

INLAND REVENUE BOARD OF REVIEW DECISIONS

HCIA3/1999

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**

INLAND REVENUE APPEAL NO.3 OF 1999
(ON APPEAL FROM BOARD OF REVIEW NO.B/R 214/1998)

BETWEEN

COMMISSIONER OF INLAND REVENUE

Appellant

and

MR LOGANATHAN, SURESH BABU

Respondent

Before : Hon Cheung J in Court
Date of Hearing : 15 March 2000
Date of Judgment : 20 March 2000

J U D G M E N T

The appeal

This is an appeal by the Commissioner of Inland Revenue (“the Commissioner”), by way of case stated, against the decision of the Board of Review (“the Board”).

The facts

The facts of this case are as follows. The Respondent (“the Taxpayer”) submitted an incorrect return for the year of assessment 1996/97. Income was understated by 67%. Mr LEE Kwok-leung (“Mr Lee”), then acting as a Deputy

INLAND REVENUE BOARD OF REVIEW DECISIONS

Commissioner in the Inland Revenue Department (“the Department”), intended to impose additional tax under section 82A of Inland Revenue Ordinance, Cap.112 (“the Ordinance”) on the Taxpayer. Mr Lee caused a notice (“the 1st Notice”) to be issued to the Taxpayer under section 82A(4) of the Ordinance notifying the Taxpayer of his intention and inviting him to make written representations. The Taxpayer submitted written representations. The case then came into the hands of another officer of the Department, Mrs SIN LAW Yuk-lin (“Mrs Sin”), who was also a Deputy Commissioner. She, having considered and taken into account the written representations, issued a notice (“the 2nd Notice”) assessing the Taxpayer to additional tax under section 82A in the sum of \$5,000.

The Board held that the 1st Notice was valid but the 2nd Notice was invalid because it was not issued by the same person who issued the 1st Notice. As a result, the 2nd Notice was null and void. The consequence is that the Taxpayer was not required to pay the additional tax.

Additional tax

If a taxpayer submits incorrect tax returns, two consequences may occur. First, prosecution under sections 80 and 82 of the Ordinance. Alternatively, he may be liable for additional tax under section 82A. Under section 82A an assessment of additional tax may be made only by the Commissioner personally or by a Deputy Commissioner personally (section 82A(3)). The procedure involved is set out in section 82A(4) :

“ Before making an assessment of additional tax the Commissioner or a deputy commissioner, as the case may be, shall –

- (a) cause notice to be given to the person he proposes so to assess which shall –
 - (i) inform such person of the alleged incorrect return, in respect of which the Commissioner or a deputy commissioner intends to assess additional tax under subsection (1);
 - (ii) include a statement that such person has the right to submit written representations to him with regard to the proposed assessment on him of additional tax;
 - (ii) specify the date, which shall not be earlier than 21 days from the date of service of the notice, by which representations which such person may wish to make under subparagraph (ii) must be received;

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) consider and take into account any representations which he may receive under paragraph (a) from or on behalf of a person proposed to be assessed for additional tax.”

The issue

The issue in this appeal is whether a single person is required to perform all the steps set out in section 82A(4) in order to levy an additional tax on a taxpayer.

Construction of tax statute

In construing a tax statute, the purposive construction approach is not excluded. *Bennion on Statutory Interpretation*, 3rd Ed. p.748 stated that :

“ Particular types of Acts (for example taxing Acts) are not excluded from strained-and-purposive construction. The presumption as to purposive construction applies to them as to other Acts.”

