

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D20/89

Assets Betterment Statement – onus of proof – standard of proof required for taxpayer to be successful in challenging assets betterment statement.

Panel: T J Gregory (chairman), Chan Pang Fee and Charles G Large.

Dates of hearing: 18, 20 and 24 October and 1 November 1988.

Date of decision: 30 June 1989.

The taxpayer carried on two separate businesses but by agreement of the parties, the appeal proceeded as if there was only one business and one tax assessment. The taxpayer was assessed to tax as the result of an assets betterment statement ('ABS'). The taxpayer challenged the accuracy of the assets betterment statement and claimed that certain adjustments should be made thereto and called evidence in support of the adjustments which he sought to have made.

Held:

That the onus of proof is upon the taxpayer and that he had not been able to discharge the onus of proof placed upon him and had not been successful in establishing the claims that he made.

Appeal dismissed.

Case referred to:

D28/88, IRBRD, vol 3, 312.

Jennifer Chan for the Commissioner of Inland Revenue.

Armando Y C Chung of Armando Y C Chung and Co for the taxpayer.

Decision:

1. THE NATURE OF THE APPEAL

- 1.1 This decision relates to two appeals by the Taxpayer as sole proprietor of the businesses identified in paragraph 1.2 below.

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- 1.2 The appeals are by the Taxpayer as sole proprietor of:
 - 1.2.1 one business ('X Company') with respect to additional profits tax assessments for the years of assessment 1976/77 to 1981/82, both inclusive; and
 - 1.2.2 another business ('Y Company') with respect to additional profits tax assessments for the years of assessment 1980/81 and 1981/82.
- 1.3.1 The Commissioner issued two determinations ('the determinations'):
 - 1.3.1.1 one with respect to the Taxpayer's business identified as X Company ('the X Company determination'); and
 - 1.3.1.2 one with respect to the Taxpayer's business identified as Y Company ('the Y Company determination').
- 1.3.2 However, as the assessments appealed against were made after the Taxpayer's agreement to an assets betterment statement ('ABS') there was an obvious difficulty in identifying from which business the Taxpayer's assets originated whereby, by virtue of an agreement reached between the Revenue and the Taxpayer, evidenced by the letter appendix D to each of the determinations, the Revenue and the Taxpayer agreed to divide the assessments between each of the businesses, the assessments with respect to the years of assessment 1976/77 to 1979/80 to be assessments relating to the Taxpayer's profits from X Company and the assessments for the years of assessment 1980/81 and 1981/82 to be assessments relating to the Taxpayer's profits from Y Company.
- 1.3.3 The determinations were issued by the Commissioner on the basis of the agreement referred to in paragraph 1.3.2 above, section 1 being common to both of the Taxpayer's objections. Section 2 of the X Company determination related to the additional profits tax assessments for the years of assessment 1976/77 to 1981/82, both inclusive, the additional assessments for the years of assessment 1980/81 and 1981/82 being annulled by virtue of the said agreement. Section 2 of the Y Company determination related to the profits tax assessment for the years of 1979/80 to 1981/82, both inclusive, with the assessment for the year 1979/80 being annulled by virtue of the said agreement. Section 3 of the determinations are identical save for paragraphs 4 which apportions the tax liability between the two businesses.
- 1.4 The appeals proceeded as one appeal and as the relevant facts are so interwoven it is appropriate for the Board to give effect to the agreement between the Revenue and the Taxpayer as the treatment of profits and to issue one decision with respect to the two appeals.

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2. THE FACTS

2.1.1 X Company

2.1.1.1 The Taxpayer commenced the business of X Company in July 1968. It was commenced as a sole proprietorship but, in 1981, new partners were admitted, refer paragraph 1(i) of the note of interview dated 21 December, appendix A to the relevant determination.

2.1.1.2 By notices, details of which are set out below, the assessor raised the following profits tax assessments on the Taxpayer:

<u>Year of Assessment</u>	<u>Date of Notice</u>	<u>Assessable Profits</u> \$
1976/77	8 October 1977	96,587
1977/78	19 July 1978	55,536
1978/79	13 August 1979	93,304
1979/80	17 July 1980	150,921

The Taxpayer did not object against any of these assessments.

2.1.2 Y Company

2.1.2.1 In his application for a business registration certificate the Taxpayer stated that the business of Y Company commenced in August 1979. It was commenced as and continued as a sole proprietorship, refer paragraph 1(ii) of the note of interview dated 21 December, appendix A to the determination of the Commissioner dated 19 March 1988.

2.2 The Investigation

2.2.1 At some time prior to 21 December 1982, the date upon which the interview minuted in appendix A to the determination took place, the Revenue had commenced an investigation of the Taxpayer's affairs. This investigation was with respect to the period 31 March 1976 to 31 March 1982.

2.2.2 The fact that this note of interview was received is confirmed by appendix A-1 to the determinations, a sheet containing 9 amendments to the note of interview signed by the Taxpayer.

2.3 Assessments

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- 2.3.1 By the notices detailed below the assessor raised additional profits tax assessments on the Taxpayer, trading as X Company, as follows:

<u>Year of Assessment</u>	<u>Date of Notice</u>	<u>Assessable Profits</u> \$
1976/77	24 March 1983	603,413
1977/78	19 March 1984	800,000
1978/79	22 March 1985	800,000
1979/80	13 March 1986	800,000
1980/81	18 March 1987	1,300,000
1981/82	25 March 1987	2,700,000

The Taxpayer, through his authorized representative, objected against each of the above additional assessments on the grounds that they were excessive.

- 2.3.2 By the notices detailed below the assessor raised profits tax assessments on the Taxpayer, trading as Y Company, as follows:

<u>Year of Assessment</u>	<u>Date of Notice</u>	<u>Assessable Profits</u> \$
1979/80	13 March 1986	800,000
1980/81	18 March 1987	1,300,000
1981/82	19 March 1984	392,929
1981/82 (Additional)	25 March 1987	2,700,000

The Taxpayer, through his authorized representative, objected against each of the above additional assessments on the grounds that they were excessive.

