

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D7/88

Appeals – Board of Review – award of costs for unmeritorious appeal – s 68(9) of the Inland Revenue Ordinance.

Appeals – mistake by tax representative alleged – need for evidence.

Panel: William Turnbull (chairman), Lester C H Kwok and Herbert Liang Hin Ying.

Date of hearing: 3 February 1988.

Date of decision: 2 May 1988.

The taxpayer appealed against the Commissioner's refusal to correct allegedly incorrect profits tax returns under s 70A of the Inland Revenue Ordinance. The basis of his appeal was that certain property had been mistakenly treated as trading stock by his previous tax representative. No evidence was given to prove such mistake. No witnesses were called, and what evidence there was clearly pointed to trading.

Held:

- (a) The appeal was wholly without merit and should never have been brought. The Board of Review has power to award costs of up to \$1,000 against unsuccessful appellants. A warning is given that the Board might exercise this power in unmeritorious cases in the future.
- (b) The Board also made the point that it is not sufficient for a tax representative to allege that his client's previous tax representative had made a mistake, without substantiating such allegation with evidence.

Appeal dismissed.

Lee Yun Hung for the Commissioner of Inland Revenue.

Li Man Chung of Li, Sung & Co for the taxpayer.

Decision:

This is an appeal by an individual Taxpayer against a refusal by the Commissioner to correct under section 70A what the Taxpayer alleged were incorrect

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Profits Tax assessments for the three years of assessment 1978/79, 1979/80 and 1980/81. Those three tax assessments were levied on profits or gains which the Taxpayer had made when he bought and sold four different properties.

At the hearing of the appeal, the Taxpayer was represented by a professional taxation adviser who formally withdraw his client's appeal so far as it related to the years of assessment 1979/80 and 1980/81. Accordingly at the hearing this Board of Review dismissed the Taxpayer's appeal so far as it related to those two years of assessment.

The representative of the Taxpayer proceeded with the Taxpayer's appeal for the year 1978/79 and submitted that the tax assessment was incorrect but did not call the Taxpayer nor any other witness to give evidence and submitted that the appeal should be decided upon the facts in the Commissioner's determination already before the Board. The Taxpayer's representative said that it was necessary to look at the intention of the Taxpayer when he acquired two properties, namely a workshop and two ground floor shops in Hong Kong. It was submitted that the two properties were purchased with a view to long term investment and the evidence to substantiate this was the fact that the Taxpayer received rental income from each of these two properties.

The tax representative appearing before us submitted that the previous tax representatives and advisers of the Taxpayer had made mistakes in advising the Taxpayer.

The relevant facts of the appeal are as stated by the Commissioner in his determination as follows:

- (3) between 1977 and 1981, the Taxpayer engaged in the following property transactions:

<u>Property</u>	<u>Date of Purchase</u>	<u>Date of Sale</u>
A	6-10-1977	24-4-1978
B	6-9-1977	14-9-1978
C	23-1-1980	4-2-1980
D	1-1981	1-1981

The Taxpayer acted as a confirmor in the sale of Properties C and D. The interest in Property D was sold before the construction of the building was completed.

- (4) The statements of profit and loss accompanying the 1978/79, 1979/80 and 1980/81 Profits Tax Returns filed by the Taxpayer in respect of his property

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dealing business reflected that the Taxpayer had derived from the property transactions mentioned in Fact 3 a total profit of \$5,352,782 with breakdown as follows:

<u>Property</u>	<u>Sale price (net)</u>	<u>Rental Income</u>	<u>Cost of sale including related deductible expenses</u>	<u>Profit</u>
	\$	\$	\$	\$
A	759,842	67,500	816,332	11,010
B	1,986,088	107,280	1,581,511	<u>511,857</u>
Profits for the year ended 31 March 1979				<u>522,867</u>
C	22,100,000	-	18,000,000	<u>4,100,000</u>
Profits for the year ended 31 March 1980				<u>4,100,000</u>
D	7,827,770	-	7,097,855	<u>729,915</u>
Profits for the year ended 31 March 1981				<u>729,915</u>

These profits were offered for assessment. Copies of the statements of profit and loss and proposed tax computations for the aforesaid years are attached.

- (5) Save for a minor adjustment in respect of the sale proceeds of property C, the Assessor adopted the returned profit figures in raising the following profits Tax Assessments on the Taxpayer:

<u>Year of Assessment</u>	<u>1978/79</u>	<u>1979/80</u>	<u>1980/81</u>
Basis Period	Year ended 31-3-1979	Year ended 31-3-1980	Year ended 31-3-1981
Assessable Profits	<u>\$522,867</u>	<u>\$4,200,000</u>	<u>\$729,915</u>
Tax Payable thereon	<u>\$ 78,430</u>	<u>\$ 630,000</u>	<u>\$109,487</u>
Date of issue	19-12-1980	17-2-1981	8-2-1982

- (6) Through the Taxpayer's former tax representatives, the Taxpayer objected to the 1979/80 assessment disputing the quantum of profit from the sale of

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Property C. The objection was eventually settled when the 1979/80 assessment was revised as follows:

Revised Assessable Profits	<u>\$4,160,000</u>
Tax Payable thereon	<u>\$ 624,000</u>

- (7) On 20 June 1983 and 21 July 1984 the Taxpayer's new tax representatives applied to have the assessments for all the three years corrected under section 70A of the Inland Revenue Ordinance.'

Though the Taxpayer's representative at the hearing made allegations that the previous representative had made mistakes, no evidence was called to substantiate this allegation and the only evidence placed before the Board was a copy of a letter from the previous representative stating that all records of the Taxpayer's affairs had been destroyed when he terminated his instructions to the previous representative.

We find that this appeal is wholly without merit. Neither the Taxpayer nor any other witnesses appeared before us to substantiate the allegation that the two properties in question were acquired as long term investments and not as short term trading properties. Even if these were two isolated transactions, which they were not, we would consider that in the absence of other evidence the Commissioner was right in taking the view that they were short term trading transactions. One property was held for only six months and the other property was held for only one year. However in this case the evidence is much stronger. The two properties in question were in fact part of a series of four property transactions, two of which the Taxpayer accepted were trading transactions because he withdrew his appeal relating to the same. Perhaps of equally great importance is the fact that it was the Taxpayer himself who filed tax returns offering for assessment the profits on all four properties and it was on the basis of these tax returns that the assessments appealed against were issued. No evidence was called and no satisfactory explanation was given regarding this. It is not sufficient for a new representative to allege that his predecessor made mistakes and appear before this Board with nothing to substantiate his allegation other than his own submission.

For the reasons stated we dismiss this appeal in so far as it relates to the year of assessment 1978/79 and confirm our decision to dismiss the appeal in relation to the two years of assessment 1979/80 and 1980/81.

Award of costs

In dismissing this appeal the Board has given consideration as to whether or not it is appropriate to award costs of \$1,000 against the Taxpayer under section 68(9) of the Inland Revenue Ordinance. This appeal is wholly without merit and should never have been brought. However, as we are aware of any recent cases where a Board of Review has awarded costs against a taxpayer, we have decided not to do so in this case but to use this

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case as a warning to remind taxpayers that the Board is empowered to order costs to be paid in cases where appeals are brought with no merit.