Case No. D154/98

Penalty Tax – assessment – finality of decision by the Board of Review – procedure defects or merits – whether the decision of the Board of Review in D15/98 IRBRD, vol 13, 163 was final – section 69(1), 70, 82A(1)(a), 82B(2) of the Inland Revenue Ordinance, Chapter 112.

Panel: Kenneth Kwok Hing Wai SC (chairman), Kenneth Chow Charn Ki and Barbara Ko Fung Man.

Date of hearing: 25 November 1998.
Date of decision: 28 January 1999.

In D15/98, a Board of Review decided in favour of the taxpayer in respect of an assessment dated 8 August 1997 ('the Previous Assessment'). The background of the said decision is that (1) the taxpayer, without reasonable excuse, made incorrect tax return for the Relevant Year of Assessment by understating income in the sum of $400,000 ('the section 82A(1)(a) fact'); (2) By notice dated 21 May 1998, the Commissioner gave notice to the Taxpayer in terms of section 82A(4) of the Inland Revenue Ordinance ('IRO') ('the sub-section (4) notice'); (3) By letter dated 20 June 1997, the taxpayer's representatives made representations on behalf of the taxpayer ('the Representations'). The subject matter then was an additional tax under section 82A in the sum of $7,500. The Respondent (the CIR) did not appeal against the decision D15/98. However, the Respondent carried out another assessment dated 2 June 1998, assessing or purporting to assess the taxpayer to additional tax purportedly under section 82A of the IRO, Chapter 112, in the sum of $6,000 ('the Assessment').

The taxpayer appeals against the Assessment on the ground that D15/98 was final under section 69(1) and section 70 of the IRO and the Commissioner could not re-open the matter determined on appeal in D15/98.

The issue on this appeal is whether the Commissioner could have his bite of the cherry after a Deputy Commissioner had had her bite of the cherry and after the decision D15/98.

Held:

1. The Previous Assessment could not have stood and did not stand on its own. One cannot artificially sever the Previous Assessment from the section 82A(1)(a) fact, the sub-section (4) notice and the Representations to contend that D15/98 merely decided that it was procedurally wrong for the Deputy Commissioner to take the Previous Assessment and that D15/98 did not

prevent the Commissioner from making the Assessment. On the contrary, one must start with section 82A(1)(a) fact; followed by the sub-section (4) notice and the Representations. All these had been considered by the Deputy Commissioner before she decided to penalise the taxpayer for the section 82A(1)(a) fact by assessing her to additional tax in the sum of $7,500. The section 82A(1)(a) fact, the sub-section (4) notice, and the Representations cumulated in the Previous Assessment.

2. The main issue in D15/98 was whether the taxpayer was liable to additional tax. What was decided in D15/98 was that on the basis of the section 82A(1)(a) fact, the sub-section (4) notice, the Representations, and the Previous Assessment, the taxpayer was not liable to additional tax.

3. Section 69(1) provides that the 'decision of the Board shall be final' and it is not permissible for the Commissioner to seek to go behind D15/98 to deal with the same section 82A(1)(a) fact again by purporting to consider the Representations and purporting to make the Assessment.

4. If the Board in D15/98 had thought that the Previous Assessment was null and void, it would have said so and declared accordingly.

5. Further, what shall be final shall be final. No distinction is drawn in section 96(1) between a decision on the 'merits' and a decision on 'procedural defects'. Even if D15/98 is merely a decision on procedural defect, it is nevertheless final under section 69(1) and it is not open to the Commissioner to peralise the taxpayer for the same section 82A(a) fact.

6. Section 69(1) is not applicable to D15/98 as the Respondent has made no application requiring that Board to state a case.

Appeal allowed.

Cases referred to:

D15/98, IRBRD, vol 13, 163
Wang v CIR [1995] 1 All ER 367
D26/96, IRBRD, vol 11, 483
BR 17/72, IRBRD, vol 1, 97
Federal Commissioner of Taxation v Ryan 153 ALR 300
R v Customs and Excise Commissioners, ex p Kay & Co Ltd and another [1996] STC 1500
R v Crawley [1994] 4 HKPLR 62
R v Wan Kit-man [1992] 2 HKPLR 728
R v Dabhade [1993] QB 329
D59/96, IRBRD, vol 12, 8

Herbert Li of Department of Justice for the Commissioner of Inland Revenue.
Lam Wai Hay of Messrs W H Lam & Co for the taxpayer.

Decision:

Board of Review decision D15/98

1. A Board of Review, differently constituted, decided in favour of the Taxpayer in D15/98, IRBRD, vol 13, 163. The Respondent (the CIR) did not appeal. The Taxpayer might have thought that it was the end of the matter, but the Respondent disagreed.

2. This is an appeal against the assessment dated 2 June 1998 by Mr Wong Ho Sang, Commissioner of Inland Revenue, assessing or purporting to assess the Taxpayer to additional tax purportedly under section 82A of the Inland Revenue Ordinance, Chapter 112 ('IRO'), in the sum of $6,000 ('the Assessment')

3. The year of assessment is 1995/96 ('the Relevant Year of Assessment'). The relevant provision is section 82A(1)(a) of the IRO for making an incorrect return by understanding income in the sum of $400,000. The amount of tax involved is $75,600. $6,000 is 7.94% of $75,600.

