

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D77/91

Profits tax – company incorporated in Hong Kong not represented at hearing – whether Board has power to hear appeal.

Panel: William Turnbull (chairman), Walter Chan Kar Lok and Chiu Chun Bong.

Date of hearing: 7 January 1992.

Date of decision: 13 March 1992.

The taxpayer was a company incorporated in Hong Kong. By his determination the Commissioner increased an assessment against which the taxpayer had objected. The taxpayer duly appealed to the Board of Review. A date for the hearing of the appeal was set but the taxpayer failed to appear at the hearing. A request had been made on behalf of the taxpayer that the appeal should be heard in the absence of its Director. At the hearing of the appeal the representative for the Commissioner duly appeared before the Board.

Held:

The procedure of the Board is governed by section 68 of the Inland Revenue Ordinance. Sub-sections (2C), (2D), (2E), provide for the handling of appeals where a taxpayer fails to attend the hearing. A company incorporated in Hong Kong cannot fail to attend the hearing due to sickness. The taxpayer could have appointed a representative to attend the hearing. The Board could not proceed to hear the appeal on the ground that the taxpayer was outside Hong Kong because a company incorporated in Hong Kong cannot be outside Hong Kong. The only power given to the Board in such circumstances was to dismiss the appeal.

Appeal dismissed.

E C D'Souza for the Commissioner of Inland Revenue.

Taxpayer in absentia.

Decision:

This is an appeal by a Hong Kong incorporated limited company (the Taxpayer) against the Commissioner's determination dated 23 October 1991 wherein he increased the net assessable profits in a profits tax assessment for the year of assessment 1987/88. In summary, the Taxpayer claimed that part of its profits were not derived from

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nor arose in Hong Kong and accordingly were not subject to Hong Kong profits tax. The assessor did not accept this proposition and was of the opinion that all of the Taxpayer's profits arose in or were derived from Hong Kong and were assessable to tax under section 14 of the Inland Revenue Ordinance.

On 9 September 1988 the assessor issued to the Taxpayer a tax assessment for the year of assessment 1987/88 which was based on the profits tax return of the Taxpayer but in which the assessor had added the profits from the sales which the Taxpayer had claimed were offshore.

The Taxpayer duly filed notice of objection against the assessment made on it and submissions and representations were made on behalf of the Taxpayer. The submissions and representations were not accepted by the assessor as proving to his satisfaction that the profits in dispute were offshore. In the course of considering the matter, the assessor made enquiries of the Taxpayer and its advisors with regard to certain commission payments which the Taxpayer alleged it had made to earn the profits which it claimed were offshore. The assessor was not satisfied that the alleged commission payments were expenses incurred by the Taxpayer in earning the profits which the assessor was now taxing as arose in or derived from Hong Kong. He formed the opinion that the profits tax assessment for 1987/88 should be increased by adding back thereto the amount of the commission payments which the Taxpayer alleged had been made.

By his determination, the Commissioner accepted the opinion of the assessor and accordingly increased the assessment against which the Taxpayer had appealed by adding thereto the amount of the commission payments which had previously been allowed and were now disallowed.

- ' 1. The Taxpayer disagrees with the Commissioner's treating its profits earned from purchasing goods in an Asian region (Region A) and shipping them directly to Europe as profits arise in or derive from Hong Kong.
2. The Taxpayer also disagrees with disallowing as expense the commission paid to Mr A as such commission is necessary to obtain business from its customer.'

The Taxpayer filed separate grounds of appeal as follows:

- ' 1. The purchasing of goods from Region A and shipping them directly to Europe are services performed outside Hong Kong. The profits therefrom should not be considered as arising in or derived from Hong Kong.
2. The commission to Mr A should not be disallowed as it is expense necessary to earn the company's profits.'

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The Clerk to the Board of Review contacted the tax representatives of the Taxpayer who are a firm of certified public accountants carrying on business in Hong Kong. At their request a hearing of the Board of Review covering a period of one and a half days was arranged and the whole day of 7 January and the morning of 8 January 1992 were fixed by the Clerk to the Board of Review for the hearing of this appeal and due notice dated 11 November 1991 was given to the Taxpayer and the tax representatives were also notified.

By letter dated 28 December 1991 the tax representatives informed the Board as follows:

‘We write to advise that we do not plan to attend the hearing scheduled on 7 and 8 January 1992 as we were unable to obtain instruction from our client.’

The tax representatives subsequently forwarded to the Board of Review a copy of a letter sent through them by facsimile and addressed to the Clerk to the Board of Review. The facsimile letter bearing the signature of a director of the Taxpayer company stated that the director who signed the letter would be absent from Hong Kong when the appeal had been set for hearing and in addition to summarising the ground of appeal made the following request:

‘Notwithstanding the absence of our senior and responsible officer, we do agree for the Bard of Review to hear the case to avoid further delay.’

At the time fixed for the hearing of the appeal on 7 January 1991, a representative for the Commissioner duly appeared but the Taxpayer failed to attend the hearing, either through its tax representatives, or anyone else authorised by it. The representative for the Commissioner informed the Board that he had been in contact with the tax representatives for the Taxpayer and had urged them to attend the hearing but they had declined to do so.

We find it unsatisfactory that there should be tax representatives appointed by the Taxpayer who having written to the Board on 28 December 1991 saying that ‘we do not plan to attend the hearing scheduled on 7 and 8 January 1992 as we were unable to obtain instruction from our client’ apparently continued to represent the client in its tax affairs and are able to receive and forward to this Board communications from their client, either they do or they do not represent the Taxpayer as its tax representative. It is not acceptable to this Board that there should be some vague entity who can on and off represent the Taxpayer but who at the critical moment when the appeal comes before the Board take the view that they do not have instructions to appear. In such circumstances the tax representatives should either handle the case in the normal way or withdraw entirely.