In *W T Ramsay Ltd v. IRC* [1982] AC 300 at 323, Lord Wilberforce said in relation to the taxing Acts that :

“ A subject is only to be taxed on clear words, not on ‘intendment’ or on the ‘equity’ of an Act ... What are ‘clear words’ is to be ascertained on normal principles; *these do not confine the courts to literal interpretation*. There may, indeed should, be considered the context and scheme of the relevant Act as a whole, and *its purpose may, indeed should, be regarded ...*”

In Case No. D15/98, the Board in construing section 82A referred to paragraph 912 of *Halsbury’s Laws of England* Vol.44 which stated that :

“ ***Taxing statutes construed strictly.*** *The language of a statute imposing a tax, duty or charge must receive a strict construction in the sense that there is no room for any intendment, and regard must be had to the clear meaning of the words. If the Crown claims a duty under a statute, it must show that that duty is imposed by clear and unambiguous words, and where the meaning of the statute is in doubt, it must be construed in favour of the subject, however much within the spirit of the law the case might otherwise appear to be; but a fair and reasonable construction must be given to the language used without leaning to one side or the other.*”

Mr Li, who appeared for the Commissioner, stated that this passage which was found in the 1983 edition of *Halsbury’s* no longer appears in the 1995 edition.

INLAND REVENUE BOARD OF REVIEW DECISIONS

The proper approach

Whatever may be the reason for the absence of a similar passage in the current edition of *Halsbury's*, I accept the approach set out in *Bennion* and the decision of Lord Wilberforce in *Ramsay* as the approach one should adopt in construing a tax statute. In my view, notwithstanding the use of the word “personally” in section 82A(3), the assessment of additional tax does not need to be made by a single person only, so long as the officers involved in the additional tax assessment hold the rank of either a Commissioner or Deputy Commissioner.

Administrative and not judicial functions

One begins the task by asking what is the role of the Commissioner or Deputy Commissioner in assessing additional tax. Although a comparison had been made to judicial proceedings in which the judge who hears the evidence will also give the verdict, in my view, it is inappropriate to compare the role of the Commissioner or the Deputy Commissioner to that of a judge. The Commissioner or Deputy Commissioner's role is an administrative one, namely, to assess the additional tax. There is no difference in principle between the Commissioner or Deputy Commissioner in assessing additional tax and that of the Commissioner in dealing with objections raised by a taxpayer against the assessment of tax by an assessor. The role is still an administrative one. This was the position in *Mok Tsze Fung v. The Commissioner of Inland Revenue* [1962] 1 HKTC 166 which was concerned with section 64 of the Inland Revenue Ordinance of 1950 which provided for an appeal to the Commissioner against the assessment by an assessor. Section 64 had since been replaced by provisions for making objections to the Commissioner. It was held by Mills-Owens J that during the hearing before the Commissioner under section 64, his role was an administrative one and not a judicial one, see also *CIR v. The Board of Review, Ex-parte Herald International Ltd* [1964] HKLR 224 and *Encyclopaedia of Hong Kong Taxation*, Vol.4, para.20299.

The power to assess additional tax by the Commissioner or Deputy Commissioner does not make their function a judicial one. The Commissioner or the Deputy Commissioner in assessing additional tax does not hold a hearing. They are not required to hear evidence or observe the demeanour of witnesses. There is no opposing parties. In considering whether additional tax should be levied, they consider whether there was any incorrect return and the written representation made by the taxpayer. The task can be performed by more than one person so long as they are holders of the same rank. If a taxpayer is dissatisfied with the assessment of additional tax, he may appeal to the Board under section 82B of the Ordinance. The Board holds hearings to determine the appeal.

Intent of legislature

It cannot be the intent of the legislature that in the operation of the Ordinance, a single person should be responsible for assessing the additional tax. The top hierarchy of the Department consists of the Commissioner, the Deputy Commissioners