- 2.4 The ABS

- 2.4.1 After exchanges of correspondence, on 12 November 1986 the ABS, appendix B to the determinations, in respect of the six years period 1976/77 to 1981/82 was delivered by the Revenue to the Taxpayer, refer paragraph 1(6) of the determination.

- 2.4.2 As a result of further correspondence with respect to the quantum of the Taxpayer's assets set out in the ABS, the assessor wrote a very detailed letter to the Taxpayer on 9 April 1987. A copy of this letter is annexed to the determinations as appendix C. Replies, dated 11 June 1987, 14 July 1987 and 9 November 1987, were received from the authorized representative of the

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Taxpayer and relevant extracts are set out in sub-paragraphs 1(10)(b)(ii) and (iii) of the determinations.

2.4.3 As a result of the correspondence exchanged between the Taxpayer, through his authorized representative, and the assessor, certain deductions to the Taxpayer's assets were agreed but others were not.

2.4.4 At the time the matter was referred to the Commissioner for his determination, the following items were in dispute:

	<u>Item</u>	<u>Amount</u>
2.4.1.1	An opening balance adjustment at 31 March 1976	300,000.00
2.4.4.2	Liabilities to sub-contractors	2,810,149.74
2.4.4.3	Investment	200,000.00
2.4.4.4	Decoration cost of residential premises	300,000.00
2.4.4.5	Living expenses	462,826.00

2.5 The determinations:

2.5.1 X Company

In his determination the Commissioner made the following rulings with respect to the additional assessable profits notified by the notices referred to in paragraph 2.3.1 above:

<u>Year of Assessment</u>	<u>Date of Assessment</u>	<u>Original Assessment</u> \$	<u>Commissioner's Assessment</u> \$
1976/77	24 March 1983	603,413	203,641
1977/78	19 March 1984	800,000	225,789
1978/79	22 March 1985	800,000	302,174
1979/80	13 March 1986	800,000	512,150
1980/81	18 March 1987	1,300,000	Annulled
1981/82	25 March 1987	2,700,000	Annulled

The annulments in respect of the years of assessment 1980/81 and 1981/82 were made pursuant to the agreement between the Revenue and the Taxpayer referred to in paragraph 1.2 above.

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2.5.2 Y Company

In his determination the Commissioner made the following rulings with respect to the additional assessable profits notified by the notices referred to in paragraph 2.3.2 above:

<u>Year of Assessment</u>	<u>Date of Assessment</u>	<u>Original Assessment</u> \$	<u>Commissioner's Assessment</u> \$
1979/80	13 March 1986	800,000	Annulled
1980/81	18 March 1987	1,300,000	740,788
1981/82 (Additional)	25 March 1987	2,700,000	1,693,702

The annulment in respect of the year of assessment 1979/80 was made pursuant to the agreement between the Revenue and the Taxpayer referred to in paragraph 1.2.3 above.

2.6 Notice of Appeal

2.6.1 Through his authorized representative, the Taxpayer gave notice of appeal against each of the determinations. These notices are identical in all respects.

2.6.2 The Grounds of appeal are as follows:

2.6.2.1 '1. We are unable to agree the view of the Commissioner that he did not recognise and deduct from the discrepancy per asset betterment statement ('ABS') the amount of shares held, as 31 March 1976. It was mentioned in the notes of interview and in the additional statement of facts that some of the shares purchased by our client prior to 31 March 1976 were not sold. It is impossible for someone to trace the records kept ten years ago when our client became aware that he had to look for them after he received the ABS as enclosed in Inland Revenue Department's ('IRD') letter dated 12 November 1986. Further evidence from share registration department of some shares held at 31 March 1976 is available (see appendix 1).'

2.6.2.2 '2. We are unable to agree the view of the Commissioner that he did not allow as deduction from the discrepancy per the ABS the sum of \$2,810,149.24 which was owing to sub-contractors at 31 March 1982. The principal activities carried out by our client were miscellaneous small building and maintenance jobs sub-contracted to him by [company identified] ("main contractor"). When he received an instruction by the main contractor, he would then look for sub-contractors to carry out the work for him. In some cases, he also supplied

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building materials to the sub-contractors. Normally, he was able to obtain one to two months' credit from his material suppliers while he can obtain payment from the main contractor in his request for payment of materials on site. During the tenancy of a job, he received progress payments from the main contractor and, in turn, he made payment to the sub-contractors. He was able to make use of the cash flow since he was not required to pay his sub-contractors until a few weeks later. This business generated enough cash flow for him to withdraw funds and place them in fixed deposits with banks since 12 January 1981. Final receipts as evidence of payment to sub-contractors made after 31 March 1982 amounting to \$647,935.24 are enclosed (see appendix 2).'

2.6.2.3 '3. We are unable to agree the view of the Commissioner who did not allow as deduction from the discrepancy per the ABS the sum of \$200,000 borrowed from Mr A when the sum was still outstanding as unpaid on 31 March 1982. This is evidenced by the confirmation from Mr A (see appendix 3).'

2.6.2.4 '4. We are unable to agree the view of the Commissioner who did not allow as deduction from the discrepancy per the ABS the sum of \$82,572.60 which was accumulated savings by our client's wife from the monthly cash living expenses given to her by our client. A copy of his wife's bank account is enclosed (see appendix 4).'

2.6.2.5 '5. We are of the opinion that the accounts payable to sub-contractors at 31 March 1980 and 31 March 1981 be deducted from the discrepancy per the ABS for the years of assessment 1979/80 and 1980/81 although it was agreed that any understatements of income will be deemed to be attributed to [X Company] ("X Company") for the years of assessment 1976/77 to 1979/80 and to [Y Company] ("Y Company") for the years of assessment 1980/81 and 1981/82. Such accounts payable were not recorded in the accounts of the company because the bookkeeper had offset such liabilities against the drawings of the proprietor. ABS for the seven years of assessment is enclosed (appendix 5).'

