

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D 3/79

Board of Review:

L. J. D'Almada Remedios, *Chairman*, D. Barrett, Hwang King-hung & R. E. Moore, *Members*.

14 August 1979.

Additional tax – no tax returns filed by deceased taxpayer – value of estate exceeding \$1,500,000 – estimated assessment of profits raised against estate – “nil” returns filed by personal representative – assessment revised – settlement of tax payable – assessment to additional tax under section 82A of Inland Revenue Ordinance for filing “nil” returns – whether estate of deceased liable for assessment to additional tax – whether personal representative personally liable for assessment to additional tax.

The appellant's husband was a public transport employee during his lifetime and no tax returns were ever filed by him. He died on 1 January 1975 leaving as disclosed in the Affidavit for the Estate Duty Commissioner an estate worth over \$1,500,000. It was also found that assets to the value of \$2,000,000 held by the appellant were acquired with funds provided by her husband. As it was not known how the appellant's husband acquired his wealth estimated assessment for profits tax purposes for the years 1970/71 to 1974/75 were raised against the personal representatives of his estate, one of whom was the appellant. The appellant lodged a notice of objection, but there being no returns filed, the objection taken was, under section 64(1)(b) of the Inland Revenue Ordinance, invalid. The appellant then filed “nil” returns in respect of those years of assessment to validate the objection. Accountants subsequently engaged by the appellant to look into the affairs of her husband took the view that he was engaged in some form of business and on the invitation of the assessor an assets betterment statement was prepared on which revised assessments were raised. Ultimately, an agreement was reached on the amounts of assessable profits for the years of assessment 1970/71 to 1974/75.

Upon settlement of the tax payable the Commissioner of Inland Revenue assessed the appellant as personal representative of the estate of her husband, to additional tax under section 82A, on the ground that the appellant had without reasonable excuse by filing “nil” returns omitted profits totally \$4,912,417. On appeal against this assessment it was the case for the Commissioner that liability for the additional tax did not fall on the appellant personally but on the estate of the deceased.

The Board held that the assessment to additional tax being a penalty assessment could not be made against the estate of the deceased. However, had the appellant been personally

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charged with liability the assessment would have been confirmed as she had submitted the “nil” returns without reasonable excuse.

Decision: Appeal allowed. Assessment to additional tax set aside.

R. E. Mayne instructed by Liu, Chan, Lam & Co for the appellant.

I. J. Poole, Crown Counsel, for the Commissioner of Inland Revenue.

Reasons:

Although there is a statement of agreed facts, it would be convenient if we outline the salient features with an indication of the view which we take on the evidence adduced before us.

Madam A (who, for convenience, we will refer to as “the Appellant”) now aged 60 is the widow of the late Mr. B. They were married when she was 28 years of age. At that time, her husband was a public transport employee. They lived in a small room. As the years went by, her husband acquired considerable wealth. What he did for a living and how he acquired his wealth is not known. He died in January 1975 leaving an estate of over \$1,500,000.00. His next-of-kin includes the Appellant, a concubine and 4 children some of whom are minors. The Appellant and the concubine are the Administratrices of his estate.

It is not disputed that the Appellant has assets to the value of over \$2,000,000.00 and it is not denied that her possessions were derived from funds provided by her husband.

The Appellant’s husband did not file any tax returns during his life-time. Upon discovery of his assets as disclosed in the affidavit for the Estate Duty Commissioner, estimated assessments for profits tax purposes for the years 1970/71 to 1974/75 inclusive were raised against the personal representatives of his estate on the 11th of May 1976.

The Appellant, having sought the advice of her Solicitors on these assessments, objected through her Solicitors to the assessments. The notice of objection was lodged on the 15 May 1976. As the assessments were made under section 59(3) of the Inland Revenue Ordinance in the absence of returns filed by her husband, section 64(1)(b) provides that any objection taken will not be valid unless returns are made within such period as the Commissioner may require. As a result, the Appellant on the 15th of June 1976 filed “nil” returns in respect of those years of assessment.

