INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D25/90

Profits tax – partnership alleged by Commissioner – insufficient evidence – onus of proof – section 68(4) of the Inland Revenue Ordinance.

Panel: Howard F G Hobson (chairman), Glen C Docherty and Frank Wong Kuen Chun.

Dates of hearing: 25, 26 and 27 June 1990.
Date of decision: 26 July 1990.

The taxpayer and her husband were alleged by the Commissioner to have been carrying on some undisclosed business in partnership with each other. The taxpayer appealed to the Board of Review against a determination which had upheld the assessor's decision that there was an undisclosed partnership. At the hearing of the appeal before the Board of Review a preliminary issue arose with regard to the onus of proof. The taxpayer submitted that the provisions of section 68(4) of the Inland Revenue Ordinance did not apply in cases such as the present case. The representative for the Commissioner conceded the appeal.

Held:

The Board annulled the assessments and ruled that it was not appropriate for the onus of proof to be on the taxpayer because the matter might be challenged in the District Court in due course when it came to collect the tax.

Appeal allowed.

Cases referred to:

CIR v Four Seas Co Ltd [1961] AC 161
Ng Chun-kwan v CIR 1 HKTC 636
CIR v Choy Sau Kam Chan Yun 2 HKTC 10
CIR v Lai Yin Ha 2 HKTC 374

Wong Chi Wah for the Commissioner of Inland Revenue.
Wong Po Hoi instructed by Shaw Ng & Ma for the taxpayer.

Decision:

This appeal concerns profits tax assessments raised jointly on the Taxpayer (Madam X) and her husband (Mr Y) for the six years 1981/82 to 1986/87 as confirmed by the Acting Commissioner of Inland Revenue ('ACIR') in his determination following objection by Madam X.

It would appear to be common ground that Madam X and Mr Y are and were at all material times married but they have been separated since 1984 when Mr Y went to live in Taiwan and he has taken no part in the Inland Revenue Department's interviews of Madam X. Seemingly he has not been prepared to co-operate with Madam X, who it would appear from statements she made to the Inland Revenue Department referred to in the determination, says her husband deserted her. For reasons which appear later, the facts recited in the determination were not debated, those facts however do suggest that:

(a) Mr Y had been in businesses in Hong Kong, some as sole proprietor and some in partnership though not on the face of it with Madam X; and

(b) Madam X had also been involved in various businesses, some as sole proprietor and some as a partner though again not, on the face of it, with her husband.

The Revenue conducted an enquiry into Madam X's tax affairs, obtaining copies of bank accounts. Attached to the ACIR's determination is a copy statement of an account with the ABC Bank (herein 'the attached statement') which shows a very considerable number of deposits over a relatively short period of time in 1983/84, that account however is in Madam X's own name.

In a statement, confirmed as correct by Madam X, she acknowledged having bank accounts in the joint names of herself and Mr Y but maintained that the funds therein were mainly hers. No copy statements of these joint accounts are attached to the determination. Madam X also acknowledged that some (unspecified) accounts had been converted to her sole name. It is clear from the determination that Madam X has throughout the Revenue's enquiries maintained that she was never in business partnership with her husband and this stance is reiterated in the grounds of appeal. We quote here the reasons given by the ACIR not accepting this assertion by Madam X:

> ' On an examination of the joint bank accounts of the two persons it is clear that very substantial amounts of money have been received and disposed by Mr Y and Madam X. No evidence has been adduced to prove to me that the accretion in their wealth can be attributable to private, non-taxable sources. Additionally I am of the view that the quantum of deposits to the bank accounts are far in excess of what might be explainable by undisclosed salaries or wages. In my opinion an unregistered and undisclosed business or trade has been carried on and in view of the fact that Madam X and Mr Y have both actively used the

> bank accounts I do not consider it unreasonable to conclude that such business was carried on by Mr Y and Madam X in partnership. I have noted Madam X's claims as to her marital status, but it is clear that whether a partnership is or is not carried on is a question of fact and whether or not any two "partners" are married or not is irrelevant to the matter.'

On reading the determination it appeared to the Chairman having regard to section 4(1) of the Partnership Ordinance that even accepting that the attached statement related to an account which had at one time been a joint account nevertheless without further explanation that alone would not constitute evidence of partnership, regardless of whatever support it might lend to the proposition that Madam X was conducting business or businesses on her own account or with persons other than Mr Y. Accordingly, on commencing the hearing the Chairman, having conferred with the members of the Board, advised the representative of the Commissioner and Counsel for Madam X that the Board wished to be addressed on that subject and the consequences should the Board conclude that there was insufficient evidence of a partnership.

At that juncture Madam X's Counsel raised the following preliminary issue.

PRELIMINARY ISSUE

Counsel submitted that notwithstanding the provisions of section 68(4) of the Inland Revenue Ordinance the onus of proving that the alleged partnership existed was upon the Revenue. His starting point was the fundamental principle that the:

> ' proof lies upon he who affirms, not upon him who denies; since, by the nature of things, he who denies a fact cannot produce proof.' (Blacks Law Dictionary fourth edition)

He then referred us to a passage from Albert Kiralfy's publication entitled 'the Burden of Proof', thus

> ' In a tax appeal the appellant is appealing against an assessment made on him by an Inspector of Taxes in accordance with the information provided in the return made by the taxpayer. Where, however, it appears that there are profits in respect of which tax is chargeable and which have not been included in the return, or if the inspector is otherwise dissatisfied with the return then he may make an assessment to the best of his judgment pursuant to Taxes Management Act 1970, section 29. In any event the taxpayer ends up as the plaintiff in a tax appeal and consequently the onus of proof is on him.
>
> Where the case involves an allegation of fraud, neglect or wilful default against the taxpayer, the burden of the proof is put on the Crown to establish a prima facie case sufficient to get leave for making an assessment out of time (see Taxes Management Act 1970, sections 36-37). Equally in an appeal against an

assessment under Taxes Management Act 1970, sections 36-37 the onus is on the Crown to establish fraud, wilful default or neglect.

