

# INLAND REVENUE BOARD OF REVIEW DECISIONS

## Case No. D7/90

Assets betterment statement – standard of proof and evidence required to establish taxpayer's case.

Panel: Howard F G Hobson (chairman), Kenneth Kwok Hing Wai and Jorgen B Schonfeldt.

Dates of hearing: 18, 19, 20, 21 December 1989 and 3, 4 January 1990.

Date of decision: 23 April 1990.

Various tax assessments were raised on the taxpayer following the preparation of an assets betterment statement. The taxpayer objected to the inclusion of certain items in the assets betterment statement and the majority of these were conceded by the assessor with the exception of sums totalling \$350,000. At the hearing of the appeal, the taxpayer and his wife gave evidence and were extensively cross-examined.

Held:

The taxpayer had established his case to the satisfaction of the Board and was successful in reducing the assessments by the amount claimed.

Appeal allowed.

Case referred to:

D18/89, IRBRD, vol 2, 391

Jennifer Chan for the Commissioner of Inland Revenue.

Albert K C Yau instructed by Ho & Li for the taxpayer.

Decision:

### 1. INTRODUCTION

This appeal is concerned with an additional profits tax assessment for 1979/80 and four profits tax assessments for 1980/81 to 1983/84 inclusive, as determined by the Deputy Commissioner of Inland Revenue ('DCIR'). Those assessments originate from an investigation into the financial affairs of the Taxpayer followed by the preparation by the

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Revenue of an assets betterment statement ('ABS'). The Taxpayer objected to the inclusion of certain items in the ABS, the majority of these were conceded by the assessor except for the deletion of an amount of \$350,000. The Taxpayer objected to the DCIR against the inclusion of this amount on the ground that it was not his money, rather it was money entrusted to him by an old lady relative, Madam A who lives in China. The DCIR rejected the Taxpayer's representative's submissions on that issue. The only ground of appeal before us therefore concerns the inclusion of the \$350,000.

The Taxpayer, who was represented at the hearing by Counsel, gave evidence as did his wife, Madam B.

### 2. BACKGROUND

The Taxpayer carried on a bicycle hire business in Hong Kong. He also owned during the relevant period three flats namely flat 1, flat 2 and flat 3. He occupied flat 2 and rented out flat 1. His wife assisted him with his business. He and/or his wife from time to time bought and sold gold.

### 3. TESTIMONY

Where expedient we have occasionally interposed our comments in square brackets.

3.1 **THE TAXPAYER:** The Taxpayer (who gave evidence in Chinese) testified that Madam A, a widow now in her 80's, is his aunt. He had known her since he was a boy, living in her house when he was studying in school in China, after his father died in 1949 when the Taxpayer was nine years of age. With the help of Madam A's husband, Mr C (since died), who lived and worked in Hong Kong separately from Madam A, the Taxpayer came to Hong Kong in 1961 as an illegal immigrant. He stayed in Mr C's shop until Mr C found a job for him. He addressed Madam A as 'grandmother' which was customary in the county he lived in China even though she was really his aunt. [We were not given an approximation of the date or place of Mr C's death but suppose it occurred at some time before the next recited events].

3.2 As to the \$350,000 his explanation was as follows. Amounts eventually totalling \$150,000 were brought out of China on several occasions by various people to whom Madam A had entrusted RMB. These people ('couriers') would then convert the RMB into Hong Kong dollars then hand the Hong Kong dollars to the Taxpayer. The Taxpayer did not hear in advance from Madam A that any given courier was coming, the couriers would simply phone him up and come to see him and hand over the money explaining that it came from Madam A. The first of these receipts was for \$3,000 and occurred about 10 April 1979. In cross-examination he said he particularly remembered this because his wife was ill and the courier brought with him some Chinese herbal

## INLAND REVENUE BOARD OF REVIEW DECISIONS

medicine for her from Madam A. [The Taxpayer did not explain how it came about that he was to act as the recipient of the money. We have to assume that either there was some pre-arrangement possibly by telephone from Madam A of which we were not apprised or that when the first courier arrived he passed on some message from Madam A to the effect that monies would be coming in from China and that the Taxpayer was to look after it on Madam A's behalf.] On each occasion the Taxpayer handed the money to his wife who then deposited it in one or other of her savings accounts.

