

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. BR 16/72

Board of Review :

L. J. D'Almada Remedios, *Chairman*, Kenneth Lo, E. J. V. Hutt & Hon. Wilfred S. B. Wong, *Members*.

18th October 1973.

Profits tax—incorrect return or false information supplied having effect of understating income or profits chargeable to tax—power vested in Commissioner personally to require statement of taxpayer's assets and liabilities—Inland Revenue Ordinance, s. 51A—onus on Commissioner to satisfy Board of sufficient grounds for exercising this power.

The Commissioner by notice under section 51A of the Inland Revenue Ordinance, called upon the taxpayer to furnish a statement containing particulars of his assets and liabilities over a specified period. The taxpayer objected on the grounds that the Commissioner did not have sufficient grounds for forming the opinion that the taxpayer had made an incorrect return or supplied false information having the effect of understating his income or profits chargeable to tax. The objector did not elect to give evidence. On appeal.

Decision: Objection dismissed.

Reasons :

We are told that this is the first appeal of its kind under section 51A of the Inland Revenue Ordinance. This section came into being as a result of a recommendation contained in the Report of the Inland Revenue Ordinance Review Committee. The comments in the Report leading to the recommendation are as follows :

“Under the schedular type of taxation in Hong Kong there is no requirement on the individual to make a return of his total income/profits. He may apply for personal assessment and make a return but even then it does not include dividends from Hong Kong companies nor any income derived outside the Colony. The basic procedure in investigating the affairs of an individual taxpayer is to obtain a statement of his assets and liabilities at the end of each of the years under review and if this information is supplemented by an estimated of the taxpayer's personal expenditure in each of those years, an estimated or notional income for each year is produced. Reconciling this income with income/profits in tax returns can be difficult in the circumstances where the taxpayer is not required to make a return of interest, dividends or rents derived from the Colony or of any income derived outside the Colony.

Despite the above difficulty it would be possible to detect evasion by means of this method which is known as the 'assets and liabilities' or 'betterment' basis if there were specific power in the Ordinance to demand the necessary particulars of the assets and liabilities of the taxpayer and of his wife. Section 51(4) gives authority to require the

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production of a wide range of documents but it does not entitle the assessor to require a taxpayer to prepare and submit a statement of his assets and liabilities: he may require any person to furnish information or produce some specific document but the section does not assist if the taxpayer has not in his possession such a document as a statement of his assets and liabilities. We consider that the Department needs this power if it is to make any real progress in investigation work.

WE RECOMMEND that the Commissioner should be given power in the Ordinance to require any person whom he has reason to believe has understated his income/profits in a return to the Department or has failed to render a return when called on to do so, to submit to him a statement of his assets and liabilities and all other information as to his and his family's living expenses and other private expenditure. In order to minimize the possibility of indiscriminate use of this power we decided that it should be a condition of our recommendation that the power be reserved to the Commissioner and may not be delegated."

Pursuant to section 51A, the Commissioner by a notice dated the 28th of September 1972, called upon the Objector to furnish a statement containing particulars, *inter alia*, of his assets and liabilities at the 31st of March in each year commencing from 1966 to 1970. To this an objection has been received and the matter has now come before us.

It is clear from the wording of section 51A that although the power is reserved to the Commissioner personally, it is not one to be exercised indiscriminately. But if the circumstances are such that lead him to believe that a person has submitted a return understating his profits, it is evident that the section intends that the Commissioner be given the authority to carry out a full enquiry and obtain information from that person regarding his affairs without which the Commissioner may be unable to make any substantial headway in detecting tax evasion. To invoke the section the Commissioner, after giving the matter his personal attention, must be of the opinion that the taxpayer has made an incorrect return or supplied false information having the effect of understating his income or profits chargeable to tax and that the taxpayer has done so without reasonable excuse and not through an innocent oversight or omission. It goes without saying, that an opinion arrived at without reasonable grounds does not satisfy the section. Indeed, on an objection taken the Commissioner is required to supply to both the Board and the Objector a statement of the grounds on the basis of which he formed his opinion giving rise to the notice and the onus is on him to satisfy the Board that he has sufficient grounds for the opinion he has formed on which his notice was based.

We mention this as the case for the Objector is that the Commissioner did not have sufficient grounds for the purpose of forming the opinion which he did.

Inasmuch as one must look to what the Commissioner had before him when he issued his notice, such exhibits as were produced in support of the Commissioner's grounds related to information or material which he had at hand prior to the issue of his notice. Most of the factual matters referred to in the Commissioner's statement are not disputed. As to disputed facts, evidence was called to establish what is alleged. The Objector did not elect to give or call any evidence.

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We do not propose to set out all the facts or material on which the Commissioner formed his opinion. We are dealing with an objector who, in his personal assessment returns, discloses an annual income in the region of \$13,000. Yet his expenditure exceeds his income many times over. Such assets as he is known to possess and the funds with which he operates his banking accounts are irreconcilable with the case of a person in his income bracket range. Between August 1968 to April 1970 he has bought shares to the value of \$2,080,049 and sold shares to the value of \$1,285,945. He has a Mercedes Benz car which is chauffeur driven and in 1965 he purchased a flat in Fontana Gardens for \$215,000.

It may be contended that section 51A cannot be invoked simply because it can be shown that a person has been able to maintain a standard of living above his declared chargeable income or that such person has been able to acquire appreciable assets beyond his apparent means with funds derived from some source unknown to the Commissioner. This factor is, however, a matter which the Commissioner may properly take into account. Although standing alone such a feature may not be sufficient, the Commissioner is entitled to have regard to all other known facts and circumstances of the case which when put together may justify his reaching the opinion required for the purpose of issuing a notice under section 51A.

In this case we think there was material on which the Commissioner could invoke the section.

The returns which the Commissioner regarded as incorrect having the effect of understating the Objector's chargeable profits related to the Business Profits Tax returns for the years of assessment 1967/68 to 1969/70. They are all "nil" returns in respect of a business which the Objector says he carried on as a broker at his residential address at Fontana Gardens. If he did conduct a business it is surprising that for each of these years he neither made a profit nor sustained a loss. No accounts were submitted with those returns. In his Personal Assessment returns for those same years a different residential address is given. He was required in the Personal Assessment returns to disclose property owned by him or his wife but he failed to do so by leaving it blank thereby representing to the Revenue that he did not own any property although he owned the flat in Fontana Gardens which he purchased in 1965 for \$215,000. When interviewed by officers of the Inland Revenue Department on the 31st day of March 1971, he denied holding any shares and receiving any dividends. He, in fact, held shares in public companies. In a subsequent interview he admitted that he bought and sold shares through brokers but he said he did so after the Far East Stock Exchange came into existence in 1969. The evidence, however, shows that prior to that in 1968 he had bought shares through brokers. The large turnover in the banking account which the Objector operated shows that he made 250 deposits in the year ending 31st March 1967; 75 deposits in the year ending 31st March 1968; 130 deposits in the year ending 31st March 1969 and 180 deposits in the year ending 31st March 1970. At times his banking account went into substantial overdrafts and we think that this feature coupled with the number of deposits he has made justified the Commissioner in assuming that he was

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carrying on some business activity which may have induced his bankers to repose an element of trust or confidence in allowing him to overdraw the account.

In our view, when consideration is had to the combination of all the circumstances of this case, the Commissioner had ample reasons for arriving at the opinion which formed the basis of his notice.

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.