenue Commissioners* [1980] 1 WLR 1196, Lord Wilberforce at

1199 pointed out that:

> 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?

Similarly, Mortimer J in *All Best Wishes Limited v Comptroller of Inland Revenue* [1992] 3 HKTC 750 at 771 observed 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.

33 Whilst the motive behind the acquisition of a property has to be assessed, it is also important to bear in mind that intentions may be changed and what was first bought as an investment may become a trading item or vice-versa. The Board did not doubt, apparently, that each of the properties in question had initially been bought as a family home. In relation to the Waterside unit and Watten Close the Board in effect concluded that the initial intention was overcome by the desire to make a profit and that impelled the subsequent sale. The question that arises was whether on a consideration of all of the circumstances that was the correct conclusion to draw.

34 In relation to the Waterside unit, I think that the Board was, with respect, diverted by the lack of credentials on the part of Ms Tew and overlooked several other factors that supported the appellants' argument. First, there was evidence that the appellants had given bad *feng shui* as the reason for the sale as early as 1997 when the Comptroller first queried them about their purchases and sales of the various properties. In a letter dated 5 April 1997 to the Comptroller, they had stated that their reason for selling Greenwood Grove was the advice of Mr Lim (whom they identified by both personal and business names) that it was bad for their health and that in relation to the Waterside unit, they had sold it because of the advice of Mr Chua (again identified by personal and business names) that it was not good for NP's career or for their unborn child. It was clear from this letter that the appellants were believers in *feng shui* and that if they could not find one geomancer, they would consult another and would rely on the advice given. Secondly, NP's evidence that his second child had a rare medical condition and that his third child had medical problems on birth was not disputed by the Comptroller. These medical problems would have given the appellants a basis for their belief in *feng shui* and it could not be contended that they were cynically invoking that doctrine to avoid paying tax. Additionally, the explanation that Mr Chua was consulted because, having received the keys, the appellants wanted advice on the placement of furniture is a credible one as believers in *feng shui* place a great deal of importance on this aspect. In this respect, the Board did not doubt the sincerity of the appellants' belief in *feng shui*. What it doubted was that they had actually been given advice that the *feng shui* of the Waterside unit was bad for them. The consistency of the story that the appellants told in relation to their consultation on the *feng shui* aspects of their homes and the early disclosure of the details of the geomancers were not, however, given sufficient weight by the Board.

35 Looking at the other badges of trade, in the case of the Waterside unit these did not uniformly indicate that the appellants were trading. First, as regards the length of ownership, the unit was held for slightly more than two years. Whilst that is not a very long period, it is not unduly short in the context of the ownership of a residential property. The unit was purchased while the

condominium in which it was located was still under construction and it is not unknown in Singapore for units under construction to be bought and sold more than once. If the unit had been sold during this period then that would have been a strong indication of a trading transaction. NP had testified that he was offered a good price for the unit during this period but rejected it because he had bought the unit to live in. Although there was no independent corroboration of that story, it was not in itself an unlikely or incredible one.

36 Second, there was the issue of financing of the purchase. As the Report states, an investment may be sold in order to acquire another investment and such a sale does not involve an operation of trade, whether the first investment is sold at a profit or a loss. Where the proceeds of sale are reinvested, this would generally negative a finding of trading notwithstanding the fact that the property had been held for only a short time. In *LKC v Comptroller – General of Inland Revenue* [1973] 2 MLJ 17, the Revenue had sought to argue that the taxpayer was trading rubber land as he had bought and sold 15 pieces of the same within the short period of three to six years. In holding that the profits were from the realisation of an investment (and thus not taxable), the court laid considerable stress on the fact that the proceeds of sale were reinvested.

