

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D37/94

**Penalty tax** – property trading – failing to inform the Commissioner of liability to profits tax – quantum of penalty.

Panel: William Turnbull (chairman), Gillian M G Stirling and Yu Yui Chiu.

Date of hearing: 6 May 1994.

Date of decision: 22 September 1994

The taxpayers were a husband and wife who were carrying on a property trading business. They failed to inform the Commissioner that they were liable to be assessed to profits tax. As a result of an investigation by the Inland Revenue Department the property trading activities of the husband and the wife came to light. The husband and the wife did not keep any proper records of their property trading activities. Penalties under section 82A of the Inland Revenue Ordinance were imposed upon the husband and the wife respectively in respect of their failure to inform the Commissioner of their liability to profits tax. The penalties were in the case of the husband 8 % more than the amount of tax involved and in the case of the wife 4% more. The husband and the wife appealed on the ground that the penalties were excessive and submitted that they had a low standard of education and that the Inland Revenue Department should have given them advice and assistance.

Held:

Neither the husband nor the wife deserved any sympathy. The penalties were too low and if the Commissioner had sought to increase the same the Board would have done so.

**Appeal dismissed.**

Tang Yiu Fai for the Commissioner of Inland Revenue.  
Taxpayer in person.

**Decision:**

This decision relates to two appeals lodged by a husband and his wife against certain additional tax assessments raised on them separately under section 82A of the Inland Revenue Ordinance (the IRO).

The two Taxpayers who are husband and wife lodged separate appeals against a number of penalty tax assessments raised upon them under section 82A of the IRO.

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At the hearing of the appeal each of the husband and the wife appeared representing themselves and requested the Board to hear their appeals simultaneously. With the consent of the representative for the Commissioner, the Board agreed to this course. The facts of the appeal are as follows:

1. The two Taxpayers are husband and wife. The penalty tax assessments against which the husband has appealed are in respect of his failure to inform the Commissioner that he was chargeable to profits tax in accordance with the provisions of the IRO in respect of the years of assessment 1985/86, 1988/89 and 1990/91. The penalty tax assessments against which the wife has appealed are in respect of her failure to inform the Commissioner she was chargeable to profits tax in accordance with the provisions of the IRO in respect of the years of assessment 1989/90 and 1990/91.
2. The husband was the sole proprietor of a business which commenced operation in August 1984 and suspended operation approximately six months later. Other than this business neither the husband nor the wife had any employment nor had they registered themselves or either of them as carrying on any other business.
3. Information available to the Revenue revealed that the husband was involved in the sale of certain properties. On 19 February 1990 profits tax returns for the years of assessment 1987/88 and 1988/89 were issued to the husband for him to report his property transactions. The profits tax returns were returned to the Revenue on 17 March 1990 together with some papers which indicated that the husband had made profits from certain property transactions. However the husband did not complete the profits tax returns and the same were rejected by the assessor who issued duplicate returns to the husband on 12 April 1990. The duplicate returns were returned to the Revenue on 4 May 1990 but the same were not signed and accordingly were not accepted as valid returns by the assessor.
4. In May 1991 the investigation unit of the Revenue commenced an investigation into the tax affairs of the husband. On 12 July 1991 the assessor wrote a letter to the husband asking him to attend an interview at the Inland Revenue Department within 14 days.
5. A number of letters were sent to the husband including a letter dated 14 November 1991 requesting the husband to submit the records and information concerning his and his wife's financial affairs for the period from 1 April 1985 to 31 March 1991.
6. On 16 December 1991 the husband submitted a bundle of papers containing information concerning the property transactions of himself and of his wife.
7. The assessor was of the opinion that the husband had carried on a trade of property dealing and on 6 March 1992 issued a profits tax return for the year of

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assessment 1985/86 to the husband. At the same time, an estimated profits tax assessment for the same year of assessment was issued to the husband. The husband lodged an objection against the estimated assessment on the ground that the assessment was excessive. The husband submitted a profits tax return for the year of assessment 1985/86 in support of his objection which showed that for the year ended 31 December 1985 he had made a profit of \$18,101.

