The objection is, therefore, dismissed. In doing so we feel that the Objector should be given a period of three months from the date of this Decision within which to comply with the Commissioner's notice and our decision should be read as if the notice had been amended accordingly.

Case No. BR 17/72

Board of Review:

Chan Ying-hung, *Chairman*, Benjamin T. M. Liu, K. H. A. Gordon & G. H. P. Pritchard, *Members*.

30th November 1973.

Profits tax—additional tax in certain cases—Inland Revenue Ordinance, s. 82A —burden of proof lies upon taxpayer—Inland Revenue Ordinance, s. 68(4) —assessments or amended assessments to be final—Inland Revenue Ordinance, s. 70—appellant's profits estimated on the basis of Assets Betterment Statement—Inland Revenue Ordinance, s. 59(2)(*b*).

The appellant appealed under section 82B of the Inland Revenue Ordinance against two assessments for additional tax made under section 82A of the Ordinance. The appellant submitted, firstly, that in an appeal under section 82A the burden lies initially on the Revenue to prove that acts or offences under section 82A(1) have been committed by the appellant without reasonable excuse. Secondly, the appellant submitted that the original assessments which gave rise to the assessments for additional tax were excessive, having regard to all of the circumstances. On appeal.

Decision: Appeal abandoned and therefore dismissed.

H. Litton, Q. C. and Martin Lee for the appellant.

N. A. Moshinsky, Crown Counsel, for the Commissioner of Inland Revenue.

Reasons:

This is an appeal brought against two assessments for additional tax made by the Commissioner in pursuance of section 82A of the Inland Revenue Ordinance (*Cap.* 112). Particulars of such assessments are as follows:—

Year of Assessment	*Amount of Additional Tax*
1969/70	$125,246.00
1970/71	75,737.00

These assessments were additional to and arose out of certain assessments to profits tax previously raised by the Commissioner and confirmed on appeal by a Board of Review.

The present appeal has been brought under section 82B of the Ordinance which expressly provides that subsections (2) and (3) of section 66 and sections 68, 69 and 70 shall "so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax".

Two points of law were argued before us *in limine*. First Mr. Litton submitted that in an appeal against an assessment for additional tax under section 82A the burden lies initially on the Revenue to prove that the acts or offences mentioned in subsection (1) of section 82A have been committed by the appellant "without reasonable excuse", the acts or offences in this case being the making of incorrect returns. He did not dispute the fact that, in the usual run of appeals, the onus of proving that an assessment is excessive or incorrect would lie on the appellant, but contended strongly that, in an appeal against additional tax, effect must be given to the words "without reasonable excuse" and the burden on the Revenue to prove that an act or offence has been committed without such excuse is the same as in a criminal prosecution. He argued that if the burden were to fall on the appellant, then he would be required to prove a negative. He also submitted that, in imposing an additional tax, the Commissioner does not have to weigh up the tax liability of a taxpayer; he is in fact imposing a penalty and not making an assessment so that the ordinary rule regulating the onus of proof in appeals against assessments should not apply. On these grounds, he invited us to rule that the Revenue should begin.

In his reply Mr. Moshinsky submitted that whether or not there was reasonable excuse in doing an act or committing an offence was a matter within the peculiar knowledge of the taxpayer and that by common law the burden of proof should lie on him. He also pointed out that section 82A described the process of charging an additional tax as an "assessment". The same word is used in section 68(4) which prescribes that "the onus of proving that the 'assessment' appealed against is excessive or incorrect shall be on the appellant". He submitted that where the same word was used in different parts of an Ordinance, it should be given the same meaning and effect.

Having considered carefully the submissions of Counsel for both sides, we gave our ruling in the following terms:—

> "We do not think it can be disputed that the nature of these proceedings is an appeal against an assessment—albeit a very special kind of assessment.
>
> In our opinion the answer to the question raised before us is to be found in section 82B. There the legislature describes an appeal such as the present one as an appeal against an assessment. It goes on to incorporate by reference the provisions of section 68(4) of the Ordinance that the onus of proof that an assessment appealed against is excessive or incorrect shall be on the appellant. We do not think that the presence of the words 'without reasonable excuse' in section 82A have the effect of throwing the onus upon the Revenue.
>
> It is to be observed that section 82A gives the Revenue two mutually exclusive remedies. They can either launch a criminal prosecution or levy an additional tax by an assessment made by the Commissioner personally. We are not concerned here with a prosecution. However, when the alternative course is adopted as is in this case, our view is that, for the removal of doubt, the legislature has extended the provisions of section 68(4) to an assessment of additional tax.
>
> We rule that the onus of proof that the assessment made by the Commissioner is wrong lies on the appellant and he should begin.".

