INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D27/97

Penalty tax – section 68(2D) – hearing in the taxpayer's absence – exercise of discretion by the Board.

Section 82A – amount of penalty decided on its own merits – 10% starting point – gross negligence – substantial omission.

Panel: Christopher Chan Cheuk (chairman), Nicholas Ian Billingham and Peter R Griffiths.

Date of hearing: 18 April 1997.
Date of decision: 6 June 1997.

About a week before hearing the taxpayer informed the Board in writing that he wanted the hearing to be held as scheduled in his absence because he would not be in Hong Kong and had no definite date for return to Hong Kong. The Board had to decide whether it was fair and reasonable for the Board to hear the case in his absence and whether there was sufficient material for the Board to decide on the merits of the case. The taxpayer's decision should be respected unless the proceedings cannot be continued.

Held:

Having considered all the circumstances the Board approved the taxpayer's application to have the case heard in his absence.

The taxpayer appealed against liability and quantum in respect of the additional tax imposed under section 82A. The Board found that ignorance of law was not a valid ground of appeal against liability and that it was the taxpayer's duly to complete and file the return correctly and without omission. The two other points raised by the taxpayer that the Government suffered no loss because of the omission and that he was a first offender were not grounds for appeal against liability. The Board would consider them in assessment of penalty. At the time when the omission was made the usual tariff for cases where the Government suffered no loss and the taxpayer was a first offender was 10%. The Board found other factors unfavourable to the taxpayer. It was a clear case of gross negligence and the mistake was not caused by accidental oversight or ignorance of law. The amount of income understated was relatively substantial almost equivalent to one-third of the whole.

Held:

That the Commissioner's decision on the additional assessment which was equivalent to 25% of the amount undercharged should not be disturbed.

Appeal dismissed.

Go Min Min for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

1. This is an appeal by a taxpayer against an assessment made by the Commissioner of Inland Revenue on 7 July 1996 in the sum of $6,600 as additional tax under section 82A of the Inland Revenue Ordinance (the IRO) for the year of assessment 1994/95.

Proceedings

2. Notice of hearing for the appeal was given to the Taxpayer on 4 March 1997. On 11 April 1997, about a week before the hearing, the Taxpayer by letter informed the Board that he had 'to go to Mainland China to take care of investment business and will not return for quite some time (including the hearing date).' He applied for hearing of the case in his absence and without any authorised representative under section 68(2D) which states:

> *'The Board may, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable on application of the appellant made by notice in writing addressed to the Clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal, proceed to hear the appeal in the absence of the appellant or his authorized representative.'*

3. However, the Board felt that it was necessary to consider whether it is appropriate to grant the application. The Taxpayer in his letter did not state when he would return to Hong Kong. From the tone of his letter it was clear that he did not have any definite date of return and he did not want the appeal to be pending. This is purely practical consideration but as a tribunal the Board has to decide whether it is fair and reasonable for the Board to hear the case in the absence of a party and whether there is sufficient material for the Board to decide on the merits of this case.

4. By a letter of 20 March 1997 the Taxpayer confirmed his agreement to the facts of this case as set out in the statement of facts which had been prepared by the Revenue and was later submitted to the Board together with Exhibits 1 to 7. The grounds of appeal were found in the Taxpayer's letter dated 17 May 1996 and also in the statement of the grounds of

appeal dated 10 June 1996. The Board concluded that it had sufficient information and materials to continue with the hearing.

5. Hong Kong is a free and democratic society. The Taxpayer in this case has the right to prosecute the appeal in a manner he considers appropriate together with the responsibility of the consequences. His decision should be respected unless the proceedings cannot be continued in his absence.

6. The Revenue had no objection to the application. Having considered all the circumstances the Board approved the Taxpayer's application to have the case heard in his absence. The Board should remind itself that the Taxpayer's absence should not be taken as a factor in deciding the merits of this case.

Fact

7. The Taxpayer was an employee and a director of the two companies, namely, the Development Company and the Insurance Agency.

8. The Taxpayer himself completed and returned the tax return form. He omitted to state the income he received from the Insurance Agency in the sum of $120,000 together with the relevant taxable income of the benefit of quarters provided by the Development Company. The total taxable income omitted was $132,000.