- 3.3 During the course of the Revenue investigation the Taxpayer identified from the passbooks twenty-eight deposits between 10 April 1979 and 28 April 1981 totalling \$104,000 made into his wife's first savings account ('first savings account') and nine deposits between 28 May 1979 and 16 February 1981 totalling \$46,000 made into her second savings account ('second savings account') in two different banks. [The lists of these deposits, compiled by the Taxpayer, and the corresponding pages of the passbooks formed part of the documentation accompanying the determination of the DCIR.]
- 3.4 In the summer of 1981 Madam A came to Hong Kong on her way to USA where she was immigrating. By that time the monies 'entrusted' to the Taxpayer totalled a little over \$150,000, the excess was given to Madam A for shopping in Hong Kong. [Since the amounts at paragraph 3.3 above total \$150,000 exactly we are unsure how the excess came about: interest is a possibility but was never mentioned.]
- 3.5 The Taxpayer identified the original of a letter dated 9 July 1981 ('the first letter'), written in Chinese under envelope bearing a postage chop 'PM July 9, 1981 [X Place]'. The envelope is addressed in English and Chinese to the Taxpayer at his cycle shop and the sender is shown as Mr D, X Place, USA. In the letter the sender [which we shall assume for the moment is Madam A] states that she arrived in USA on 5 July 1981 and goes on 'In respect of the money you are keeping for me, please do not remit it to me for the time being. It is because I do not need to use the money at present. Please keep it for me. I am afraid I cannot adapt to live here. I am preparing to stay with my children and grand-children for a short period and, afterwards, return to my hometown and settle down there.'
- 3.6 The Taxpayer next identified the original of a letter dated 7 May 1982 ('the second letter'), with envelope date-stamped the same day; the letter is in Chinese, purports to be signed by Madam A, again the sender is shown on the envelope as Mr D, with the above address.

In the second letter, Madam A wrote 'I have decided to return to Hong Kong next Friday by World Airways reaching Hong Kong ... around noon Sunday [the sixteenth] Hong Kong time. [Mr E and Mr F] etc have given me a sum of

## INLAND REVENUE BOARD OF REVIEW DECISIONS

money this time to bring back to my hometown for building a house. I hope you will pick me up at the airport when the time comes for the sake of safety.'

The Taxpayer went on to say that he and his wife met Madam A at the airport. She had US dollars which a friend of Madam A changed into Hong Kong dollars at the Taxpayer's home the 'following evening'. [From questions in cross-examination it would seem this friend was a female.] Madam A counted the Hong Kong dollars and gave the Taxpayer \$200,000 for safe-keeping. The remaining Hong Kong dollars she kept to use for shopping during a visit to Macau. However as Madam A was not feeling well she went direct to China from there instead of coming back to Hong Kong first. The Taxpayer said he secreted the \$200,000 in his home: specifically in or beside a water pipe. He did this rather than put it into a bank because Madam A said she would need the money at any time because she intended to build a house on the Mainland and she had instructed him not to put the money into a bank. Later, before Easter 1983, he used \$150,000 towards the purchase of flat 3 (a bargain as the vendor lost \$500,000 on the resale) for \$860,000 for which he put up \$460,000 and obtained a mortgage for \$250,000. He said he did not use the entire \$350,000 he then held for Madam A because she had said she might need the money at any time. He explained this a little further by saying that of the \$350,000, \$150,000 were Madam A's own savings whereas the \$200,000 had been given to her by her children in USA.

3.7 About January 1985 [after the years of assessment with which are concerned] the Taxpayer sold flat 1 which he had bought in 1970/71. From a list produced to us of deposits and withdrawals from the first savings account during 3 May 1984 to 24 January 1986, a sum of \$33,000 was deposited on 25 January 1985 and is identified as being the deposit received on the sale, and \$290,000 deposited on 2 February 1985 is said to be the balance of the sale proceeds (after satisfying the mortgage). Madam A phoned him from China and told him (about Lunar New Year 1985) that work on the house had started so she asked for part of the money back. [The Taxpayer did not say and was not asked whether Madam A specified how much she needed]. In subsequent questioning by the Board the Taxpayer said this call was made before he sold flat 1 that is, before 25 January 1985.

3.8 He said Madam A's nephew, Mr G, a sailor on a freighter which plies between Canton and another port in China, came to collect the money. The Taxpayer paid Mr G on two occasions amounts in cash totalling \$190,000 withdrawn from his wife's savings account. These were identified (in another list prepared by the Taxpayer) as having been withdrawn in three amounts of \$50,000 between 4 February 1985 and 11 February 1985 and one amount of \$40,000 on 23 February 1985.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The remaining \$160,000 was accounted for by two amounts of \$50,000 and \$60,000 and a final \$50,000 all handed to Mr G. These were identified in the said list of withdrawals as having been made between 17 January 1986 and 24 January 1986.