3. DOCUMENTATION

The Board had before it the documents set out below:

3.1 Papers submitted before the hearing:

3.1.1 The determinations;

3.1.2.1 The note of interview of 21 December 1982, appendix A to the determination;

3.1.2.2 The Taxpayer's schedule of amendments to the note of interview, appendix A-1 to the determination;

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- 3.1.3 The assets betterment statement, appendix B to the determination to which were annexed:
 - 3.1.3.1 Schedule 1, cash at bank, appendix B-1;
 - 3.1.3.2 Schedule 3, estimated cost on purchase of properties, appendix B-2;
 - 3.1.3.3 Schedule 4, purchase of shares, appendix B-3;
 - 3.1.3.4 Schedule 5, securities charges, appendix B-4;
 - 3.1.3.5 Schedule 6, tax paid, appendix B-5;
 - 3.1.3.6 Schedule 7, bank interest income, appendix B-6;
 - 3.1.3.7 Schedule 8, sale of shares, appendix B-7;
 - 3.1.3.8 Schedule 9, dividend received, appendix B-8;
 - 3.1.3.9 Schedule 10, depreciation allowance, appendix B-9.
- 3.1.4 A copy of the letter from the assessor to the Taxpayer dated 9 April 1987, appendix C to the determinations.
- 3.1.5 A copy of an undated agreement received by the Inland Revenue on a date in October 1987, appendix D to the determinations;
- 3.1.6 List of sub-contractors of Y Company and amounts due to them, appendix E to the determinations;
- 3.1.7 Management accounts prepared by a firm of certified public accountants for Y Company as at 31 March 1982, appendix E-1 to the determinations;
- 3.1.8 Management accounts prepared by a firm of certified public accountants as at 31 December 1982, appendix F to the determinations;
- 3.1.9 Audited accounts for the period ended 30 September 1982, appendix G to the determinations;
- 3.2 Documents submitted by the Taxpayer:
 - 3.2.1 A copy of a letter dated 29 March 1988, marked appendix 1;
 - 3.2.2 Copies of 19 receipts in Chinese, without translations, marked appendix 2;

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- 3.2.3. A copy of confirmation note as to a debt marked appendix 3;
- 3.2.4 A copy of a computer print-out marked appendix 4;
- 3.2.5 An assets betterment statement in respect of the Taxpayer with three schedules, numbered respectively schedule 1, schedule 2 and schedule 7, marked appendix 5.
- 3.3 During the course of the presentation of the Taxpayer's case the following documents were produced and admitted in evidence:
 - 3.3.1 A copy of a letter from central registration Hong Kong Limited to the Taxpayer's authorized representative, which was marked exhibit A-1;
 - 3.3.2 A letter dated 29 March 1988, which was marked exhibit A-2 and refer 3.2.1 above.
 - 3.3.3 A letter dated 22 April 1988 with two-pages of computer print-out annexed, which was marked exhibit A-3;
 - 3.3.4 A sheet of calculations comprising three columns, the first column with Chinese names, the second column with sums of money and the third column with further sums of money being the amount in the second column multiplied by 1.12, which was marked exhibit A-5;
 - 3.3.5 A schedule setting out shares said to be held by the Taxpayer as at 31 March 1976, which was marked exhibit A-6;
 - 3.3.6 A schedule of accounts said to be payable by the Taxpayer as at 31 March 1982, which was marked exhibit A-T;
 - 3.3.7 The original of the confirmation note from Mr A, and refer paragraph 3.2.3 above, which was marked exhibit A-8;
 - 3.3.8 Three pages of bank statements in the name of the Taxpayer as follows:
 - 3.3.8.1 For the period 2 January 1980 to 21 January 1980 which was marked exhibit A-9(i);
 - 3.3.8.2 2 February 1980 to 14 February 1980 which was marked exhibit A-9(ii);
 - 3.3.8.3 2 May 1980 to 2 June 1980 which was marked exhibit A-9(iii);
 - 3.3.9 Photocopy paying in slips for credits to the account of the Taxpayer as follows:

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- 3.3.9.1 dated 16 January 1980 for the sum of \$50,000, which was marked exhibit A-10(i);
- 3.3.9.2 dated 13 February 1980 for the sum of \$50,000, which was marked exhibit A-10(ii);
- 3.3.9.3 dated 22 May 1980 for the sum of \$100,000, which was marked exhibit A-10(iii).
- 3.3.10 Copies of the receipts referred to in paragraph 3.3.2 above together with uncertified English translations thereof which were marked exhibit A-6;
- 3.4 During the course of the appeal the Revenue submitted the following documents which were admitted in evidence:
 - 3.4.1 A copy of the note of interview of 21 December 1982, appendix A of the determination, which was marked exhibit IRD-1;
 - 3.4.2 A copy of the assets betterment statement and all attached schedules, appendix B to the determination, which was marked exhibit IRD-2;
 - 3.4.3 A copy of the Taxpayer's letter to the assessor dated 24 November 1986, which was marked IRD-3;
 - 3.4.4 A copy of the Taxpayer's letter to the assessor dated 23 December 1986, which was marked IRD-4;
 - 3.4.5 A copy of the Taxpayer's letter to the assessor dated 9 November 1987, which was marked IRD-5;
 - 3.4.6 Accounts of Y Company for the year ended 31 March 1982 submitted by the Taxpayer to the Revenue (appendix E1 of the determinations), which was marked IRD-6;
 - 3.4.7 Details of sub-contractors charges for the year ended 31 March 1982 delivered by the Taxpayer to the Revenue (appendix E of the determinations), which was marked IRD-7;
 - 3.4.8 Copies of ledgers, folios 194 and 195, submitted by the Taxpayer to the Revenue, which was marked IRD-8;
 - 3.4.9 Bank statement for March and April 1982 of X Company's account which was marked IRD-9;

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3.4.10 Bank statement for March and April 1982 of Y Company's account which was marked IRD-10;

3.4.11 Bank statement for March and April 1982 of Y Company's account which was marked IRD-11.

4. THE HEARING OF THE APPEAL

4.1 The case for the Taxpayer;

Comment as to the conduct of this appeal by the Taxpayer's authorised representative is made in paragraphs 5.3.6, 5.3.7 and 5.3.8 below. Ignoring the sequence of events referred to therein, the representative handed in a written submission which may be summarised as follows:

4.1.1 Claimed deduction in the opening balance as at 31 March 1976 of \$300,000;

This amount represented shares previously purchased by the Taxpayer. In so far as documentary evidence could now be obtained this comprised the letters from the registrars, exhibit A-1 to A-3 and these were listed in exhibit A-4 the amount being \$215,392 being all the Taxpayer could now trace.

