Case No. D45/88

Penalty assessment – 'reasonable excuse' – s 82A of the Inland Revenue Ordinance.

Penalty assessment – whether penalties could be imposed on taxpayers who fail duly to lodge returns but subsequently submit correct returns – s 82A(i)(ii) of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), Elsie Leung Oi Sie and Ma Ching Yuk.

Dates of hearing: 7 and 8 September 1988.
Date of decision: 26 October 1988.

For seven years, the taxpayer failed to submit profits tax returns on time. Subsequently, the Commissioner assessed the taxpayer to penalties. The taxpayer appealed.

One defence was that the taxpayer had a 'reasonable excuse'. He alleged that he had received extensions of time from the relevant assessor over the telephone, but this was denied by the assessor concerned. Secondly he alleged that, the penalties having been levied seven years after the defaults, records had been lost or destroyed and witnesses were no longer available. Thirdly, he claimed that the notices issued by the IRD requiring him to submit returns did not warn him of the penalties which might apply. (Yet, the taxpayer was in fact a certified public accountant.)

With respect to one year, the taxpayer claimed that penalties under section 82A could not be levied upon a taxpayer who fails to submit returns on time but who ultimately submits correct returns. His argument was that, in such a case, no tax has been 'undercharged' within the meaning of section 82A.

Held:

The penalties should not be reduced.

(a) The defence of reasonable excuse failed.

The burden was on the taxpayer to prove that the assessor had permitted extensions. He had failed to substantiate his allegation.

There was no evidence as to what the missing records and witnesses would have proved, nor as to what steps had been taken to locate them.

(b) Penalties could be levied on taxpayers who fail to lodge returns on time, even where they subsequently file correct returns.

Appeal dismissed.

Lam Wai Ming for the Commissioner of Inland Revenue.
Stanley So of Nominsec Ltd for the taxpayer.

Decision:

1. This is an appeal against additional tax assessments made under section 82A of the Inland Revenue Ordinance for the years of assessment 1978/79, 1979/80 and 1984/85. Notice of appeal against additional tax assessments for the years of assessment 1980/81 to 1983/84 inclusive had also been given but were withdrawn at the hearing of the appeal.

2. Section 82A, so far as relevant, is in these terms:

> ' (1) Any person who without reasonable excuse …
>
> (d) fails to comply with the requirements of a notice given to him under section 51(1) … shall … be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which …
>
> (ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) …, or which would have been undercharged if such failure had not been detected.'

3. It is common ground that the Taxpayer in the present case failed to comply with the requirements of a section 51(1) notice in relation to each of the years in question by failing to furnish a profits tax return within the time stated in the notice, and that he also did not furnish such a return within the extensions of time given to him.

4. In relation to the years 1978/79 and 1979/80, the ground of appeal is that the Taxpayer had a reasonable excuse. As for 1984/85, the ground of appeal is that no amount has been undercharged in consequence of the failure to comply with the notice.

Reasonable excuse

5. Mr So, the Taxpayer's representative, alleged that in each case the Taxpayer or his representative reached an agreement with the assessor in charge over the telephone whereby the assessor granted an appropriate extension of time to cover the delay in filing the

return. On the other hand, Mr Lam for the Revenue denied the allegation. We take the view that it is for the Taxpayer to prove the grant of the extensions. He failed to do so. No witness was called nor any record produced to substantiate the allegation.

Mr So further complained that it was some seven years after the defaults that action was taken by the Revenue to impose any additional tax, and that in the meantime relevant records had been lost or destroyed and witnesses had left their employment whose whereabouts were unknown. However, no evidence was adduced to show what the records and witnesses could have proved or what steps were taken to locate them.

Mr So also pointed out that the two section 51(1) notices did not warn the taxpayer of the penalty provisions contained in section 82A. Mr So did not go so far as to say that the Taxpayer in this case was not aware of section 82A. It would have been most surprising if he had done so, for the Taxpayer is and was at all material times a certified public accountant carrying on, among other things, the business of a tax representative. Throughout the years from 1978/79 to 1984/85 inclusive (and here we are taking into account the years 1980/81 to 1983/84 inclusive even though the Taxpayer is not appealing in relation to them), the Taxpayer was consistently and persistently late in filing his returns despite extensions given. In August 1986, the Revenue gave notice to the Taxpayer of their intention to assess him to additional tax in respect of all the years from 1978/79 to 1984/85 inclusive. In these circumstances, we do not think that the Taxpayer can complain about the lapse of time before action was taken to impose additional tax. For these reasons, the Taxpayer's case as to reasonable excuses fails.

No amount undercharged

6. This ground relates only to the year 1984/85. The profits tax return was issued to the Taxpayer on 1 April 1985, requiring him to furnish the return within one month. An extension was granted until 31 October 1985. In mid-November 1985, the Revenue issued a final reminder to the Taxpayer requiring him to submit the return within 14 days. On 21 January 1986, when the Taxpayer had still not submitted his return, the assessor raised an estimated profits tax assessment on him assessing his profits in the sum of $250,000. On 21 February 1986, the Taxpayer lodged a notice of objection against the assessment and submitted his return. The return was accepted by the Revenue and the profits were reassessed in the sum of $198,001.

Mr So contended that no amount of tax had been undercharged in consequence of the Taxpayer's default because the amount of tax charged on the estimated assessment exceeded that charged on the reassessment. We accept that argument. Mr So went on to say that, since no amount of tax had been undercharged, section 82A did not apply. We do not think that is correct. Paragraph (ii) of that section is in two parts. Mr So has dealt only with the first part. The second part consists of the words 'or which would have been undercharged if such failure had not been detected' and is alternative to the first part. In the present case, if the Taxpayer's default had not been detected by the Revenue, the estimated assessment would not have been made, and no amount of tax would have been charged. In

other words, the full amount of tax to which the Taxpayer is chargeable would have been undercharged. Section 82A therefore applies to this case.

Conclusion

7. This appeal is therefore dismissed, and the additional tax assessments in question are hereby confirmed.