INLAND REVENUE BOARD OF REVIEW DECISIONS

and the Assistant Commissioners. The task of assessing additional tax is given to the two most senior officers of the Department instead of the assessors. The Commissioner and the Deputy Commissioner are civil servants. Civil servants come and go by appointment, promotion, retirement or transfer. Civil servants also go on leave. It would disrupt the smooth operation of the tax system if the interpretation by the Board is adopted. Take this example : if the Commissioner, shortly before his retirement, had issued section 82A notices requiring the taxpayers to make representations, these notices would be useless upon his retirement because the new Commissioner who assumes the office is not the very same person who issued the notices in the first place. This cannot be right. To carry the matter further, if the new Commissioner is required to issue the notices afresh, he would receive the same representations that the former Commissioner had already received. His task is not made any different by the new representations. A further illustration is this. Under section 82A(6) an assessment can be raised on the executors of a taxpayer who had since died. If a taxpayer had died after making representations which were within his personal knowledge, it would be unfair to the executors who would be liable to the additional tax, if the written representations submitted by the deceased taxpayer cannot be acted upon by the new Commissioner.

Interpretation and General Clauses Ordinance

The approach I have adopted is supported by provisions of the Interpretation and General Clauses Ordinance (“IGC Ordinance”). There is no contrary intention in either the Ordinance or the IGC Ordinance which displaces the operation of the IGC Ordinance. Section 19 of the IGC Ordinance requires a fair, large and liberal construction of an Ordinance as will best ensure the attainment of its object according to its true intent, meaning and spirit. Section 39(2) provides that :

“ Where any Ordinance confers any power or imposes any duty on the holder of any public office as such, **then the power may be exercised and the duty shall be performed by the holder for the time being of that public office.**” (*emphasis added*)

Section 54 further provides that :

“ In any Ordinance, ... any reference to a public officer, or to a person holding a public office by a term designating his office, **shall include a reference to any person for the time being lawfully discharging the functions of that office,**” (*emphasis added*)

Section 39(2) and section 54 clearly indicate that the condition in section 82A is satisfied so long as the duties are discharged by the holder for the time being of that particular public office. This is how one expects a public duty is to be performed.

Meaning of the word “personally”

Section 3A of the Ordinance provides that :

INLAND REVENUE BOARD OF REVIEW DECISIONS

“(1) Where under this Ordinance any power is conferred or any duty is imposed on the Commissioner and so long as it is not provided that the power or duty shall be exercised or performed by the Commissioner personally, such power may be exercised or such duty may be performed by a deputy commissioner or by an assistant commissioner.

(2) Except where a provision of this Ordinance provides that a power or duty shall be exercised or performed by the Commissioner personally, the Commissioner may, subject to such limitations as he may think fit, authorize in writing any public officer to exercise any power or perform any duty conferred or imposed upon him by this Ordinance.”

By reason of section 3A, in discharging his functions under section 82A, the Commissioner clearly cannot delegate the task to a Deputy Commissioner or an Assistant Commissioner or any public officer. In my view, when the Ordinance requires that the assessment of additional tax is to be made by the Commissioner or a Deputy Commissioner personally, all that it means is that the Commissioner or a Deputy Commissioner cannot delegate his task to someone else and the task have to be performed by a public officer holding the rank of the Commissioner or Deputy Commissioner for the time being.

“As the case may be”

Reference is made to the words “as the case may be” in section 82A(4). This may well indicate that both the Commissioner or the Deputy Commissioner cannot be involved in one particular case. However, this is not the situation in the present appeal where the assessment for additional tax was made by two public officers, both holding the same rank of a Deputy Commissioner. I do not see how a legitimate expectation can be relied upon by the Taxpayer that the additional tax assessment would only be made by one single officer.

Effect of irregularity

Mr Li also submitted that even if section 82A is to be construed as requiring the assessment to be made by the same officer, the irregularity in the present case could not be so fundamental as to nullify the 2nd Notice.

Substantial compliance and consequence

It is only necessary for me to deal very briefly with this issue. In *Nina T. H. Wang v. Commissioner of Inland Revenue* [1994] 4 HKTC 15, the Privy Council reviewed the authorities and stated that :

“...their Lordships consider that when a question like the present one arises – an alleged failure to comply with a time provision – it is simpler and better to avoid these two words ‘mandatory’ and ‘directory’ and to ask two

INLAND REVENUE BOARD OF REVIEW DECISIONS

questions. The first is whether the legislature intended the person making the determination to comply with the time provision, whether a fixed time or a reasonable time. Secondly, if so, did the legislature intend that a failure to comply with such a time provision would deprive the decision maker of jurisdiction and render any decision which he purported to make null and void?"