- 3.9 The Taxpayer identified an original letter purporting to come from Madam A in China dated 20 February 1985 (with envelope in Chinese date-chopped '1985 2 20') ('the third letter') in which Madam A, after mentioning finding a suitable plot of land just before the winter and that foundation work was progressing wrote 'The sum of Hong Kong dollars one hundred and ninety thousand that you have entrusted to your friend has been sent and received by me on many different occasions so to cope with the need for the construction. As regards to the remaining one hundred and sixty thousand dollars I would notify and ask you to send the money to me when I need it.'
- 3.10 Amongst the papers accompanying the DCIR's determination is a letter dated 29 January 1986 ('the fourth letter'), its envelope appeared to be dated-stamped in China on 30 January 1986. It purports to be from Madam A in China and is addressed to the Taxpayer. After confirming that the house was completed and that she moved in on 28 December [presumably 1986] and inviting the Taxpayer to come over to celebrate it, she went on to confirm the receipt of the remaining \$160,000, which together with the \$190,000 'sent last February' made \$350,000 she had received.
- 3.11 [At this juncture it is appropriate to mention that the envelopes we have referred to were not produced to the DCIR. We should also mention that in the first and second letters the Taxpayer and his wife are referred to as 'Dear Brother and sister-in-law', in the third letter they are addressed as 'Elder brother and elder sister-in-law.' The Taxpayer is about fifty (see paragraph 3.1 above) and his wife appeared a few years younger.]
- 3.12 In cross-examination he said he didn't know how Madam A made a living in China between 1979 and 1984. However he said she had four sons in USA who he knew sent her money. He said she could not spend all the monies her sons sent her and therefore assumed the money Madam A sent him from China came from her savings.

He wrote to Madam A confirming how much he received from the couriers. His wife kept a record of monies received but she tore it up when Madam A came through Hong Kong in July 1981 on the way to USA. He confirmed he had prepared the lists of deposits and withdrawals referred to above when the Revenue asked him to identify deposits in his wife's account which he claimed were monies entrusted to him by Madam A. [From correspondence it would seem these tables were prepared around March 1986]

## INLAND REVENUE BOARD OF REVIEW DECISIONS

3.13 When asked how out of all the entries shown in his wife's savings account books he was able to single out any deposit as representing money entrusted by Madam A he said he always received monies in amounts rounder off to the nearest hundred and were usually larger than \$1,400. [In fact the smallest amount identified is \$1,800.] He stated that he was able to eliminate some of the deposits as irrelevant with the help of documents produced to him by the Inland Revenue Department. He said he always received dollar notes from the couriers and explained the fact that bank records produced by the Commissioner's representative disclosed that in two instances coins were deposited. He explained that he gave the notes to his wife, she however may have exchanged the notes for coins from the cycle hire business before making the deposit. He said that the couriers were different though later said that some of them may have been the same on two or more occasions: of the twenty-eight deposits making up \$104,000 he thought there were about six or seven couriers.

3.14 He said he didn't know the full name of the woman who in May 1982 changed Madam A's US dollars into Hong Kong dollars, but said her surname was 'A' and she came from the same place in China as Madam A. He said he counted the \$200,000 given him by Madam A after the exchange – it was all in \$1,000 notes.

When asked why different accounts were used to deposit Madam A's money he said it was in case something went wrong with one bank. He also said his wife had been told by counter staff that a large deposit might attract the attention of the Government. He said his wife managed the family's finances, she was the one that decided what amounts went into what accounts and what properties to buy but she had discussed the matter with him.

Madam A phoned him about two months after going back to China (that is, about July/August 1982) saying that the land she had in mind had been sold to someone else so she didn't need money for the time being. The \$200,000 was therefore gradually deposited into savings accounts by nineteen deposits between 27 July 1982 and 26 September 1983 (a list of these deposits was produced to us). In answer to questions from the Board he said he received several telephone calls from Madam A but he never made any telephone calls to her – she had no telephone at home.

