Case No. BR 4/72

Board of Review :

L. J. D'Almada Remedios, *Chairman*, G. E. S. Stevenson, D. T. Nolan and Lau Chan-kwok, *Members.*

2nd November 1972.

Profits tax—accretion of assets irreconcilable with taxpayer's known income—additional assessment—Inland Revenue Ordinance, s. 60—Assets Betterment Statement—onus on taxpayer to satisfy Board that increase in assets derived from non-taxable source.

The appellant was a medical practitioner against whom default assessments under sections 59 and 60 of the Inland Revenue Ordinance were raised. He was furnished with an Assets Betterment Statement on which the additional assessments were based. He appealed against the assessments but failed to give evidence to prove that the increase in assets was derived from non-taxable sources. On appeal.

Decision: Additional assessments confirmed subject to adjustment in respect of $2,000 transferred from one account to another.

Case referred to:—Farrand v. Satterthwaite, 14 T.C. 469.

Reasons :

The Appellant is a medical practitioner against whom default assessments under sections 59 and 60 of the Inland Revenue Ordinance have been raised. These assessments usually arise where there is suspicion that a taxpayer has not made full disclosure of his profits and are preceded by an examination of the taxpayer's affairs from his books and records. Information is sought from any source which the Assessor thinks may assist him. Wide powers are given to the Assessor under the Ordinance to facilitate his investigations and to enable him to obtain evidence and the production of documents which he may consider relevant for the purpose. If the Assessor discovers that from one year to the next, or over a period of years, there has been an accretion of assets irreconcilable with the taxpayer's known income, an Assets Betterment Statement is prepared and submitted to the taxpayer for him to give an account of the unexplained accretions. If the Taxpayer is able to satisfy the Assessor that his increase in assets is derived from a non-taxable source, that would be the end of the matter. If not, then depending on what explanations are offered and found acceptable to the Revenue, a reconciliation statement or a Revised Assets Betterment Statement is sometimes prepared based on the explanations rendered or such further discovery as may be made by the Assessor. This process may be repeated more than once to

afford the taxpayer an opportunity of offering any further comment or explanation he may care to make.

In the case under review, the final Revised Assets Betterment Statement is Exhibit G2 produced in evidence.

Before dealing with the Assets Betterment Statement it is important to bear in mind that, when a return of income is not accepted by the Assessor, or it is a case under section 60, the Assessor is entitled, indeed has a duty, to make an estimated assessment. It is not necessary for the Assessor or the Commissioner to give his reasons for arriving at an estimate. On the other hand it is reasonable to suppose that the Commissioner would not like to see the public image of his department damaged by leaving a taxpayer with a justifiable sense of grievance if an assessment is made at random upon no intelligible basis; so, in fairness to the taxpayer and to enable him to know on what basis the assessment is made, an Assets Betterment Statement is prepared. The final Assets Betterment Statement represents nothing more than an account of how the Assessor has arrived at an estimate and formulated an assessment. No pretence is made as to either the accuracy or precision of such a statement. It is merely a calculation of a taxpayer's income on a "net assets basis". 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. This onus is not discharged if he leaves the Board in a state of conjecture by his failure to give evidence on matters peculiarly within his own knowledge. If he elects to remain silent the Board may not be justified in concluding that his increase in assets was not derived from his business takings. One of the object of the "assets accretion method" in estimating income is to provide the taxpayer with the opportunity, if he is aggrieved by an assessment on that basis, to satisfy the Board that his accretions were not so derived. If at the end of the hearing, there is no evidence or insufficient evidence to warrant such a conclusion, the assessment must stand.

In this appeal with which we are concerned, the Appellant did not give evidence. Nor was any witness called on his behalf. The Assets Betterment Statement (Exhibit G2) on which the assessments were found was attacked on grounds which can conveniently be grouped under the following headings, which we will deal with as they are mentioned.

Unidentified Bank Withdrawals : This refers to an item in the Statement pertaining to funds withdrawn from banks for unidentified purposes. The entry is made on the assumption that such withdrawals were not for allowable expenditures connected with the Appellant's business. If they were it is for the Appellant to satisfy us on that score. In respect of two cheques for $1,000 each it seems sufficiently obvious (as conceded by the Revenue) that these cheques relate to amounts transferred from one account to another. To this extent a necessary adjustment must be made to the Statement. In respect of all other withdrawals the Appellant has failed to discharge the onus of satisfying us that the funds were drawn for the payment of deductible expenses or that the cheques drawn relate to transfers from one bank to another. It is not enough to produce a cheque to show to whom it was paid. There must be evidence to show that the payment related to an allowable business

expense. We do not have such evidence before us. Subject, therefore, to an adjustment for a total sum of $2,000 to which we have referred, we find no justification for disturbing the figures under this heading.