4.1.2 Liabilities to sub-contractors at 31 March 1982, \$2,810,149.74.

During the years 1979 to 1982 the Taxpayer carried on business as the main sub-contractor to one particular client for the performance of building and maintenance works to housing estates. Information had been submitted to the Revenue as to how the Taxpayer made use of the cash flow, the method used in the recording of transactions and how payments to sub-contractors were made. What the Taxpayer could not provide was further evidence to satisfy the Commissioner that these accounts payable should be admitted as deductions. The amount of the accounts payable at 31 March 1982 represents 7.1 times the total payment to sub-contractors. In the ABS, in appendix 5, the larger amount of discrepancies were noted since 1980, 1981 and 1982, that is since the Taxpayer started Y Company.

He questioned whether a business like the business of Taxpayer could be operated without taking advantage of credit? How could the Taxpayer manage to finance his operations to undertake construction work with turnover for over \$10,000,000? These were questions which needed to be considered. From the background the Taxpayer did not have sufficient funds without obtaining credit to finance his business. He was guided by his bankers to make use of the cash flow to earn interest but, as a layman, he had simply ignored the need to keep receipts invoices and acknowledgements of debts at (sic) financial year ends.

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The Taxpayer had an obligation under section 51C(1) of the Ordinance, which was quoted, and he kept records of all income and expenditure by means of a general ledger on a cash receipts basis with a list of accounts payable to the financial year end. It was questioned whether section 51C requires a taxpayer to keep sufficient records of his income and expenditure to enable the assessable profit to be verified as opposed to readily ascertained, for a period of not less than seven years.

Having searched the records as to accounts payable at 31 March 1982 there are certain items of payables, amounting to \$647,935.24, which had not been included in the claim for the deductions. The amounts were verified by the receipts produced, exhibit 6, and these amounts should be deducted.

4.1.3 Investment in Z Company:

It was stated that the Taxpayer had known the lender for a long period of time and that the amounts claimed were now verified by copies of the deposit slips presented as exhibits, refer exhibits A-10(i), A-10(ii) and A-10(iii). The lender had signed a confirmatory note, exhibit A, and the Board was requested to accept this as a loan and a deduction.

4.1.4 Wife's savings from living expenses \$82,572.60

This was saved from the cash payments made by the Taxpayer to his wife for house holding living expenses during the years 1977 to 1982. The amounts of living expenses set out on pages 8 and 9 of the determination were living expenses which included these monthly payments to his wife. The Taxpayer had lived in a low cost housing estate for over fifteen years and his family's frugal style of living warranted the savings made by his wife. During the years 1977, 1978 and 1979 there were practically no discrepancies, as shown in the ABS. Accordingly, there was no evidence to support that the savings of the Taxpayer's wife were derived from the Taxpayer's other sources of income.

4.2 The evidence:

4.2.1 The Taxpayer.

4.2.1.1 He explained the nature of his business, performing work for other contractors as a sub-contractor which involved the purchase of building materials which was funded from payments from the contractor employing him or from loans. He was able to get credit terms from suppliers and these credit terms depended on the credit terms that he had given his employers. Payments were made by cheques and receipts obtained. Receipts were kept as a record and they were kept in bundles, each bundle representing a month. He kept receipts for seven to eight years.

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- 4.2.1.2 His work was in renovation and maintenance. He would receive an order from an employing contractor specifying a time for completion. He employed some labour but he also sub-contracted the work he got. He paid sub-contractors half monthly but if he himself had not been paid he would delay payments to his sub-contractors. Occasionally he would help them financially.
- 4.2.1.3 He paid his sub-contractors out of the payments he received but if he received no payment he would borrow or advance the monies to pay the sub-contractors. Payments were made by cheques but occasionally, cash. Some acknowledged payment on their own official receipts, others wrote out receipts on blank paper. He kept the receipts from the sub-contractors for seven to eight years.
- 4.2.1.4 The large credit at the end of March 1982 were payments received but not paid out to material suppliers.
- 4.2.1.5 According to his records he had paid some \$17,000,000 to sub-contractors but, actually, his liability totalled some \$19,000,000, the difference being owed and unpaid.
- 4.2.1.6 When preparing the management accounts at 31 March 1982 \$2,800,000 was due but unpaid to sub-contractors. He had records. One sub-contractor had completed his work but was unpaid. This sub-contractor, together with other sub-contractors in a similar position, created the total. He still had these records.
- 4.2.1.7 In the tax year 1981/82 he had used as many as ten to twenty different sub-contractors. During this period he and the sub-contractors employed some two hundred workers. He employed foremen to supervise the sub-contractors and they also employed foremen to oversee their own workers. Progress on work was maintained to a schedule which was checked by the client. In this particular year he did many sub-contracts – the maintenance work in a settlement area. He could not operate his business without credit.
- 4.2.1.8 He did not know accounting but employed a bookkeeper whose education standard was up to completion of secondary level.
- 4.2.1.9 From 1977 to 1982 he paid maintenance for his family out of what he collected from others. The amount was just sufficient to cover their expenses. They lived in a low cost housing estate. He knew his wife had saved during the period. Throughout the period to which the ABS related he had received commissions on the introduction of business to others and had won money at the races. To the end of March 1982 the commissions earned amount to about \$1,000,000. He did not know his net assets at the end of March 1982 but the money in the bank, less what he owed, was his own.

