

Case No. D15/06

Penalty tax – two adjournments granted due to unavailability of taxpayer’s witnesses – whether or not the appeal could be withdrawn after the commencement of the hearing of an appeal – section 68(9) of the Inland Revenue Ordinance (‘IRO’)

Panel: Colin Cohen (chairman), Benny Kwok Kai Bun and Peter F T Roberts.

Dates of hearing: 23 January and 1, 3 and 28 March 2006.

Date of decision: 27 April 2006.

The taxpayer appealed against the profits tax assessment. On 23 January 2006, the taxpayer made an application for an adjournment due to the unavailability of their witnesses who were residents in other country. Adjournment was granted to 1 March 2006 and the appeal was set down for three-day hearing. In the middle of the hearing on 3 March 2006, the taxpayer asked for adjournment so as to call two witnesses from other country. The Board acceded to such request and the hearing was re-fixed for 28 March 2006 and 31 March 2006.

On 24 March 2006, the Clerk to the Board of Review received a letter from the taxpayer that they could not secure the attendance of the two remaining witnesses and in turn asked for the appeal to be withdrawn.

Held:

1. Appeals may only be withdrawn before the hearing of an appeal. The correct approach would be for the appeal to be dismissed.
2. Having regard to the circumstances of the case and the adjournments that had been incurred, the Board are of the view that it is only right and proper that a sum of HK\$5,000 should be added to the tax charged and recovered therewith.

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

Ho Chi Ming Counsel, King Wong Counsel, Brian W Gilchrist of Messrs Johnson Stokes & Master, Fung Siu Fan of Messrs Wilfred Wan & Co., CPA Ltd and Alex Chang Kwong Wah of Messrs Alson Secretaries Ltd, for the taxpayer.

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Tse Yuk Yip and Chan Man On for the Commissioner of Inland Revenue.

Decision:

1. On 24 August 2005, the Deputy Commissioner of the Inland Revenue made the following Determinations:

- (1) Profits tax assessment for the year of assessment 1999/2000 under Charge Number 1-1107100-00-1, dated 28 May 2002, showing assessable profits of HK\$5,613,068 with tax payable thereon of HK\$898,090 is hereby increased to assessable profits of HK\$6,042,854 with tax payable thereon of HK\$966,856.
- (2) Profits tax assessment for the year of assessment 2000/01 under Charge Number 1-1095644-01-5, dated 28 May 2002, showing assessable profits of HK\$17,815,392 with tax payable thereon of HK\$2,850,462 is hereby increased to assessable profits of HK\$19,179,495 with tax payable thereon HK\$3,068,719.
- (3) Profits tax assessment for the year of assessment 2001/02 under Charge Number 1-1071128-02-5, dated 9 December 2002, showing assessment profits of HK\$12,717,265 with tax payable thereon of HK\$2,034,762 is hereby increased to assessable profits of HK\$27,398,510 with tax payable thereon of HK\$4,383,761.
- (4) Profits tax assessment for the year of assessment 2002/03 under Charge Number 1-1105049-03-3, dated 12 November 2004, showing assessable profits of HK\$22,113,530 with tax payable thereon of HK\$3,538,164 is hereby confirmed.

2. This appeal was set down for a three-day hearing. On 23 January 2006, however, the Taxpayer made an application for an adjournment due to the unavailability of its witness who was resident in Country A. We gave the Taxpayer an indulgence, adjourned the appeal and consent directions were signed by the parties on that date.

3. The appeal commenced on 1 March 2006 where the Taxpayer opened its case and in turn called Mr B who was a director and a controlling shareholder of the Taxpayer. On 3 March 2006, the Counsel made an application for a further adjournment since they wished to call two further witnesses, a Ms C and a Mr D, both of whom were resident in Country A. As a matter of indulgence, the Board acceded to such request and the hearing was re-fixed for 28 March 2006

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and 31 March 2006. Directions were given for witness statements to be served in good time before the resumed hearing.

4. On 24 March 2006, the Clerk to the Board of Review received a letter dated the 23 March 2006 from Messrs Wilfred Wan & Co, CPA Ltd. In that letter, they indicated that they could not secure the attendance of the two remaining witnesses and in turn asked for the appeal to be withdrawn.

5. On 28 March 2006, Mr Brian Gilchrist of Messrs Johnson, Stokes & Master ('Mr Gilchrist') represented the Taxpayer. The Taxpayer's attention was drawn to the fact that appeals may only be withdrawn before the hearing of an appeal and as such, the correct approach would be for the appeal to be dismissed. Mr Gilchrist did not oppose such a course of action. At the same time, we drew to Mr Gilchrist's attention the relevant provisions of section 68(9) of the Inland Revenue Ordinance:

'(9) Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith. (Amended 11 of 1985 s.5; 56 of 1993 s.27; 12 of 2004 s.14)'

6. His attention was drawn to the fact that various indulgences had been given to the Taxpayer and that costs had been incurred by the Board in respect of this matter. Mr Gilchrist did not oppose an Order that the Board should order the Taxpayer to pay a sum by way of costs.

7. Having regard to the circumstances of the case and the adjournments that had been incurred, we are of the view that it is only right and proper that a sum of HK\$5,000 should be added to the tax charged and recovered therewith.

8. The appeal is dismissed, the various Determinations made by the Deputy Commission of the Inland Revenue are confirmed and a further sum of HK\$5,000 shall be added to the tax charged.