

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D32/89

Penalty assessments – licensed hawker – failure to notify Commissioner of liability to tax – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Terence Tai Chun To and Ronny Wong Fook Hum.

Date of hearing: 11 July 1989.

Date of decision: 18 August 1989.

The taxpayer was a licensed hawker occupying a fixed hawker pitch selling fresh green vegetables. The taxpayer never filed any tax returns in respect of this hawker business. As a result of investigations made by the Inland Revenue Department the taxpayer filed a number of tax returns which were subsequently found out to be incorrect and following further investigations agreement was reached between the taxpayer and the assessor as to the assessable profits of the taxpayer for a period of six years. The Deputy Commissioner assessed additional tax on the taxpayer under section 82A of the Inland Revenue Ordinance in respect of the last four years in question. The tax undercharged was a total of \$128,000 and the additional penalty tax was a total of \$136,000. The taxpayer argued that he was a hawker by profession and had been a hawker for some forty years in Hong Kong. He had now reached the end of his career and was not aware of the fact that a hawker was liable to pay business profits tax. He was illiterate and could neither read nor write English or Chinese. He had no accounting knowledge. He said that he was licensed by the Urban Services Department. Licensed hawkers are exempted from the requirement to register under the Business Registration Ordinance. It was not alleged that there was any attempt to evade payment of tax.

Held:

The penalty imposed was excessive and should be reduced to \$75,000 representing about 20% of the maximum penalty which could have been imposed. It was considered significant that the Governor in Council has exempted hawkers from the obligations imposed by the Business Registration Ordinance. The taxpayer had filed tax returns for another business carried on by him and this fact gave credence to the submission that the taxpayer thought a hawker business was not taxable.

Appeal allowed in part.

Tse Hon Kin for the Commissioner of Inland Revenue.

Taxpayer in person.

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Decision:

This is an appeal by a Taxpayer against a number of additional tax assessments imposed upon him under section 82A of the Inland Revenue Ordinance for the years of assessment 1982/83 to 1985/86 inclusive.

The facts of the case are as follows:

1. The Taxpayer carried on a transportation business which ceased in 1982 when he transferred it to his son. He filed profits tax returns in respect of this transportation business.
2. For very many years the Taxpayer and his wife also carried on business as hawkers and they held a hawker licence and occupied a fixed hawker pitch selling fresh green vegetables. The Taxpayer never filed any profits tax returns in respect of this hawker business.
3. At the request of the Inland Revenue Department the Taxpayer called to see officers of the Department in December 1986 and disclosed to the investigating officers that he had been carrying on hawker activities. The Taxpayer had not registered his hawker business under the Business Registration Ordinance.
4. In January 1987 profits tax returns for the years of assessment 1980/81 to 1985/86 inclusive were issued to the Taxpayer in respect of his hawker business but he failed to complete and return the same within the one month period given to him for that purpose.
5. In March 1987 in the absence of the returns the assessor raised an estimated profits tax assessment on the Taxpayer for the year of assessment 1980/81 showing assessable profits in the sum of \$200,000 and the Taxpayer duly lodged notice of objection thereto.
6. In May 1987 the Taxpayer submitted through his tax representative the tax returns for the years of assessment 1980/81 to 1985/86 as follows:

<u>Year of Assessment</u>	<u>Basis Period</u> (year ended)	<u>Returned Profit</u> \$
1980/81	31-3-1981	40,894
1981/82	31-3-1982	25,928
1982/83	31-3-1983	100,233

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1983/84	31-3-1984	130,350
1984/85	31-3-1985	72,950
1985/86	31-3-1986	109,700

7. On various dates estimated assessments were then issued to the Taxpayer for the years 1981/82 to 1985/86 inclusive all in the sum of \$200,000 each. The Taxpayer duly lodged notice of objection to the estimated assessment for the year 1981/82 but not in respect of the four later years.
8. In October 1988 the Taxpayer accompanied by his tax representative and his son attended an interview with the assessor and during the interview the Taxpayer agreed to settle his case on the basis that he had total assessable profits of \$900,207 in respect of his hawker business for the years of assessment 1980/81 to 1985/86 which were computed and agreed as follows:

<u>Year of Assessment</u>	<u>Profits per Return</u> \$	<u>Agreed Assessable Profit</u> \$
1980/81	40,894	40,894
1981/82	25,928	59,313
1982/83	100,233	200,000
1983/84	130,350	200,000
1984/85	72,950	200,000
1985/86	<u>109,700</u>	<u>200,000</u>
	<u>\$480,055</u>	<u>\$900,207</u>

9. On a later day of October 1988 revised profits tax assessments for the years of assessment 1980/81 to 1981/82 based on the agreed assessable profits were issued. The estimated assessments for the subsequent years, each of which was in the sum of \$200,000 against which the Taxpayer had not filed any objection remained.
10. In December 1988 the Deputy Commissioner gave notice to the Taxpayer of his intention to assess additional tax under section 82A of the Inland Revenue Ordinance for the years of assessment 1982/83 to 1985/86 in respect of the failure by the Taxpayer to inform the Commissioner that he was chargeable to profits tax.
11. The Taxpayer made representations through his tax representative and after taking the representations into account the Deputy Commissioner in March 1989 issued the following additional tax assessments under section 82A of the Inland Revenue Ordinance:

