Case No. D101/03

Penalty Tax –appellant appointed an attorney to handle her property before she emigrated – rentals received from the property – property tax was payable – but appellant had no actual knowledge of the returns sent – returns not submitted within the stipulated time limit – late returns submitted after a lapse of a few years – agreement on the assessable value of property reached – but the Revenue still levied additional tax for breaching section 51(1) and 51(2) without reasonable excuse –appellant claimed to be victim of the default of the attorney – non-receipt of tax return amounts to reasonable excuse under section 82A – plea of ignorance – personal duty to report – could not take refuge behind the alleged defaults on the part of the attorney – factors in favour of the appellant – factors against the appellant – quantum – additional tax should have been assessed in the light of similar decisions – sections 51(1), 51(2) and 82A of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Sandy Fok Yue San and Ronald Tong Wui Tung.

Date of hearing: 18 December 2003.
Date of decision: 23 February 2004.

This was an appeal by the appellant against the additional tax in the sum of $168,000 imposed on her by the Commissioner.

The appellant was a 70 year old lady who left Hong Kong in 1996 for emigration. She was currently residing abroad.

Prior to her departure in 1996, the appellant appointed Bank C as her agent to manage her Property A, which was acquired by the appellant in 1970. It was thereafter used as her matrimonial home.

According to the power of attorney which she executed in favour of Bank C dated 23 September 1995, Bank C was empowered ' To pay all taxes, rates, charges, expenses and other outgoings whatsoever payable by me … for or on account of [Property A]' .

With the approval of the appellant, Bank C entered into three tenancy agreements dated 14 June 1996, 2 June 1998 and 14 July 2000 for the letting of that flat. Bank C regularly sent statements of rental account to the appellant at a GPO Address. Those statements itemized in full the rentals received and the expenses defrayed by Bank C.

Tax return for the year 1996/97 was sent to the appellant at Property A. Reminders for due submission of that return were likewise sent to Property A.

There was no evidence indicating that the appellant had actual knowledge of these documents although she returned to Hong Kong between 21 November 1997 and 26 November 1997. The 1996/97 return was not submitted to the Revenue within the stipulated time limit.

Similarly, tax return for the year 2000/01 was sent to the appellant at Property A. Reminders were likewise sent to Property A. Once again there was no evidence indicating that the appellant had actual knowledge of these documents in 2001.

On 31 August 2001, the Revenue sent to the appellant at the GPO Address three returns for the years 1997/98, 1998/99 and 1999/2000. By this stage the appellant had appointed an accountants' firm [' the Firm'] as her authorized representative.

The 1997/98, 1998/99 and 1999/2000 returns were submitted to the Revenue on 29 September 2001. The appellant disclosed in these returns the amount of rent which she received from the letting of Property A over the years.

On 29 May 2002, the Revenue sent to the appellant a letter indicating that the Revenue was vetting the returns for the years 1996/97 to 2001/02. The appellant was invited to attend a meeting with the Revenue. The letter further enclosed copies of the returns for 1996/97 and 2000/01 and the original of the return for 2001/02. This letter was not placed before the Board for consideration and the Board did not know whether the letter was sent to Property A or the GPO Address.

At the end, the 1996/97, 2000/01 and 2001/02 returns were submitted by the appellant via the Firm on 9 July 2002. Particulars of all rentals received from Property A were also furnished to the Revenue.

On 28 August 2002, the appellant and the Revenue reached an agreement on the assessable value of Property A for the years 1996/97 to 2000/01 in the sum of $1,676,903.

By notices of assessment dated 13 September 2002, the appellant was duly assessed on the basis of the said agreement.

By notice under section 82A(4) of the IRO, the Commissioner informed the appellant that she was of the opinion that the appellant had, without reasonable excuse:

(a) failed to comply with the requirements of the notices given to her under section 51(1) of the IRO for the years of assessment 1996/97 and 2000/01 and

(b) failed to inform the Commissioner in writing that she was chargeable to tax for the years of assessment from 1997/98 to 1999/2000 within the period prescribed under section 51(2) of the IRO.

The appellant explained that she had delegated all the matters to Bank C, in which its negligence caused her failure to duly submit tax returns.

Despite so, the Commissioner by notices dated 17 December 2002 imposed additional tax in the sum of $168,000.

The appellant appealed to this Board.

The facts appear sufficiently in the judgment.