3.15 The Commissioner's representative then referred to the withdrawals which the Taxpayer identified as being made to pay Madam A and noted that there were three withdrawals of \$50,000 each (total \$150,000) before the third letter (20 February 1985) and a further \$40,000 on 23 February 1985 after the letter, yet the letter confirmed receipt of \$190,000. The Taxpayer explained that Mr G had himself paid Madam A the \$40,000 and the Taxpayer reimbursed Mr G when the latter came to Hong Kong. He further explained that Mr G used the

## INLAND REVENUE BOARD OF REVIEW DECISIONS

money the Taxpayer gave him to buy electrical goods in Hong Kong which he then sold in China for RMB which he gave to Madam A.

His attention was drawn to Madam A referring in the third letter to Mr G as 'your friend' whereas the Taxpayer said he was Madam A's nephew. The Taxpayer said that Mr G was indeed his friend. He said he was unsure how many visits Mr G made to Madam A in China but remembered he gave Mr G \$50,000 in advance on three occasions and \$40,000 was a reimbursement. In re-examination he said Mr G came to Hong Kong on two occasions.

- 3.16 He wrote to Madam A to let her know how much he had received from the couriers though not always immediately, therefore his letters sometimes covered more than one lot of receipts. He never received any letter from her in response.
- 3.17 His attention was drawn to the statutory declaration (in the English language) dated 3 March 1986 he had evidently prepared for the ABS investigation (to which copies of the first to fourth letters were attached, but not the envelopes) and to conflicts between statements there and his testimony on oath. He put these conflicts down to poor translation: his evidence before the Board was the correct version – it was in greater detail. As he did not understand English he was unable to know what the declaration actually said. He said he told the solicitor or his clerk what should go in the declaration. Madam A did not say he could 'use' the money however he did use \$150,000 towards the purchase of flat 3 (March 1983). He said the bike hire business only opened on weekends and holidays. He let his wife have the money from that business for housekeeping. He said Mr D was Madam A's son. He said she was illiterate and her letters had to be written for her. He didn't know the writers.
- 3.18 MADAM B: The Taxpayer's wife Madam B was sworn and gave evidence in Chinese. She said she knew Madam A being the mother of her husband's brother's wife and that Madam A had stayed in her flat on Madam A's return from USA in 1982. She confirmed that before 1982 Madam A had sent couriers with money which they had received in RMB, converted into Hong Kong dollars and had given the dollars to the Taxpayer. Sometimes the money was brought to her flat, sometimes to the cycle shop – the couriers would phone in advance. The money was in cash, given to her husband who would give it to her which she would deposit into bank accounts within a few days. By 1982 the amount was \$150,000 and a further \$200,000 was received in 1982 when Madam A stopped off in Hong Kong on her return to China. She saw US dollars changed for Hong Kong dollars, saw Madam A round this off to \$200,000 which she gave to the Taxpayer and told him keep it in the flat because she was going to buy a piece of land with good fung shui to build a house. She said she might need the money at any time. The witness said she put the money in a tin and it had been hidden beside a drain pipe in a cupboard

## INLAND REVENUE BOARD OF REVIEW DECISIONS

which was obscured by a bed. Later there was leakage from upper floors and as the housing management were sending someone round to inspect she decided to take the money out of the flat. She dug a hole near the cycle hire store and hid the tin of money in that. When she learnt that Madam A was unable to get the piece of land she had hoped to buy because it had been bought by someone else she took the money and intended to deposit it in a bank account. She was partly motivated in this intention by the rising interest rates she was having to pay on flat 3 mortgage property and therefore hoped to get a good deposit rate. However a bank officer at the bank where her second saving account was in told her that the deposit of a large sum might draw attention. She said that flat 2 was purchased through the Housing Authority – subsidized home ownership scheme – and if they learn of the \$200,000 they might take back her flat. She therefore made deposits into three different accounts over a period until the whole \$200,000 were deposited. She didn't use a single bank because years ago she had put money into a bank which went bust. She eventually gathered the various deposits into a single amount and obtained a US dollar swap deposit at a high interest rate which helped pay the mortgage instalments on flat 3. However about a year after purchasing flat 3 she used Madam A's money to redeem the mortgage on that property because the mortgage interest rate was too high.