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- 4.2.1.10 Under cross-examination:
- 4.2.1.10.1 The witness identified the letters, exhibits A-1, A-2 and A-3 and stated that the market prices were obtained by his authorised representative and were prices as at 31 March 1976.
- 4.2.1.10.2 The witness acknowledged that the proceeds of the sale of shares had been deducted from his assets as listed in the ABS refer second item under the heading 'Less' appearing on the first page of the ABS.
- 4.2.1.10.3 The receipts, exhibit 6, and the list of those constituted his evidence of the amounts due to sub-contractors at 31 March 1982. This was prepared by his employee, his bookkeeper. He was questioned as to the document in Chinese, exhibit A-5 and explained that the first column contained the names of persons of firms and was taken through the list. He was unable to explain the figures or calculations. He also said that the paper had been prepared some two to three months after 31 March 1982.
- 4.2.1.10.4 The witness was referred to the letter of 9 November 1987, appendix C to the determination, and particularly page 2. After questioning which established that the witness did not know how information required was supplied he was referred to exhibit 6 and taken through various exhibits. The witness stated that when the receipt was prepared he would make out a cheque but he could not recollect if he had made out a cheque for several of the receipts put to him.
- 4.2.1.10.5 The witness said that the sum total of these receipts \$647,935.24 was part of the \$2,810,149.24 he was claiming. He was unable to cross-reference payments to the bank statements which had been put in, exhibits A-9(i), (ii) and (iii).
- 4.2.1.10.6 The witness was then questioned about his relationship with Mr A. He said he had known him since about 1976 through business connections, essentially as one of his sub-contractors. He was unable to recall when exhibit A-8 was made although it came into existence after the Inland Revenue had made enquiries. He could not remember when the enquiries were made. The witness's attention was drawn to appendix C to the determination, the letter of 9 April 1987 and paragraph 10, and acknowledged that at the time of his response to that letter he could only give vague details. The witness confirmed that the \$200,000 was advanced to the firm. The witness confirmed that he did not read English and could not read the document and that he thought the document was prepared by his authorised representative.
- 4.2.1.10.7 The witness was questioned as to his need for funds at the time of the loan and by reference to his bank account and the amounts of credit at the time these

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advances were made. The witness could not recollect when the loan was repaid although he stated that this was done in 1983.

4.2.1.10.8 The witness was then questioned as to his wife's savings. Although his wife had not worked since 1982, prior to 1982 she had worked in a factory whose name the witness could not recall although it produced gloves. He had no copies of his wife's employer's returns as to her salary. It was also confirmed that his wife had increased her savings from the house keeping expenses allowed to her by investing in stocks and shares, particularly \$50,900 on 11 July 1980 and \$79,585.70 on 6 August 1980.

4.2.1.10.9 In re-examination the witness stated that he had claimed the deduction of \$2,810,149.74 and he had receipts to justify this and that he could obtain them from his office.

4.2.2 Mr B

4.2.2.1 This witness gave evidence that he had known the Taxpayer for some twenty years and confirmed that he had signed the document confirming the loan to the Taxpayer, exhibit A-8.

4.2.2.2 Under cross-examination he stated that he did not understand English but he had agreed to sign the document at the request of the Taxpayer. He had been told that the Revenue were making enquiries into the transactions between the Taxpayer and himself and the Taxpayer wanted confirmation. He said the content had been explained to him. He said that the cheques were his company's cheques and that he had a personal account and a company account with a bank. He gave the name of his firm, which was a sole proprietorship of his, and which commenced business in the 1970's, he could not be more specific. He had retired around 1982. When asked as the purpose for the loan the witness said that the Taxpayer had obtained a contract and needed funds for liquidity. The loan was interest free. He stated that the loan had been repaid some years ago by a number of payments in 1982 or 1983 but he could not remember precisely how.

4.2.2.3 Under questioning from the Board the witness stated that the confirmation, exhibit A-8, had been signed recently and that he had not checked any records before he signed it. The dates stated were correct according to his recollection and that although he could not remember the date his business started or when he retired he remembered the dates he made the loans.

4.2.2.4 He was asked whether he ever banked with the W Bank and he stated that he had an account with it but he could not recollect whether it was his own or his company's or the dates when the account was in operation although this was in the early stage of his business.

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4.2.3 Mr C

4.2.3.1 This witness gave evidence that he was a plumber, that he had known the Taxpayer personally since 1975 and was friendly with him. He worked for the Taxpayer as a sub-contractor doing plumbing and drainage pipework. He stated that the receipt shown to him was signed after he had received payment.

4.2.3.2 Under cross-examination the witness stated that his business was no longer in operation and that he worked as a casual labourer on a building site. He could not recollect whether the payment was a cash payment or a payment paid by cheque. To the witness's recollection the payments were for plumbing work one at a housing estate but he could not recollect the other.

4.2.4 Mr D

4.2.4.1 This witness gave similar evidence to the preceding witness as to his relationship with the Taxpayer and as to receipts shown to him.

4.3 Concluding submission:

4.3.1 Wife's Savings:

The Board's attention was drawn to the print-out of the bank account, marked appendix 4, refer paragraph 3.2.4 above, which was made up of small amounts excluding the sums referred to in cross-examination of the Taxpayer namely \$10,256.23, \$50,900, \$79,585.70 and \$10,000.

4.3.2 Liability to sub-contractors:

There was evidence before the Board in the receipts for \$647,935.24. The records presented by the Taxpayer could be correlated by reference to bank accounts and this is explained by the Taxpayer having made advances to sub-contractors. The bank account shows withdrawals of an aggregate amount of \$589,686.80. One receipt, that for \$17,486 referred to a bank cheque debited on 3 April 1982 according to the bank statement, exhibit IRD-10 although there is a \$2,000 discrepancy. It was impossible to prove in detail the amounts owed but the amounts allegedly outstanding at 31 March 1982 were outstanding.

4.4. The Revenue submission:

The Revenue handed in a written submission.

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4.4.1 Having identified the sums in dispute and having reviewed the history of the investigation the Revenue's representative went into specific details with respect to the items claimed as follows:

4.4.2 The opening balance

On the basis of accounting for the purchases and sale in the ABS no adjustments were required. By showing 'shares purchased' as a positive adjustment to the discrepancy and 'shares sold' as a negative adjustment the opening and closing balances had been taken into account. Schedule 4 to the ABS detailed shares purchased in the period and schedule 8 detailed shares sold in the period. Although these shares do not exactly cross reference, the gross assets had been reduced by the proceeds of sale of shares proven to have been sold during the period to which the ABS relates. The Revenue also pointed out that no evidence had been adduced to support the alleged value of the shares as at 31 March 1976. The only evidence was that the Taxpayer who thought that the valuation had been prepared by his authorised representatives.

