INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D13/99

Penalty Tax – incorrect profits tax return – without reasonable excuse – penalty under section 82A of the Inland Revenue Ordinance.

Panel: Benjamin Yu SC (chairman), Cheung Wai Hing and Russell Adam Langley Coleman.

Date of hearing: 28 April 1999.
Date of decision: 20 May 1999.

The Commissioner of Inland Revenue was of the opinion that the taxpayer, who practised as a general practitioner, had without reasonable excuse, made incorrect tax returns in respect of his business for the relevant years of assessment. On 11 November 1997, the Commissioner gave notice to the taxpayer under section 82A(4) of his intention to assess the taxpayer to additional tax by way of penalty, and invited his representation. On 19 December 1997, the tax representative submitted written representations on behalf of the taxpayer to the Commissioner. Having considered and taken into account of the taxpayer's representations, the Commissioner issued notices of assessment and demand for additional tax on 8 January 1998 under section 82A of the IRO. By a notice dated 6 February 1998, the taxpayer appealed against the relevant additional assessment issued.

Held:

(1) A point that the appeal was not valid as the notice of appeal was not accompanied by a statement of the grounds of appeal as required by section 82B(1)(b) of the IRO ('the Point') would be more appropriately taken before the hearing of the appeal.

(2) The Point was not a meritorious one. In the context of an appeal against additional tax where the various notices of assessment and demands for additional tax themselves gave no reasons and where the notice of appeal itself stated that the ground of appeal was that the assessment was 'excessive', and where the matters urged upon the Board in the appeal had substantially been set out in the representations made under section 82A(4) which accompanied the notice of appeal, the Board considered that it would be unduly technical to find that the notice of appeal was invalid for want of a formal document called 'statement of grounds of appeal'. The Board held that section 82B(1) could be complied with if the grounds were indicated in the notice of appeal, and this was so in the present case.

(3) In all the circumstances, the Board was prepared to accept that the taxpayer did intend to co-operate with the Inland Revenue Department in the audit and investigation and the Board would consider the level of penalty in this case upon such basis.

(4) The financial difficulties of a taxpayer were not a reason for appeal. It may be a factor for the Commissioner to consider the method and time for payment: See D96/97.

(5) Section 82A(4) of the IRO did not limit the matters which the Commissioner may take into consideration when deciding on the amount of additional tax, nor did section 82B of the IRO which affords to the taxpayer a right of appeal on the amount of additional tax.

(6) Although the taxpayer had incurred substantial expenses for his family members, which the Board was sympathetic to their circumstances, the Board could not see any relevance that the conditions of his family members have to this appeal. The Board, however, would consider the level of penalty in this case upon such basis. The amount of expenses the taxpayer may have incurred by reason of his family's conditions was again irrelevant to this appeal.

(7) In considering the level of the penalty, the Board borne in mind that the taxpayer was a professional man, that he must be aware of his duty to make proper and accurate returns of his business, that he had repeatedly and for a continuous period of 6 years, under-reported his tax liability, and that the amount of tax so attempted to be evaded was very substantial, nearly $4,000,000.

(8) The Board further borne in mind that the taxpayer himself offered a figure of $4,500,000. In these circumstances, the Board could see no possible ground for challenge on the amount which was in fact levied, even on the footing that the taxpayer had intended to co-operate fully with the Inland Revenue Department in the investigation and audit.

Appeal dismissed.

Cases referred to:

D18/92, IRBRD, vol 7, 144
D96/97, IRBRD, vol 12, 520

Yeung Ka Sing for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The facts

1. The appellant (hereinafter referred to as 'the Taxpayer') is a medical doctor and is and has been practising as such during the years of assessment 1989/90 to 1994/95 ('the Relevant Years of Assessment'). The Taxpayer practised as a general practitioner, but with special interest in cosmetic procedures. The Taxpayer does not, however, claim that he has specialist qualifications in cosmetic surgery.