- 3.19 She said though flat 1 was worth \$550,000 based on the rental of \$2,200 per month she sold it for \$323,000 but as at that time Madam A needed her money it was sold more cheaper. Mr G visited her and her husband on three occasions and each time they gave him \$50,000 to buy electrical goods to take to China. He said he had given Madam A \$190,000 and asked for the \$40,000 difference which she gave him. She believed the \$190,000 was paid within tow months of the sale of flat 1 and recalled that after a period of time about the second half of 1985 a further \$160,000 was paid through Mr G. This \$160,000 came from the proceeds of flat 1. The witness said she was semi-illiterate, never having been to school but she could read arabic figures and read and write a letter, with help.
- 3.20 In cross-examination, she mentioned that Madam A had stayed with her for, she thought, two days in 1981 on her way to USA. She was questioned in detail concerning entries in the passbooks, some withdrawals being matched with deposits into another account. She did not compile the lists of deposits she simply gave the passbooks to the Taxpayer.
- 3.21 On being questioned as to how she knew the total amounts of receipts from China was \$150,000 the witness pointed to a note book on the table in front of the Taxpayer's solicitor which was passed up to her. She said she used this to keep notes of things she might forget and she had entered in it notes of the monies received from Madam A. She had torn out the pages concerning the details and given them to Madam A during her visit in 1981.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

The entries in the remainder of the book were in Madam B's own handwriting – her son or husband helped her with the characters.

Counsel for the Taxpayer had not referred to this book in the examination-in-chief and it was not produced to the DCIR. Counsel said he became aware of the book to days prior to Madam B beginning her evidence but thought it raised as many questions as it answered and had therefore not introduced it into evidence. Although the allegedly more relevant pages had been torn out there were also some references to 'money sent back to repay [Madam A]'.

- 3.22 She confirmed she saw the US dollars which Madam A brought from USA and saw two or three people who came to her flat to change the US dollars into Hong Kong dollars. She thought there were a man and a woman who did the exchange but there was a third friend present.

She gave Madam A the torn out notes because when Madam A settled down in USA with her daughter-in-law she assumed Madam A would want the money to be sent to her. The note book dealt with other matters such as borrowings and loans unrelated to Madam A. Those entries which did refer to Madam A summarized closing balances – the individual deposits were in torn out pages.

- 3.23 She confirmed, as was apparent from the ABS, that she or the Taxpayer had bought and sold gold from time to time. She referred to one occasion when she bought gold for Madam A which was passed by a Mr H to Madam A in China. The money for this transaction (about \$40,000) appeared to us to have nothing to do with the monies identified as being entrusted to the Taxpayer.

### 4. SUBMISSIONS

- 4.1 Counsel for the Taxpayer submitted that if the evidence of the Taxpayer and his wife concerning the monies from Madam A had been concocted they could have made up a far simpler tale. It was also apparent that the withdrawals of the \$190,000 all took place before the interviews with the Inland Revenue Department. Where discrepancies occur they could be excused because they referred to events which took place eight to nine years ago.

- 4.2 The DCIR's representative sought a ruling on the introduction, after the testimony had ended and the witnesses released, of certain Inland Revenue Department papers which she had not put to the Taxpayer. The Chairman ruled them inadmissible because by their introduction the Board were asked to draw inferences which the Taxpayer, having been dismissed, was in no position to rebut which would be prejudicial: moreover in no position to rebut which would be prejudicial: moreover if these papers were no important they should have been introduced during cross-examination. The papers concerned were

## INLAND REVENUE BOARD OF REVIEW DECISIONS

bullion dealing slips, land office records, a letter from the assessor to the Taxpayer and a letter from a finance company to the Revenue. Granted the Land Office record is a matter of public record but whatever point was intended to be made by this document, it should have been put to the witness.

4.3 The Commissioner's representative then drew our attention to the fact that none of the \$350,000 was repaid as at 31 March 1984 being the date up to which the ABS was prepared. [The ABS however was prepared on 17 February 1986 which date the whole \$350,000 is said to have been repaid: \$190,000 by February 1985 and \$160,000 in January 1986.]

4.4 Her review of the viva voce evidence can be summarized as follows:

- (1) The Taxpayer never knew beforehand from Madam A how much the couriers would bring and though the Taxpayer said he wrote to Madam A confirming receipts she never replied to these letters. The Taxpayer did not remember the name of the couriers and was unsure how many there were.
- (2) The Taxpayer said the record of the receipts were destroyed in 1981 yet his wife said she gave the notes to Madam A.
- (3) The Taxpayer said a female relative of Madam A exchanged the US dollars for \$200,000. Madam B said there were a man and a woman and a friend.
- (4) She pointed out the discrepancies between the statutory declaration (a two pages document) and noted that the Taxpayer had admitted 'many of the statements therein' were incorrect. Specifically in the declaration the Taxpayer said Madam A:
  - (a) deposited \$150,000 with him since the beginning of 1981, whereas he told the Board the first amount was received about 10 April 1979. [It is clear that he had referred to this date in his submissions to the Revenue during their investigations.]
  - (b) told him he could use the \$350,000 (whereas in his testimony he denied she had told him he could use it).
  - (c) by the third letter asked him to remit 'all the money'. [On the face of the letter to which that part of the declaration refers there is an obvious mistake since the letter itself only said that the balance of \$160,000 would be called for when needed.]