4.4.3 The amount owing to sub-contractors

4.4.3.1 As an initial point the claim of the Taxpayer was that these had been omitted because of the bookkeeping system employed, namely that the bookkeeper had offset these amounts with the Taxpayer's drawings. In the Revenue submission: if this was to be rectified the journal entries would be:

'debit: proprietor's drawings, or work in progress' and 'credit accounts payable'

whereby there would be no difference.

4.4.3.2 The working paper, exhibit A-5, was not explained and, therefore, did not establish anything.

4.4.3.3 No explanation had been offered either by the Taxpayer during his evidence or his authorised representative as to how the receipts exhibited were relevant. It was also pointed out that although the assessor had asked for these receipts by his letter of 9 April 1987, they had not been provided and, in fact, the correspondence between the assessor and the authorised representative disclosed that none were available at the time the questions were raised.

4.4.3.4 Loan of \$200,000:

Having commented that reference to bank accounts showed that the Taxpayer was not short of cash, the representative of the Revenue pointed out that the only dates the witness could confirm were the dates the cheques were paid into

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the Taxpayer's bank account, and supported by the pay in slips exhibit A-10(i), A-10(ii) and A-10(iii), issued by the bank.

The fact that the Taxpayer had established that \$200,000 which had been received from the witness did not establish that this was a genuine loan as opposed to a business receipt. The Revenue pointed out that the Taxpayer's amendment in paragraph 19 of the record of his interview on 21 December 1982 stated 'Caller had made no private loans to or from others except transactions made in the ordinary course of business' (refer to paragraph 9 of appendix A1 to the determination).

4.4.3.5 Wife's savings:

The Revenue submission was that the evidence was that this money had come from monies paid by the Taxpayer to his wife for payment of living expenses. As the Taxpayer had been given full credit for the amounts he had suggested should be deducted in respect of living expenses that was an end to the matter: he had had the benefit of the deduction and to confer an additional deduction with respect to what the wife had saved would be to increase the deduction beyond what it actually should be.

4.4.3.6 The authorities:

The representative of the Revenue referred the Board to D28/88, IRBRD, vol 3, 312. The Revenue requested the Board to consider this case as authority for the proposition that it is for the Taxpayer to maintain proper accounts and if he fails to do so or is unable to prove that his assets betterment statement is incorrect with proper evidence the assessment based on the assets betterment statement must be confirmed.

5. REASONS FOR DECISION

5.1 Burden of Proof

It was for the Taxpayer to satisfy the Board that the Revenue were wrong in failing to take into account the matters referred to in the following paragraph when finalizing his ABS.

5.2 The matter in issue

The Taxpayer's complaints at the appeal related to:

5.2.1 The Revenue's failure to include in the Taxpayer's assets at 31 March 1976 the sum of \$300,000 said to be the value of shares purchased prior to that date.

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- 5.2.2 The Revenue's failure to deduct from the Taxpayer's assets as at 31 March 1982 the sum of \$2,810,149.74 said to represent amounts then due by the Taxpayer to sub-contractors.
- 5.2.3 The Revenue's failure to deduct from the Taxpayer's assets the sum of \$200,000 said to have been borrowed from an old friend in three amounts namely \$50,000 on 16 January 1980, \$50,000 on 13 February 1980 and \$100,000 on 22 May 1980 and said to have been repaid subsequent to 31 March 1982.
- 5.2.4 The Revenue's failure to deduct from the Taxpayer's assets as at 31 March 1982 the sum of \$82,572.60 said to represent savings made by the Taxpayer's wife from the cash payments made by him to her for household and living expenses.
- 5.3 Comment
- Before examining each of the claims in detail, the Board feels obliged to make certain comments.
- 5.3.1 This particular appeal is one of a considerable number of appeals against assessments to additional profits tax based on an investigation by the Revenue of a taxpayer's affairs when, because of the claimed absence of accounting records, the Revenue has been compelled to adopt the ABS method.
- 5.3.2 Several of these cases have been reported and it has been made clear that it is for the Taxpayer to prove that the amounts allegedly disallowed by the Revenue were improperly disallowed.
- 5.3.3 An investigation of a taxpayer's affairs is a time consuming exercise and from the documentation which accompanies the determinations it can be seen that the Revenue are extremely careful to endeavour to investigate fully each claim made by a taxpayer.
- 5.3.4 In this particular appeal the investigations started in December 1982 and three of the matters in issue were addressed in paragraphs 9, 10 and 21 in the letter of 9 April 1987, appendix C to the determination. No meaningful attempt was made by the Taxpayer to respond to this letter and, as will be apparent from comments made in subsequent paragraphs of this decision, at the hearing no meaningful attempt was made to establish the validity of the claims.
- 5.3.5 The Board would comment that it is not unreasonable for the Board to assume that a taxpayer has been advised by his representative as to the evidence which a Board is entitled to expect to be adduced if the Board is to be able to determine whether or not a taxpayer has been improperly taxed. Although the

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assembling of evidence may be time consuming and although adducing such evidence before the Board may also be time consuming, that is what has to be done. An appeal pursued without evidence to support the claims is a waste of time and, no doubt, is a costly exercise for the appealing taxpayer and, accordingly, an exercise which cannot be justified.

5.3.6 In this particular appeal the Taxpayer's representative commenced with a statement which reiterated the objections raised during the course of the investigation and he submitted documents on the assumption that the mere submission of documents would satisfy the Board that the Revenue were incorrect initially and that that error was perpetuated by the Commissioner in the determinations. At the conclusion of his submission the Taxpayer's representative indicated that he was not calling any witnesses.

5.3.7 The Board felt obliged to point out that the assertion of a fact in a submission is not evidence and for a Board to be able to take notice of the content of a document the content must be proved by a witness. The Taxpayer's representative was invited to consider his position and, additionally, was requested by the Board to identify those parts of the determinations with which the Taxpayer took issue and to explain to the Board why the Taxpayer was aggrieved.