37 In the present case, there was not very much evidence on how the Waterside unit was financed or how the proceeds of its sale were used. The only document that the appellants were able to produce with regard to these matters was that same letter of 5 April 1997 to which I referred in [34] above. The letter stated that the appellants had purchased their first property at Greenwood Grove for $575,000 using savings, CPF and a mortgage loan of about $438,500. They had sold it in November 1990 at $725,000 and had used the proceeds of sale (after payment of the mortgage) to buy the Waterside unit. The Waterside unit was purchased in December 1990 for $963,840 and according to the letter was paid for as follows:

| | |
|---|---|
| Initial downpayment | : $96,384 paid with savings |
| Balance | : $192,956 paid with borrowings from family members while awaiting *(sic)* for the sale proceeds |
| CPF | : $144,500 |
| Loan from UOB | : $530,000 |

The letter went on to state that the Waterside unit was sold in January 1993 for $1,340,000 and that the proceeds of this sale were used to buy Watten Close and the Le Marque unit. In relation to Watten Close, that was purchased in March 1993 at $1,430,000 and the initial downpayment of $143,000 was paid for with sale proceeds whilst a further $387,000 from sale proceeds was allocated towards the price, with the appellants taking a loan from OCBC Bank to make up the rest of the price.

38 Whilst it is not possible to match the figures exactly, it does appear that the proceeds of sale from Greenwood Grove could have been utilised to purchase the Waterside unit and that the proceeds of sale from the Waterside unit could have gone to the purchase of Watten Close. The timing of each sale and subsequent purchase was not an exact match but was close enough to allow the proceeds of one property to be utilised towards the purchase of the next. In any case, and in each case, the proceeds of sale were not enough to cover the purchase price of the subsequent property and the appellants needed to take a bank loan in order to complete the subsequent

purchase. In a situation where bank financing is required, reinvestment would be all the more probable as rational parties would endeavour to reduce their financing costs. The appellants unfortunately were not able to provide bank statements to substantiate the facts in the letter of 5 April 1997. Bearing in mind, however, that the appellants were individuals buying for personal use (though from time to time they might have capitalised on an opportunity to take profit) and therefore might not have maintained very good records, the details in the letter in relation to the first three properties supported the appellants' case and were internally consistent with their claims. It showed, on the balance of probabilities, that not only had the appellants reinvested their proceeds from Greenwood Grove into their purchase of the Waterside unit but that they had also reinvested their proceeds from the latter into their purchase of Watten Close.

39 Overall, having reconsidered the badges of trade in relation to the purchase of the Waterside unit, I am persuaded that the Board reached the wrong conclusion, on the evidence available, in relation to this property. The evidence, when considered as a whole (without regard to Ms Tew's alleged shortcomings), supported the appellants' contention that bad *feng shui* compelled them to sell the Waterside unit. As the Board itself accepted, the discovery of bad *feng shui* is a legitimate reason for a taxpayer to sell his property. The onus of proving this reason of course remains with the taxpayer but this onus can be discharged without necessarily having to adduce the evidence of the geomancer who gave the advice on the issue. In HK D124/99, a case that was cited by the Board itself, the tribunal accepted the evidence of a taxpayer that the property in question was sold because of advice from a geomancer that it was unsuitable for the taxpayer's wife and that there was a high risk of her having a miscarriage. It accordingly held that the gains from the sale of this property ought not to be taxed. The tribunal came to this conclusion on the basis of evidence given by the taxpayer both oral and documentary although neither the *feng shui* expert nor written evidence of his advice was adduced.

40 In this case, in addition to the evidence on the appellants' motive for realising the Waterside unit, there was supporting evidence in relation to the use of the sale proceeds. In addition, the period of holding not being unduly short meant, in my view, that this badge was a neutral factor rather than one that indicated a trading transaction. Overall therefore, in relation to the Waterside unit, the holding must be reversed and the appellants must succeed on their appeal.

41 I move on to consider Watten Close. In essence, the appellants submitted that Watten Close had been sold because they wanted to avoid litigation with Interics and not because they wanted to make a gain from its sale. They contended that the Board had erred in finding that NP's evidence concerning the appellants' dispute with Interics was a bare assertion. They said that not every dispute gives rise to correspondence and documents; likewise, there are many business deals concluded and performed based on oral trust.