Mr. Litton then proceeded to open on his appeal. He informed us that he intended to adduce evidence and arguments to show that the original assessments which gave rise to the assessments for additional tax were excessive having regard to all the circumstances including the fact that the appellant, circumstanced as he was, could not have made the enormous profits upon which he was assessed.

Mr. Moshinsky objected immediately and submitted that by virtue of section 70 the assessable profits had been conclusively determined and that no evidence should be allowed which sought to prove that such profits were excessive or that the appellant's original returns were correct.

We were asked by Counsel for both parties to hear arguments on this objection and to make a ruling thereon at the outset rather than wait until the evidence was actually tendered. We acceded to this request because we were assured that considerable time might be saved.

In the course of his submissions, Mr. Martin Lee, who assisted Mr. Litton, and who addressed us on the objection raised by Mr. Moshinsky, made it clear that he would not be relying on "reasonable excuse" under section 82A but would contend that the original returns submitted by the appellant were correct. Mr.

Moshinsky, on his part, assured us that he would not be relying on any rule of estoppel in support of his arguments. That being the case, it seemed to us that the only point that we were called upon to decide was the applicability of section 70.

In the case before us, the appellant's profits were estimated on the basis of Assets Betterment Statements under section 59(2)(*b*) which enables the assessor to make an estimate if he does not accept the return of a taxpayer. The appellant objected to the estimates made and the assessable profits were eventually determined by the Commissioner in pursuance of the provisions of section 64. Later, on appeal, the Commissioner's determination was confirmed by a Board of Review.

In our view, the appellant's original tax returns must be taken to be incorrect. This is a finding implicit from the decision of the former Board and from the nature of the successive proceedings which we have described above. Any evidence or argument seeking to prove or establish the contrary must, of necessity, involve the proposition that the assessable profits determined and confirmed as aforesaid were wrong. That would be violating the provisions of section 70 if they apply to these proceedings, and we hold that they do.

As to the words "so far as they are applicable" in section 82B(3), we can see nothing in the Ordinance or in the circumstances of this case which make it inappropriate for us to apply the provisions of section 70. It follows that in our opinion the assessments above referred to are final and conclusive for all purposes including any purpose under section 82A and section 82B.

Such being our view, we ruled that the appellant was not at liberty to adduce evidence for the purpose of proving (1) that the amount of assessable profits determined and confirmed as aforesaid were excessive or (2) that the original returns filed by the appellant were correct. Although no specific argument was addressed to us on the point of limiting arguments as opposed to evidence, we indicated that what we had stated as set out above might not be inapplicable also to any argument which the appellant might seek to put forward for any of the aforesaid purposes.

At the request of Counsel for the appellant, the hearing of the appeal was then adjourned, so that they could consider the course they should take in view of the rulings delivered by us.

We have since been informed by the Clerk to the Board of Review that he has received written notice from the appellant's solicitors that the appellant abandons his appeal. The appeal is accordingly dismissed and the assessments of the Commissioner set out in the first paragraph hereof are hereby confirmed.

Case No. BR 2/73

Board of Review:

L. J. D'Almada Remedios, *Chairman,* A. K. W. Lui, A. E. Chaney & V. O. Roberts, *Members.*

18th October 1973.

Salaries tax—income derived from services in the Colony—taxpayer employee of Hong Kong company, but salary paid in the U.S.A. by American company—whether liable to Hong Kong salaries tax—Inland Revenue Ordinance, s. 8(1).

The appellant, a resident of Hong Kong, was the Managing Director of a Hong Kong company which was the subsidiary of an American company. His salary was paid into his account in the U.S.A. by the parent company but was debited to the account of the Hong Kong company and reimbursed to the American company. The appellant was assessed to salaries tax in Hong Kong. Although the appellant's salary was credited to his account in the U.S.A. by a foreign company it was in the nature of an advance which was charged against his employers in Hong Kong. On appeal.

Decision: Appeal dismissed. Assessment confirmed.

Reasons:

The Appellant appealed against a Salaries Tax assessment for the Year of Assessment 1969-70. The grounds of appeal are:—

1. That his income was not derived from a source in the Colony; and,
2. That his remuneration did not come to him by virtue of his office and employment with the Hong Kong Company.

The facts as set out by the Commissioner are not disputed. Stated briefly, the Appellant took up residence in Hong Kong in