Held:

Tax returns for the years 1996/97 and 2000/01

1. The appellant contended that she was not liable for additional tax in respect of the years 1996/97 and 2000/01 as she did not receive the returns sent to her at Property A. Reliance was placed on D94/97, IRBRD, vol 12, 57. The Board held in that case that as the taxpayer had not received the return, the requirements of a notice 'given' to the taxpayer had not been complied with and the taxpayer was not liable for additional tax. Alternatively, the Board there held that the non-receipt of the return amounted to reasonable excuse under section 82A.

2. The Board accepted the submission of the appellant in relation to the notices sent to the appellant at Property A in 1997 and in 2001. It was no answer to say that the appellant should have kept the Revenue informed as to her change of address. The appellant had not been charged with that default.

3. The appellant did not however dispute the fact that the Revenue sent her the letter dated 29 May 2002 and her daughter (Ms D) had that letter in hand when she visited the Revenue on 8 June 2002.

4. Whilst Ms D asked the Revenue for further copies of the 1996/97 and 2000/01 returns on 10 June 2002, the fact that Ms D had in her possession the 29 May 2002 letter was a sufficient basis for the Board to conclude that the requisite notice was 'given' to the appellant and she had to complete the return within one month from 29 May 2002.

5. The appellant did not furnish any explanation covering the period between 29 May 2002 and 8 June 2002.

6. Given the fact that she had by then submitted three returns for the years 1997/98, 1998/99 and 1999/2000, she must have been aware of the basis of her liability and the need for urgency.

7. The Board was of the view that she had no reasonable excuse for her default between 29 June 2002 and 9 July 2002. The default in these circumstances was however a minor one.

No reasonable excuse on the basis of the appointment of Bank C as attorney

8. The appellant did not return to Hong Kong to give viva voce testimony before the Board. The Board had difficulties in understanding the appellant's defence on the basis of her appointment of Bank C.

9. It was unclear to the Board whether the appellant was maintaining that at all material times she knew that she had to pay property tax in respect to Property A and had appointed Bank C to discharge such liability or whether she was maintaining that she had no knowledge of any liability for property tax and she entrusted Bank C to handle all affairs pertaining to Property A including her personal liability for property tax.

10. If the former be the case of the appellant, the regular statements of rental account sent by Bank C to the appellant would have made clear to her that her mandate to Bank C had not been discharged.

11. If the latter be the case of the appellant, it amounts no more than a plea of her own ignorance. As pointed out by this Board in D96/97, IRBRD, vol 12, 520:

> *'It is a generally accepted principle that ignorance of the law is not a ground for appeal … Once the plea of ignorance were allowed, it would throw our whole legal system into disarray'*.

12. Furthermore, the duty to report was a personal duty of the appellant. She could not take refuge behind the alleged defaults on the part of her attorney.

Quantum

13. In relation to the years 1996/97 and 2000/01, given the said findings, the Board held that the additional tax assessments of $30,000 and $29,000 amounting to

75% and 56% of the tax undercharged were far too high.

14. The Board was of the view that the additional tax should have been assessed in the light of the decisions of this Board on late return cases.

15. The Board borne in mind the level of additional tax in cases such as D2/90, IRBRD, vol 5, 77, D11/93, IRBRD, vol 8, 143, D59/96, IRBRD, vol 12, 8, D88/97 (unpublished), D15/01, IRBRD, vol 16, 168 and D118/02, IRBRD, vol 18, 90.

16. The factors that were in favour of the appellant: the delay for both years was a matter of days as opposed to months and the appellant displayed a high degree of co-operation with the Revenue.

17. As against the appellant, the Board considered that: she submitted three returns in October 2001. She should be familiar with the basis of assessment and the need for urgency. These returns were sent to the appellant as a result of further investigation by the Revenue.

18. She should have displayed much greater urgency in view of what transpired in October 2001.

19. Bearing all these factors in mind the Board would assess additional tax for 1996/97 at $3,188 being 8% of the tax involved and for 2000/01 at $2,592 being 5% of the tax involved. The 3% difference between the two years was intended to reflect the interest element in the tax retained.

20. The Board took a much more serious view in relation to the years 1997/98, 1998/99 and 1999/2000. As pointed out by this Board in D7/95, IRBRD, vol 10, 79:

> *'It is the duty of each and every taxpayer in Hong Kong to inform the Commissioner of their liability to tax and to file true and correct tax returns. The system of taxation in Hong Kong is simple and effective only if taxpayers fulfil their obligations in accordance with the Inland Revenue Ordinance. The system of low taxation in Hong Kong is dependent upon an honour system by taxpayers'*.

