

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/89

Profits tax - assets betterment statement - onus of proof - nature of assets betterment statement.

Panel: William Turnbull (chairman), Robert Gaff and Patrick Wu Po Kong.

Date of hearing: 18 July 1989.

Date of decision: 2 October 1989.

The taxpayer carried on business as a tailor and a jewellery shop in Hong Kong. He also carried on a similar line of business in Japan. The Inland Revenue Department investigated the tax affairs of the taxpayer and resorted to the preparation of an assets betterment statement. The taxpayer did not agree with the assets betterment statement prepared by the assessor and appealed to the Board of Review. The taxpayer claimed to deduct from the assets betterment statement money which he said he had earned in Japan and the net proceeds of the sale of gold which he alleged was owned by his wife.

Held:

The onus of proof is upon the taxpayer. The assets betterment statement procedure is not accurate or precise but is a means of ascertaining the income of the taxpayer in default of any other available information. If the taxpayer is aggrieved then the onus is upon him to prove that the assets betterment statement is incorrect. In the present case, the Board accepted on the evidence before it that the taxpayer had earned profits in Japan which did not arise in and did not derive from Hong Kong. The Board also accepted that the taxpayer had received the proceeds of the sale of gold owned by his wife. The Board was not satisfied with regard to the quantum claimed by the taxpayer as deductions from the assets betterment statement. The Board accepted part of the claims only.

Appeal allowed in part.

Case referred to:

D28/88, IRBRD, vol 3, 312

Wong Yui Keung for the Commissioner of Inland Revenue.
Taxpayer represented by his wife.

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Decision:

This is an appeal by a taxpayer against a number of additional profits tax assessments for the years of assessment 1979/80 to 1984/85 inclusive.

The facts of the case are as follows:

1. The Taxpayer carried on business as a tailor and as a jewellery shop. Following enquiries made by the Inland Revenue Department additional profits tax assessments were issued in respect of the years of assessment 1979/80 to 1982/83 in respect of the tailor business and for the years of assessment 1982/83 to 1984/85 in respect of the jewellery business.
2. The Taxpayer had submitted various tax returns which had been accepted by the Inland Revenue Department and tax assessments had been issued accordingly. Subsequently the assessor investigated the tax affairs of the Taxpayer and resort was made to the assets betterment statement method of ascertaining what were the actual profits made by the Taxpayer from his two businesses. This was because the accounts and records maintained by the Taxpayer for his two businesses were not adequate or accurate.
3. In the course of ascertaining the income of the Taxpayer from the assets betterment statement method the Taxpayer claimed that he had certain receipts of money from business transactions carried on in Japan which should not be subject to Hong Kong taxation. He further submitted that his wife had a quantity of gold which was her own property and which she had sold during the years in question. He claimed that the proceeds of sale of the gold should be deducted from his taxable income as ascertained under the assets betterment statement procedure.
4. The Taxpayer claimed to deduct from the assets betterment statement the money from Japan, namely \$300,978 and the net proceeds of sale of his wife's gold, namely \$250,000. The assessor asked the Taxpayer for proof of the deductions claimed by the Taxpayer but the Taxpayer was not able to produce evidence to the satisfaction of the assessor. The assessor accordingly issued additional tax assessments to the Taxpayer based on the assets betterment statement which included the sums which the Taxpayer claimed should be deducted. The Taxpayer filed notice of objection against these assessments. By his determination dated 1 November 1988 the Deputy Commissioner rejected the claim by the Taxpayer with regard to the wife's gold, and the money brought back from Japan and confirmed the assessor's additional assessments subject to certain deductions (not the subject of this appeal) which the

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Taxpayer had been able to prove to the satisfaction of the assessor should be deducted from the assets betterment statement.

5. The Taxpayer has now appealed to the Board of Review against the disallowance by the Deputy Commissioner of the income from Japan of \$300,978 and the gain on disposal of gold of \$250,000.

At the hearing of the appeal the wife of the Taxpayer appeared and represented the Taxpayer. She gave evidence on behalf of the Taxpayer and was cross-examined. The Taxpayer was in Japan and unable to appear before the Board in person.

The Board of Review accepts that the representative had an extensive knowledge of both of her husband's businesses and of their mutual financial affairs.