The issue

4. The issue on this appeal is whether the Commissioner could have his bite of the cherry after a Deputy Commissioner had had her bite of the cherry and after the decision D15/98.

The facts

5. There is no factual dispute and the material facts can be stated quite briefly.

6. The Taxpayer, without reasonable excuse, made incorrect tax return for the Relevant Year of Assessment by understating income in the sum of $400,000 ['the section 82A(1)(a) fact'].

7. By notice dated 21 May 1998, the Commissioner gave notice to the Taxpayer in terms of section 82A(4) of the IRO ('the sub-section (4) notice')

8. By letter dated 20 June 1997, the Taxpayer's representatives made representations on behalf of the Taxpayer ('the Representations').

9. By an assessment dated 8 August 1997, Mrs Sin Law Yuk-lin, a Deputy Commissioner, assessed the Taxpayer to additional tax under section 82A in the sum of $7,500 ('the Previous Assessment').

10. The Taxpayer appealed against the Previous Assessment.

11. On 16 April 1998, a Board of Review, comprising Mr Ronny F H Wong, SC (Chairman), Mr Andrew Mak Yip Shing and Mr Anthony So Chun Kung, decided in favour of the Taxpayer – see D15/98. On liability, that Board concluded that the Previous Assessment was not a valid notice and the Taxpayer was not liable to the additional tax in question (§21). On quantum, that Board concluded that 'had it been necessary for us to decide this issue, we would have reduced the additional tax to $6,000' (§29). That Board 'allow this appeal and discharge the additional tax accordingly' (§30).

12. The Respondent (the CIR) did not appeal against the decision D15/98.

13. By letter dated 15 May 1998, Ms Go Min-min, senior assessor, wrote to the Taxpayer in the following terms:

> *'I refer to the Board's decision of 16 April 1998 in which it is ruled that the notice of assessment dated 8 August 1997 issued in the name of the Deputy Commissioner of Inland Revenue is not a valid notice.*
>
> *In this respect, the Representations you made on 20 June 1997 in response to the Commissioner's notice of 21 May 1997 under section 82A(4)(a)(i) of the Inland Revenue Ordinance will be submitted to the Commissioner for consideration personally. You will be advised of the outcome in due course.'*

14. The Assessment, dated 2 June 1998, was issued by the Commissioner.

15. By notice of appeal dated 30 June 1998, the Taxpayer lodged her appeal against the Assessment.

The CIR's memo on amicus curiae

16. By letter dated 20 November 1998, the Clerk to the Board of Review wrote at the request of the Chairman of this panel to the parties' respective representatives requesting them to send their written submission and authorities in advance of the scheduled hearing and to inform her whether there was any reason why the Board of Review should not invite a barrister to appear at the hearing of the appeal as amicus curiae to assist the Board.

17. By using a printed memo form and dating it on 23 November 1998, Ms Go wrote to the Clerk of the Board, stating, among others, that:

> *'The Inland Revenue Ordinance (Chapter 112) does not have any specific provisions for the Board of Review to invite a barrister to appear at the hearing of the appeals as amicus curiae to assist the Board. In the present case, we consider that the Board need not invite a barrister to appear as amicus curiae*

to assist at the hearing. In case of need, the Counsel for the Commissioner will be prepared to assist the Board …

c.c. Mr Herbert Li (Senior Government Counsel).'

18. The Board of Review decides appeals from decisions of the Commissioner of Inland Revenue. The Board is neither a part nor a branch of the Inland Revenue Department. The use of printed 'memo' form for communication from the Respondent (the CIR) to an appeal to the appeal tribunal is not appropriate and it should cease immediately.

Taxpayer's case

19. The Taxpayer was represented by Mr Lam Wai-hay, certified public accountant, at the hearing of the appeal. In the course of his submission, Mr Lam abandoned all grounds based on the Bill of Rights. Mr Lam argued that D15/98 was final under section 69(1) and section 70 of the IRO and the Commissioner could not re-open the matter determined on appeal in D15/98.

Respondent's (CIR's) conduct of this appeal

20. By an undated letter received by the Clerk on 19 November 1998, Ms Go informed the Taxpayer's representatives and the Board that the following cases would be cited at the hearing of the appeal:

(a) *Wang v CIR* [1995] 1 All ER 367; and

(b) Board of Review Case D29/96, IRBRD, vol 11, 483.

21. Incidentally, as (a) is also reported in Weekly Law Reports and Hong Kong Law Reports, we do not know why the Respondent (the CIR) proposed to cite the report in All England in place of the official law reports.

22. On the date of the hearing of the appeal, Mr Herbert Li, Senior Government Counsel, placed a bundle of authorities before the Clerk comprising the following cases:

(c) Board of Review Case BR17/72, IRBRD, vol 1, 97;

(d) *Federal Commissioner of Taxation v Ryan* 153 ALR 300;

(e) *R v Customs and Excise Commissioners, ex p Kay & Co Ltd and another* [1996] STC 1500;

(f) *R v Crawley* [1994] 4 HKPLR 62;

(g) *R v Wan Kit-man* [1992] 2 HKPLR 728; and

(h) *R v Dabhade* [1993] QB 329.