The agreed facts state that the “nil” returns were filed to validate the objection.

Subsequently, the Appellant engaged accountants to look into the affairs of her husband and it is evident that her accountants took the view that her husband was engaged in some form of business. On the invitation of the assessor, an assets betterment statement was prepared for the years of assessment 1970/71 to 1974/75.

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Based on such statement, revised assessments were raised. Ultimately, an agreement was arrived at for the settlement of the Profits Tax assessments and Revised Assessments.

Upon settlement of the tax payable the Commissioner invoked the provisions of section 82A and levied a penalty assessment against the Appellant as personal representative of the deceased, on the ground that she had, without reasonable excuse, by filing a “nil” return, omitted profits totalling \$4,912,417.

Against this penalty assessment the Appellant now appeals.

Initially, Counsel for the Appellant and ourselves acted on the assumption that the penalty assessment was directed personally against the Appellant. The notice under section 82A was addressed to: ‘Madam A, the Personal Representative of Mr. B (deceased)’. As doubts arose in the course of the hearing, we were, naturally, interested to know against whom the penalty assessment was being levied. We indicated to the representative for the Commissioner that we would welcome the assistance and views of Crown Counsel on this and other points raised. At an adjourned hearing, Crown Counsel appearing on behalf of the Commissioner informed us that it was against the estate of the deceased that the penalty assessment is being levied and not the Appellant personally.

The material parts of section 82A reads:

“82A. (1) Any person who without reasonable excuse –

- (a) makes an incorrect return ... either on his behalf or on behalf of another person or a partnership ...

shall be liable to be assessed to additional tax ...”

Mr. Ronald Mayne, for the Appellant, argues that the return complained of was not made on the Appellant’s behalf nor on behalf of another person; that the estate of a deceased taxpayer is not a ‘person’ either in its ordinary grammatical sense or within the statutory meaning of the word ‘person’ as defined in Inland Revenue Ordinance or the Interpretation Ordinance.

Mr. I. Poole, Crown Counsel for the Commissioner, submits that the word “person” can be taken to mean either the individual when alive or his estate or trustee if he is dead; that the act of the Appellant is an act by her on behalf of the estate so that it is the act of estate and, therefore, the estate can be subjected to the penalty.

Leaving aside section 82A, it may be convenient to consider the position of a taxpayer who has died without filing returns. In most Commonwealth countries fiscal legislation provides for such an eventuality. In the United Kingdom it is covered by section 74 of the Tax Management Act, 1970, which provides as follows:

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- “(1) If a person chargeable to income tax dies the executor or administrator of the person deceased shall be liable for the tax chargeable on such deceased person and may deduct any payments made under this section out of the assets and effects of the person deceased.
- (2) On neglect or refusal of payment any person liable under this section may be proceeded against in like manner as any other defaulter.”

So, in the United Kingdom, personal representatives are personally liable for the tax but may charge the sum in their accounts.

In like manner, though worded differently, section 54 of the Inland Revenue Ordinance imposes a liability on executors in respect of tax exigible against a deceased person for all periods prior to his death. The section reads:

“The executor of a deceased person shall be chargeable with the tax for all periods to the date of such person’s death with which the said person would be chargeable if he were alive, and shall be liable to do all such acts, matters or things as the deceased person if he were alive would be liable to do under this Ordinance ...”

It imposes a direct liability upon the executor of a deceased person for tax in respect of all taxable income to which the deceased would be chargeable at the time of his death. It is the executor who is charged, not as a substitute for the deceased but on a liability that would have fallen on the deceased had he lived. The section also creates a responsibility on the executor to undertake such obligations as may be required of the deceased were he alive. The executor discharges them by virtue of the statutory obligation imposed upon him which is a direct and personal responsibility. He does not, in our view, act as agent for or on behalf of the estate of the deceased. The section is intended to enable an assessment to be made against the executor and for the recovery of tax against him as if he were the deceased himself.

