

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D25/93

Procedure – request for adjournment after case set for hearing – whether adjournment should be granted.

Panel: William Turnbull (chairman), John C Broadley and Nicholas Ian Billingham.

Date of hearing: 2 June 1993.

Date of decision: 20 September 1993.

The taxpayer had appealed against a determination of the Deputy Commissioner. The case was set for hearing in the usual way. Ten days before the case was due to be heard and after previously confirming that Counsel had been briefed, the tax representative wrote to the Board of Review informing the Board that the Counsel who had been retained was not able to handle the case because of another urgent case and would not be free to handle the case for some months. As Counsel had already been extensively briefed an adjournment was requested.

The Board was not able to vacate the dates and fix another case for hearing. The Board was duly convened when the tax representative appeared before the Board without his solicitor or Counsel and indicated that he wished to have the case adjourned.

The Board requested either the solicitor or the Counsel having the conduct of the case to appear before it. The solicitor then appeared before the Board, accepted full responsibility for what had happened and explained the circumstances.

The Board was mindful of directing that the case should proceed but agreed to the adjournment because of the prejudice which would be caused to the taxpayer. An adjournment was accordingly granted.

H Bale for the Commissioner of Inland Revenue.

Robert Lew of Messrs James Lew & Co for the taxpayer.

### Ruling:

This is an appeal by a corporate taxpayer against a profits tax assessment wherein the assessor has refused to allow a depreciation allowance on certain alleged plant and machinery. In summary, the Taxpayer purchased the roof of a building on which was situate a metal frame structure with a neon sign. The Taxpayer claimed the entire cost of purchasing the roof as being the cost of plant and machinery on which the Taxpayer was

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allowed to claim depreciation allowances. The assessor rejected this claim. The Taxpayer argued that the metal structure and neon sign was attached to the roof in such a way that the entire neon sign, metal structure and roof were one composite whole and could not be separated for tax purposes. The matter was referred to the Deputy Commissioner who upheld the assessment and rejected the argument of the Taxpayer but in his determination dated 26 February 1993 indicated that if the metal structure and neon sign were to be considered separately from the roof of the building it might be the case that a plant or machinery allowance could be permitted.

Messrs James Lew & Co, certified public accountants (The CPA) by letter dated 25 March 1993 gave notice of appeal on behalf of the Taxpayer to the Board of Review against this determination by the Deputy Commissioner and the grounds of appeal are as follows:

‘The issue in dispute is that the Taxpayer company has sought to claim depreciation allowances pursuant to section 37(1) of the Inland Revenue Ordinance on the capital cost of an asset, being a structure located on the roof top of three buildings, collectively known as (XYZ building), displaying the advertising sign ‘ABC’ for which the company paid \$15,000,000. The Commissioner has denied this claim.’

After setting out the amount of tax in dispute, the letter went on to say as follows:

‘The ground of appeal is that the roof and the advertising sign as defined in the Commissioner’s determination properly constituted plant and machinery within the meaning of section 37 of the Inland Revenue Ordinance, chapter 112, and the Commissioner erred insofar as he determined otherwise and/or rejected the Taxpayer’s contentions.’

On 26 March 1993 a letter was sent by the Clerk to the Board to the Taxpayer’s representative asking for particulars with regard to routine matters such as the expected length of the hearing, whether any witnesses would give evidence, etc. This letter was in standard form and a copy was sent to the Taxpayer.

The Clerk to the Board convened a board to hear the appeal and duly gave notice dated 31 March 1993 to the Taxpayer that the appeal had been set for hearing commencing 9:30 am on 2 and 3 June 1993. A copy of this notice was sent to the CPA.

By letter dated 16 April 1993 the CPA wrote to the Board in the following terms:

‘In response to your letter of 26 March 1993, please be informed that:

1. It is estimated that the appeal can be completed in two sessions.

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2. The appeal will be conducted by Counsel, Mr X who is briefed by Mr Y of solicitor firm B.
3. The witness will likely be a representative of an appraisal company. The name of the representative is not known at this time.
4. It is not expected that an interpreter will be required.'

This letter dated 16 April 1993 was copied to Mr Y of solicitor firm B representing the Taxpayer and Mr X, the Counsel instructed on behalf of the Taxpayer.

