

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D20/94

Profits tax – appeal not genuine – costs awarded.

Panel: Ronny Wong Fook Hum QC (chairman), Archie William Parnell and Ronald Leung Ding Bong.

Date of hearing: 25 April 1994.

Date of decision: 21 June 1994

The taxpayer appealed against an assessment to profits tax and claimed that certain expenses should be allowable deductions. At the hearing of the appeal no evidence was called. It was apparent to the Board that some of the expenses claimed were not genuine expenses because they appeared either to be for the personal use of an individual or were inappropriate for the purpose claimed or were incurred after the relevant period.

Held:

The Board dismissed the appeal and took the view that the appeal was an abuse of the appeal machinery because the taxpayer had no genuine wish to pursue the appeal.

Appeal dismissed with \$5,000 being costs of the Board awarded.

Wong Kuen Fai for the Commissioner of Inland Revenue.

Young Wai Ching for Messrs Y K Lee & Co for the taxpayer.

Decision:

I. THE FACTS:

1. The Taxpayer is a private company incorporated in Hong Kong in 1981. In the report of its director for the period 27 March 1985 to 31 March 1986, the Taxpayer stated that it had commenced business in early 1985 and that its business was in the 'provision of management services in respect of concert and show'.
2. At the material times, the following persons were directors of the Taxpayer:

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| Name | Date appointed | Date resigned |
|-------------|-----------------------|----------------------|
| Mr A | 1982 | 1985 |
| Mr B | 1982 | 1986 |
| Miss C | 1985 | - |
| Company A | 1986 | - |

3. Miss C is a performer in Hong Kong.
4. Upon the Taxpayer's failure to submit its 1985/86 profits tax return, the assessor raised an assessment under section 59(3) of the Inland Revenue Ordinance as follows:

| | |
|---------------------|-------------|
| Assessable Profits | \$2,000,000 |
| Tax Payable thereon | \$370,000 |

5. The Taxpayer through its [then representative] objected to this assessment on the ground that it was excessive. In support of its objection, the Taxpayer submitted its 1985/86 profits tax return together with financial statements and computations. According to those submissions of the Taxpayer:
 - (i) Turnover of the Taxpayer was said to amount to \$2,716,000. In its letter of 30 November 1988 the [then representative] explained that 'All the income were received from an entertainment company, the Company B'.
 - (ii) A sum of \$1,471,848 was said to have been incurred for 'Performance expenses W' in respect of the shows performed by Miss C in Company B.
 - (iii) A sum of \$181,000 was said to have been incurred by way of 'Performance expenses X' again presumably for the shows performed by Miss C in Company B.
 - (iv) The [then representative] as auditors of the Taxpayer qualified its account by making it clear that the relevant supporting papers in respect of fee income and 'Performance expenses W' were not available to them for their inspection.
6. The Taxpayer entered into 2 contracts with Company B:
 - (i) The first contract entered in 1985 was for not less than 25 shows to be performed in July that year at the rate of \$47,000 per show. This sum

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was to include 'Performance expenses Y'. A total of 27 shows were performed by Miss C in 1985.

- (ii) The second undated contract was for 14 shows in December 1985 at the rate of \$100,000 per show. This sum was to include 'Performance expenses Z'.
7. Miss C herself entered into a contract in June 1984 with Company C for a period of 24 months from June 1984. Under this contract, Miss C was to be paid \$1,700 per show and \$10,000 per one hour performance. She was paid a total of \$15,300 during the relevant period. This sum would not appear to form part of the Taxpayer's turnover.
8. The Commissioner disallowed 'Performance expenses X' for 2 reasons:
- (i) The Taxpayer had not adduced any evidence to show that it had incurred the expense.
 - (ii) Under the 2 contracts with Company B, the Taxpayer was not responsible for 'Performance expenses X'.
9. The Commissioner was only prepared to allow a deduction for 'Performance expenses W' equal to one-third of the amount claimed because:
- (i) Most of the invoices produced by the Taxpayer were in the name of Miss C.
 - (ii) Some of the invoices bear dates earlier than 1985 when Miss C was appointed a director of the Taxpayer.
 - (iii) Some of the expenses were incurred before the Taxpayer's contracts with Company B.
 - (iv) Part of the expenses were incurred for Miss C's performance at Company C.
 - (v) The Taxpayer did not demonstrate actual payment in respect of some of the suppliers.

II. THE COURSE OF THE APPEAL

1. The Commissioner's determination was dated 6 December 1993. The Taxpayer gave notice of appeal by their letter dated 20 December 1993. The Board fixed 11 April 1994 for hearing of the appeal.

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2. By letter dated 7 March 1994, the Taxpayer's current representative Messrs Y K Lee & Co requested re-arrangement of the hearing date. By further letter dated 25 March 1994, Messrs Y K Lee & Co pointed out that '[the Taxpayer] is unable to ascertain the period of [Miss C's] availability, please therefore re-schedule the hearing at your convenience, if our client cannot attend the hearing at that time, she is going to give up the appeal.'
3. The Board re-scheduled the appeal to be heard on 25 April 1994. By letter dated 21 April 1994, Messrs Y K Lee & Co sought further adjournment of the hearing. This request was refused as it is imperative that appeals before this Board be disposed of as soon as possible and it is wholly undesirable to leave matters pending the convenience of a director of the Taxpayer.

III. THE HEARING BEFORE US ON 25 APRIL 1994

1. None of the directors of the Taxpayer attended the hearing. The appeal was handled by a Mr Young, an audit supervisor of Messrs Y K Lee & Co. Mr Young obviously had no personal knowledge of the affairs of the Taxpayer. Whilst we appreciate the valiant efforts he made to assist us, we were perturbed by the somewhat cavalier attitude of Messrs Y K Lee & Co to delegate an appeal of this nature to a subordinate without the attendance of a principal.
2. In relation to 'Performance expenses X', no evidence was tendered before us to deal with the Commissioner's objections. We have no alternative but to conclude that the Taxpayer has not discharged its onus to demonstrate that the same had indeed been incurred.
3. We share the Commissioner's disquiets in relation to the invoices tendered by the Taxpayer in support of the deductions for 'Performance expenses W'. We have other reservations:
 - (i) A sizeable portion of the invoices were issued by Boutique M in the name of Miss C. They bear all the hall-marks of clothings bought for her personal use.
 - (ii) There are invoices issued by other boutiques in respect of men's wears.
 - (iii) Some of the invoices were issued by a department store well after conclusion of the performances at Company B.
4. We did not have the benefit of any explanation from the Taxpayer on those areas of concern. The burden rests squarely on the Taxpayer and the Taxpayer did not see fit to discharge it.

IV. OUR DECISION

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1. We dismiss the appeal of the Taxpayer and affirm the determination of the Commissioner dated 6 December 1993.
2. We take the further view that the Taxpayer has abused the appeal machinery by mounting an appeal which they have no genuine wish to pursue. We further order the Taxpayer to pay costs of these proceedings in the sum of \$5,000 under section 68(9) of the Inland Revenue Ordinance.