42 Having considered the submissions, the evidence before the Board and the Board's reasoning, it is apparent that very different considerations applied to the disposal of Watten Close. First, as the Board noted, the property was held for approximately four months only, being purchased on 22 March 1993 and sold on 29 July 1993. This short period of holding would *prima facie* be an indication that it was purchased and sold for trading purposes. The appellants therefore had to establish that the quick sale of the property was occasioned by a sudden emergency or an unanticipated need for funds or some other reason that could vitiate the inference that their intention was to trade.

43 The appellants' reason for the sudden sale was their fear of litigating the dispute that arose when Interics purportedly doubled its initial quotation to $400,000. There was no direct evidence of either the initial quotation or the subsequently doubled quotation. The only piece of paper

that the appellants had from Interics was a receipt for the sum of $20,000 that they had paid the firm. According to the receipt, the amount was "1st payment for [the] project at … Watten Close". This did not support any particular figure as being the amount agreed on in respect of the renovations. It should also be noted, however, that in the letter of 5 April 1997, the appellants had stated that their reason for selling Watten Close was that Interics who had quoted $200,000 for the renovation work had later revised their quote to about double. This provided some support for the appellants' assertions.

44 The nub of the issue, however, is not whether Interics had originally quoted $200,000 and subsequently revised that quote to $400,000 but whether this dispute about how much the work would cost and the fear of the contractor's alleged connections with the judiciary were the factors that impelled the sale. The Board did not believe that it did.

45 The Board found NP's evidence on this issue to be implausible. Apart from the lack of documentation in relation to the dispute with Interics, there was NP's claim that Interics had refused to furnish him with a copy of its written quotation. As the Comptroller pointed out, NP was the managing director of a rattan and cane import and export business that had been in operation since 1992. He must therefore have been a commercially savvy individual. Yet, he had wanted the Board to believe that he had been willing to pay the sum of $20,000 to a contractor without the comfort of a written agreement of any sort. This was also despite NP's concession in cross-examination that an experienced businessman such as himself would not have paid the sum of $20,000 on the basis of an oral agreement.

46 The appellants had testified that they had been compelled to sell because of their fear of the threats made by Interics. This allegation, however, was not consistent with the apparent ease with which the appellants had settled the claim which they said Interics was prepared to make against them. Whilst the dispute had arisen, the appellants said, because Interics wanted to double its quote, yet Interics was apparently happy to forget about the contract when the appellants informed it that they were going to sell the property. Although Interics did not return the deposit, it allowed the appellants to set off the same against the cost of furnishings purchased from its shop. The ease with which the dispute was settled was shown first in NP's affidavit of evidence-in-chief. There he stated that the appellants had simply told Interics that they were dissatisfied with Watten Close and had decided to sell the property. As such there was no need to carry on with the renovation works. Secondly, during cross-examination, NP revealed what had happened to the $20,000 deposit. When cross-examined further on the settlement, he stated:

> Q: So can you explain to us what was this compromise, why was Interics suddenly willing to drop the matter, just because you said you were selling the property?
>
> A: I think – I mean I figure they have no choice because we are no longer keeping the property. All right. So the money that we paid them, all right, was in – we were forced to take her – so-called her furnitures and things like that at a very high price. I mean that was the compromise. Okay, I mean she's not going to refund us the 20,000 –
>
> Q: Yes.
>
> A: We have to take her stuff, can be furniture, can be curtain, can be anything…
>
> Q: I see. So there was – the compromise that you reached was that in exchange for these $20,000 that you have already paid, you will – it's like store credit, you can buy things from their shop.

A: Correct.

