INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D7/94

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

Panel: Robert Wei Wen Nam QC (chairman), Colin Cohen and Herbert Liang Hin Ying.

Date of hearing: 7 February 1994.
Date of decision: 25 April 1994

The taxpayer was liable to pay property tax. He failed to inform the Commissioner of his liability. The Commissioner imposed penalties of approximately 10% of the tax which would have been undercharged if the failure to notify the Commissioner had gone undetective. The taxpayer argued that it was the fault of the Inland Revenue Department for sending correspondence to an incorrect address and for failing to issue tax returns.

Held:

It was the duty of the taxpayer to inform the Inland Revenue Department of his liability to tax. A penalty of 10% was not excessive.

Appeal dismissed.

Nip Cheng Wing Suet for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the assessments of additional tax raised under section 82A of the Inland Revenue Ordinance for the years of assessment 1987/88 and 1988/89 on an individual (the Taxpayer) for failing without reasonable excuse to inform the Commissioner of Inland Revenue that he was chargeable to property tax during the 4-month period allowed by section 51(2).

2. Section 51 provides, so far as it is relevant, as follows:

> '(1) an assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish any return which may be

specified by the Board of Inland Revenue for property tax, salaries tax or profits tax …

(2) Every person chargeable to tax for any year of assessment shall inform the Commissioner in writing that he is so chargeable not later than 4 months after the end of the basis period for that year of assessment unless he has already been required to furnish a return under the provisions of subsection (1).'

Section 82A provides, so far as it is relevant, as follows:

'(1) Any person who without reasonable excuse –

…

(e) fails to comply with section 51(2),

shall … be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which -

(ii) … would have been undercharged if such failure had not been detected.'

3. The Taxpayer was the sole owner of the property in question during the period from mid-1970 to early 1991. In the property tax returns for the years of assessment 1984/85, 1985/86 and 1986/87 issued to him in May 1985, 1986 and 1987 respectively, the Taxpayer reported that the property was used by him for business purposes for the three years of assessment in question. Consequently the property was exempted from property tax for those three years as it had produced no rental income.

3.1 Property tax returns are not issued every year to owners of exempted property; instead, they are issued with review returns every three to five years to ascertain whether there is change in the exempt status.

3.2 No property tax returns for the years of assessment 1987/88 and 1988/89 were issued to the Taxpayer until 20 June 1990 when, upon receipt of information that the property was let during those two years, property tax returns for those years were issued to the Taxpayer. On 6 August 1990 the completed returns were received by the Inland Revenue Department. In the return for the year of assessment 1987/88, the Taxpayer reported (which we accept) that the property was used by himself for business purposes from April 1987 to December 1987 and was let from December 1987 to March 1988 and that rent received totalled $112,000. In the return for the year of assessment 1988/89 he reported (which we accept) that the property was let from April 1988 to March 1989 and that rent received totalled $384,000. In both returns he stated that he desired to elect for personal assessment.

3.3 On 19 June 1991 the Taxpayer sent in his applications for personal assessment for the years of assessment 1987/88 and 1988/89, and also gave notice of his new postal address.

3.4 On 21 January 1992 he gave notice that he was not in a position to apply for personal assessment for the years of assessment 1987/88, 1988/89 or 1989/90, and requested to have property tax demand notes issued in respect of those years.

3.5 On 27 April 1992 property tax demand notes were issued to him for the years of assessment 1987/88 and 1988/89, and were paid on 18 June 1992.

4. The Deputy Commissioner of Inland Revenue was of the opinion that the Taxpayer had without reasonable excuse failed to inform the Commissioner in writing that he was chargeable to property tax for the years of assessment 1987/88 and 1988/89 within the 4-month period prescribed by section 51(2).

4.1 On 4 December 1992 the Deputy Commissioner gave notice to the Taxpayer under section 82A(4) of his intention to assess him to additional tax for his failure to comply with section 51(2). The notice was sent to the Taxpayer's old postal address but was received by him. In his written representations in response to the section 82A(4) notice, the Taxpayer complained about the continued use by the Revenue of the old postal address.

4.2 On 10 February 1993 the Deputy Commissioner assessed the Taxpayer to additional tax under section 82A as follows:

Year of Assessment	Tax Undercharged $	Section 82A Additional Tax $	Percentage of Additional Tax
1987/88	14,784	1,500	10.15%
1988/89	47,616	4,800	10.08%
	62,400	6,300	10.10%

The notices of assessment and demand for additional tax were again sent to the old postal address and were not received by the Taxpayer.