In her evidence she stated that when she was married in 1974 she had received as gifts a quantity of gold. She said that she had sold the gold during the years in question but did not have any documentary evidence to support the sales of the gold. She said that she had obtained statements from her mother and her father-in-law both of which were to the effect that when she was married she received about thirty taels of gold. She said that from 7 August 1981 up to 8 November 1983 she had sold this gold for a total sum of \$193,900. She claimed that this amount should be deducted from the assets betterment statement.

With regard to the moneys brought back from Japan she said that her husband carried on business in Hong Kong and had established contact and goodwill with many Japanese customers. Because of his goodwill with the customers he had started carrying on business in Japan. He rented premises in Japan where he made clothes for customers in Japan. She said that during the period in question her husband had made many visits to Japan and she herself had accompanied her husband on a number of occasions. She said that her husband earned money in Japan which he brought back to Hong Kong and which he had paid into the bank in Hong Kong. She said that the total amount which was brought back from Japan and paid into the bank was \$300,978.

We accept the evidence given by the wife to the effect that when she was married she had received a quantity of gold. We also accept that during the years in question she sold this gold and the net proceeds should be deducted from the assets betterment statement. However we do not accept that the amount to be deducted is as much as \$250,000. This figure is no more than a 'guesstimate' made by the Taxpayer and his wife. They have not been able to prove to our satisfaction that this is the correct sum. The onus of proof is placed upon the Taxpayer by the Inland Revenue Ordinance. As was said by a previous Board in D28/88, IRBRD, vol 3, 312 (cited by the representative for the Commissioner) the assets betterment statement procedure is imperfect but the only way of resolving cases such as the present where a taxpayer has not maintained adequate or accurate accounting records. We cite with approval the following statement from D28/88 at pages 316 and 317:

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'As stated, it is the duty of a taxpayer to keep adequate accounts to enable him to handle his taxation affairs in accordance with the requirements of the Inland Revenue Ordinance.

An assets betterment statement is not the best way of ascertaining the assessable profits of a business or of an individual. It is a last resort when all else fails. It is important to bear in mind that, when a return of income is not made or is not accepted by an assessor or a case arises under section 60 of the Ordinance, the assessor is entitled and indeed has a duty to make an estimated assessment. In default of accurate information, it is customary for the assessor to protect the public revenue by issuing an assessment which is not less than whatever profit the taxpayer might have made. This imposes the obligation or burden on the taxpayer to come forward with what is his true taxable income. It forces the taxpayer to cooperate either by producing acceptable accounts or by assisting in the preparation of a meaningful assets betterment statement.

An assets betterment statement in its final or revised form is nothing more than an account of how the assessor has arrived at estimating the taxable profit of a taxpayer. It is not and does not pretend to be accurate or precise. It is merely a calculation of a taxpayer's income on a "net assets basis" in default of any other available information. If a taxpayer is aggrieved by an assessment founded on such a statement, it is for him to show how and to what extent it is incorrect or excessive. If he fails to do that, the assessment will be confirmed. It is for the taxpayer to displace the assessment. The taxpayer can blame no one except himself for such a state of affairs having arisen and can blame no one except himself if he finds it difficult to discharge the burden and prove that the betterment profit revealed by the assets betterment statement is wrong. The onus is not discharged by the taxpayer simply appearing before the Board and saying that the assets betterment statement is wrong. The onus is not discharged by the taxpayer if he leaves the Board in a state of conjecture by his failure to give evidence on matters peculiarly within his knowledge. If he elects to remain silent or is unable to give detailed and acceptable evidence or is unable to obtain independent acceptable documentary evidence and to call witnesses to substantiate the truth of what he says, then he leaves the Board with no alternative but to uphold the assessments based on the assets betterment statement because, like the Commissioner before it, the Board has no better means of ascertaining the true profits of the taxpayer.

The assets betterment statement method of estimating the income of a taxpayer provides the taxpayer with the opportunity, if he is aggrieved by the assessment raised on that basis, of satisfying the Board that the increase in his

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wealth did not arise from his business activities. If at the end of the Board hearing there is no acceptable evidence or insufficient evidence to warrant a conclusion that the assessments are excessive, then the same must stand.'

