Case No. D3/82

Board of Review:

S. V. Gittins, *Chairman*; Martin C. M. Lee, J. G. Oliver & Patrick P. K. Wu, *Members*.

4 May 1982.

S. 82A Inland Revenue Ordinance—penalty assessment—tax undercharged—reasonable excuse—whether additional tax excessive.

The appellant's tax representative prepared accounts for the year ending 31st December 1977 which were initially not accepted by the appellant's directors. No return of assessable profits for the year 1977/78 was made and an estimated assessment was made in 1979. In 1980 the appellant's directors approved the accounts and an additional assessment was made. After requesting and receiving representations from the appellant's solicitors a penalty assessment was made. The appellant appealed on the grounds that it had a reasonable excuse for delay as it had an honest doubt as to its tax liability and that the penalty assessment was excessive.

Held:

(i) Casual canvassing of opinion on tax liability does not constitute a reasonable excuse.

(ii) The penalty assessment was reasonable and proper, taking into account the maximum assessable.

Appeal dismissed.

D. O'Dwyer for the Commissioner of Inland Revenue.
Peter A. L. Vine of Deacons for the appellant.

Reasons:

This is an appeal against an assessment to additional tax by the Commissioner of Inland Revenue under section 82A of the Inland Revenue Ordinance, Cap. 112 (the Ordinance) for the year of assessment 1977/78 in the sum of $120,000.

Agreed facts include the following:—

(1) On 3rd April 1978 the Appellant was given Notice by Form BIR 51 under section 51 of the Ordinance to furnish its return of assessable profits for the year of assessment ending 31st March 1978 within one month.

(2) At the request of the Appellant's Tax Representative an extension of time for the submission of the return to 31st July 1978 was granted.

(3) On 11th August 1978 the Appellant was issued with a Form IR 81E notice stating that it had not complied with the extended time to furnish a return by 31st July 1978 and warned that if the return was not received within 14 days proceedings may be commenced under section 80, and in addition profits may be estimated and tax charged thereon.

(4) In January 1979, the Form BIR 51 not having been submitted, the assessor made an estimated assessment under section 59(3) of the Ordinance in the sum of $1 Million profit for the Year of Assessment 1977/78.

(5) A Notice of Assessment and Demand for Profits Tax (Charge No. IH 55564) was issued on 22nd January 1979 with a copy to the Tax Representative. The assessment was as follows:—

Year of Assessment 1977/78	
Estimated profit year ended 31st December 1977 ……	$1,000,000
Less: Losses brought forward …….	6,079
Assessable profits ……..	993,921
Profits Tax payable at 17% ……	168,966
Year of Assessment 1978/79	
Provisional Tax $1,000,000 at 17% ……..	170,000
Total Tax payable ……..	$338,966

The total tax payable was duly paid on 5th March 1979.

(6) On 15th January 1980 the Tax Representative, on behalf of the Appellant, submitted *inter alia* Form BIR 51 for the Year of Assessment 1977/78 enclosing accounts for the year ended 31st December 1977.

(7) The Auditor's report on the account for the year ended 31st December 1977 (Year of Assessment 1977/78) bore the date 14th December 1978 and showed net profits of $9,205,793 comprising:—

Profit on sale of Flats and Shops ……	$8,774,538
Net profit from rental income, interest received and miscellaneous income ……...	431,255
Total ……..	$9,205,793

The Tax Representative computed the assessable profits for tax purposes as $9,082,994.

(8) On 12th March 1980 a Notice of Additional Assessment and Additional Demand for Tax was issued to the Appellant for the Year of Assessment 1977/78 as follows:—

Re assessed profits ($9,082,994 less loss $6,079) …….	$9,076,915
Original Assessment ……..	993,921
Additional Assessment ……..	8,082,994
Profits Tax payable at 17% ……	1,374,109

The Profits Tax payable was duly paid as follows:—

Set off of repayment due 1978/79 12th March 1980 …….	645,054
Payment 24th April 1980 ……...	729,055

(9) On 13th October 1980 the Commissioner of Inland Revenue issued a notice to the Appellant under section 82A(4) advising the Appellant of his intention to assess additional tax under section 82A of an amount not exceeding $4,629,225 (i.e. treble $1,543,075 the amount of tax which would have been charged had the return of assessable profits been made on time). The notice invited written representations from the Appellant with regard to the proposed assessment of additional tax.

(10) on 3rd November 1980 the Appellant's Solicitors made representations to the Commissioner of Inland Revenue against the assessment of any additional tax.

