

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D14/83

Board of Review:

Charles A. Ching, *Chairman*; R. S. Huthavt & R. E. Moore, *Members*.

14 November 1983.

Profits tax—additional assessment under section 60(1)—appeal by personal representative of taxpayer—Assets Betterment Statement—onus of proving assessment wrong.

Following the death of the taxpayer, Additional Profits Tax was assessed on the business of which he had been the proprietor for the five years 1974/75 to 1978/79. The assessments were based on an Assets Betterment Statement determined by the Commissioner of Inland Revenue. The appellant as personal representative of the taxpayer appealed against each additional assessment on the ground that the Assets Betterment Statement was incorrect. The appellant contended that the appellant should be subject to a lower standard of proof than the taxpayer himself would have been.

Held:

- (1) A personal representative is subject to the same onus of proof as any other taxpayer.
- (2) The appellant must discharge by admissible evidence the onus placed on him of establishing the assessment is wrong.

Appeal dismissed.

Lee Kwok-leung for the Commissioner of Inland Revenue.
S. W. Lau of Lau, Wong & Chan, Solicitors for the appellant.

Reasons:

This is an appeal by W in her capacity as personal representative of M deceased, who died on 17th January 1980, against the Determination of the Commissioner dated 21st March 1983 of objections of five separate Additional Profits Tax Assessments raised under section 60(1) of the Inland Revenue Ordinance in respect of the Deceased's proprietorship business known as S for the years of assessments 1974/75 to 1978/79 inclusive.

The Determination increased the additional assessable profits for the year 1974/75 and reduced them for the four subsequent years.

The additional assessments were made on the basis of an Assets Betterment Statement ("A.B.S.") which, in final form as determined by the Commissioner, appeared as Appendix H in the agreed documents placed before the Board. The A.B.S. had in fact been revised on two previous occasions following discussions between the Appellant's legal advisers and

INLAND REVENUE BOARD OF REVIEW DECISIONS

the Inland Revenue Department and the former statements appeared in the agreed documents as Appendices A and B with a reconciliation between the two also included as Appendix C.

The facts placed before the Board were not satisfactory. The papers included a document headed "Statement of Facts Agreed" but also marked "Without Prejudice" and it was clear from subsequent correspondence between the Commissioner and the Appellant's legal advisers that a number of "facts" were not agreed. Neither the Assessor nor the Appellant's legal advisers elected to call evidence and the Board was therefore left to determine the issues on the basis of the documentation placed before it, taking into account those items on which agreement had not been reached.

During the course of the hearing, both sides confirmed as an agreed fact that the Deceased's daughter, D, played an active role in the management of the business of the S during the last few years of the Deceased's life.

The Appellant's case was that a number of items contained in the final A.B.S. which was the basis of the Commissioner's Determination were incorrect. In particular:—

- (1) that the opening assets as at 31st March 1973 should include:—
 - (a) \$20,000 paid by the Deceased to P on 28th April 1972, allegedly for the acquisition of an interest in an unidentified partnership;
 - (b) \$10,100 and \$8,132.40 paid on 29th August 1972 to K and L respectively, allegedly for the purchase of quoted shares;
- (2) that the adding back of disallowable expenses and particularly, the rent received by the Deceased was incorrect and produced a double counting as the Deceased had already paid Profits Tax on his share of the rent and Property Tax on his share of the property;
- (3) that the unidentified withdrawals included in the final A.B.S. should be assumed to be business expenses, satisfactory explanations having been given for other larger amounts which were included in the first A.B.S. and excluded in the final one.

In addition to the above points, the Appellant contended that it was not open to the Commissioner, when determining the objection in respect of the 1974/75 assessment, to increase the amount thereof as this increase was made after the expiration of the 6-year period referred to in section 60(1) of the Ordinance.

In his submissions to the Board, the Appellant's legal representative, while conceding that the onus of proof lay on the Appellant, made the following points:—

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) that where an appellant is a personal representative of a deceased, a lower standard of proof is required because the deceased is unable to give evidence or explain facts which were within his personal knowledge when alive;
- (b) that as a payment of \$16,733 made by the Deceased to a securities firm on 2nd June 1977 had been assumed by the Assessor to be for quoted shares and was therefore added to the assets in the A.B.S., a like presumption should be made in respect of the payments made in 1972 prior to the opening date of the A.B.S.;
- (c) that the Board should assume in favour of the Deceased, who could not give evidence, that unidentified withdrawals were for business expenses and should be deducted from the assets in the A.B.S.

These arguments were countered by the Commissioner's representative in a detailed written submission which relied strongly on the explanation of the concept of quantifying allegedly understated profits of a taxpayer by means of an A.B.S. which is contained in the reported Board of Review Case No. 4 of 1972 at p. 85 and the onus of proof placed on a taxpayer aggrieved by an assessment based thereon.

The exposition of the law and practice in the above Board of Review case is in accordance with the earlier decision of the Hong Kong Supreme Court in *Mok Tsze Fung v. C.I.R.* (1962 H.K. Tax Cases p. 166) and numerous reported Australian Board of Review Cases based on similar legislation such as, for example, 24 C.T.B.R. (N.S.) Case 70 at p. 550.

The result of these decisions is quite clearly that (in the absence of manifest error) in order to succeed on an appeal against an Assessment or Additional Assessment which has been made on the basis of an A.B.S., the appellant must discharge by admissible evidence the onus placed on him of establishing that the Assessment is wrong. The standard of proof required is the balance of probabilities and mere conjecture or argument will not suffice. It is not for the Assessor to explain or justify the Assessment (although in the present case the Inland Revenue Department has taken great pains so to do) and it does not assist an appellant to show that there is doubt as to whether or not an item placed in one category might possibly belong in another. While the Board sympathises with the difficulties faced by an appellant in a case such as the present, it knows of no authority which supports the proposition that a lower standard of proof should be required or that assumptions might be made in favour of an appellant acting in the capacity of personal representative which would not be made if the appellant were a live person appealing in his own right.

Applying the above tests to the present case, the Board finds that the Appellant has not discharged the onus of showing that any of the Assessments were wrong. In connection with the disallowable expenses, the Board is satisfied that the Appellant's representative has not understood the inter-relationship of the profits tax computation, the property tax and the personal assessment election by the deceased and that the Assessor's treatment of these items is correct.

INLAND REVENUE BOARD OF REVIEW DECISIONS

Finally, the Board is satisfied that as the Additional Assessment for the year 1974/75 was made within the 6-year period referred to in section 60(2), the provisions of section 60(1) and 64(2) clearly empower the Commissioner to increase the Assessment objected to.

In consequence, the Appeal is dismissed and the Assessments are confirmed.