Case No. D24/85

Board of Review:

Charles A. Ching, *Chairman*, D. Evans, Helen A. Lo, *Members.*

31 October 1985.

Additional Tax—Section 82A, of the Inland Revenue Ordinance—understatement of assessable profits — reliance on professional service — whether reasonable excuse — whether penalty excessive.

The Appellant had submitted tax returns which grossly understated his assessable profits. A penalty assessment by way of additional tax was imposed on him by the Commissioner. The Appellant appealed on the grounds that he had a reasonable excuse as he had relied on the service of professional people in handling his tax affairs and that the penalty was too severe.

Held:
It is for the taxpayer to make a correct return and is not possible for him to disassociate himself from the signed declaration made by him in the return. In the circumstances the penalty was not excessive.

Appeal dismissed.

Chan Sui Keung for the Commissioner of Inland Revenue.
Benjamin Chain for the Appellant.

Reasons:

The taxpayer commenced a sole proprietorship business in 1971. In 1978 he completed a profits tax return. Subsequently, by a letter dated 13 July 1978, the Inland Revenue Department informed him that, since the income derived by him and his wife was considerably less than the personal and family allowances to which he was entitled, he would not be asked to make annual Profits Tax Returns each year in the future. However, the letter also went on to say inter alia:—

‘2. Nevertheless, you must inform me if, at any time any one of the following events occurs:—

(i) The annual profits of your business (including remuneration and other benefits received by you and your dependants—e.g. salaries, food, interest on capital, etc.) together with the income of you and your wife from employment exceed $34,000.

(ii) …

(iii) You or your wife:—
(*a*) …
(*b*) …
(*c*) …
(*d*) buy any property.'

He was reminded that failure to make such a notification might amount to an offence under the Inland Revenue Ordinance, Cap. 112, and that he was still required to keep sufficient records of his income and expenditure so that his assessable profits could be readily ascertained. The letter was in both the English and the Chinese languages.

In September of 1982 the taxpayer was asked to complete a Profits Tax Return. He took his books to a firm of accountants ('the first representatives') together with the Return. They completed the return, he signed it and submitted it to the Inland Revenue Department. He was then required to attend an interview at the Department on 13 May 1983. There is a signed and written account of that interview (Appendix 5) and its correctness was agreed. It shows that he claimed that a full set of books was maintained. He did not disclose two savings accounts in his own name with a total of just over $1,000,000. He did disclose that he and his wife had purchased two properties, one in 1982 and the other 'a few years ago' and that both were mortgaged, one for overdraft facilities to the extent of $300,000 and the other for general banking facilities up to a maximum of $700,000.

At the same interview he was given Profits Tax Return forms for 1978/1979 to 1982/1983 inclusive and he was asked to complete them. Again, the first representatives filled them in and he signed them. The Assessor did not accept their accuracy and compiled an Assets Betterment Statement for the period 1 April 1977 to 31 March 1983. It showed the opening net assets as being $72,028 and the closing net assets as being $2,382,854. The taxpayer was asked for his comments. He was then assessed to additional tax. He then went to another firm of accountants ('the second representatives'). They wrote to the Commissioner on 27 January 1984. They said that the records had been handled by two bookkeepers who had died so that the first representatives had not had bull information. They asked that the accounts submitted by the first representatives be ignored and that they should prepare revised accounts. Those revised accounts were subsequently submitted. They showed that the assessable profits in the returns drawn up by the first representatives ($305,896) had been understated by about seven times. Additional tax was therefore levied on the taxpayer under section 82A of the Inland Revenue Ordinance, Cap. 112. The amount of additional tax is $458,300 and amounts to an average of just under 41% of the maximum that could have been charged. The taxpayer now appeals.

Mr. Chain, who appeared for the taxpayer, submitted that the taxpayer had a reasonable excuse under section 82A. He argued that the taxpayer had relied on professional service and had handed over all of his books to professional people to handle the matter on his behalf. He realized that to succeed, he would have to show that the taxpayer had 'played no part in the incorrect return' or that he had 'somehow disassociated himself' from it. He relied on a decision of this Boad in B/R 80/76.

We cannot accept these arguments. Mr. CHAN Sui-keung, who appeared for the Commissioner with Mr. LAU Hin-chung, brought to our attention two other decisions of this Board, namely D1/82 and D24/84. These are both decisions that it is not a reasonable excuse for an incorrect return that professional accountants had been employed. We are sure that those two decisions are correct. It is for the taxpayer to make a correct return. He signs a declaration to that effect on the return itself. It is not possible for a taxpayer to have played no part in or to have disassociated himself from a return on which he makes such a declaration. We also agree with Mr. Chan that B/R 80/76 is not in point. That was a case where the taxpayer and his advisers had come to their own conclusion on the character of two transactions. They were held to have been wrong but that the taxpayer had a reasonable excuse.

The next point argued by Mr. Chain was that in any event the penalty was too severe. He suggested that it would be proper to have regard only to the approximately $1,000,000 in the two undisclosed bank accounts and to base the additional tax upon that. We do not agree. We can see no logical reason why the penalty should be calculated on that amount especially having regard to the terms of section 82A(1). The taxpayer had been warned of the consequences of failing to notify the Commissioner should any of the events specified in the letter of 13 July 1978, take place. He did not. He had subsequent opportunities to reveal the existence of the two bank accounts but did not do so. The returns made up by the first representatives and signed and submitted by the taxpayer were gross understatements of profits. The Inland Revenue Department have been put to expenditure of time, effort and money. For years the Treasury has been deprived of the use of the tax which this taxpayer should have paid. We do not think the penalty was excessive.

For these reasons we dismiss this appeal.