8. On 10 April 1992 the assessor issued two sets of profits tax returns for the years of assessment 1986/87 to 1990/91 to the husband and the wife for them to report their property transactions. These returns were submitted by them to the Revenue on 27 April 1992 showing the following particulars:

(a) For the husband:

<b>Year of Assessment</b>	<b>Basis Period</b>	<b>Returned Profits/(Loss) \$</b>
1986/87	year ended 31.12.1986	(60,521)
1987/88	year ended 31.12.1987	21,970
1988/89	year ended 31.12.1988	237,331
1989/90	year ended 31.12.1989	Nil
1990/91	year ended 31.12.1990	(6,857)

(b) For the wife:

<b>Year of Assessment</b>	<b>Basis Period</b>	<b>Returned Profits/(Loss) \$</b>
1986/87	year ended 31.12.1986	Nil
1987/88	year ended 31.12.1987	Nil
1988/89	year ended 31.12.1988	Nil
1989/90	year ended 31.12.1989	52,162
1990/91	year ended 31.12.1990	20,825

9. By letter dated 4 May 1992 the assessor reminded the husband that information requested in the letter of the assessor dated 14 November 1991 had not yet been provided to the Commissioner and informed the husband that if the information was not provided as requested estimated assessments for all other years of assessment would be issued.

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10. On 12 October 1992 in default of any reply from the husband, the assessor issued the following estimated assessments on the husband and the wife in respect of their property dealing activities:

<b>Year of Assessment</b>	<b>Husband Assessable Profits \$</b>	<b>Wife Assessable Profits \$</b>
1986/87	100,000	50,000
1987/88	100,000	50,000
1988/89	500,000	50,000
1989/90	50,000	300,000
1990/91	400,000	250,000

11. The husband and the wife filed objection against all of the assessments and also elected for personal assessment for each of years of assessment in question.
12. On 13 February 1993 the husband called at the Inland Revenue Department and provided certain additional information with regard to his property holdings and other financial matters.
13. On 11 March 1993 the husband and the wife both called on the Inland Revenue Department. The husband and the wife both signed settlement agreements with the Revenue. The husband and the wife had claimed that they had incurred expenses in the renovation of apartments which should be deducted from the profit which they had made on the re-sale of the apartments. They also claimed other expenses including commission payments. They were informed by the assessor that such expenses could only be allowed if they could produce documentary evidence to support the same. The husband and wife were informed that the agreements which they were signing were not final and were subject to review.
14. The husband and wife were requested by the assessor to provide statements of property transactions for the period from 1 October 1991 to 31 December 1991. On 31 March 1993, they provided statements showing their property transactions. On 17 May 1993 the husband and the wife called on the Inland Revenue Department and amended settlement agreements were then signed which included the property transactions for the period from 1 October 1991 to 31 December 1991.
15. On the basis of the amended settlement agreements signed on 17 May 1993 the profits of the husband and the wife in respect of their property dealing activities for the years of assessment 1985/96 to 1990/91 were revised as follows:

- (a) The husband:

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<b>Year of Assessment</b>	<b>Basis Period</b>	<b>Revised Assessable Profits \$</b>
1985/86	year ended 31.12.1985	48,101
1986/87	year ended 31.12.1986	42,195
1987/88	year ended 31.12.1987	26,070
1988/89	year ended 31.12.1988	334,331
1989/90	year ended 31.12.1989	Nil
1990/91	year ended 31.12.1990	175,143

(b) The wife:

<b>Year of Assessment</b>	<b>Basis Period</b>	<b>Revised Assessable Profits \$</b>
1986/87	year ended 31.12.1986	Nil
1987/88	year ended 31.12.1987	Nil
1988/89	year ended 31.12.1988	Nil
1989/90	year ended 31.12.1989	282,162
1990/91	year ended 31.12.1990	126,825