2. In respect of each of the Relevant Years of Assessment, the Taxpayer had originally filed profits tax returns in respect of his business showing gross income and assessable profits as tabulated below:

Year of Assessment	**Date of Filling Return**	**Gross Income**	**Returned Assessable Profits**
		$	$
1989/90	9-8-1990	2,319,535	427,570
1990/91	12-8-1991	2,596,806	402,323
1991/92	25-8-1992	3,616,816	482,068
1992/93	13-9-1993	4,579,235	1,244,108
1993/94	26-9-1994	5,695,105	750,434
1994/95	15-8-1995	4,388,347	606,961
		23,195,844	3,913,464

3. Based on these returns, the assessor raised the following profits tax assessments on the Taxpayer in respect of his business:

Year of Assessment	**Profits Assessed**
	$
1989/90	427,570
1990/91	402,323
1991/92	482,068
1992/93	1,244,108
1993/94	750,434
1994/95	606,961
	3,913,464

4. By a letter dated 29 November 1995, the assessor informed the Taxpayer that he was conducting an audit on his tax return for the year of assessment 1994/95. On 8 December 1995, the Taxpayer appointed Thomas Lee and Company Limited as his tax representative. Thereafter, the assessor conducted investigations on the Taxpayer's business, such investigations included interviews with the Taxpayer and his tax

representative, examination of the bank statements of the Taxpayer, field visit to the Taxpayer's clinic.

5. Such investigations extended to the other Relevant Years of Assessment, in the course of which the assessor also interviewed the Taxpayer's mother said to have been employed by the Taxpayer in his clinic as public relations consultant, involved in contacting beauticians and the marketing of cosmetics. The assessor also examined the bank account of the Taxpayer's mother, into which deposits had been made and were transferred to the Taxpayer's account.

6. On 12 July 1996, the assessor raised the following estimated profits tax assessments for the years of assessment 1990/91 to 1994/95 inclusive on the Taxpayer's business:

Year of Assessment	**Additional Assessable Profits**
	$
1990/91	2,500,000
1991/92	8,000,000
1992/93	8,500,000
1993/94	14,000,000
1994/95	2,000,000

7. The Taxpayer raised objections on these assessments. Further investigations and negotiations went on until 20 October 1997 when the Taxpayer's representative submitted a proposed basis of settlement and tax computations for full and final settlement of the field audit case as well as for settlement of the objections lodged by the Taxpayer for the Relevant Years of Assessment. That letter was countersigned by the Taxpayer. The proposed additional assessable profits were:

Year of Assessment	**Proposed Additional Assessable Profits**
	$
1989/90	1,450,721
1990/91	1,835,702
1991/92	7,053,238
1992/93	5,333,637
1993/94	9,777,926
1994/95	1,126,880
	26,571,104

The last paragraph of the letter of 20 October 1997 stated that the Taxpayer

'understand that his admission of liability to the additional profits tax assessments for the 6 years in concern would amount to admission of offences under the IRO and, in addition to the tax undercharged, penalty could be imposed by the Commissioner of Inland Revenue under Part XIV of the IRO.

We need to bring to your attention that our client has borrowed heavily from banks to pay the tax demanded. He is presently indebted in the amount of over $10,000,000 to the banks. Thus, our client does not have the amount of cash available to enable him to propose a compound penalty under section 80(6) of the IRO, our client nevertheless wishes to inform the Commissioner that he is prepared to accept additional tax to be raised by the Commissioner under section 82A of the IRO on him in respect of the 6 years of assessment from 1989/90 to 1994/95 in the total amount of $4,500,000, which is roughly equivalent to a penalty loading of 115%. Our client would need an extended time to settle the additional tax under section 82A of the IRO and earnestly requests that he be allowed to settle the additional tax by monthly instalments of $100,000 each.'

8. This proposal was accepted by the assessor and he issued revised additional assessments for the Relevant Years of Assessment in accordance with the proposed computation of the Taxpayer. The Taxpayer had previously settled part of the tax payable for the estimated additional assessments issued under an instalment plan with the Collector. He settled the balance of the outstanding tax shortly after the issue of the revised additional assessments.

