

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D88/98

Profits tax – whether the sale of a property was a sale of capital asset or trading stock – taxpayer gone into liquidation – liquidator’s duties – application to hear the appeal in the absence of the taxpayer or liquidator’s authorized representative under section 68(2D) of the Inland Revenue Ordinance – power of the Board to order the taxpayer to pay costs under section 68(9) of the IRO.

Panel: Christopher Chan Cheuk (chairman), Colin Cohen and Philip Kan Siu Lun.

Date of hearing: 7 August 1998.

Date of decision: 17 September 1998.

This was an appeal by the taxpayer against the relevant profits tax assessment relating to the sale of certain properties. The main issue was whether it was a sale of capital asset or trading stock. The appeal was scheduled to be heard on 7 August 1998. However, the taxpayer has gone into voluntary liquidation and two liquidators were appointed to manage its affairs. On 30 July 1998, about 10 days before the hearing, the Board received a letter dated 28 July 1998 from one of the liquidators concerned, pursuant to section 68(2D) of the Inland Revenue Ordinance, requesting for hearing in the taxpayer or his authorised representative’s absence as he would be out of Hong Kong on the scheduled date of hearing. After considering the matter the presiding Chairman, who noted that the liquidator had neither indicated the reason for going abroad nor the date of return directed the Clerk to issue a warning letter to the taxpayer. Notwithstanding this warning letter, neither the taxpayer nor any of its two liquidators took any action or made any response to the letter. At the scheduled date of hearing, neither of the two liquidators nor its authorised person attended the hearing. The Board proceeded to consider the application by the taxpayer under section 68(2D) of the IRO in its absence.

Held:

1. The leading authority on whether the sale of a property was a sale of capital asset or trading stock was All Best Wishes Limited v CIR 3 HKTC 750 at 771.
2. In this case, there was no witness before the Board to assist them in assessing the evidential value of the different documents. The Board had no opportunity to hear and see the persons concerned. It was not appropriate to adjudicate the case purely on paper without hearing evidence.

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3. The Board had considered that as the taxpayer had gone into liquidation, the liquidators were in charge of the winding up of the company. They owed fiduciary duties to the company and creditors, and duties under the Companies Ordinance. The attitude adopted by the liquidators, was not in the interests of the taxpayer or its creditors.
4. In considering the application made under section 68(2D), the Board had to be satisfied that the taxpayer was outside Hong Kong on the date fixed for hearing of the appeal and was unlikely to be in Hong Kong within such period thereafter as the Board considered reasonable.
5. Having considered the circumstances of the application and the submission by the Revenue, the Board found that the application failed to meet the requirements of section 68(2D). Accordingly, the Board refused the application.
6. The power of the Board to grant adjournment was rather limited. Adjournment could only be granted if the Board was satisfied that the taxpayer's failure to attend was due to sickness or other reasonable cause. As no reasonable cause for the taxpayer's absence was established, the only choice opened to the Board was to dismiss the appeal.
7. Under section 68(9) of the IRO the Board has the power to order the taxpayer to pay costs. It could be argued that this section would apply to cases where the original assessment is upheld and where hearing of the appeal has been conducted. The Board ruled that this section applied to the present case.
8. In dealing with the issue of costs, the Board found no merit in the taxpayer's application. The Board also found the pleading of the taxpayer as set out in its submission dated 28 July 1998 and the way that the taxpayer has conducted its case was an abuse of the statutory procedure. It was right for the Board to order the taxpayer to pay costs.

Appeal dismissed and a cost of \$3,000 charged.

Case referred to:

All Best Wishes Limited v CIR 3 HKTC 750

Ma Wai Fong for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

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The Appeal

1. This is an appeal by the Taxpayer against the determination by the Commissioner of Inland Revenue, made on 9 March 1998 in respect of profits tax assessment for the year of assessment raised on the Taxpayer. The appeal was scheduled to be heard on 7 August 1998 at 5.15 p.m. The Taxpayer is now in members' voluntary liquidation and two liquidators have been appointed to manage its affairs.