16. The following is a summary of the amount of tax which would have been undercharged if the failure of the husband and the wife to inform the Commissioner of their chargeability to profits tax had not been detected:

(a) The husband:

<b>Year of Assessment</b>	<b>Tax Undercharged \$</b>
1985/86	3,124
1986/87	Nil*
1987/88	Nil*
1988/89	55,588
1989/90	Nil*
1990/91	<u>23,773</u>
	<u>82,483</u>

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(\* Exempt under Personal Assessment)

(b) The wife:

Year of Assessment	Tax Undercharged \$
1989/90	47,390
1990/91	<u>19,169</u>
	<u>66,559</u>

17. On 4 October 1993 the Commissioner of Inland Revenue gave notice to each of the husband and the wife under section 82A of the IRO informing them of his intention to assess additional tax by way of penalty under section 82A.

18. By letter dated 9 October 1993 the husband and the wife made written representations to the Commissioner of Inland Revenue. After taking into account these representations, the Commissioner of Inland Revenue on 20 December 1993 issued assessments to additional tax by way of penalty under section 82A for the years of assessment 1985/86, 1988/89, 1989/90 and 1990/91 on the husband and the wife respectively as follows and in the following amounts:

(a) The husband:

Year of Assessment	Tax Undercharged \$	Section 82A Additional Tax	Additional Tax as Percentage of Tax Undercharged \$
1985/86	3,124	4,000	128%
1988/89	55,588	62,000	112%
1990/91	<u>23,773</u>	<u>23,000</u>	97%
	<u>82,485</u>	<u>89,000</u>	108%

(b) The wife:

Year of Assessment	Tax Undercharged \$	Section 82A Additional Tax	Additional Tax as Percentage of Tax Undercharged \$
1989/90	47,390	50,000	106%
1990/91	<u>19,169</u>	<u>19,000</u>	99%
	<u>66,559</u>	<u>69,000</u>	104%

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19. By letter dated 18 January 1994 the husband and the wife gave notice of the appeal to the Board of Review against the foregoing penalty tax assessments.

A date was fixed for hearing the appeals by both the husband and the wife simultaneously in accordance with their wishes and with the agreement of the Commissioner. At the time and date fixed for the hearing of the appeal both the husband and the wife duly appeared before this Board and confirmed that it was their wish to have their separate appeals heard simultaneously, explaining to the Board that the facts were the same. The representative for the Commissioner confirmed his agreement to this course of conduct and the Board directed that the hearing of the respective appeals should proceed simultaneously.

The husband addressed the Board on behalf of himself and his wife. The wife also addressed the Board on behalf of herself and her husband.

The husband explained that he had come to Hong Kong in 1975 as an illegal immigrant. He had finished primary 4 level education in Mainland China and his educational standard was low. He said that because of disappointing business he had temporarily suspended the business which he was operating and registered it again in August 1990. He said that from 1984 he and his wife began to receive rental income and had filed property tax returns every year. He said that they had occasionally invested in real estate.

He said that because of his limited education his ability to understand English and Chinese was not good. He placed the blame upon the Revenue who he said had not been able to give him guidance or expert advice which he had expected to receive in helping to solve his problem. He said that in his opinion the staff of Revenue should have the responsibility for helping every taxpayer to fill out tax returns. He said that where a taxpayer was illiterate government officials should try their best to assist and he drew attention to the fact that he had omitted signing one tax return and said that it should be the responsibility of the Revenue to draw attention to this.

He went on to say that he did not understand English and did not understand the contents of correspondence written to him in English.

He said that he had visited the Revenue and had been told that if he cooperated and did not waste time in reaching a settlement, the Commissioner might consider not imposing any penalty. It was for this reason that he had not gone any further in claiming the deduction of expenses from the profits which he had made.