5.3.8 As a result of the Board's intervention the Taxpayer adduced the evidence summarised in paragraph 4.2 above. However, his representative did not attempt to identify the parts of the Commissioner's determination with which he disagreed or to explain why he disagreed.

5.3.9 It is not for the Board to advise those taxpayers who are represented as to what is required of them. However, had the Board not intervened it would have had no alternative but to dismiss the appeal on the basis that no evidence had been adduced in support of the appeal in which event the Taxpayer would have justifiably felt aggrieved.

5.4 The Shareholding

5.4.1 The Taxpayer produced letters from the registrars of four companies, exhibits A-1, A-2, A-3 and A-4, which disclosed shareholdings in six companies. This evidence is accepted by the Board.

5.4.2 He also produced a schedule, exhibit A-6, valuing the Taxpayer's shareholdings in these companies, as at 31 March 1976 at \$215,392. The Taxpayer did not know how these values were calculated. The Board does not consider it proper to accept the value of these shares as at 31 March 1976 as having been proved. To do so would not have been difficult but it was not done.

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5.4.3 The Taxpayer said that the shares were sold prior to 31 March 1982 but produced no evidence to establish this. Having had the registrars identify his shareholdings on 31 March 1976 he could have had the registrars identify when the shares were transferred out of his name. He did not attempt to do so.

5.4.4 In the absence of evidence as to the material facts the Board has no choice but to reject this claim by the Taxpayer.

5.5 The amounts due to sub-contractors at 31 March 1982

5.5.1 The Taxpayer claimed that as at 31 March 1982 he owed sub-contractors \$2,810,149.74 and that this should be deducted from his assets. In his evidence he produced 19 receipts, variously dated 1, 2 or 3 April 1982, and a schedule, marked exhibit A-7, which totalled these 19 receipts at \$647,935.24. Two witnesses were called to identify their receipts. One witness identified two receipts one for \$13,977.48 and one for \$5,270. The other identified a receipt for \$13,005. The sum total of the evidence adduced to support this claim for a deduction of \$2,810,149.74 was the Taxpayer's statement that he had not paid his sub-contractors \$2,810,149.74 at 31 March 1982 and that he had only been able to find receipts for \$647,935.24 of this.

5.5.2 In his closing submission, the authorised representative said that it was impossible to prove in detail the amounts owed by the Taxpayer to sub-contractors at 31 March 1982 but the amounts of \$2,810,149.74 were outstanding.

5.5.3 The evidence before the Board may be summarised as follows:

5.5.3.1 The investigation of the Taxpayer commenced in December 1982. On 9 April 1987 the Revenue addressed a letter to the Taxpayer and a copy of this letter is at appendix C to the determination of the Commissioner. Paragraph 9 of this letter reads as follows:

‘(9) A schedule showing the following details for each of the sub-contractors as stated in paragraph (4) of your representative letter dated 23 December 1986:

- (a) Copy of the invoices issued by the sub-contractor in respect of the balance outstanding as at 31 March 1982.
- (b) The date of subsequent settlement and the mode of payment.
- (c) The account number of the bank account from which the payment was made and the cheque number concerned.

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- (d) Copy of the receipt issued by the sub-contractor.
- (e) Copy of the confirmation issued by the sub-contractor regarding the balance outstanding as at 31 March 1982.
- (f) A description of the contract and the construction concerned.
- (g) Your explanation of how the construction fees received or accrued at 31 March 1982 in respect of the contracts as mentioned in (f) above have been reflected in the accounts of [Y Company] for the year ended 31 March 1982 and the amounts concerned.
- (h) Your confirmation if these liabilities to sub-contractors corresponded to work-in progress not yet accounted for in the accounts of [Y Company] for the year ended 31 March 1982.'

5.5.3.2 The Taxpayer made no meaningful attempt to respond to this request for information.

5.5.3.3 In his evidence the Taxpayer stated that he retained receipts in bundles by reference to months and kept records for seven to eight years. On this basis, receipts for expenditure incurred in the year ended 31 March 1982 were, at the time the letter referred to in paragraph 5.5.3.1 was written, and would still be in his possession.

5.5.3.4 Amongst the documents produced at the appeal were unaudited accounts of Y Company for the year ended 31 March 1982. Including in the working account for the year ended 31 March 1982 was the expenditure of \$19,952,667 in respect of sub-contractors' charges.

5.5.3.5 Appendix E to the determination is a schedule listing the Taxpayer's sub-contractors and the amounts they had earned in the year 1981/82. This schedule totals \$19,952,666.61. For this schedule to be prepared the Taxpayer must be deemed to have known the value of the work he had contracted out. If the Taxpayer had that information this Board cannot accept that he did not know which of this work he had paid for and which he had not.

5.5.3.6 The witnesses called by the Taxpayer were, no doubt, paid in April 1982 for work performed prior to 31 March 1982 but, obviously, they were unable to say whether or not the amounts due to them formed part of this \$2,810,149.74.

5.5.4 It is totally unsatisfactory for the Board to be requested to make an adjustment when the person requesting the adjustment cannot himself identify what was overlooked and what was not.

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5.5.5 The Taxpayer has not proved any part of this claim to the satisfaction of the Board. Accordingly, this claim is dismissed.

5.6 Deduction for loan for investment

5.6.1 No evidence was adduced from the person or company with whom this investment was made. No photocopy of a cheque for the amount allegedly invested was produced nor was any receipt for the alleged investment. The evidence before the Board was as follows:

5.6.1.1 At the hearing the Taxpayer produced three photocopy paying-in slips to support the deposit on the days specified of the three sums referred to in paragraph 2.3 above and these were admitted as exhibits A-10(i), A-10(ii) and A-10(iii), respectively. These paying-in slips state that the cheques paid in were cheques drawn on the W Bank.

5.6.1.2 The Taxpayer also produced three photocopy bank statements being an account of Y Company with a bank, for:

5.6.1.2.1 The period 2 to 21 January 1980, exhibit A-9(i), showing the deposit on 16 January 1980 of \$50,000, and refer exhibit A-10(i).

