

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D53/91

Penalty tax – executor of personal representative of a deceased – whether liable to penalty tax – section 82A of Inland Revenue Ordinance.

Panel: Denis Chang QC (chairman), Raymond Faulkner and John Lo Siew Kiong.

Dates of hearing: 20 March and 11 June 1991.

Date of decision: 8 October 1991.

The taxpayer was the executor of the estate of a deceased lady who in term was the personal representative of her deceased husband. Following the death of the husband, the wife was required by the Commissioner to file tax returns in respect of her deceased husband's income. By the nature of the tax return forms, the income of both the husband and the wife had to be included. Following an investigation it was found that the wife had failed to fully disclose all of the income of her deceased husband and additional assessments to tax were issued based on an assets betterment statement. The wife then died and appointed the taxpayer as her executor. The Commissioner gave notice of an intention to assess penalty tax under section 82A of the Inland Revenue Ordinance upon the taxpayer in respect of the incorrect returns which the wife had made. The taxpayer made written representations to the Commissioner and after considering the same, the Commissioner imposed certain penalties. The taxpayer appealed to the Board of Review against the penalty tax assessments.

Held:

The wife, as the personal representative for the estate of her husband, had been required under the provisions of the Inland Revenue Ordinance to make tax returns which she had done. However, the tax returns which she had made were incorrect and accordingly she incurred a potential liability for penalty tax by so doing. Section 82A provides that where a person who is liable to be assessed to penalty tax has died, an assessment to penalty tax may be made on the executor.

Appeal dismissed.

Case referred to:

D3/79, IRBRD, vol 1, 334

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Adela Au for the Commissioner of Inland Revenue.
Taxpayer represented by his accountant.

Decision:

This is an appeal against the imposition of additional tax assessed upon the Taxpayer as personal representative of the estate of the late Madam X for allegedly incorrect salaries tax returns filed by Madam X on behalf of the estate of her late husband Mr Y for the years of assessment 1983/84 to 1985/86 inclusive.

Section 82A makes a person liable to be assessed to additional tax in certain cases if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts. One such case is where a person without reasonable excuse makes an incorrect return by 'omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person ...'

Section 82A(6) provides that where a person who is liable to be assessed to additional tax has died, an assessment to additional tax may be made on his executor.

Section 54 provides (subject to two provisos which need not concern us here) that the executor of a deceased person should be chargeable with the tax for all periods prior 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'.

The late Mr Y and Madam X were mainly involved in the trades of grocery store and supermarket during their lifetime. They were directors of a number of private limited companies incorporated in Hong Kong. Their shareholdings in these companies at all material times were as follows:

<u>Name of Company</u>	<u>Date of Incorporation</u>	<u>Mr Y</u>	<u>Madam X</u>	<u>Total</u>
(a) A Company	25-10-1968	5	25	30
(b) B Limited	16-5-1969	7.32	-	7.32
(c) C Limited	15-8-1972	32	-	32
(d) D Limited	9-3-1973	31.82	31.82	63.64
(e) E Limited	23-1-1976	3	-	3
(f) F Limited	28-12-1977	60	-	60
(g) G Limited	23-2-1979	0.04	-	0.04
(h) H Limited	18-3-1980	25	-	25
(i) I Limited	7-1-1983	4.75	-	4.75

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The late Mr Y died in 1986. During his lifetime he did not file any salaries tax returns for any of the years of assessment 1983/84 to 1985/86.

The salaries tax returns for the aforesaid years of assessment were issued to the personal representative of the estate of the late Mr Y on 18 December 1987. The notice in each return required the person to whom it was issued to complete the form in every particular and return it to the assessor within thirty days of the notice. There was (and is) apparently no specially prescribed form for a surviving spouse to make a return both in respect of his or her own salaries and those of his or her deceased spouse. Looking, however, at the content of the returns that were issued in the present case it is quite clear that what was required by the notice contained therein was that Madam X do make a return of the whole of her deceased husband's and of her income for the relevant years of assessment from any office or employment, she being the personal representative of her husband's estate. In reaching this conclusion we bear in mind the provisions of section 63 which looks to the 'substance and effect' of the notice and to whether the person 'intended to be affected thereby is designated therein according to common intent and understanding'.