Preliminary Issue

2. On 30 July 1998, about 10 days before the hearing, the Board received a letter dated 28 July 1998 from Mr X as liquidator requesting for hearing in his absence. The second paragraph of the letter states as follows:

'As I shall be out of Hong Kong on 7 August 1998, I may not be able to attend the hearing. Pursuant to section 68(2D) of the Inland Revenue Ordinance, I hereby serve you written notice and request the Board to hear the appeal in the absence of the Taxpayer or my authorised representative.'

3. Following the usual practice of the Board, the application was referred to the presiding Chairman for direction. After considering the matter the presiding Chairman did not think it is appropriate to rule on the matter and directed the Clerk to issue a letter to the Taxpayer with an appropriate warning which is set out as follows:

'I am instructed to inform you that the Board will conduct the hearing as scheduled on 7 August 1998 at 5:15 p.m. and will deal with your section 68(2D) application first as preliminary issue. If the Board grants the application, it will proceed to hear the appeal in your absence. But, please note that if the Board refuses your application, you may run the risk of the case being dismissed summarily under section 68(2B).'

4. In the letter the Clerk also indicated to the Taxpayer the presiding Chairman's view in the following manner:

'We have referred your letter to Mr Christopher CHAN, the presiding Chairman of the Board for consideration. He finds that you have not indicated the reason for going abroad. Neither have you told us when you will return. The presiding Chairman refuses to make any ruling thereon and shall refer the case to the Board.'

5. Notwithstanding the letter of 3 August 1998 neither the Taxpayer nor any of its two liquidators took any action or made any response to the letter. Mr X did not supply any further detail about his absence or give any information about the time of his return to Hong Kong.

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Hearing

6. At the scheduled time neither of the two liquidators attended the hearing and no authorised person was appointed to appear before the Board. The Board waited for ten minutes and no one representing the Taxpayer appeared. The Board proceeded to consider the application by the Taxpayer under section 68(2D) of the IRO in its absence. Miss MA for the Revenue opposed the application on the ground that it was unreasonable. The Taxpayer is a limited company now in liquidation and the two liquidators have been appointed to look after the business of the company. Miss Ma submitted that only one of the liquidators would be away and the other should perform his duty and appear.

Ruling

7. The attitude adopted by the Taxpayer's liquidators is difficult for us to understand. Despite the warning given by the Clerk in her letter of 3 August 1998 the Taxpayer's liquidators still failed to attend the hearing; nor did they authorise any person to appear. We are deprived of the benefit of hearing the argument of the Taxpayer.

8. This is a case relating to the sale of certain properties; the issue is whether it was a sale of capital asset or trading stock. The leading authority on this subject is All Best Wishes Limited v CIR, 3 HKTC 750 at page 771 Mr Justice Mortimer sets out how the intention of the taxpayer can be proved:

'The intention of the taxpayer, at the time of acquisition, and at the time when he is holding the asset is undoubtedly of very great weight. And if the intention is on the evidence, genuinely held, realistic and realisable, and if all the circumstances show that at the time of acquisition of the asset, the taxpayer was investing in it, then I agree. But as it is a question of fact, no single test can produce the answer. In particular, the stated intention of the taxpayer cannot be decisive and the actual intention can only be determined upon the whole of the evidence. Indeed, decisions upon a person's intention are commonplace in the law. It is probably the most litigated issue of all. It is trite to say that intention can only be judged by considering the whole of the surrounding circumstances, including things said and things done. Things said at the time, before and after, and things done at the time, before and after. Often it is rightly said that actions speak louder than words.'

We think it right to follow the decision of Mr Justice Mortimer. We have no witness before us to give us any assistance to assess the evidential value of the different documents. We have no opportunity to hear and see the persons concerned. It is not appropriate to adjudicate the case purely on paper without hearing evidence.