21. In sharp contrast to the late return cases, the failure of a taxpayer to inform the Revenue of his chargeability to tax might result in such taxpayer escaping the tax net altogether.

22. In D118/02, the Board pointed out that 100% of the amount of tax undercharged

was appropriate to those cases:

(a) Where there has been no criminal intent and the taxpayer has totally failed in his or its obligations under the IRO or

(b) Where the Commissioner has had to resort to investigations or the preparation of assets betterment statements or has otherwise had difficulty in assessing the tax or

(c) Where the failure by the taxpayer to fulfill his or its obligations under the IRO has persisted for a number of years.

23. In this case the additional tax assessed for the three years ranged between 64% and 75% of the tax undercharged.

24. The Revenue explained that they regard this case as one falling within the 'Disclosure with full information promptly on challenge' category in its Penalty Policy Statement. The Revenue placed this case within sub-group (b) of that Statement on the basis that the defaults in this case result from sheer recklessness or sheer gross negligence.

25. The normal penalty loading for this group is 50% rising to 75% of the tax involved. The assessments in question were well above the normal loading.

26. Whilst the Board had some reservations with regard to the Revenue's placement of this case at the high end of group (b), it was not prepared to disturb this assessment bearing in mind the ambiguity of the appellant's case.

27. For these reasons, the Board allowed the appeal in part in relation to the years 1996/97 and 2000/01 and dismissed the appeal in relation to the remaining years.

Appeal allowed in part.

Cases referred to:

D94/97, IRBRD, vol 12, 517
D96/97, IRBRD, vol 12, 520

D2/90, IRBRD, vol 5, 77
D11/93, IRBRD, vol 8, 143
D59/96, IRBRD, vol 12, 8
D88/97 (unpublished)
D15/01, IRBRD, vol 16, 168
D118/02, IRBRD, vol 18, 90
D7/95, IRBRD, vol 10, 79

Fong Wai Hang for the Commissioner of Inland Revenue.
Au Yeung Wai Ming of Messrs Shea and Company for the taxpayer.

Decision:

1. The Appellant is a 70 year old lady currently residing abroad. She left Hong Kong in 1996. According to the written submission of Ms Au-Yeung, Solicitor for the Appellant, she emigrated to Canada in that year. The documents before us however suggest that she left Hong Kong for residence in Hawaii.

2. On 3 September 1970, the Appellant acquired Property A and thereafter used that flat as the matrimonial home with her husband Mr B.

3. Prior to her departure in 1996, the Appellant appointed Bank C as her agent to manage Property A. According to the power of attorney which she executed in favour of Bank C dated 23 September 1995, Bank C was empowered 'To pay all taxes, rates, charges, expenses and other outgoings whatsoever payable by me ... for or on account of [Property A]'.

4. Bank C thereafter entered into extensive correspondence with the Appellant and Mr B in relation to the letting out of Property A. With the approval of the Appellant, Bank C entered into three tenancy agreements dated 14 June 1996, 2 June 1998 and 14 July 2000 for the letting of that flat. Bank C regularly sent to the Appellant at GPO xxxx Hong Kong ['the GPO Address'] statements of rental account. Those statements itemized in full the rentals received and the expenses defrayed by Bank C.

5. On 9 May 1997, the Revenue sent to the Appellant at Property A a return for the year 1996/97. Reminders for due submission of that return dated 25 September 1997 and 31 October 1997 were likewise sent to Property A. There is no evidence before us indicating that the Appellant had actual knowledge of these documents although she returned to Hong Kong on 21 November 1997 and stayed till 26 November 1997. The 1996/97 return was not submitted to the Revenue within the stipulated time limit.

6. As part of the Revenue's periodical despatch, a return for the year 2000/01 was sent to the Appellant at Property A. Reminders dated 12 July 2001 and 1 November 2001 were likewise sent to Property A. Once again there is no evidence before us indicating that the Appellant had actual knowledge of these documents in 2001.

7. On 31 August 2001, the Revenue sent to the Appellant at the GPO Address three returns for the years 1997/98, 1998/99 and 1999/2000. By this stage the Appellant had appointed an accountants' firm ['the Firm'] as her authorised representative. The 1997/98, 1998/99 and 1999/2000 returns were submitted to the Revenue on 29 September 2001. The Appellant disclosed in these returns the amount of rent which she received from the letting of Property A.

8. On 29 May 2002, the Revenue sent to the Appellant a letter indicating that the Revenue was vetting the returns for the years 1996/97 to 2001/02. The Appellant was invited to attend a meeting with the Revenue. The letter further enclosed copies of the returns for 1996/97 and 2000/01 and the original of the return for 2001/02. This letter has not been placed before us for our consideration and we do not know whether it was sent to Property A or the GPO Address.

