

Applying the "practical hard matter of fact test" we think that the sums received by way of interest were derived from the Colony. Apart from the reasons given above, it is our view that the source of interest flowed from the credit made available by M. in Hong Kong to the buyers; it was the grant of credit in Hong Kong from which sprang the obligation to pay interest. The assessment is, therefore, confirmed.

Case No. BR 23/75

Board of Review:

L. J. D'Almada Remedios, *Chairman*, Ressel Fok, D. A. Graham & C. H. Wong, *Members*.

16th June 1976.

Profits tax—additional tax in certain cases—Inland Revenue Ordinance, section 82A—incorrect return or false information supplied effectively understating income or profits chargeable to tax—no strict rule by which Commissioner determines amount of additional tax—Board will not disturb the additional assessment unless it is excessive.

In respect of 6 consecutive years of assessment viz. 1969/70 to 1974/75, the taxpayer had submitted incorrect returns in connection with his business thereby understating his profits. He was assessed by the Commissioner to additional tax under section 82A of the Inland Revenue Ordinance in the sum of \$103,700.00 which the Commissioner (in accepting the taxpayer's claim that certain sums had been acquired by him as betting wins and payments on transactions outside Hong Kong and that these were "border-line cases") reduced to \$86,000.00.

Although there still remained substantial undisclosed profits for which no explanation was given, the taxpayer appealed against the Commissioner's assessment to additional tax on the ground that it was excessive having regard to the circumstances. On appeal.

Decision: Additional assessment to tax of \$86,000 confirmed.

J. D. Donnelly for the appellant.

Charles Lui for the Commissioner of Inland Revenue.

Reasons:

In this case we are concerned with the years of assessment 1969/70 to 1974/75 in respect of which incorrect returns were submitted by the Appellant in connection with the business carried on by him.

It is not disputed that in filing his returns for these years of assessment the Appellant understated his profits to the extent of \$968,943.00. The amount of tax undercharged was, as a consequence, \$146,393.00.

Under section 82A of the Inland Revenue Ordinance, the Appellant is liable to a penalty of double the amount of tax which has been undercharged. (This section has since been amended to increase the penalty to treble the amount but the amendment has no application to the case under review).

As far as we know there is no hard and fast rule by which the Commissioner determines the penalty to be imposed. It is not uncommon to find cases in which a full penalty has been exacted. Clearly, if a taxpayer's wilful omission is flagrant a maximum additional tax may be appropriate as a strong deterrent. The circumstances of each particular case must be examined and if liability is established then any assessment by way of additional tax will not be disturbed unless in the opinion of the Board the additional assessment is excessive.

The amount of additional tax originally imposed was \$103,700.00 which includes compound interest on the tax lost to the Inland Revenue Department. This is less than 75% of the Appellant's maximum liability. This figure was subsequently reduced by the Commissioner to \$86,000.00. In making the reduction the Appellant was given benefit of the doubt on all the claims he has made in his letter the 3rd day of December 1975 relating to the receipt by him of certain sums (which he has labelled as "borderline cases") such as betting wins on horse races and payments to him on transactions outside the Colony.

The Commissioner's representative stresses that these claims have not been accepted; indeed, revised computations were agreed to by the Appellant resulting in accepted assessments which, in the absence of objections, became final and conclusive on the 28th of August 1975. Based on these assessments the additional tax was imposed. However, in a reconsideration of the penalty, the Commissioner gave effect to the Appellant's representations on the borderline cases and reduced the penalty from \$103,700 to \$86,000.

No serious attempt has been made to suggest that the representations made as to the "borderline cases" amount to reasonable excuse so as to justify the avoidance of liability. The amount of profits understated, as we have mentioned, amount to \$968,943.

The "borderline cases" add up to a fraction of that sum. The balance of undisclosed profits remain substantial for which no explanation or excuse has been proffered.

We do not regard the additional tax imposed by the Commissioner to be excessive having regard to the circumstances of the case.

The Appellant has embarked on the reprehensible course of systematic tax evasion, year in year out, for a period of six years. The perpetuation of such conduct over the years is a feature that justifies a serious view and the imposition of a salutary penalty. However, when the Appellant's affairs came to be investigated by the Revenue, the Appellant's co-operation and the assistance he rendered in making full disclosure was, in our view, a consideration properly taken into account by the Commissioner in assessing the quantum of additional tax but for which an even higher penalty than that which was imposed could have been exacted. We think the additional tax imposed is reasonable and, accordingly, we confirm the assessment.

Case No. BR 29/75

Board of Review:

L. J. D'Almada Remedios, *Chairman*, Roland K. C. Chow, N. J. Gillanders & Wilfred S. B. Wong, *Members*

11th September 1976.

Salaries tax—wage dividend—sum payable to employee of company conditional upon declaration of a dividend to shareholders—whether wage dividend received formed part of employee's emoluments—Inland Revenue Ordinance, section 9—proper rate of exchange to be adopted for conversion purposes.

The taxpayer who was employed by an American company was paid a fixed salary and various allowances in U.S. dollars. He was also paid a sum in U.S. dollars known as a "wage dividend" at the end of the year if in that year there had been a declaration of dividend payable to shareholders. In computing the taxpayer's income for the purposes of salaries tax for the years of assessments 1971/72, 1972/73 and 1973/74 payments received by the taxpayer as wage dividends were taken into account, and for currency conversion purposes the mean rate of exchange for twelve months for the basis period for each year of assessment was adopted. The taxpayer objected to the inclusion of the wage dividends as part of his earnings and complained that the rate of exchange that should be adopted should be the rate prevailing at the time of payment of the tax. On appeal.