This short account of the rules relating to the legal burden of proof in tax appeals disguises the extent to which, especially in cases where the taxpayer is left to prove a negative, the evidentiary burden may rapidly shift to the Crown.'

As regards section 68(4), he argued that he was not submitting that the assessment was 'incorrect' and went on to refer us to the following cases which bear upon the meaning of that word:

(a) CIR v Four Seas Co Ltd [1961] AC 161 wherein (at page 170) Lord Devlin, delivering judgment on behalf of the Privy Council, said:

> ' Their Lordships are disposed to think that the right interpretation of this group of sections in the light of the definition of "person" as including partnership requires the partnership to be treated as a separate entity for all three purposes of charge, assessment and recovery. But the only one of these three that it is strictly necessary for them to consider in order to decide this case is assessment. For the relevant words in section 19(1), which governs the point, are "the assessable profits of such person." Their Lordships cannot interpret section 22 in any other way than to say that where there is a partnership, the partnership is the person who is assessed.'

(b) Ng Chun-kwan v CIR 1 HKTC 636 where the Counsel for Madam X considered the following quotation from the judgment of Briggs C J to be material:

> ' Section 75 of the Ordinance is quite another matter. It deals with the recovery of the tax and not with assessments at all. The wording of sub-section (4) of the section wraps up all the objections which can be made to the assessment. This is not to say that there is no defence to a claim for tax brought by the Commissioner. There may be question as to the identity of the taxpayer for example. As I see it section 75 of the Ordinance confers a limited, in fact a very limited, jurisdiction on the District Court rather than limits the jurisdiction of the courts as a whole.'

The Board believes the next paragraph has some bearing:

> ' The Ordinance therefore carefully differentiates between assessment and tax. Objections to the former are dealt with by a Board of Review and the Supreme Court – objections to the tax are dealt with by the District Court. I do not see how it can be suggested that matters for

which an avenue of appeal is provided can be raised by way of a defence in another court.'

As also this passage from the judgment of Huggins J:

'Mr Johnson concedes that the Appellant would be able to require a District Judge to scrutinize any certificate issued under section 75(3) which might be tendered in evidence and that the court might inquire into the identity of the taxpayer. As to the certificate, this concerns the admission of evidence and is not a matter which could be pleaded by way of defence anyway, but as to the point of identity I understand counsel to be conceding that a defendant may deny that he has been assessed. He did not seem to be prepared to go further.'

(c) CIR v Choy Sau Kam Chan Yun 2 HKTC 10 and CIR v Lai Yin Ha 2 HKTC 374 which so far as we are concerned merely acknowledges the comment of Briggs C J, as to the possibility of a defence relating to identity, mentioned above.

Counsel then produced a copy of a decision handed down (the copy does not disclose the date) in the District Court in an action brought by the CIR against a party for payment of the taxes. Evidently the CIR had applied to set aside the defence on the grounds that in effect it implied that the tax was 'incorrect'. The District Judge apparently accepted the defendant's argument that the defence did not allege that the tax was incorrect rather the defence was that the assessed party did not exist, he therefore dismissed the Revenue's application – 'the question of whether the person in the form of the partnership exists or not is a matter of fact to be tried'. We were advised that that decision is being appealed.

Having heard Madam X's Counsel, we invited the Revenue's representative to reply on the issue of onus of proof and adjourned for a short while for his benefit since he had not been alerted to the possibility that this point might be taken as a preliminary issue. In the result however, he did not address the point. All he felt able to say was that during enquiries of Madam X the assessors had reached the conclusion that there was a partnership and he implied that he would be adducing evidence. After conferring with the members of the Board, the Chairman ruled that the burden was upon the Revenue to produce prima facie evidence that the alleged partnership existed.

We thereupon adjourned until the following day.

On the resumption, the CIR's representative said he would no longer be resisting the appeal and invited us to annual the assessments, indicating – though it does not directly concern us – that the Revenue were considering raising assessments upon Madam X in her own capacity.

We therefore annulled the assessments concerned and by this decision confirm such annulment.

For the sake of completeness, we should add that the Chairman's ruling on the onus of proof was given in the absence of any considered counter – argument by the CIR's representative. We do not think the representative is in any way to blame for this, he is not a lawyer and cannot be expected to deal with legal issues of this kind. It is possible that if comprehensive argument had been made concerning both the Partnership Ordinance and the reason for the distinction between on the one hand section 75(4), which debars a defence to the collection of tax on the grounds that the tax is incorrect but which by virtue of the decisions referred to would seem to admit a defence as to identity (or non-existence in this case), and on the other hand section 68(4), which places the burden of proof that an assessment is incorrect upon the taxpayer, a different ruling may have been reached. However, it would seem bizarre that due to section 68(4) a Board (which is the final arbiter on matters of fact) should feel bound to conclude that a partnership exists and yet its decision could be rendered ineffectual if at the collection stage a judge of the District Court were not satisfied that the Revenue has adduced sufficient evidence of the alleged partnership. A very confused state of affairs would have occurred if the District Court, having heard whatever evidence the Revenue adduced at a trial taking place before the Board gave its decision, had found in favour of the defendant, in a reserved judgment published after the Board's hearing, whereas this Board had meanwhile upheld the assessment for tax which could not be recovered. We acknowledge that from a practical viewpoint such confusion is unlikely to arise.

Counsel for Madam X wished us to note that having been confronted with the initial dilemma, the Revenue had behaved with extreme fairness and had given Counsel and his colleagues everly consideration in every respect.