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- (5) She noted that Madam A had not come forward from China to give evidence in support, nor had any of the couriers or Mr G. [We see that in the DCIR's determination there was reference to a letter dated 11 June 1987 wherein it was said Madam A could not come to Hong Kong to provide corroboration due to her advanced age. There was also exhibited to the determination a document dated 19 June 1987 purporting to be issued in China by the Federation of Retired Overseas Chinese which refers to Madam A entrusting \$350,000 to the Taxpayer and going on to say that 'because of old age she is unable to come to Hon Kong'. The Commissioner's representative made no reference to these matters either in cross-examination or in her submission.]
- (6) She pointed to one withdrawal of \$5,500 from a Hong Kong bank account and noted there was a deposit of \$5,500 into the second savings account of Madam B, which was said to have been received from a courier. Taken alone none of the entries were conclusive evidence of money from Madam A.
- (7) In short the evidence was unconvincing. She sought to make unsupported comments concerning the wages of normal workers in China by way of suggesting that Madam A could not have saved the \$150,000. [This ignores the Taxpayer's belief that this money had been saved out of remittances from her children in USA.] She thought the evidence as to how the \$200,000 came into the Taxpayer's possession 'unreal' – that an old lady of her 80's should be carrying so much US dollars was not credible nor her desire to exchange them since the Hong Kong dollar was falling – the \$7.8 peg not being introduced until September 1983.
- (8) (a) As to the letters she said they were vague and wondered why they were written. She challenged the authenticity of the letters though conceded that the envelopes were genuine. She suggested that the letter paper and its folds appeared new. [We found nothing suspicious in this respect.]
- (b) She referred us to Case No D18/89, vol 2, IRBRD, 391 where the Board rejected certain statutory declarations because the declarations were unavailable to be tested by cross-examination. She equated that situation to the letters.

[We note here that the representative at no stage during cross-examination of either the Taxpayer or his wife suggested that the letters were fabricated. Her submission is the first occasion that she chose to raise that speculation. We should also point out that the DCIR

## INLAND REVENUE BOARD OF REVIEW DECISIONS

in his reasons for rejecting the Taxpayer's objections never suggested the letters were a sham.]

### 5. CONCLUSIONS

5.1 Neither the Taxpayer nor his wife appeared to us to be devious or sophisticated. Madam B in particular seemed a fairly straight forward, if slightly naïve, person. That said we believe the best approach to our task of considering the evidence is to take basic points first and then address the detailed issues.

(1) Is there a Madam A living in China who came to Hong Kong in 1981 and went on to USA where she stayed until she went back to China via Hong Kong in May 1982?

(2) There was produced to us by the Taxpayer's Counsel a bundle of papers amongst which were Photostat copies of a PRC passport issued in 1980 to Madam A, a female whose date and place of birth was 1904 Guangdong Province. There is a Hong Kong transit visa (to be used before 4 July 1981) and a Hong Kong Immigration chop dated 3 July 1981 and a further visa to the effect that visitor is permitted to remain until 5 July 1981 with a 3 July 1981 Immigration chop and a departure chop dated 5 July 1981. There is also a copy of a US Government permit issued on 6 January 1982 in 'SFR' to re-enter USA for Madam A, giving an address of X Place USA which exactly coincides with the address on the envelopes to the first and second letters. There is also a copy of a visa issued by the British Vice-Counsel in USA on 28 April 1982 marked good for single journey to Hong Kong before 16 April 1983. This visa is overchopped by the Hong Kong Immigration on 16 May 1982 with a visitor permit good till 30 June 1982 and contains a departure chop which appears to be dated May 1982 – the actual date is unclear. There is also a Hong Kong Immigration chop dated 19 May 1982 and a Macau chop dated 29 May 1982 and one dated 7 June 1982.

(3) Apart from introducing these copies into evidence as part of a bundle of papers, the Taxpayer's Counsel made no reference to them, nor did the Commissioner's representative. They were not made available in the objections made to the DCIR.

(4) However from these we find as a fact that the answers to the questions posed at (1) above are in the affirmative.