9. The following is a comparative table of the assessable profits in respect of the Taxpayer's business before and after the audit and the amount of tax undercharged in consequence of the Taxpayer's submission of incorrect tax returns:

Year of Assessment	**Assessable Profits Before Audit**	**Assessable Profits After Audit**	**Profits Understated**	**Tax Undercharged**
	$	$	$	$
1989/90	427,570	1,878,291	1,450,721	217,608
1990/91	402,323	2,238,025	1,835,702	275,355
1991/92	482,068	7,535,306	7,053,238	1,057,985
1992/93	1,244,108	6,577,745	5,333,637	800,045
1993/94	750,434	10,527,360	9,770,926	1,465,639
1994/95	606,961	1,733,841	1,126,880	169,032
	3,913,464	30,484,568	26,571,104	3,985,664

10. The Commissioner of Inland Revenue was of the opinion that the Taxpayer had, without reasonable excuse, made incorrect tax returns in respect of his business for the Relevant Years of Assessment. On 11 November 1997, the Commissioner gave notice to the Taxpayer under section 82A(4) of his intention to assess the Taxpayer to additional tax by way of penalty, and invited his representations. On 19 December 1997, the tax representative submitted written representations on behalf of the Taxpayer to the Commissioner. Having considered and taken into account of the Taxpayer's representations, the Commissioner issued notices of assessment and demand for additional tax on 8 January 1998 under section 82A of the Inland Revenue Ordinance ('the IRO') for the Relevant Years of Assessment in the following amounts:

Year of Assessment	Tax Undercharged	Section 82A Additional Tax	Additional Tax as percentage of Tax Undercharged
	$	$	
1989/90	217,608	283,000	130.05%
1990/91	275,355	348,000	126.38%
1991/92	1,057,985	1,288,000	121.74%
1992/93	800,045	914,000	114.24%
1993/94	1,465,639	1,569,000	107.05%
1994/95	169,032	170,000	100.57%
	3,985,664	4,572,000	114.71%

11. By a notice dated 6 February 1998, the Taxpayer appealed against the additional assessment issued for Relevant Years of Assessment under section 82A of the IRO.

12. That notice stated as follows:

> 'I hereby lodge a formal notice of appeal under section 82B(1) of the Inland Revenue Ordinance against the additional assessment issued for the years of assessment 1989/90 to 1994/95 under section 82A on the grounds (sic) that they are excessive.
>
> For the purpose of this appeal, I enclose a copy of the following relevant documents:
>
> 1. Notice of assessment;
>
> 2. Notice of intention to assess additional tax given under section 82A(4) and;
>
> 3. Written representation made by the Taxpayer under section 82A(4).'
>
> These documents were enclosed in the notice of appeal as stated therein.

The validity of the appeal

13. At the conclusion of the hearing of this appeal, Mr Yeung took a point that the appeal was not valid as the notice of appeal was not accompanied by a statement of the grounds of appeal as required by section 82B(1)(b) of the IRO. Such point should, it seems to us, be more appropriately taken before the hearing of the appeal. Nevertheless, we are content to deal with it without deciding whether the Respondent (the CIR) should be taken as having waived the point by taking part in the conduct of the appeal. Section 82B(1) provides:

> 'Any person who has been assessed to additional tax under section 82A may, within 1 month after notice of appeal is given to him, give notice of appeal to the

Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by –

(a) a copy of the notice of assessment,

(b) a statement of the grounds of appeal from the assessment,

(c) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and

(d) a copy of any written representations made under section 82A(4).'

Our attention has also been drawn to D18/92, IRBRD, vol 7, 144 where it was held in the context of section 66 of the IRO that the Board is a body constituted under the IRO and has no inherent power to extend time for the filing of grounds of appeal.

14. In our judgment, the point is not a meritorious one. In the context of an appeal against additional tax where the various notices of assessment and demands for additional tax themselves gave no reasons, and where the notice of appeal itself stated that the ground of appeal was that the assessment was 'excessive', and where the matters urged upon us in the appeal had substantially been set out in the representations made under section 82A(4) which accompanied the notice of appeal, we consider that it would be unduly technical to find that the notice of appeal is invalid for want of a formal document called 'statement of the grounds of appeal'. It seems to us that we should only uphold such an argument if it is clearly correct. We do not think so. We hold that section 82B(1) can be complied with if the grounds are indicated in the notice of appeal, and this was so in the present case.