The husband submitted that both he and his wife had been very cooperative with the Revenue at all times.

The Board of Review sought clarification from the husband with regard to the facts and the submission which he had made on behalf of himself and his wife. The Board enquired as to whether or not the Taxpayers agreed that the profits listed in the statement of facts tabled before the Board were correct and accepted by the husband and the wife. In

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reply the husband said that these were the amounts which had been agreed with the Revenue and were the profits computed by the Revenue. The Board asked the husband what in his submission should have been the correct profits if he and his wife did not agree with the amounts computed by the Revenue and previously agreed by them. He was unable to give any accurate answer to this question other than saying he and his wife had not earned that much because decoration fees and bank interest had not been deducted. However, the husband was unable to inform the Board of what profits he and his wife in his opinion had made.

The Board enquired regarding the activities of the husband and the wife and the husband informed the Board that by way of example they would purchase an apartment in a very old building which they would re-decorate before selling. He stated that in his opinion this constituted property investment and not property dealing. He said that all of the properties purchased had been old properties requiring re-decoration. He submitted that the properties were held for periods of one year or up to three years and that it took a few months to re-decorate the flat. As this submission was clearly contrary to the facts before the Board the attention of the husband was drawn to a table of transactions which had been placed before the Board. Referring to this table it was pointed out to the husband that in one case he had bought and sold a property within 20 days and another within 9 days. The explanation by the husband of the first sale was that he did not actually purchase the property but had only signed a temporary contract prior to re-sale. The explanation given for the second sale was that the flat was purchased as a residence for the husband and his wife but the wife refused to live in the flat because it was infested with rats. The Board pointed out that another property had been sold within 28 days of purchase.

Having heard the submissions made by the husband and by the wife the Board did not consider it was necessary to ask the representative for the Commissioner to address the Board.

It is quite clear from the submission made by the husband and the wife that they are both intelligent people. There were no suggestions made by either of them that they in any way regretted or were remorseful regarding their conduct. Indeed the submissions made were rather to the contrary. The husband sought to place the blame upon the Revenue and its staff. We find no substance whatsoever in this. We cannot see what was the nature of the grievance of the husband and his wife in relation to the Revenue. On the facts before us the situation was that the husband and his wife were carrying on a very active business of trading in property and making substantial profits. In the course of 5 years there were a total of 13 property transactions. We do not accept that the husband and his wife were ignorant of their obligations under the IRO and we do not accept the truth of their submission that they did not believe this was property trading. It was so obviously property trading that even a person of limited intelligence and education would have realized this fact. The husband and the wife failed in their obligations to inform the Commissioner of their liability to pay tax and failed to file tax returns. When the Revenue found out that the husband and the wife had been carrying on an active property trading business, the husband and the wife were unable to produce any proper or accurate accounts. Indeed, even at the hearing before the Board, when they were asked regarding this they were not able to do anything more than make a rough estimate.

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This Board has no sympathy for either the husband or the wife. It is quite obvious that at all relevant times they were actively carrying on a business of dealing in property. They made significant profits from so doing and did not inform the Commissioner nor file profits tax returns. Having been found out they were forced to disclose to the Revenue what they had been doing. The total amount of the penalties imposed is only slightly more than the amount of the tax which would have been undercharged if the matter had not come to the attention of the Revenue. In the case of the husband it is 8% more and in the case of the wife 4% more. It appears to us that the Commissioner has been unduly lenient in assessing the penalties. The husband stated to us that he had been living in Hong Kong since 1975, which is some 10 years before the first year of assessment in question and almost 20 years before the husband and the wife appeared before the Board. We find it inconceivable that at least by the time when they appeared before the Board they would still maintain that what they had been doing was not property trading. Had this Board been asked by the representative for the Commissioner to increase the penalties imposed we would have had little hesitation in so doing.

For the reasons given this appeal is dismissed and the assessments against which the husband and the wife have appealed are hereby confirmed.