From the above evidence, it was clear that Interics was not averse to the cancellation of its contract with the appellants as long as it did not need to return the $20,000 payment. The appellants could have achieved the same result and yet kept Watten Close by telling Interics that they no longer wished to carry out the renovation works and then buying furniture to the value of the deposit. If indeed there had been a concluded contract for work valued at $200,000 to be done, the sale of Watten Close would not in itself have provided a legal excuse for the appellants to breach that contract and the appellants could still have been liable to Interics for damages for breach of contract. That Interics apparently accepted the termination of the contract without much ado (NP thought they had no choice but to do so and obviously Interics said nothing to him to contest that assumption) indicates that the appellants were exaggerating their fears of a legal dispute with Interics over the change in the amount of the quotation.

47 In any case, objectively speaking, the appellants' decision to sell Watten Close was an overreaction to the threat of a legal action by Interics. Whilst the dispute on the surface involved $400,000, the actual quantum of the damages that could have been awarded would have been much less and definitely small in relation to the purchase price of Watten Close ($1.43m). As the Comptroller submitted, it is doubtful that the appellants' fear of Interics' alleged connection with judges would have driven them to sell the property if there had been no profit to be gained from the sale. The explanation for the sale was improbable and the Board had reasonable ground to disbelieve it. Thus, the appellants had not been able to establish an emergency that required a quick sale of the property.

48 The appellants submitted that the proceeds from the sale of the Waterside unit were reinvested in Watten Close. As I stated above, this was supported by what was stated in the 5 April 1997 letter. Whilst, however, the appellants' initial intention in purchasing Watten Close may have been to acquire it both as an investment and a family home, that intention did not necessarily continue thereafter. The quick sale of the property was one indication that the intention had changed. Another indication that the intention had changed was that the appellants were not able to establish that the proceeds of sale of Watten Close itself were reinvested.

49 During the cross-examination of NP, queries were raised by both the Board and the Comptroller regarding the financing of the Le Marque unit which was the next property purchased by the appellants. Essentially, according to the agreed statement of facts, the Le Marque unit was purchased even before Watten Close was sold. When cross-examined about how, bearing in mind the chronology, the proceeds of Watten Close had been used to purchase the Le Marque unit, NP was unable to give an answer stating that the transaction had taken place many years previously. He also made reference to the 5 April 1997 letter. While being re-examined, NP brought up the possibility of the bank having arranged a bridging loan for the appellants and this is what was said:

Q: Moving on, the respondent's counsel has referred to the sale of Watten Close and the subsequent purchase of Le Marque. Are you able to clarify what you meant by "I presumed the sales proceeds were ploughed into Le Marque"?

…

A: So like I said, we went to the bank and said that okay, we prepared to sell Watten away because we are having this problem but we are going to buy Le Marque. So I think they must have done some calculation and okay, this is how much you can get. That means we already tell them in advance, "Okay, we will need this money, all right, for our Le Marque

property". So I think maybe, I mean I am not sure, they arranged a bridging loan or something like that. That means they know very well that once the Watten property is sold, the money will be ploughed back into Le Marque.

The letter of 5 April 1997 was, however, as conceded by counsel for the appellants "ambiguous with respect to the bridging loan granted by the bank to purchase Le Marque". The Board found that there were no documents or other evidence substantiating how Watten Close had been purchased or how the proceeds of the Waterside unit had been applied. It found that NP had given unclear and confusing evidence on this aspect. These findings cannot be impugned.

50 In the light of all the circumstances it is not possible to hold that the Board's finding that the sale of Watten Close was a trade was wrong in law or not supported by the evidence. The appellants' appeal on this issue fails.

**Conclusion**

51 I therefore hold that the appellants' appeal shall be allowed in part to wit, in relation to the notice of additional assessment issued in respect of the gains from their sale of the Waterside unit. As the appellants have succeeded on only one of the two discrete issues in the appeal and as the Comptroller has, likewise, only succeeded on one issue, I order that each party should bear his/its own costs of the appeal.