9. We have also considered the point that the Taxpayer is not in liquidation. The liquidators are in charge of the winding-up of the company. They owe fiduciary duties to the company and creditors, and duties under the Companies Ordinance. Such attitude

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adopted by the liquidators, to say the least, is not in the interests of the Taxpayer or its creditors.

10. Section 68(2D) requires the Board to be satisfied that the taxpayer was outside Hong Kong on the date fixed for hearing of the appeal and was unlikely to be in Hong Kong within such period thereafter as the Board considered reasonable. Having considered the circumstances of the application and the submission by the Revenue we find that the application fails to meet the requirements of section 68(2D). Accordingly we refuse the application.

Adjournment

11. As the subsection (2D) application has been refused and the Taxpayer was not before us at the time of hearing, we are left with only two alternatives under section 68(2B): either to adjourn the case or to dismiss the appeal. Our power to grant adjournment is rather limited: adjournment can only be granted if the Board is satisfied that the Taxpayer's failure to attend was due to sickness or other reasonable cause. As no reasonable cause for the Taxpayer's absence is established we are left with only one choice: to dismiss this appeal.

Costs

12. Under section 68(9) of the IRO the Board has the power to order the Taxpayer to pay costs. Section 68(9) is set out in full as follows:

'Where under subsection (8), the Board does not reduce or annual such assessment, the Board may order the Taxpayer to pay as costs of the Board a sum not exceeding \$5,000, which shall be added to the tax charged and recovered therewith.'

13. We are invited to consider whether this subsection applies to the present case. It can be argued that it applies to cases (a) where the original assessment is upheld and (b) where hearing of the appeal has been conducted. As the Board has dismissed the appeal we have not reduced or annulled the assessment. The first hurdle is overcome. Subsection 8 refers to the hearing of the appeal. The purpose of the present meeting is to hear the appeal and we are of the opinion that the application under section 68(2D) forms part of the appeal. We have dealt with the application and the appeal. Accordingly, we rule that section 68(9) applies.

14. In dealing with the issue on costs, first, we find no merit in the Taxpayer's application. We are also disturbed by the cavalier way that the Taxpayer pleaded its case as set out in paragraph 3 of its submission dated 28 July 1998:

'3. At the very beginning, I must draw the attention of the Board that at the present moment, all the Company's cash flow has already been distributed to the shareholders by way of dividend prior to the passing of the special resolution to wind up the Company voluntarily on 23 January 1997. [Fact

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(10), and Fact (15)(d)]. If the Board confirms the assessment appealed against hereof, the Company will immediately become insolvent and the Inland Revenue Department as one of the creditors will take over the Company and proceed to creditor's compulsory winding-up by court. This will lead to further wastage of public fund with no realistic benefit to the Treasury of the Hong Kong Government. From the latest liquidator's statement of account for the period ended 22 July 1998 [page 5-7 of Document Bundle], the Company is indebted to me for an amount of \$30,610.05, being the liquidator's expenses incurred thereof. As the Company has no liquid fund at the moment, it cannot instruct counsel to represent her in this hearing. I hope this will not jeopardise the Company's case.'

From this long paragraph the liquidator who prepared this submission tried to inform the Board that it was a waste of time for us to decide on this case. Whatever the outcome will be the Taxpayer has no money and will become insolvent if it is asked to pay the tax. We find such pleading to be vexatious and the way that the Taxpayer has conducted its case is an abuse of the statutory procedure. It is only right for us to order the Taxpayer to pay costs.

Conclusion

15. For the reasons given above we dismiss this appeal and confirm the profits tax assessment for the year of assessment 1996/97 dated 22 April 1997, showing assessable profits of \$7,182,867 with tax payable thereon of \$1,185,173. We also order that the Taxpayer pay as costs of the Board a sum of \$3,000.00 which shall be added to the tax charged and recovered therewith.