23. As the Respondent's (the CIR's) position was that the Board need not invite a barrister to appear as amicus curiae to assist at the hearing and that in case of need, the Counsel for the Commissioner would be prepared to assist the Board, we gratefully accepted the offer and asked Mr Li to assist us.

Assistance given by Senior Government Counsel

24. We asked Mr Li about the relevance of his cases. Mr Li told us that with the Bill of Rights grounds having been abandoned, none of his cases was relevant. We were greatly relieved by what Mr Li told us as we could not have read his bundle of authorities comprising cases (c) – (h) before the hearing of the appeal, and we did not have to read it during or after the hearing of the appeal.

25. We asked Mr Li to formulate the propositions in law which the Respondent (the CIR) contended and relied on. More or less at the end of the day, Mr Li eventually formulated the following propositions (in Mr Li's words):

(a) The Respondent (the CIR) accepts that section 70 applies to penalty tax appeals, but contends that the Assessment is valid under the proviso;

(b) Section 70 does not apply to effect finality in case of appeal on penalty tax in respect of an assessment issued with procedural defects;

(c) The word 'assessor' in the proviso to section 70 includes (or means) the 'Commissioner or Deputy Commissioner' for the purpose of penalty tax assessments;

(d) The Respondent accepts that section 69(1) is final only on matter decided by the Board; and

(e) The proviso to section 70, section 82A(3) and section 82B(3) authorise the Commissioner to issue the Assessment.

26. When asked if there was any case to be cited, Mr. Li said there was none.

Our decision

27. The Previous Assessment could not have stood and did not stand on its own. One cannot artificially sever the Previous Assessment from the section 82A(1)(a) fact, the sub-section (4) notice and the Representations to contend that D15/98 merely decided that it was procedurally wrong for the Deputy Commissioner to make the Previous Assessment and that D15/98 did not prevent the Commissioner from making the Assessment. On the contrary, one must start with the section 82A(1)(a) fact; followed by the sub-section (4) notice and the Representations. All these had been considered by the Deputy Commissioner

before she decided to penalise the Taxpayer for the section 82A(1)(a) fact by assessing her to additional tax in the sum of $7,500. The section 82A(1)(a) fact, the sub-section (4) notice, and the Representations ***cumulated*** in the Previous Assessment.

28. The grounds of appeal which are open to a taxpayer in an appeal against an additional tax assessment are stated in section 82B(2) of the IRO. In other words, the issues which may be raised for decision in an appeal against an additional tax assessment are, among others, that:-

> *'On an appeal against assessment to additional tax, it shall be open to the Taxpayer to argue that:-*
>
> *(a) he is not liable to additional tax …'*

29. The main issue in D15/98 was whether the taxpayer was liable to additional tax. What was decided in D15/98 was that on the basis of the section 82A(1)(a) fact, the sub-section (4) notice, the Representations, and the Previous Assessment, the Taxpayer was not liable to additional tax.

30. Section 82B(3) of the Ordinance provides that:-

> *'Sections … 69 and 70 shall, so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were assessments to tax other than additional tax.'*

31. Section 69(1) provides that the 'decision of the Board shall be final'.

32. The decision of the Board in D15/98 that 'the Taxpayer was not liable to the additional tax in question' is final and it is not permissible for the Commissioner to seek to go behind D15/98 to deal with the same section 82A(1)(a) fact again by purporting to consider the Representations and purporting to make the Assessment.

33. If the Board in D15/98 had thought that the Previous Assessment was null and void, it would have said so and declared accordingly.

34. Further, what shall be final shall be final. No distinction is drawn in section 69(1) between a decision on the 'merits' and a decision on 'procedural defects'. Even if, contrary to our view, D15/98 is merely a decision on procedural defect, it is nevertheless final under section 69(1) and it is not open to the Commissioner to penalise the Taxpayer for the same section 82A(1)(a) fact.

35. For the sake of completeness, we note that the proviso to section 69(1) is not applicable to D15/98 as the Respondent (the CIR) has made no application requiring that Board to state a case.

36. We turn now to section 70. Given the quality of the assistance which we had from the Respondent (the CIR), we do not wish to decide, but are prepared to assume, that the proviso to section 70 may authorise the Commissioner or a Deputy Commissioner to make an additional tax assessment 'for any year of assessment which does not involve re-opening any matter which has been determined on … appeal for the year'. This does not assist the Respondent for the simple reason that the making of the Assessment involved re-opening matters which had been determined on appeal in D15/98. This is not permissible under the proviso to section 70.

37. For the reasons given above, we allow the appeal and annul the Assessment.

38. We conclude our decision by a quotation from D59/96, IRBRD, vol 12, page 8 at page 17:

> *Section 82A 'should [not] be used or abused to oppress, harass or bully taxpayers or their tax representatives'.*