The next event so far as the Board was concerned was the receipt on 21 May 1993 of a letter dated 20 May 1993 written by the CPA which the letter was in the following terms:

'We have just been informed by our Counsel, Mr X, who was engaged to appear on behalf of the abovementioned company in the Board of Review hearing to be held on 2 and 3 June 1993, that he has an urgent case to attend to on those particular days. Mr X estimates that he will not be able to free up any time until August 1993.

As our solicitors have briefed Mr X extensively on this case and in order to avail the company of the best representation over a matter of considerable sum, we respectfully request the Board of Review to grant us an extension, until sometime in August, to hear our appeal.'

Because of the short time between the receipt of this letter and the date fixed for the hearing of the appeal it was not possible to vacate the date and arrange for another appeal to be heard on the same dates by the same Board. Accordingly the Clerk to the Board by letter dated 25 May 1993 informed the Taxpayer as follows:

'I refer to your letter dated 20 May 1993 applying for an adjournment of the hearing scheduled to be held on 2 and 3 June 1993.

I have forwarded a copy of your letter to the presiding chairman for his consideration. The chairman has instructed me to inform you that you are kindly requested to make your application before the Board of Review scheduled to be held on Wednesday, 2 June 1993 commencing at 9:30 am in the board room of this office.'

At the time and date fixed for the hearing of the appeal the members of the Board who had been convened duly met, Mr Robert Lew of the CPA appeared on his own and informed the Board that he was not prepared to present the Taxpayer's case at the hearing convened on that date and indicated that Mr X had been briefed.

Mr Bale representing the Commissioner indicated that the Commissioner was both ready and prepared to proceed with the hearing of the appeal.

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The Board informed Mr Lew that it would be advisable for the solicitor who had instructed Mr X, if not counsel himself, to appear before the Board and make a proper application for an adjournment with the full reasons therefor. The hearing was then temporarily adjourned.

Shortly thereafter the Board reconvened when Mr Y of solicitor firm B appeared before the Board with Mr Robert Lew of the CPA. Mr Y informed the Board that when the date for the hearing had been fixed two months previously he had not obtained Mr X's diary and accepted full responsibility for this error on his part. He said that though he had instructed Mr X to prepare the case and the grounds of appeal had been drafted by Mr X and that he had orally informed Mr X over the phone of the dates, he later found out that Mr X had not checked the dates with his diary and a mistake had arisen for which Mr Y accepted full responsibility. He said that it was only two weeks previously when he wrote to Mr X and sent him a copy of a valuation report as evidence in the case and informed Mr X in writing of the dates fixed for the hearing that he was told by Mr X that Mr X was not aware of the hearing dates and Mr X could not attend the Board hearing. Mr X also suggested to Mr Y that since the valuation report was not yet ready and also that when it was ready it would have to be sent to the Commissioner before the hearing Mr Y should seek an adjournment of say two months when both sides would be ready for a proper hearing. Mr Y said that when Mr X had informed him that he was not available to take the case on or about 13 May 1993 he could have instructed another Counsel but had not done so because the valuation report was not ready.

In view of the conduct of those seeking the adjournment the Board was mindful of refusing to grant the requested adjournment but to have done so would have seriously prejudiced the Taxpayer. In all of the circumstances the Board felt that it had no alternative but to grant the adjournment requested and directed that the Clerk should fix new dates before the same Board the members of which had already studied the papers prior to the request for an adjournment.

The members of the Board felt that the handling of this matter left something to be desired and that there was a certain lack of courtesy. The efficient operation of the Board depends upon the full cooperation of all concerned and this applied especially to tax advisers, solicitors, and counsel. In the present case there is no reason why the appeal should not have been properly prepared in advance and proceeded on the dates originally fixed, or alternatively, for those having the conduct of the appeal on behalf of the Taxpayer to have notified the Clerk to the Board immediately that the dates were fixed and to have explained the true position and requested new dates. Had this been done it would have avoided the embarrassment which arose. It should not be assumed that an adjournment will be granted by the Board if an application is made at the last minute and there are no good and valid grounds for granting such an adjournment.

It is to the credit of Mr Y that when he was acquainted with the situation on the morning of 2 June 1993 after the Board had convened, he immediately appeared before the Board in person and accepted full personal responsibility for what had happened. This greatly influenced the Board in exercising its discretion to allow the case to be adjourned.

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The Board hereby confirms that in the circumstances and to avoid prejudice to the Taxpayer it has ordered that the hearing of this appeal be adjourned for new dates to be fixed.