5.2 Did the Taxpayer know Madam A? Although we do not know how Counsel came by the above copies, the inference is strong that he knew her sufficiently to obtain these copies and the envelopes (the authenticity of which is not in doubt) of the first and second letters came to him from an address which

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Madam A had given the US immigration authorities. We accept that the Taxpayer knew Madam A.

5.3 Was the Taxpayer related to her? We see no reason to doubt the Taxpayer on this point and therefore accept this as a fact. We do not think anything turns on the exact relationship nor on the manner in which she addressed the Taxpayer having regard to Madam B's evidence that the relationship was through marriage and not one of blood. Nor do we think that any inference adverse to the Taxpayer can be drawn from the fact that she called him 'elder brother' when he was neither older nor in the accepted sense her brother.

5.4 Next do we consider that the four letters are genuine? We accept as a matter of fact that Madam A was illiterate and that her letters were therefore written for her consequently, the handwriting in the text of the letters was not hers. The first and second letters were written in Chinese from left to right horizontally whereas the third and fourth letters were from right to left vertically. The signatures on the first and second letters appear the same and though we are unable to clearly identify the signature in the third and fourth letters as being the same, there are strong similarities. There is no evidence before us to suggest that an Inland Revenue Department investigation had commenced before the first and second letters were written. We do not know precisely when the Inland Revenue Department investigation started: there is a reference in a chronology prepared by Counsel to '17 December 1985 [the Taxpayer] attended interview with IRD' but we do not know if this date is accurate or whether it signifies the Taxpayer's first knowledge of an investigation. We know the Taxpayer received an estimated assessment in July 1983, to which he objected, there is nothing to suggest the investigation was under way before that date.

In our view therefore all four letters are genuine and were not written to support the Taxpayer's objections to the ABS and we so hold as a matter of fact.

5.5 We now turn to the detail.

(1) The first letter and the evidence referred to at paragraph 5.1(2) above are corroborative of the evidence of the Taxpayer (and his wife) of Madam A coming to Hong Kong on her way to USA in July 1981. It refers to 'the money you are keeping for me' though no amount is specified. Commissioner's representative made much of this point but since she trusted the Taxpayer there really was no point in mentioning the amount – particularly as the point she was making was that she did not want it remitted to her: conceivably she may not have wished Mr D (who we accept was her son) to know how much money she had, particularly as she had already decided to settle back in China. Although this letter does not quantify the amount entrusted nevertheless

## INLAND REVENUE BOARD OF REVIEW DECISIONS

it does corroborate the Taxpayer's evidence that Madam A did entrust some money to the Taxpayer and we so find as a fact. The letter is not corroborative of the entrusting being accomplished through couriers.

- (2) The second letter coupled with the Immigration stamps corroborates the evidence of the Taxpayer (and his wife) that Madam A came from USA to Hong Kong in May 1982 and that she went to Macau and that she was bringing 'a sum of money' to be used to build a house in China. It is in line also with the Taxpayer's evidence that he met her at Kai Tak on her arrival. We find as a fact that Madam A was bringing money from USA and, as it was unlikely to be in any other currency, that it was in US dollars.
- (3) It is self-evident from the envelope of the third letter that Madam A was in China in February 1985. The content corroborates the Taxpayer's evidence regarding her quest for a suitable plot of land, finding one and commencement of the foundations. It then mentions receipt of \$190,000 and that she would notify the Taxpayer when the remaining \$160,000 was needed. We consider this letter particularly important. As appears from cross-examination, by 20 February 1985 the Taxpayer had only handed Mr G \$150,000. The discrepancy was explained both by the Taxpayer and his wife as Mr G having put up the additional \$40,000 himself which the Taxpayer then reimbursed with a withdrawal on 23 February 1985. We don't know why Mr G should have chosen to advance the \$40,000 but presumably if his aunt, Madam A, had been prepared, over many years, to trust the Taxpayer with \$350,000 and Mr G was trusting him with \$150,000, there must have been a sufficiently strong element of mutual trust to lead him to believe he would be reimbursed.
- (4) In the light of the foregoing we are inclined to accept the fact that Madam A did entrust \$150,000 and a further \$200,000 to the Taxpayer and if it were not the fact that the Taxpayer had submitted to the Inland Revenue Department lists identifying deposits and withdrawals we could end this decision at this juncture.
- (5) However since the lists were before us we believe it is incumbent upon us to test the Taxpayer's evidence. First therefore as to the thirty-seven individual deposits making up the \$150,000.