Sub-sections (2C), (2D), and (2E) of section 68 of the Inland Revenue Ordinance make provision for how this Board must handle its affairs. For convenience we set out the provisions in full;

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- ‘ (2B) If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorised representative the Board may-
- (a) if satisfied that the appellant’s failure to attend was due to sickness or other reasonable causes, postpone or adjourn the hearing for such period as it thinks fit;
 - (b) proceed to hear the appeal under subsection (2D); or
 - (c) dismiss the appeal.
- (2C) If an appeal has been dismissed by the Board under subsection (2B)(c) the appellant may, within thirty days after the making of the order for dismissal by notice in writing addressed to the Clerk to the Board, apply to the Board to review its order and the Board may, if satisfied that the appellant’s failure to attend at the meeting of the Board for the hearing of the appeal was due to sickness or any other reasonable causes, set aside the order for dismissal and proceed to hear the appeal.
- (2D) The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on the application of the appellant made by notice in writing addressed to the Clerk to the Board and received by him at least seven days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorised representative.’

It is clear that in the circumstances of this appeal, the Board has no alternative but to dismiss the appeal. Under subsection (2B) three different sets of circumstances can arise if the appellant fails to attend the meeting of the Board either in person or by his authorised representative.

The Board can if it is satisfied that the appellant’s failure to attend was due to sickness or other reasonable causes postpone or adjourn the hearing. In the present case the Taxpayer is a company and accordingly cannot fail to attend due to sickness. We know no reasonable cause why the Taxpayer failed to attend by a duly authorised representative. It had in Hong Kong a representative who failed to attend the hearing. The Taxpayer could have appointed any other person in Hong Kong to appear but it did not do so. The fact that a director is absent from Hong Kong does not mean that the company cannot carry on its business. Accordingly this Board has no power to postpone or adjourn the appeal.

The Board can proceed to hear an appeal under subsection (2D) if it is satisfied that the appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal. A company incorporated in Hong Kong cannot be outside Hong Kong. It is permanently present in Hong Kong. We are informed that a director of the Taxpayer who

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was normally responsible for its business and affairs was outside Hong Kong. However the director is not the company and the company is a separate legal person under the laws of Hong Kong. There are benefits in forming a limited company and one of the fundamental benefits is the fact that a company has a legal existence separate from its shareholders and its directors. Accordingly we have no power to hear this appeal under subsection (2D).

The only power which we are given under the Inland Revenue Ordinance is to dismiss this appeal in accordance with the provisions of section 68(2B)(c).

Having carefully reviewed the matter and having decided that we have no power to proceed to hear this appeal, we order that the same be dismissed.

Because the Taxpayer has requested that the Board should hear the appeal in the absence of its director, the Board reviewed the case with the Commissioner's representative in the hope that it might be possible to find some way in which this Board could meet the request of the Taxpayer made by its director. In the course of reviewing the matter, the Board looked at the papers which were before the Board and which comprised the Commissioner's determination including the facts and statements contained therein, the grounds of appeal, the reasons for the appeal and the statement of facts which was filed by the tax representative for the Taxpayer when the notice of appeal was given. We have already set out above the grounds and reasons for the appeal. The statement of facts reads as follows:

- ' 1. The facts have been stated in the Commissioner's determination.
2. The only Hong Kong based activities related to the purchase of goods in Region A and shipping them to Europe were the bank transactions.
3. The Taxpayer had to pay Mr A because it was through the latter that the Taxpayer obtained its business.'

As is well known the onus of proving that the assessment appealed against is excessive or incorrect is upon the Taxpayer. This is specified by section 68(4) of the Inland Revenue Ordinance. Even if the Inland Revenue Ordinance had given us power to hear this appeal in the absence of the Taxpayer, we would have still dismissed the appeal because we would not have been satisfied that either the profits in dispute did not arise in or derive from Hong Kong and we would not have been satisfied with regard to the commission expense which it is alleged was incurred by the Taxpayer. A perusal of the documents shows that the Taxpayer appears to have been acting as a principal and not as a commission agent when goods were bought from Region A and exported to Region B. Previously the Taxpayer had claimed that certain commission income not the subject matter of this appeal arose offshore in China but subsequently conceded that it was taxable in Hong Kong. Without having a full explanation and understanding of the facts, we could not find that the income which is the subject matter of this appeal was offshore.

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We also note that the alleged commission income in relation to Hong Kong sales was in the region of an average of 15% and in relation to the sales of Region A an average of 38%. Again we would have to find this unacceptable without an adequate explanation as to why commission income should be so high for what it is claimed were minimal services.

With regard to the commission expense, it would appear from what the Taxpayer itself alleges that it was a corrupt payment according to the Laws of Hong Kong. Of course it may not have been corrupt according to the Laws of Region A and Region B. It was stated by the Taxpayer to the Commissioner that

‘The payment of commission to Mr A was not one of the terms of sales agreement to (the purchaser). (The purchaser) was not aware of or notified that such commission had been paid to its representative.’

Whilst the Law of Taxation does not concern itself with whether or not the activities of taxpayers are lawful, it is necessary that expense payments are proved to have been made in the course of earning profits. In the present case there would be insufficient evidence before us to satisfy the onus of proof placed upon the Taxpayer. Accordingly even if we had power to hear and decide this appeal in the absence of the Taxpayer we would still dismiss the appeal.