In *R. v. Immigration Appeal Tribunal, Ex-parte Jeyanthan* [1999] 3 All ER 231 Lord Woolf suggested the matter can be dealt by asking three questions :

“ The questions which are likely to arise are as follows : Is the statutory requirement fulfilled if there has been substantial compliance with the requirement and, if so, has there been substantial compliance in the case in issue even though there has not been strict compliance? (The substantial compliance question.) Is the non-compliance capable of being waived, and if so, has it, or can it and should it be waived in this particular case? (The discretionary question.) If it is not capable of being waived or is not waived then what is the consequence of the non-compliance? (The consequences question.)”

In the present case, there was obviously a substantial compliance with the statutory notice requirement under section 82A(4). The notice had been issued to the Taxpayer who responded by his written representations. If Mrs Sin was to issue a fresh 1st Notice, it would have been identical in content with the 1st Notice issued by Mr Lee and would have served no useful purpose at all. Discretion is not an issue in the present case. To the third question, the Taxpayer would have suffered no adverse consequences. He was not deprived of the chance to make written representations before the additional tax was imposed. His written representations were considered by a revenue officer in the rank of a Deputy Commissioner. If the Taxpayer was aggrieved by the decision, a right of appeal to the Board was available to him under the statute. In my view, any irregularity would not have the effect of nullifying the 2nd Notice.

Section 63

Section 63 of the Ordinance provides that :

“ No notice, assessment, certificate, or other proceeding purporting to be in accordance with the provisions of this Ordinance shall be quashed, or deemed to be void or voidable, for want of form, or be affected by reason of a mistake, defect, or omission therein, if the same is in substance and effect in conformity with or according to the intent and meaning of this Ordinance, and if the person assessed or intended to be assessed or affected thereby is designated therein according to common intent and understanding.”

INLAND REVENUE BOARD OF REVIEW DECISIONS

This makes it clear beyond doubt that in construing section 82A, one is concerned with the substantial compliance of the statutory provisions.

Quantum

There is no dispute that the amount of additional tax is properly assessed.

The answer to the questions

The two questions raised in the case stated are as follows :

- “(a) Whether, as a matter of law, the Board was correct in holding that the following steps prior to the imposition of additional tax under Section 82A of the Inland Revenue Ordinance must be performed by the self same person and no additional tax can properly be imposed if steps (i) and (ii) on the one hand and steps (iii) and (iv) on the other hand are performed by different persons :
- (i) The forming of an intention to assess additional tax in respect of an incorrect return.
 - (ii) The despatch of a notice in compliance with the specific requirements to the taxpayer in question.
 - (ii) The consideration of the representations from the taxpayer in question.
 - (iv) The imposition of additional tax.
- (b) Whether, as a matter of law, the Board was correct in holding on the facts of this case that the notice of assessment for additional tax issued by Mrs. SIN LAW Yuk-lin as Deputy Commissioner under Section 82A was invalid by reason that the notice of intention to assess additional tax under Section 82A(4) had not been issued by her but by another person acting as Deputy Commissioner.”

The answer to these two questions is both “no”.

Costs

The Taxpayer did not appear on the hearing of the appeal. He informed the Court in writing that he would not be making representations and would abide by the result of the decision. This is a test case for the Commissioner because there are other similar pending cases. The appropriate order is that there shall be no order as to costs of the appeal.

INLAND REVENUE BOARD OF REVIEW DECISIONS

(P. Cheung)
Judge of the Court of First Instance,
High Court

Mr Herbert Li, SGC of Department of Justice, for the Appellant

Respondent in person, absent