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<u>Year of Assessment</u>	<u>Tax Undercharged</u> \$	<u>Section 82A Additional Tax</u> \$
1982/83	30,000	32,000
1983/84	30,000	32,000
1984/85	34,000	36,000
1985/86	<u>34,000</u>	<u>36,000</u>
	<u>\$128,000</u>	<u>\$136,000</u>

12. In April 1989 the Taxpayer gave notice of appeal to the Board of Review against these additional tax assessments.

At the hearing of the appeal the Taxpayer appeared on his own behalf. He explained that he was a hawker by profession and that he had been carrying on business as a hawker for some forty years in Hong Kong. He said that he was now 64 years old and had reached the end of his career as a hawker. He said that he did not know that a hawker was liable to pay tax as carrying on a business and he did not know any of his hawker acquaintances who paid tax.

He said that he did not wish to evade tax if he was liable to pay tax. He said that he was illiterate and could not read or write either English or Chinese. He said that he had no knowledge of accounts or accounting matters and had not kept any accounts with regard to his hawker business. He said that he had a hawker licence from the Urban Services Department which he had now surrendered back to the Urban Services Department. He said that he had originally been licenced as a mobile hawker some twenty-eight years ago and had obtained a fixed pitch hawker licence from the Urban Services Department some ten years ago.

The representative of the Commissioner pointed out that the ability of a taxpayer to pay penalties must be distinguished from his liability to pay penalties. He submitted that in this case the Taxpayer was liable to pay penalties because he had failed to inform the Commissioner that he was liable to pay tax in respect of his hawker business. He said that under the Business Registration Ordinance a hawker was exempt from business registration but that did not make him exempt from being chargeable to tax. He said that these were two entirely different requirements. He said that ignorance is no excuse and drew our attention to the fact that the Taxpayer had filed tax returns in respect of his transportation business. He drew our attention to the fact that though the Taxpayer had been carrying on his hawker business for many years it was not until he was investigated by officers of the Inland Revenue Department in December 1986 that he disclosed his hawker business.

The representative for the Commissioner confirmed that the Commissioner did not allege that the Taxpayer had attempted to evade payment of tax which would have

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involved a prosecution. He pointed out that even though the Taxpayer knew that his affairs were being investigated, he had still not furnished accurate returns of his profits derived from his hawker business. He said that the old age and lack of education of the Taxpayer had been taken into account by the Deputy Commissioner when he had imposed the additional assessments by way of penalty upon the Taxpayer.

Having carefully taken into account all of the facts of this case and the submissions made by the parties we find that the additional assessments imposed upon the Taxpayer by way of penalty under section 82 of the Inland Revenue Ordinance are excessive. It is accepted that the Taxpayer was not attempting to evade payment of tax. This is a case of an individual who was totally ignorant of the tax laws of Hong Kong. He had been carrying on his hawker business for very many years, according to his statement forty years. It is significant to note that the Governor in Council has exempted hawkers from the obligations imposed upon all people carrying on business in Hong Kong to register under the Business Registration Ordinance. In our opinion this exemption requires some further thought and perhaps should be rescinded. We do not know why the exemption was originally introduced by the Governor in Council. Probably it was introduced because at the time when it was introduced hawkers were below the tax threshold in Hong Kong. We totally agree with the representative for the Commissioner when he points out that obligations under the Business Registration Ordinance and the Inland Revenue Ordinance are entirely separate. However the question which we ask ourselves, and which the Taxpayer was entitled to ask himself is why should a hawker, who now earns profits in excess of the minimum threshold under the Inland Revenue Ordinance, be exempt from the obligation to register himself as carrying on a business. By not requiring registration a person who carries on business as a hawker is taken outside of the procedural system of taxation which we have in Hong Kong. The Commissioner issues tax returns to individuals who have Business Registration Certificates. In this case it is significant that the Taxpayer carried on a transportation business and did file tax returns for that business. This lends credence to the point made by the Taxpayer that he thought that a hawker business was not taxable.

Previous Boards of Review have indicated that where a person totally fails in his obligations under the Inland Revenue Ordinance, an appropriate starting point for calculating penalties is an amount equal to the tax undercharged. It is then necessary to decide whether that amount should be increased or reduced. Taking into account all of the facts of this case we consider that a penalty equal to the amount of tax undercharged would be too high. In all of the circumstances we consider that an appropriate total penalty in this case would be an amount of \$75,000. This is about 20% of the maximum penalty which could be imposed upon the Taxpayer and is in line with penalties in cases which we consider to be of similar weight and gravity to the one now before us.

Accordingly we order that the total amount of additional assessments be reduced from a total of \$136,000 to a total of \$75,000 as follows:

Amount of Section 82A

Amount of Reduced

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<u>Year of Assessment</u>	<u>Additional Tax as Assessed by Deputy Commissioner</u> \$	<u>Section 82A Additional Tax as ordered by Board of Review</u>
1982/83	32,000	18,750
1983/84	32,000	18,750
1984/85	36,000	18,750
1985/86	<u>36,000</u>	<u>18,750</u>
	<u>\$136,000</u>	<u>\$75,000</u>