Issue and grounds of appeal

9. In his letter of 17 May 1996 and statement of the grounds of appeal the Taxpayer did not clearly state whether he appealed against liability or quantum. The Board assumed and proceeded on the basis that he had appealed against both. He advanced different grounds of appeal which will be dealt in the following paragraphs.

Letter dated 17 May 1996

10. In the letter dated 17 May 1996 the Taxpayer explained:

(a) He thought that he should file separate returns for incomes from different companies:

(b) Later, he received the tax demand note which covered incomes from both companies and thought it was not necessary to file further return for the omission; and

(c) As the quarters were provided by the Development Company and was disclosed in his return, he found no reason to file another report as it would be repetitive.

11. In other words, he pleaded ignorance of the law. But, ignorance is not a valid ground of appeal against liability. There was nothing in evidence which made us believe this was an honest mistake.

Other grounds of appeal

12. The other grounds of appeal were found in the 'statement of the grounds of appeal' in Chinese dated 10 June 1996 (but wrongly translated as '10 May 1996'). The Board has carefully considered each of them.

13. The Taxpayer claimed that he did not have any intention to evade or omit tax. This was a factual issue which could not be easily decided by written submission without hearing testimony and seeing the person. But, from the documents disclosed it was clear that the Taxpayer completed his return partly in English and partly in Chinese as shown in Exhibit 1 in a grossly negligent manner:

(a) the return was not dated;

(b) he did not state who his employer was;

(c) he left blank the capacity he was employed;

(d) he did not complete the value of quarters provided;

and (e) above all, he did not disclose his income from the Insurance Agency which amounted to almost one-third of his total income for the year.

14. We need not stress how important it is for every taxpayer to complete the tax return correctly and without omission. Based on the return the Revenue calculates the tax. We are satisfied that the tax return has given sufficient guidance for taxpayer to complete the return. The Taxpayer held very important position in both companies and earned very high income. He was not an illiterate and should understand the importance of filing an accurate return.

15. He complained that the Revenue 'did not handle the case in a proper manner.' He alleged that the Revenue was fully aware of the mistake as it had the employers' returns, and did not notify him immediately to correct the mistake. The Revenue's reply was that on the notice of assessment for 1994/95 issued on 5 September 1995 (Exhibit 2) in the column of assessor's note the code '01' was printed. Had the taxpayer been careful enough he would have referred to the explanatory note overleaf which stated 'the income for the year is assessed in accordance with information supplied by your employer(s).' Definitely, the Taxpayer had not made such reference. Even if he had done so, it would have been too late and assessment had already been made. The Board maintains that it is taxpayer's duty to complete and file the Return correctly and without omission.

16. Another ground the Taxpayer advanced was that Hong Kong Government had not suffered any loss arising out of the mistake. This point was irrelevant in deciding liability.

17. The Taxpayer claimed 'he had always maintained a good record.' This point was also irrelevant in considered liability. The Taxpayer further complained that 'under the present unfavourable condition with the income of the public getting lower in general' it was unreasonable for the Government to make such unreasonable demand. The Board failed to see how the general economy affected one's liability.

18. The Board dismisses the appeal against liability.

Quantum

19. Having dismissed the appeal against liability the Board has to consider the appeal against quantum. The Taxpayer was a first offender and the Revenue had suffered no loss. Ms Go Min-min for the Revenue submitted that the Commissioner had already been lenient in this case where the quantum of penalty of $6,600 was about 5% of the income and 25% of the amount of tax which would have been undercharged.

20. With reference to the recent Board of Review cases it is wrong to say that the rate of penalty at 25% of the amount undercharged is lenient. In cases where the Taxpayer is a first offender and the Revenue has suffered no loss the usual tariff is 10% and not 25%.

21. The Revenue submitted that the tariff had been increased since July 1995 from 10% to 25%. But, the mistake was committed before the increase.

22. The Board maintains the general principle that each case has to be decided on its own merits. Having made reference to the past cases the starting point for this case is 10%. However, the Board has found factors which are unfavourable to the Taxpayer.

(a) The Board does not think that the omission was due to an accidental oversight or was caused by ignorance of the law. Though there was no evidence to show that the Taxpayer intended to evade tax, it was a clear case of gross negligence which no tax system should allow.

(b) The amount of income understated was relatively substantial amounting to nearly one-third of the whole.

23. After balancing the relevant factors the Board is of the view that the determination by the Commissioner should not be disturbed. Accordingly, the appeal against quantum is dismissed.