9. Ms D, daughter of the Appellant, visited the Revenue on 8 June 2002. She had with her the Revenue's letter to the Appellant dated 29 May 2002. Little progress was made at this meeting as the Revenue invited Ms D to demonstrate her authority from the Appellant.

10. Pursuant to the written authorization of the Appellant, Ms D re-visited the Revenue on 10 June 2002. The Revenue furnished her with further copies of the returns for 1996/97, 2000/01 and 2001/02.

11. The 1996/97, 2000/01 and 2001/02 returns were submitted by the Appellant via the Firm on 9 July 2002.

12. On 29 July 2002, the Revenue invited the Appellant to furnished particulars of all rentals received from Property A. These were sent by the Firm to the Revenue on 3 August 2002.

13. On 28 August 2002, the Appellant and the Revenue reached agreement on the assessable value of Property A for the years 1996/97 to 2000/01:

Year of assessment	**Reported Assessable value**	**Agreed Net Assessable Value**	**Understated Net Assessable Value**
	$	$	$
1996/97	0	265,703	265,703
1997/98	0	345,600	345,600
1998/99	0	367,742	367,742
1999/2000	0	352,258	352,258
2000/01	0	345,600	345,600

		1,676,903	1,676,903

14. By notices of assessment dated 13 September 2002, the Appellant was duly assessed on the basis of the agreement referred to in paragraph 13 above.

15. By notice under section 82A(4) of the Inland Revenue Ordinance ['IRO'], the Commissioner informed the Appellant that he was of the opinion that she had, without reasonable excuse:

(a) failed to comply with the requirements of the notices given to her under section 51(1) of the IRO for the years of assessment 1996/97 and 2000/01 and

(b) failed to inform the Commissioner in writing that she was chargeable to tax for the years of assessment from 1997/98 to 1999/2000 within the period prescribed under section 51(2) of the IRO.

16. By letter dated 26 November 2002, the Appellant tendered the following explanation to the Commissioner:

> '*Due to the agreement between my husband and the bank we thought the bank had handled and file (sic) everything including any property tax and other taxes for me, we had fully authorized the bank to lease, collect rental, and deduct any necessary expenses and to manage [Property A] on our behalf. Due to the neglecting of the bank personnel, I became the victim of this matter.*'

17. After considering the representations of the Appellant, the Commissioner by notices dated 17 December 2002 imposed additional tax as follows:

Year of assessment	**Understated Net Assessable Value**	**Amount of tax involved**	**Additional tax imposed**	**Additional tax imposed as a % of the amount of tax involved**
	$	$	$	%
1996/97	265,703	39,855	30,000	75
1997/98	345,600	46,656	35,000	75
1998/99	367,742	55,161	40,000	73
1999/2000	352,258	52,838	34,000	64
2000/01	345,600	51,840	29,000	56
	1,676,903	246,350	168,000	68

18. This is the Appellant's appeal against the additional tax so imposed.

Any reasonable excuse in relation to the years 1996/97 and 2000/01?

19. The Appellant contends that she is not liable for additional tax in respect of the years 1996/97 and 2000/01 as she did not receive the returns sent to her at Property A. Reliance is placed on D94/97, IRBRD, vol 12, 57. The Board held in that case that as the taxpayer had not received the return, the requirements of a notice 'given' to the taxpayer had not been complied with and the taxpayer was not liable for additional tax. Alternatively, the Board there held that the non-receipt of the return amounted to reasonable excuse under section 82A.

20. We accept the submission of the Appellant in relation to the notices sent to the Appellant at Property A in 1997 and in 2001. It is no answer to say that the Appellant should have kept the Revenue informed as to her change of address. The Appellant has not been charged with that default.

21. The Appellant does not however dispute the fact that the Revenue sent her the letter dated 29 May 2002 and Ms D had that letter in hand when she visited the Revenue on 8 June 2002. Whilst Ms D asked the Revenue for further copies of the 1996/97 and 2000/01 returns on 10 June 2002, the fact that Ms D had in her possession the 29 May 2002 letter is a sufficient basis for us to conclude that the requisite notice was 'given' to the Appellant and she had to complete the return within one month from 29 May 2002.

22. The Appellant did not furnish any explanation covering the period between 29 May 2002 and 8 June 2002. Given the fact that she had by then submitted three returns for the years 1997/98, 1998/99 and 1999/2000, she must have been aware of the basis of her liability and the need for urgency. We are of the view that she has no reasonable excuse for her default between 29 June 2002 and 9 July 2002. The default in these circumstances is however a minor one.