We, and no doubt the assessor and Deputy Commissioner, have considerable sympathy for persons who have to try to explain and account for money which they received a long time ago. Had they kept proper records there would be no need to resort to the assets betterment procedure. However it is the fault of the Taxpayer that he finds himself in such a dilemma.

Having found as a fact that the Taxpayer is entitled to a deduction for the proceeds of his wife's gold and having decided that the Taxpayer has failed to establish to our satisfaction that the net proceeds were \$250,000 it is necessary for us to decide what, if anything, should be deducted. We have evidence that the wife did receive approximately thirty taels of gold when she was married and the claim of the Taxpayer is based on the evidence of the wife given before us at the hearing. We accept the wife's evidence that she sold this gold during the years in question and that the proceeds of sale should be deducted from the assets betterment statement. The wife in her evidence pointed to a number of receipts in bank statements which she said represented the receipts of sales of gold but without more precision on her part or supporting documentary evidence we are not able to find as a fact what were the proceeds of sale. The representative for the Commissioner tabled a statistical summary of gold prices for the years 1979 through 1983 showing the price of gold fluctuated between a low of \$1,230 to a high of \$4,855 per tael. For want of a better yardstick we adopt a price of \$3,000 per tael which is the approximate middle point between these two extremes.

Based on the foregoing we find that an appropriate amount to deduct from the assets betterment statement in respect of the sales of gold is \$90,000. This is significantly less than has been claimed by the Taxpayer. The reason for the difference may be that the Taxpayer claimed that he had made profits from gold trading as well as the receipts from sale of his wife's gold. However without any supporting evidence we are not able to consider further this part of his claim.

We now come to the claim regarding the receipts from Japan. On the evidence of the wife we accept that the Taxpayer had income from the business which he conducted in Japan and that this income does not arise in nor is derived from Hong Kong. We accept the statement by the wife that the Taxpayer rented premises in Japan in which he made clothes for customers in Japan. We also accept that he visited these customers when he was in Japan and obtained orders from them when he was in Japan. No doubt there was some relationship between his business in Hong Kong and his business in Japan but on the facts before us that does not make this Hong Kong sourced income.

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As with the sales of gold our difficulty lies in determining how much should be deducted from the assets betterment statement. The amount claimed is \$300,978. Though this figure has the semblance of precision it is in fact the total of various bank account receipts which the Taxpayer believes to represent moneys which he brought back from Japan and an estimate of the number of suits which he could have made in Japan per day multiplied by the number of days he was in Japan. In cross-examination the representative for the Commissioner established that only some of the receipts were the proceeds of exchange of Japanese Yen or US dollars and that a number of the receipts were transfers from one account to another. In her evidence the wife was not able to explain this and accordingly we feel obliged to reject such receipts. Likewise we cannot accept an estimate based on what might have happened without any supporting documentation or invoices. The Taxpayer has pinpointed six bank receipts totalling \$164,172 which he submitted to the assessor and the Deputy Commissioner represented money brought back from Japan. Only three of these receipts were the proceeds of Yen or US dollars and they are the only receipts which have been established to our satisfaction as deriving from the Taxpayer's business in Japan. They amount in total to \$103,430 and we decide that this sum should be deducted from the assets betterment statement.

In the course of giving evidence the wife of the Taxpayer said with much feeling that she had her own personal savings when she was married and that they should also be deducted from the assets betterment statement. As they do not form part of the Taxpayer's claim or grounds of appeal they are not the subject matter of this appeal. However even if it were part of the Taxpayer's appeal we would not accept such a claim because all sums of money which were owned by the Taxpayer and his wife at the date of the commencement of the assets betterment statement have already been brought into account.

For the reasons given we allow the Taxpayer's appeal to the extent of \$90,000 being proceeds of sale of the wife's gold and \$103,430 being moneys brought back from Japan, making a total of \$193,430.

As this appeal relates to a total of seven separate assessments and as the Deputy Commissioner in his determination has already decided that the assessments should be reduced in respect of sums which are not the subject matter of this appeal it is appropriate that we should remit the seven assessments back to the Commissioner to enable him to make such reductions as are appropriate to reduce the total assessable profits of the Taxpayer by the aforesaid sum of \$193,430.