Coming now to section 82A: if an executor, pursuant to the obligations imposed by the Ordinance, so conducts himself that through his own fault and, without reasonable excuse, penal consequences arise it is a liability for which he and not the estate is responsible. Take, for example, the case of a testator who leaves the whole of his estate to his infant children and appoints X as his executor. If X, without reasonable excuse, submits a false return, is the penalty to be inflicted on the children? We are unable to read section 82A as authorizing a penalty on anyone else but X. Section 82A being penal in nature is aimed at punishing the actual wrongdoer. The act of making a false return is the act of the person doing it. Liability attaches, in the clear terms of the section, on the person who makes the incorrect return and not on those for whom it is made. The deceased himself was not liable to a penalty under section 82A. He has not done any of the acts set out in sub-paragraphs (a), (b) or (c) of that section. (He died in January 1975 at which date sub-paragraphs (d) and (e) of section 82A had not yet come into operation). It is not alleged

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that he had committed any of the acts mentioned in the section that would justify a penalty assessment.

We also agree with Mr. Mayne that the return complained of was not filed by the Appellant on behalf of “another person” since the estate of the deceased is not a person. This appeal, therefore, insofar as it is a claim against the estate of the deceased and not against the Appellant, succeeds and the penalty assessment is set aside. We are not unmindful of section 63 which states that no assessment shall be quashed for want of form if the person intended to be assessed is designated according to common intent and understanding. But as it has been categorically stated to us that it is the estate of the deceased and not the Appellant that is to be subjected to the penalty, section 63 cannot be applied.

We think it would be desirable if we indicate what would have been the outcome of this appeal if the Revenue had looked to the Appellant rather than to the estate of the deceased for liability.

For convenience, we have called the levy under section 82A a “penalty assessment” although it is referred to in the section as “additional tax”. Strictly speaking, it is not a tax in the ordinary concept of the word. It does not have to be measured against income. In reality, it is a fine to penalize the culprit. The Commissioner, in the exercise of his executive discretion, can decide whether to impose or waive the fine or penalty. As liability can be attached to a person who makes an incorrect return “on behalf of another” we take the view, contrary to the submission of Counsel for the Appellant, that additional tax is not conditional upon the person assessed being already liable to pay tax in one form or another personally. The section is designed to include cases in which persons may or must make returns of income in which they themselves may have no beneficial interest or from which they may derive no income. The section is not confined to a taxpayer making a return of his own income. The Appellant, therefore, can incur personal liability if the incorrect return was made without reasonable excuse.

If the person sought to be charged with liability had been the Appellant, and not the estate of the deceased, we would have confirmed the assessment on the ground that the “nil” return she had submitted was without reasonable excuse.

Her evidence was unsatisfactory. She obviously knew more than what she was prepared to tell us. It may well be that she did not know what her husband’s business was, but we have no doubt that she knew that her husband was operating some form of business from which his wealth was derived. The argument put to us is that the “nil” returns were presented to “validate” the objection to the assessments and as this is admitted by the Revenue and forms part of the Agreed Facts it amounts to a reasonable excuse. The Revenue’s admission that the returns submitted were to validate the objection is, in our view, neutral since by virtue of section 64(1)(b) returns are required to validate the objection taken; the admission in no way relates to the propriety of the contents of the returns but merely to the reason for their being filed. The returns were submitted through the

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Appellant's solicitors without explanation or qualification. They were to the effect that the deceased when alive did not carry on any business and so derived no profit. This is obviously untrue and the Appellant knew it. In our view, it is not a reasonable excuse to recklessly make an incorrect return without qualification or explanation simply for the purpose of validating an objection. The Appellant could have asked for time in order that enquiries may be made for the purpose of putting in a proper return. But if such request was not made then to justify a finding of "reasonable excuse" the burden is on the Appellant to show either that the returns were honestly made believing them to be true, or that the assessor was informed and put on notice at the time the returns were submitted that certain statements made in the returns are or may be inaccurate for such reason as the Appellant may be able to offer. As the Appellant has not discharged this burden, we find that there was no reasonable excuse for the incorrect returns.