Any reasonable excuse on the basis of the appointment of Bank C

23. The Appellant did not return to Hong Kong to give viva voce testimony before us. We have difficulties in understanding the Appellant's defence on the basis of her appointment of Bank C. It is unclear to us whether the Appellant is maintaining that at all material times she knew that she had to pay property tax in respect of Property A and had appointed Bank C to discharge such liability or whether she is maintaining that she had no knowledge of any liability for property tax and she entrusted Bank C to handle all affairs pertaining to Property A including her personal liability for property tax.

24. If the former be the case of the Appellant, the regular statements of rental account sent by Bank C to the Appellant would have made clear to her that her mandate to Bank C had not been discharged.

25. If the latter be the case of the Appellant, it amounts no more than a plea of her own ignorance. As pointed out by this Board in D96/97, IRBRD, vol 12, 520:

> *'It is a generally accepted principle that ignorance of the law is not a ground for appeal ... Once the plea of ignorance were allowed, it would throw our whole legal system into disarray'.*

Furthermore, the duty to report is a personal duty of the Appellant. She cannot take refuge behind the alleged defaults on the part of her attorney.

Quantum

26. In relation to the years 1996/97 and 2000/01, given our findings in paragraph 22 above, we are of the view that the additional assessments of $30,000 and $29,000 amounting to 75% and 56% of the tax undercharged are far too high. We are of the view that the additional tax should have been assessed in the light of the decisions of this Board on late return cases. We have borne in mind the level of additional tax in cases such as D2/90, IRBRD, vol 5, 77, D11/93, IRBRD, vol 8, 143, D59/96, IRBRD, vol 12, 8, D88/97 (unpublished), D15/01, IRBRD, vol 16, 168 and D118/02, IRBRD, vol 18, 90. The following factors are in favour of the Appellant: the delay for both years was a matter of days as opposed to months and the Appellant displayed a high degree of co-operation with the Revenue. As against the Appellant, we have borne in mind the following: she submitted three returns in October 2001. She should be familiar with the basis of assessment and the need for urgency. These returns were sent to the Appellant as a result of further investigation by the Revenue. She should have displayed much greater urgency in view of what transpired in October 2001. Bearing all these factors in mind we would assess additional tax for 1996/97 at $3,188 being 8% of the tax involved and for 2000/01 at $2,592 being 5% of the tax involved. The 3% difference between the two years is intended to reflect the interest element in the tax retained.

27. We take a much more serious view in relation to the years 1997/98, 1998/99 and 1999/2000. As pointed out by this Board in D7/95, IRBRD, vol 10, 79:

> *'It is the duty of each and every taxpayer in Hong Kong to inform the Commissioner of their liability to tax and to file true and correct tax returns. The system of taxation in Hong Kong is simple and effective only if taxpayers fulfil their obligations in accordance with the Inland Revenue Ordinance. The system of low taxation in Hong Kong is dependent upon an honour system by taxpayers'.*

28. In sharp contrast to the late return cases, the failure of a taxpayer to inform the Revenue of his chargeability to tax might result in such taxpayer escaping the tax net altogether. In

D118/02, the Board pointed out that 100% of the amount of tax undercharged is appropriate to those cases:

(a) Where there has been no criminal intent and the taxpayer has totally failed in his or its obligations under the IRO or

(b) Where the Commissioner has had to resort to investigations or the preparation of assets betterment statements or has otherwise had difficulty in assessing the tax or

(c) Where the failure by the taxpayer to fulfill his or its obligations under the IRO has persisted for a number of years.

29. In this case the additional tax assessed for the three years ranged between 64% and 75% of the tax undercharged. The Revenue explained to us that they regard this case as one falling within the 'Disclosure with full information promptly on challenge' category in its Penalty Policy Statement. The Revenue placed this case within sub-group (b) of that Statement on the basis that the defaults in this cases result from sheer recklessness or sheer gross negligence. The normal penalty loading for this group is 50% rising to 75% of the tax involved. The assessments in question are well above the normal loading. Whilst we have some reservations with regard to the Revenue's placement of this case at the high end of group (b), we are not prepared to disturb this assessment bearing in mind the ambiguity of the Appellant's case as outlined in paragraph 23 above.

30. For these reasons, we allow the appeal in part in relation to the years 1996/97 and 2000/01 and dismiss the appeal in relation to the remaining years.