The said returns were signed by Madam X and received by the department on 15 January 1988 and showed the following incomes:

<u>Year of Assessment</u>	<u>Wife's Income from D Limited</u>
	\$
1983/84	62,700
1984/85	72,000
1985/86	96,450

Salaries tax assessments for these three years were raised on Madam X, per income returned, on 15 February 1988. No objection was lodged.

On 12 May 1989, estimated assessments showing additional assessable income from office or employment were raised on '[Madam X], personal representative of the estate of the late [Mr Y]'. Madam X lodged valid notice of objection to these additional assessments through her tax representative ('the representative') on 22 May 1989.

There followed correspondence between the Revenue and the representative concerning the preparation of an assets betterment statement and information relating to the couple's sources of income. Following submission by the representative of an amended assets betterment statement for the period from 13 April 1983 to 1 April 1986, and after extensive enquiries and analysis of bank accounts, the assessor compiled an assets betterment statement ('ABS') for the late Mr Y and Madam X showing discrepancies of \$4,897,068 for the three years ended 31 March 1986. The ABS attributed the discrepancies to 'additional income from [D Limited, C Limited and G Limited] and was issued to Madam

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X on 17 July 1990 with a covering letter inviting her to make explanations and a copy of the ABS was sent to the representative on the same day.

On 23 July 1990 the ABS was returned to the assessor duly signed by Madam X as executrix of the estate of her late husband. Her signature was witnessed by the representative. Immediately above her signature was that part of the ABS which attributed the discrepancies to additional income from the three named companies. It read:

‘I have examined the above statement, and to the best of my knowledge, it shows the correct additional income received from [D Limited, C Limited and G Limited] in each year. The deceased and his wife, [Madam X] have no assets and liabilities other than those shown in above during the period.

In settlement of objections for the years of assessment 1983/84 to 1985/86 inclusive, I am prepared to accept the discrepancies attributable to the years ended 31 March 1984, 31 March 1985 and 31 March 1986 as the basis of the revised assessable income for the years of assessment 1983/84 (additional), 1984/85 (additional) and 1985/86 (additional).

I also understand that as the executrix of the estate of the deceased, I shall be liable to penal action under part XIV of the Inland Revenue Ordinance, which is at the discretion of the Commissioner or his deputy. I also understand that the maximum amount of penalty will not exceed treble the amount of tax undercharged.’

The following is a comparative table of the assessable incomes before and after investigation and the amount of tax undercharged:

<u>Year of Assessment</u>	<u>Incomes assessed per return (A)</u> \$	<u>Incomes assessed after investigation (B)</u> \$	<u>Tax charged on (A) (C)</u> \$	<u>Tax charged after investigation (D)</u> \$	<u>Tax undercharged (E)=(D)-(C)</u> \$
1983/84	62,700	2,478,072	335	371,710	371,375
1984/85	72,000	1,519,301	1,100	258,281	257,181
1985/86	<u>96,450</u>	<u>1,130,845</u>	<u>4,690</u>	<u>192,243</u>	<u>187,553</u>
Total	<u>231,150</u>	<u>5,128,218</u>	<u>6,125</u>	<u>822,234</u>	<u>816,109</u>

On 3 August 1990, in accordance with the ABS additional salaries tax assessments for the years of assessment 1983/84 to 1985/86 were revised and issued to Madam X. No objection to the assessments were lodged.

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On 18 September 1990, the Taxpayer informed the Revenue that Madam X had died in early September 1990 and a copy of the will of the late Madam X, appointing the Taxpayer to be her executor, was submitted on 31 October 1990.

