

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D109/99

Profits Tax – asset betterment statement – burden on taxpayer to show it incorrect or excessive.

Panel: Ronny Wong Fook Hum SC (chairman), Cheung Wai Hing and Dora Lo Lai Yee.

Date of hearing: 22 November 1999.

Date of decision: 18 January 2000.

The taxpayer traded as Company A. In July 1993, the Revenue produced three assets betterment statements. In the third asset betterment statement, the Commissioner assessed betterment profits of \$2,369,140 in 1989. The taxpayer appealed against the determination of the Commissioner.

The taxpayer contended, inter alia, that he was then holding funds on behalf of various persons in China including a Mr E (the depositors) and he made various disbursements on their behalfes.

Held:

‘ If a taxpayer is aggrieved by an assessment founded on [an asset betterment] statement, it is for him to show how and to what extent it is incorrect or excessive.’ (D28/88 applied).

The Board found that the taxpayer failed to discharge his onus by failing to call Mr E to give evidence nor giving full particulars as to the persons who received funds pursuant to the instructions of the depositors.

Appeal dismissed.

Case referred to:

D28/88, IRBRD, vol 3, 312

Tsoi Chi Yi for the Commissioner of Inland Revenue.

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Taxpayer in absentia.

Decision:

Background

1. Company A was a business registered in Hong Kong on 5 December 1987. It imported materials into China. Mr B and his wife Mrs B were its initial partners. Mrs B resigned from the partnership on 13 July 1988. Company A allegedly ceased business by the end of 1988.

2. By its return for the year of assessment 1987/88 dated 24 October 1988, Mr B reported to the Revenue that Company A suffered loss in the sum of \$125,651.

3. By a further return for the year of assessment 1988/89 dated 14 February 1989, Mr B reported to the Revenue that Company A incurred loss in the sum of \$475,611.

4. In about July 1993, the Revenue commenced investigation into the affairs of Mr and Mrs B. Lengthy correspondence ensued between the parties in the course of which the Revenue produced 3 asset betterment statements:

- (a) The first asset betterment statement was sent to Mr B on 20 February 1998. It is for the period from 1 April 1987 to 31 March 1989. It can be summarised as follows:

Year	Total assets \$	Increase (Decrease) in net assets \$	Betterment Profits \$	Profits (Loss) returned \$	Discrepancies \$
1987	1,726,000				
1988	2,008,017	290,277	244,922	(125,651)	370,573
1989	4,608,111	2,503,407	2,847,835	(475,611)	3,323,440

- (b) The second asset betterment statement was sent to Mr B on 9 March 1998. It is for the period between 1 April 1987 to 31 March 1993. The following is the asset position of Mr B according to this statement:

Year	Total assets \$	Increase (Decrease) in net assets \$
1987	1,726,000	

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1988	2,008,017	290,277
1989	4,608,111	2,503,407
1990	4,100,815	(483,774)
1991	4,408,529	313,729
1992	\$3,846,945	(\$546,000)
1993	\$4,104,460	\$274,929

The Revenue indicated to Mr B that 'As little discrepancy is shown for the period after 1.4.1989, this Department is not prepared to pursue the said period at the present stage.'

- (c) The third asset betterment statement was sent to Mr B on 27 April 1999. It covers the 3 years between 1987 to 1989. The position according to this third statement may be summarised as follows:

Year	Total assets	Increase (Decrease) in net assets	Betterment profits	Profits (Loss) returned	Discrepancies
	\$	\$	\$	\$	\$
1987	1,726,000				
1988	2,008,017	290,277	164,121	(125,651)	289,772
1989	4,498,111	2,393,407	2,369,140	(475,611)	2,844,751

5. It was in the light of the third asset betterment statement that the Commissioner by her determination dated 31 May 1999 revised the assessments on Mr B trading as Company A as follows:

Date when original assessment issued	Year of assessment	Assessable profit		Profits tax	
		Original	Revised	Original	Revised
		\$	\$	\$	\$
4-3-1994	1987/88	1,000,000	164,121	165,000	27,079
17-3-1995	1988/89	1,000,000	2,369,140	155,000	367,216
17-2-1996	1989/90	1,000,000	Nil	150,000	Nil
17-2-1997	1990/91	1,000,000	Nil	150,000	Nil
10-11-1997	1991/92	500,000	Nil	75,000	Nil
10-11-1997	1992/93	500,000	Nil	75,000	Nil

6. Mr B appealed against the determination of the Commissioner.

The hearing before us

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7. Mr B left Hong Kong in May 1997 for Country C. He is now living in Country D.
8. By letter dated 30 October 1999, Mr B informed this Board that he would not be attending the hearing scheduled on 22 November 1999. Given this intimation from Mr B, we decided to consider this appeal in his absence.

The case of Mr B

9. In his letter to this Board dated 30 October 1999, Mr B contended as follows:
 - (a) He relied on the second asset betterment statement and argued that the Revenue should not rest its case on the third asset betterment statement in assessing his net assets.
 - (b) He argued that Company A could not possibly have made profits to the tune of \$2,369,140 for the year of assessment 1988/89. He would not have closed down that business if it had been generating profits of that magnitude.
 - (c) He asserted that he was then holding funds on behalf of various persons in China [‘ the Depositors’] including a Mr E. Pursuant to the instructions of these Depositors, he subsequently made various disbursements on their behalves. He attributed the depletion of his assets in the subsequent years to his compliance with those instructions. He drew our attention to the guarantees that he assumed in respect of the school fees of various persons educated overseas.

The law in relation to asset betterment statement

10. The position was fully explained by this Board in D28/88, IRBRD, vol 3, 312:

‘ An asset 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 asset 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

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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.'

11. Mr B made scant attempt to discharge his onus. We give the following illustrations:
 - (a) Mr E is obviously a vital witness. Mr B says their relationship broke down in 1989 and he now has no further access to Mr E. There is no evidence before the Commissioner or this Board as to the precise amounts deposited by Mr E with Mr B.
 - (b) Mr B gave the assessor the addresses of a number of persons who allegedly received funds pursuant to instructions of the Depositors. Mr B invited the assessor to contact these persons for proof. Mr B wholly failed to appreciate that the burden is on him and he should place before the Revenue and this Board full particulars of the amounts received by these persons together with their confirmations.
12. This Board is not entitled to speculate. We cannot assist Mr B by our own guess work. The reduction of assets in subsequent years is closely linked with his positive case of holding funds in trust. Mr B did not see fit to attend the scheduled hearing to give us assistance. We have no material whatsoever to disturb the assessments.
13. For these reasons, we dismiss Mr B's appeal and confirm the assessments.