5.6.1.2.2 The period 2 to 14 February 1980, exhibit A-9(ii), showing the deposit on 16 January 1980 of \$50,000, and refer exhibit A-10(ii).

5.6.1.2.3 The period 2 May to 2 June 1980, exhibit A-9(iii), showing the deposit on 16 January 1980 of \$50,000, and refer exhibit A-10(iii).

5.6.1.3 The Taxpayer also produced exhibit A-8, an undated document in English signed by a person said to have been the lender confirming the dates of payment and stating that the advances were outstanding as at 31 March 1982.

5.6.1.4 The person said to be the lender was called as a witness. Under cross-examination this witness stated that:

5.6.1.4.1 he did not understand English and had agreed to sign this document at the request of the Taxpayer. He had been told that the Revenue has been making enquiries and that the Taxpayer wanted confirmation;

5.6.1.4.2 the cheques were his company's cheques and he had a personal account and a company account with a bank;

5.6.1.4.3 the Taxpayer had told him that he had obtained a contract and needed funds for liquidity;

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- 5.6.1.4.4 the loan was interest free and had been repaid some years ago by a number of payments in 1982 or 1983.
- 5.6.1.5 This witness was extremely vague about everything other than the three amounts referred to in exhibit A-8. He was asked whether he had ever banked with the W Bank, the Bank on which the three cheques were drawn, refer exhibits A-10(i), A-10(ii) and A-10(iii), and stated that he had an account with it but he could not recollect whether it was his own or his company's or the dates the account was in operation although he said this was in the early stage of his business, which he said he established in the 1970's.
- 5.6.2 The Board is obliged to consider the Taxpayer's claim that the borrowing was made to effect an investment in the light of the fact that the amounts allegedly borrowed were advanced over a period of 4 months in conjunction with the lender's statement that the explanation given to him by the Taxpayer was because of his need for liquidity to perform a contract.
- 5.6.3 The Revenue had fully explored this claim by the Taxpayer before issuing the assessments to additional profit tax. In the letter dated 9 April 1987 referred to in 3.2.5 above the Taxpayer was asked for specific details of this loan. The paragraph in the letter reads as follows:
- ‘ (10) The following details in respect of the investment of \$200,000 in a company:
- (a) Name and address of each of the lenders and the amount borrowed from each of them,
- (b) Terms of repayments.
- (c) Copy of the loan agreements.
- (d) Date of receipt of the loans.
- (e) The account number of the bank account into which the moneys received were deposited.
- (f) An explanation of how the loans were repaid by you together with a schedule showing the date of repayment, the amount repaid, the name of the recipient, mode of repayment and the account number of the bank account from which the moneys were withdrawn.’
- 5.6.4 In spite of that letter the Taxpayer apparently did nothing until the hearing of the appeal was approaching when the document signed by the lender was

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prepared and obtained and when the photocopy paying-in slips were obtained. It is obvious that the documents could have been obtained and submitted to the Revenue within a reasonable period of the request in the letter of 9 April 1987 but no explanation was put forward as to why this was not done.

5.6.5 The photocopy bank statements referred to in 3.3.2 above show that at the close of business on 15 January 1980 the Taxpayer's credit balance was \$372,811.63. After the deposit of two cheques, including the cheque for \$50,000 to which exhibit A-10(i) relates, and after eight cash withdrawals and one cheque withdrawal, at close of business on 16 January his credit balance was \$398,039.83. Exhibit A-9(ii) shows that on 12 February 1980 the account was overdrawn \$14,405.49. Two cheques were deposited, one being for \$50,000 to which exhibit A-10(iii) relates, and one for \$50,125; after four cash and four cheque withdrawals at close of business on that date the account was in credit in the amount of \$21,119.51. The third statement, exhibit A-9(iii), shows that on 19 May the account was in credit to the extent of \$12,738.55 and after the deposit of the cheque to which exhibit A-10(iii) relates the account was in credit in the amount of \$112,738.55. There were various withdrawals between 23 May and 2 June and credits of approximately \$15,000. At close of business on 2 June 1980 the account was in credit in the amount of \$84,146.49.

5.6.6 If the advance had been made for the purposes of an investment it would have been reasonable to expect the withdrawal of the borrowings for payments in respect of the investment. The bank account does not show any immediate or proximate withdrawal: rather the deposits were reduced by small withdrawals. The use to which these deposits were made is more consistent with the lender's explanation that the Taxpayer required the funds for liquidity purposes than investment purposes.

5.6.7 In the Board's view the documentary evidence produced by the Taxpayer does not establish that the borrowing was made for investment purposes: if the documentary evidence establishes anything it is that the Taxpayer used the amounts borrowed for business purposes. Accordingly, this claim is disallowed.

5.7 Wife's savings:

5.7.1 The Taxpayer submitted to the Board a copy of transactions on an account between 1 April 1976 and 5 January 1982, showing an opening balance of \$4,125.05 and a closing balance of \$62,158.30. As interest is credited from time to time it is assumed that the account is a savings account. No independent evidence was adduced to prove the source of this copy document or to establish the content was correct or to identify whose account it was.

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- 5.7.2 The Taxpayer state that this document was a copy of the transactions on his wife's bank account although there is nothing on the document to verify this. The Board was asked to accept this.
- 5.7.3 The witness also stated that the source of the sums deposited, less certain large sums, was the housekeeping allowance and the Board was asked to accept this.
- 5.7.4 The Taxpayer's wife was not called as a witness. The Board is asked to accept the Taxpayer's explanations as to how his wife came into possession of the amounts from time to time deposited in an account he said was that of his wife.
- 5.7.5 In his closing submission the Taxpayer's authorised representative told the Board that the amount claimed was less the deposits said by the Taxpayer to be the proceeds of the sale by his wife of shares she had purchased. No attempt was made to reconcile this submission with the bank statement. It is not for the Board to attempt to work out whether this statement is true or even plausible. This is a matter for evidence.
- 5.7.6 What evidence there was with respect to this account was entirely hearsay and the Board does not consider it proper to upset the determination with respect to this claim on hearsay evidence.

6. DECISION

For the reasons given the Board dismisses the appeal in its entirety.