

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D83/01

Profits tax – whether the sale of a property was trading in nature – absence of taxpayers in the hearing – three options available to the Board under such circumstances – sections 68(2B) and 68(2D) of the Inland Revenue Ordinance (‘IRO’).

Panel: Anthony Ho Yiu Wah (chairman), Ng Yin Nam and Archie William Parnell.

Date of hearing: 10 August 2001.

Date of decision: 27 September 2001.

The taxpayers, Madam A and Mr B, appealed against a determination of a profits tax assessment for the year of assessment 1997/98 arising out of the purchase and sale of a property (‘the Property’) and the refusal to allow the deduction of a sum claimed to be decoration expenses. The issue in the appeal was whether the taxpayers were liable to profits tax by having entered into an adventure in the nature of trade.

The taxpayers were all along represented by Company D and its services were abruptly terminated by the taxpayers about two weeks before the hearing. Two days before the hearing, Madam A notified the Clerk to the Board of Review in writing that they would not attend the appeal hearing on the ground of language barrier as well as the sickness of Madam A.

In reply, the Clerk to the Board of Review drew the attention of the taxpayers to section 68(2B) of the IRO and reminded them that if they failed to attend the hearing of the Board either in person or by representative, their appeal could be dismissed because Madam A’s letter failed to satisfy the requirements of section 68(2D) of the IRO.

Despite so, the taxpayers failed to attend the scheduled hearing.

Held:

1. Section 68 of the IRO governed the proceedings of the Board of Review. Subsection (2B) stated that if, on the date fixed for the hearing of an appeal, the taxpayer failed to attend the hearing either in person or by his authorized representative, the Board had three courses of action.
2. The first specified course of action was for the Board to postpone or adjourn the

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hearing if satisfied that the taxpayer's failure to attend was due to sickness or other reasonable cause.

3. In this case, however, although Madam A claimed to be suffering from a long term illness, there was no evidence to indicate that she was prevented from attending the hearing by such illness. In any event, Mr B was not sick and the taxpayers could always appoint an authorized representative to represent them, which in fact they had done all along until the services of the Representatives were abruptly terminated about two weeks before the hearing. Furthermore, the taxpayers had not applied for a postponement or adjournment of the hearing, they simply did not want to attend the hearing.
4. The second specified course of action was for the Board to proceed to hear the appeal under subsection (2D), which stated that if the taxpayer was outside Hong Kong on the date fixed for the hearing of the appeal and was unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable, the Board may proceed to hear the appeal in the absence of the taxpayer provided that the taxpayer had made written application at least seven days prior to the date fixed for the hearing of the appeal.
5. In this case, although Madam A did write to the Board two days before the scheduled hearing, requesting the Board to consider the taxpayers' case, such request did not satisfy the seven days requirement and there was no evidence that the taxpayers were outside Hong Kong on the hearing date. Accordingly, subsection (2D) did not apply in this case.
6. The third specified course of action was for the Board to dismiss the appeal. In the circumstances of this case, the Board ordered that the appeal be dismissed.

Appeal dismissed.

Chan Siu Ying for the Commissioner of Inland Revenue.
Taxpayers in absentia.

Decision:

Background

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1. Madam A and Mr B (herein referred to as ' the Taxpayers' collectively) have objected to the profits tax assessment for the year of assessment of 1997/98 raised on them. The Taxpayers claimed that the profit derived by them from the sale of a property, namely, a flat and carpark at Housing Estate C (' the Property') is capital in nature and should not be subject to profits tax. The Taxpayers further claimed that a sum of \$168,300 had been incurred by them in decorating the Property.
2. In the determination of the Commissioner of Inland Revenue dated 28 December 2000, the Commissioner determined that the Taxpayers had embarked on an adventure in the nature of trade in buying and selling the Property and the profit derived therefrom should be chargeable to tax. The Commissioner further determined that insufficient evidence had been adduced by the Taxpayers to substantiate that they had incurred the decoration expenses in question and that such expenses should be disallowed.
3. This is an appeal against the determination of the Commissioner. In a notice of appeal filed by Company D (' the Representatives') on behalf of the Taxpayers, the Representatives stated that:
 - (a) due to the fact that the Taxpayers had lost the relevant documents in relation to the sale and purchase of the Property, the Taxpayers are, on a without prejudice basis, prepared not to pursue further the objection that the profit derived from the sale of the Property was capital in nature and not subject to profits tax; and
 - (b) the Taxpayers do object against the Commissioner' s additional assessment of \$168,300 in disallowing decoration expenses of \$168,300.
4. On 28 June 2001, the Clerk to the Board of Review gave notice to the Taxpayers that Friday, 10 August 2001 commencing at 5:15 p.m. had been fixed for the hearing of this appeal.
5. By a letter dated 24 July 2001, the Representatives notified the Clerk to the Board of Review of the termination of their services by the Taxpayers.
6. By a letter dated 8 August 2001, Madam A (one of the Taxpayers) informed the Clerk to the Board of Review that the Taxpayers are not attending the hearing for the following reasons:
 - (a) both Madam A and Mr B have no knowledge of English and would have problems of communication and comprehension at the hearing; and
 - (b) Madam A is suffering from thyroid disease and it is necessary for her to receive continuous medication; nervous excitement from the hearing could aggravate her illness.

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7. Madam A in her said letter further stated that the Taxpayers' submissions and materials in support thereof have already been submitted to the Inland Revenue Department ('IRD'). Madam A submitted that it was unfair for the IRD to refuse to allow the deduction of the decoration expenses and requested the Board to take into account of all the circumstances and to give a fair and just ruling.

8. On 9 August 2001, the Clerk to the Board of Review wrote to the Taxpayers drawing their attention to section 68(2B) of the IRO and reminding them that if they failed to attend at the hearing of the Board either in person or by their authorized representative, their appeal could be dismissed by the Board because (inter alia) Madam A's said letter did not satisfy the requirements of section 68(2D) of the IRO.

9. Despite the said letter dated 9 August 2001 from the Clerk to the Board of Review, the Taxpayers failed to attend at the hearing on 10 August 2001 either in person or by their authorized representative.

Decision

10. At the hearing, the representative for the Commissioner applied to the Board to dismiss the appeal under section 68(2B) of the IRO.

11. Section 68 of the IRO governs the proceedings of this Board of Review. Subsection (2B) states that if, on the date fixed for the hearing of an appeal, the taxpayer fails to attend the hearing either in person or by his authorized representative, the Board has three courses of action.

12. The first specified course of action is for the Board to postpone or adjourn the hearing if satisfied that the taxpayer's failure to attend was due to sickness or other reasonable cause. In this case, however, although Madam A claimed to be suffering from a long term illness, there was no evidence to indicate that she was prevented from attending the hearing by such illness. In any event, Mr B was not sick and the Taxpayers can always appoint an authorized representative to represent them, which in fact they had done all along until the services of the Representatives were abruptly terminated about two weeks before the hearing. Furthermore, the Taxpayers had not applied for a postponement or adjournment of the hearing, they simply did not want to attend the hearing.

13. The second specified course of action is for the Board to proceed to hear the appeal under subsection (2D). Subsection (2D) states that if the taxpayer 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, the Board may proceed to hear the appeal in the absence of the taxpayer provided that the taxpayer has made written application at least seven days prior to the date fixed for the hearing of the appeal. In this case, although Madam A did write to the Board on 8 August 2001 requesting the Board to consider the Taxpayers' case, such request did not satisfy

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the seven days requirement and there was no evidence that the Taxpayers were outside Hong Kong on the hearing date. Accordingly, subsection (2D) has no application in this case.

14. The third specified course of action is for the Board to dismiss the appeal. In the circumstances of this case, the Board orders that the appeal be dismissed.