On 5 November 1990, the Commissioner gave notice to the Taxpayer under section 82A(4) of the Inland Revenue Ordinance that he proposed to assess the Taxpayer to additional tax in respect of the incorrect salaries tax returns made by the late Madam X for the years of assessment 1983/84 to 1985/86 inclusive.

On 16 November 1990, the Taxpayer submitted written representations to the Commissioner. After considering the representations, the Commissioner by way of penalty issued on 29 November 1990 the following notices of assessment and demand for additional tax under section 82A of the Inland Revenue Ordinance for the years of assessments 1983/84 to 1985/86:

<u>Year of Assessment</u>	<u>Tax Undercharged</u> \$	<u>Section 82A Additional Tax</u> \$	<u>Percentage of Penalty Tax</u> %
1983/84	371,375	134,100	36
1984/85	257,181	69,300	27
1985/86	<u>187,553</u>	<u>34,500</u>	<u>18</u>
Total	<u>816,109</u>	<u>237,900</u>	29

On 24 December 1990, the Taxpayer gave notice of appeal to the Board against the said assessments to additional tax on various grounds.

The first issue is whether Madam X did lodge returns which were incorrect. We find that the returns were incorrect. As mentioned above it was quite clear that Madam X was required to make a return of the whole of her late husband's income from office or employment and that of herself. In the ABS signed by her as aforesaid she clearly acknowledged there was additional assessable income and she accepted the attribution of that income to the three named companies; and, in settlement of her objections to the estimated assessments, she clearly accepted that the additional income would form the basis of revised salaries tax assessments which were in fact subsequently made. Thus quite apart from questions of estoppel and the effect of section 70 there is clear evidence from which we can conclude that the returns were indeed incorrect. Section 70 is also relevant because insofar as there was an agreed settlement of the objection to the estimated assessment (that is by way of the ABS accepted by Madam X) and revised assessments were issued on the basis of the agreed ABS, the assessment as made or agreed became 'final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income'.

The second issue is whether additional tax by way of penalty could be levied against the Taxpayer in his capacity as representative of the estate of Madam X for incorrect

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salaries tax returns made by her in her capacity as personal representative of the estate of her late husband. The Taxpayer argues that an estate is not 'a person' for the purposes of the relevant provisions of the Ordinance; further that by the time notices under section 82A(4) were served Madam X had already died, the contention being that such a notice must be given to the person who had made the allegedly incorrect return and not to his or her personal representative.

In our view the scheme of the Ordinance is clear. The liability to additional tax arose not because of anything which Madam X's late husband had done. He made no returns for the relevant years in his lifetime. Neither he nor his estate could therefore be charged with making incorrect returns. However Madam X was required, by virtue of section 54 and the notice given to her in her capacity as personal representative of her late husband's estate, to make correct returns. She failed in that duty. She made incorrect returns instead. Thus under section 82A, unless there was reasonable excuse, she became liable to be assessed to additional tax. That liability to be assessed (insofar as it is distinguishable from liability arising upon an assessment actually made) arose in her lifetime. Section 82A makes it quite clear that 'where a person who is liable to be assessed to additional tax' has died, an assessment to additional tax may be made on his executor. Before making an assessment to additional tax the Commissioner shall under section 82A(4) cause notice to be given to 'the person he proposes so to assess'. Clearly where he is proposing to make an assessment on the executor he must give notice to the executor. This is what he has done in the present case. There is nothing in the decision of the Board of Review in D3/79, IRBRD, vol 1, 334, relied upon by the Taxpayer, which can assist the Taxpayer's case.

'Reasonable excuse' was a ground which eventually was not pursued by the Taxpayer; in any event on the materials before us we do not see any reasonable excuse. Neither is there any reason to say that the penalty was excessive in all the circumstances. The additional tax imposed for 1983/84 to 1985/86 inclusive are 12.04%, 9% and 6.13% of the maximum respectively.

For reasons given above we dismiss the appeal and confirm the assessments.