Motor Car : This is a car belonging to the Appellant's wife. It was purchased in September 1966 for $10,100 and sold in January, 1969 for $5,500. The Appellant's representative raised two points for consideration. Firstly, it is contended that it is a business asset used by the doctor in his business. Dealing with this first contention, we are unable to find any evidence in support of this claim. This is his wife's car. It is not mentioned as business asset in the doctor's returns. From the point of view of evidence, we do not know whether the doctor was ever in the car; or whether he has a driver's licence; or whether he had ever used the car for his business. There is, therefore, no material before us from which we would be justified in concluding that it is a business asset. The second contention put forward by the Appellant's representative is that, irrespective of whether it was a business asset or not, the accountancy treatment in the Statement is wrong because no allowance has been made for depreciation and, had such allowance been taken into account, it would show that the car was sold at a profit. It is unnecessary to set out the full reasoning that has been put forward in support of this contention as we find no error in substance or principle in the Assessor's accountancy treatment of this item.

Estimated Living Expenses : $24,000 per annum is the figure inserted by the Assessor as his estimate for living expenses for the doctor, his wife and three children. We are invited to cut this figure down substantially because it is said that the doctor is living with his father and is supported by his father. In the circumstances we are told that his living expenses should be about $500 a month. This is a question of fact. It is not conceded by the Revenue. As in all such issues of fact, we are in no position to determine the merits of a claim of this kind without evidence being called so that it may be tested and considered for the purpose of arriving at a conclusion. What is said to us across the table by the Appellant's representative is not evidence. In **Farrand v. Satterthwaite**[1]**,** for example, it was said (at p. 472) that "you cannot . . . come and get your case decided merely on the statement of a solicitor which the other side say that they do not accept." Among the exhibits submitted is a short signed statement by the Appellant's father that all the living expenses of his son and his family are paid by him. Strictly speaking, such a statement is not admissable in evidence without calling the writer. In any event, we are not prepared to act on such a statement without proper foundation being laid, such as by the Appellant giving evidence in support of such a claim so that its merits may be determined.

Sale of Premises in Pokfulam Road : The loss sustained on the sale of this property is one of the major items that have come up for argument. The loss is treated by the Revenue as a capital loss. It was not until after the issue of the Revised Assets Betterment Statement on 16th July 1971 that a claim was made by the Appellant to the contrary. No returns were ever filed by the Appellant to show that he was engaged in or had stepped into the business of trading or dealing in land, which is now his claim in respect of this property which was

[1] 14 T.C. 469.

sold in July 1969 at a loss. In his Business Profits tax return for the year of assessment 1969/70 (submitted after the property was sold) he was asked about any other business in the Colony and his answer was in the negative. The Appellant also treated the loss on the sale as a capital loss in an Assets Betterment Statement drawn by the Appellant's tax representatives. However, the assertion now made is that it should be regarded as a revenue loss because as regards this property the Appellant was trafficking in land in the business or trade of property dealing. In support of the Appellant's case, a letter from his architect was produced showing what the capital outlay for a development of the property would involve and the profit that could be expected by a sale after development. Two letters from the Appellant's bankers promising to grant a loan to finance the development were also submitted in evidence. These two letters show an intention to develop but, from an evidential point of view, they are really neutral as development could be either for the purpose of investment or for resale at a profit after completion. The architect's letter is however more in the Appellant's favour. But would we be justified in finding for the Appellant on the strength of that letter alone? It is to be remembered that we do not have the benefit of the Appellant's evidence. The property was bought in March 1964 and sold in March 1969. Was it purchased with a view to re-development and re-sale at a profit? Or for re-sale without re-development? Or for retention for a number of years with an eye to capital appreciation? If it was for re-development why was the scheme not implemented, particularly as the Appellant was offered finance for the purpose? Was such an intention abandoned? These and many other related and material factors fall for consideration. But only part of the picture has been put before us. Whether or not the Appellant was engaged in the business of property dealing is a question of fact that depends on the totality of the facts with due regard being had to all the circumstances of the case. We cannot be expected, nor would we be justified, in coming to a finding of fact if the Appellant fails to give evidence, the effect of which is to deprive us from being in possession of or able to give consideration to all the other facts that should be taken into account to arrive at a finding. The Appellant has, therefore, failed to discharge the onus resting upon him to satisfy us of the contention he has advanced.

Two other minor points were raised and they relate to the contention that the Assets Betterment Statement did not include provision for a return discount of 4½% of the cost received in acquiring mutual funds and the dividends received in respect of shares in the Appellant's name. The Statement does, in fact, take into account dividends received. If any further dividends have been received we have no evidence of what they are. As regards the return discount of 4½% we do not see the point in raising this when details or particulars were asked for, but none were proffered.

Although the Appellant did not give evidence, it is clear that his tax representatives have taken a lot of time and trouble in the preparation of this appeal. They have put forward to us every conceivable argument that could be advanced in favour of their client. But in a case of this kind where all the issues are questions of fact and nearly all the facts are within the exclusive knowledge of the Appellant, his failure to give evidence puts difficulties in our way in coming to a finding of fact, since the Appellant is the person best able to establish the facts but elects to remain silent. By taking such a course he is putting it out of the power of

the Revenue to test, and the Board to assess, the validity of his allegations so that in the end result the Board is unable to come to any conclusion to justify a finding that the Appellant has discharged the burden of proof.

In this appeal we therefore confirm the assessments subject to the adjustment required in allowing the Appellant the benefit of the two sums of $1,000 each, which represent bank transfers as dealt with by us above and which would result in the assessment being slightly reduced. We are therefore remitting this appeal to the Commissioner with our opinion and for such adjustment to be made, but subject thereto the assessments are confirmed.