(11) The Commissioner considered these representations and on 19th November 1980 issued an assessment to additional tax in the sum of $120,000.

The Grounds of Appeal are:—

(1) That the Appellant had reasonable excuse for its failure to comply with the requirement of a notice given to the Appellant by the Inland Revenue Department under section 51(1) of the Inland Revenue Ordinance and that in consequence the Appellant is not liable to the assessment for additional tax for the Year of Assessment 1977/78; and

(2) With prejudice to the foregoing, the Appellant maintains alternatively that the additional tax the subject of this appeal is excessive having regard to the circumstances of this particular case, even though not in excess of the maximum stipulated in section 82A of the Inland Revenue Ordinance.

Mr. A gave evidence before the Board on behalf of the Appellant. He is an executive director and financial controller of the Appellant and the director of several other companies dealing with real estate. He testified that the Appellant is a "one property" company and that it acquired certain property on 11th December 1972. He produced minutes of a Directors'

meeting dated 11th December 1972 stating that the purchase of the property was "for investment purpose after reconstruction". Minutes of a subsequent meeting on 28th April 1976 stated that because of the continuation of rent control on domestic premises it was resolved to sell the units from the 4th to 20th floors of the new building on the site. The witness stated that he did not accept the action taken by the Tax Representative in the accounts for the year ended 31st December 1977 in which all profits from the sale of units were brought in as trading profits [see Fact (7) above]. The accounts prepared on 14th December 1978 were not then signed by the Directors because the witness and other directors considered that most if not all such profits were capital gains and not taxable. The signing of the accounts was deferred while the directors took the views of other persons including a Public Accountant and the Company's Solicitor Mr. B. The taking of counsel's opinion in England was also considered. Eventually on 7th January 1980 the directors decided to approve the accounts and Form BIR 51 was submitted on 15th January 1980 [see (6) above].

For the Appellant it was urged that the delay in submitting the required return was due to an honest doubt as to tax liability which was eventually conceded, and there was no underdisclosure of profit—only delay in admitting that the profit was assessable.

There is no dispute that the Appellant was in breach of section 51(1). The question for the Board is whether the Appellant had reasonable excuse.

Section 82A provides:—

> "(1) Any person who without reasonable excuse—
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> …
>
> (*d*) fails to comply with the requirements of a notice given to him under section 51(1);
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> …
>
> shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which—
>
> …
>
> (ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.
>
> …"

Mr. Vine submitted as a point of law that the Appellant had not been "undercharged" as provided in section 82A(ii) and therefore not liable to be assessed to additional tax.

This is a matter of construction. We remind ourselves of the well-known principles of construction of a tax statute that any ambiguity should be resolved in favour of the tax-payer. But we must also take into account the provisions of section 19 of the

Interpretation and General Clauses Ordinance, Chapter 1 of the Laws of Hong Kong, which provides:—

> "An Ordinance shall be deemed to be remedial and shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance according to its true intent, meaning and spirit."

We feel that section 82A is clear, and is wide enough and is intended to cover this particular situation where—

(1) the Appellant had failed to comply with section 51(1);
(2) its profits were therefore estimated [Fact (5) above];
(3) the tax thus charged was subsequently proved to be less than what the Appellant's *actual* profits warranted; and
(4) the tax has therefore been "undercharged in consequence of the failure to comply with a notice under section 51(1)".

We would therefore hold against the Appellant on this point of construction.

As to the explanation given by Mr. A for the delay, we are of the opinion that what appears to be a casual canvassing of opinions on the Appellant's tax liability after the directors' express non-acceptance in December 1978 of the accounts prepared by the Appellant's own professional accountants (who have always acted for the Appellant as such) does not constitute "reasonable excuse" which, as conceded by Mr. Vine, was for the Appellant to establish, albeit on a preponderance of probability. The directors had positive options before them to avoid such a delay, including (*inter alia*) the appointment of a new tax representative, giving specific instructions to its solicitors to obtain counsel's opinion, etc. But the Appellant took no positive step to avoid or reduce the delay.

The first ground of appeal against liability to additional tax is accordingly dismissed.

As to the second ground of appeal, nothing has been said to cause us to think that the amount of $120,000 additional tax is anything but reasonable and proper, taking into account that the maximum amount was $4.6 Million. If there had been any attempt to evade tax by false statements the amount would have been far greater. Further, public funds have been deprived of interest on the amount of tax undercharged to an amount at least equal to if not in excess of the additional tax.

Both grounds of appeal are dismissed and the assessment confirmed.