15. We turn then to the merits of the appeal. Before us, the Taxpayer did not attempt to re-open the revised additional assessments made upon him as a result of the settlement between his tax representative and the Commissioner. Nor did he renew the complaints he had previously made against his tax representative in the handling of the case. The Taxpayer urged upon us various reasons why the additional assessments should be reduced. Although presented as six reasons, there are, in summary, three grounds he relied upon, namely:

(1) that he had intended to and did co-operate fully with the Commissioner during the audit and investigation,

(2) his present financial position, and

(3) the unfortunate circumstances of his family members, namely his elder brother and his father and mother, and the time and expense that he was put to on their account.

16. We can deal with the first ground shortly. Although the period of investigation and audit took rather long, from about December 1995 until October 1997, we bear in mind that the additional assessment related to some six years of assessment, and that during this period, the Taxpayer had throughout engaged tax representative to act on his behalf, and he did, as he explained to us, have to devote a large part of his time on problems of his family members. In all the circumstances, we are prepared to accept that he did intend to co-operate with the Inland Revenue Department in the audit and investigation and we shall consider the level of penalty in this case upon such basis.

17. On his second ground of financial hardship, he had only put before us some bank statements showing the amount of indebtedness to the banks. We have not, however, been given any evidence of his present income and expenditure. Nor have we been furnished with evidence of his assets. Mr Yeung informed us, and the Taxpayer accepted, that the Taxpayer made profits of $2,100,000, $2,700,000 and 3,100,000 in the years of assessment 1995/96, 1996/97 and 1997/98 respectively. We observe that in the letter dated 20 October 1997 quoted in paragraph 7 above, the Taxpayer had acknowledged the Commissioner's right to levy additional tax by way of penalty, and had virtually offered the amount of $4,500,000 while requesting for payment on instalement terms. In the letter of representation dated 10 December 1997 also signed by the Taxpayer himself, the same amount was mentioned as one which he was 'prepared to accept'. In the circumstances, we do not feel able to accept the evidence of the Taxpayer that he really has financial difficulties in discharging this liability to pay the additional tax.

18. We therefore do not need to consider whether financial difficulties of a Taxpayer can, in an appropriate case, be a relevant ground for mitigation of additional tax liability. Our attention bas been drawn to the Board's previous decision in D96/97, IRBRD, vol 12, 520 where we find this statement:

> 'The second ground that she was in financial difficulty is not a reason for appeal. It may be a factor for the Commissioner to consider the method and time for payment.'

In that case, the Board did not provide any reason for so concluding. We note that section 82A(4) of the IRO does not limit the matters which the Commissioner may take into consideration when deciding on the amount of additional tax, nor does section 82B of the IRO which affords to the Taxpayer a right of appeal on the amount of additional tax. Nevertheless, since we have not heard full argument on the point, we would prefer to leave the question open.

19. We come to the third ground. The Taxpayer addressed us at length on the very unfortunate circumstances of his elder brother, his father and his mother. The Taxpayer also told us that he had incurred substantial expenses for those family members. Whilst we are sympathetic to their situation, we fail to see any relevance that their conditions have to this appeal, save for the limited purpose referred to in paragraph 16 above. For the same reason, we consider it unnecessary to set out the details of their circumstances. During the final

submission stage, the Taxpayer had requested an adjournment to enable him to produce further evidence to substantiate his claim that he had incurred medical expenses for his brother, his father and mother and funeral expenses for his father. We took the view that the amount of expenses the Taxpayer may have incurred in this respect was again irrelevant to this appeal, particularly when he had not chosen to adduce evidence to satisfy us of his alleged financial difficulties. Accordingly, we declined his request.

20. We turn finally to the level of the penalty. We bear in mind that the Taxpayer is a professional man, that he must be aware of his duty to make proper and accurate returns of his business, that he has repeatedly and for a continuous period of 6 years, under-reported his tax liability, and that the amount of tax so attempted to be evaded was very substantial, nearly $4,000,000. We further bear in mind that in the letters of 20 October 1997 and 10 December 1997, the Taxpayer himself offered a figure of $4,500,000. In these circumstances, we can see no possible ground for challenge on the amount which was in fact levied, even on the footing that the Taxpayer had intended to co-operate fully with the Inland Revenue Department in the investigation and audit.

21. We must therefore dismiss this appeal and confirm the assessment of additional tax for each of the Relevant Years of Assessment.