Attached to the determination is a schedule of four deposits made into the first savings account and seven into the second savings account and also identification of other deposits – rentals and other monies – all unrelated to Madam A's deposits. The identification of these would reduce the imponderable entries and assist towards isolating Madam

## INLAND REVENUE BOARD OF REVIEW DECISIONS

A's deposits. Neither Counsel nor the Commissioner's representative chose to refer to this schedule. It will be recalled that the Taxpayer said these deposits were all in multiples of \$100 and also that her deposits were always in excess of \$1,400. The lowest amount in his list is \$1,800 deposited on 29 February 1980, the greatest is \$10,000, one on 8 April 1980 and another on 16 February 1981. There are sixty-four deposits in the first savings account between 5 February 1979 and 2 May 1981. There are thirty-five of these of \$1,800 or more in multiples of \$100. Of that thirty-five deposits, the Taxpayer identified twenty-eight which is to say that only seven did not relate to Madam A.

As regards the second savings accounts, there are thirty-one deposits between 28 February 1977 and 6 April 1982. Of these of \$1,800 or more in multiples of \$100 there are twelve of which the Taxpayer identified nine. We also note that a few deposits appear to have been received into the account by way of transfer or transferred out immediately after deposit – these entries could therefore be generally eliminated by the Taxpayer. Given these statistics the ability to identify Madam A's deposits looks less implausible and of course when the Taxpayer made up the list for the Inland Revenue Department sometime in 1986 he was four years closer to the events than he is now. Naturally this approach depends on believing first that the Taxpayer did receive monies from Madam A (which fact we have accepted) and that these were received from couriers in amounts of not less than \$1,800 which is to say that we accept that the \$1,800 shown in his list is accurate. However we think it is a reasonable working hypothesis and on that basis lends credence to the list of deposits prepared by the Taxpayer.

- (6) We therefore accept as a fact that the Taxpayer received \$150,000 in the manner described by him and that this was composed of the identified deposits.
- (7) We next turn to the matter of identifying the nineteen deposits, which totalled \$200,000, made after flat 1 was sold.

Between 18 February 1983 and 26 September 1983, twenty-three deposits were made into the first savings account. Seventeen are in multiples of \$100 and exceed \$100 – of these the Taxpayer identified nine. Between 19 April 1982 and 4 March 1983, twenty deposits were made into the second savings account of which eleven were over \$1,800 and in multiples of \$100. Of these the Taxpayer identified three. In another joint account there were twenty-two deposits between 11 January 1983 and 3 January 1984. Thirteen fulfilled the \$1,800 plus and \$100 multiple test and seven of these were identified as Madam A's deposits. The differences between the number of deposits meeting the

## INLAND REVENUE BOARD OF REVIEW DECISIONS

\$1,800/\$100 criteria and the number of identifications is not so close in these three accounts as in the case of the amounts totalling \$150,000. They do not therefore carry the same degree of probability of the Taxpayer's ability to accurately identify them however the disparity is not so great as to rule out the possibility of identifying nine out of seventeen, or three out of eleven or seven out of thirteen. We are therefore satisfied with and accept the Taxpayer's evidence regarding the \$200,000 worth of deposits.

- (8) Finally with regard to identifying the four withdrawals totalling \$190,000 and three withdrawals making up the \$160,000 these are relatively easy to isolate as they appear in a single account. The four withdrawals were made shortly after and in the same month as, \$290,000 being part of the proceeds of sale of flat 1, was deposited. The three other withdrawals occurred after the deposit of \$170,000 derived from the proceeds of sale of gold transferred from another bank account (the gold purchases having largely been funded indirectly by the balance of the proceeds of flat 1).
- (9) In regard to both the deposits and the withdrawals although Madam B's note book (which we accept does contain genuine contemporaneous records) is sketchy we believe it affords reasonable corroboration of some of the viva voce evidence.

We accept the Taxpayer's evidence concerning these withdrawals.

- (10) Turning to the discrepancies between the statutory declaration and the Taxpayer's viva voce evidence we accept that the former was not prepared with a great deal of detail in mind. Indeed on the face of it there are errors which do not jibe with the exhibited letters. We are inclined to agree with Counsel's remark that had it gone into the same detail with which the Board had to cope with it would have taken a long time to compose and would have gone far beyond the two pages it comprised. In any event the main purpose of the declaration seems to have been to exhibit the letters.

We therefore find in favour of the Taxpayer. Accordingly this appeal succeeds and the assessments are remitted back to the Commissioner for adjustment in the light of this decision.