4.3 On 26 July 1993 the Commissioner gave notice to the Taxpayer of an order for a surcharge of 5% to be added to the additional tax. On 20 August 1993 the Taxpayer wrote to the Commissioner stating that he had never received the notices of assessment and demand for additional tax. On 26 August 1993 duplicate notices of assessment and demand for additional tax were sent to the Taxpayer's new postal address.

4.4 On 10 September 1993 the Taxpayer lodged an appeal against the assessments of additional tax.

4.5 On 30 November 1993 the additional tax for the two years was paid and the surcharge was cancelled.

5. Both in the notice of appeal and at the hearing, the Taxpayer complained that, despite the fact that he had notified the Inland Revenue Department of his new postal address on 19 June 1991 (see paragraph 3.3 above), the Inland Revenue Department continued to use the old postal address and that the notices of assessment and demand for additional tax dated 10 February 1993 were sent to the old postal address and were never received by him with the result that a surcharge of 5% was wrongly added to the additional tax. He also complained that after he had sent in his applications for personal assessment on 19 June 1991 (see paragraph 3.3 above), he was again issued with application forms for personal assessment, which he did not fill in because on 21 January 1992 he gave notice of cancellation of his applications for personal assessment. No doubt he had cause for making those complaints, but they did not provide any answer to the charge that he had without reasonable cause failed to inform the Commissioner of his chargeability to property tax in respect of his rental income within the time allowed by section 51(2), that is, before 1 August 1988 for the year of assessment 1987/88 and before 1 August 1989 for the year of assessment 1988/89. It was common ground that he did not so inform the Commissioner within the time allowed; clearly he had failed to comply with section 51(2); the assessments for additional tax in question were raised for such failure. This appeal lays under section 82B; it was for the Taxpayer to show (1) that he had a reasonable excuse for the failure, or (2) that the assessments were excessive having regard to the circumstances to the case, but he has failed to do so. He argued in this way: the Revenue was at least partly to blame for his failure to comply with section 51(2): no property tax returns were issued to him for the years of assessment 1987/88 and 1988/89 until June 1990 when the time limits for complying with section 51(2) had long expired, while returns for the three previous years had been issued to him in May 1985, 1986 and 1987 respectively so that there was no need to comply with section 51(2); he had thought that returns for the years of assessment 1987/88 and 1988/89 would also be issued in like manner; in the meantime he had emigrated to Country A, although the Revenue had only his Hong Kong address and was not made aware of his move at the time; while in Country A he did not watch the dates carefully, so he was to blame for his oversight. It must be pointed out that under section 51(1) the assessor may, but need not, issue a return to any person – he has a discretion in the matter. In the present case, having received from the Taxpayer nil returns for three successive years, the assessor decided to, as he was entitled to do, issue returns to the Taxpayer not annually but at 3 – 5 year intervals; in the meantime if the Taxpayer should let the property for rental income, he would be obligated to report his chargeability to property tax under section 51(2). Before us, the Taxpayer did not plead ignorance but oversight. But this is hardly just a case of forgetfulness about tax obligations induced by long periods of absence from Hong Kong; after all he was collecting rent from his property; therefore he must have been aware of his obligations under section 51(2). We rather think, and we find, that, between taking the initiative of reporting his rental income and his chargeability to property tax under section 51(2) and waiting until he was required to do so by the receipt of a property tax return, he chose the latter alternative. In doing so he incurred the risk of breaching section 51(2) if he was not issued with a return within the 4-month period. There

can be no reasonable excuse for such a breach. Even assuming for argument's sake that this was a case of oversight or carelessness, that still would not have helped him: oversight or carelessness is not a reasonable excuse, just as ignorance of section 51(2) is not.

5.1 The breaches of section 51(2) resulted in substantial delays in the reporting of rental income in respect of the years of assessment 1987/88 and 1988/89 (see paragraph 3.2 above). The total amount of additional tax for the two years was $6,300 – equivalent to about 10% of the tax which would have been undercharged if the breaches had not been detected. That seems to be well within the normal range of percentages for this class of case. We do not find the assessments excessive.

6. It follows that this appeal is dismissed; the assessments in question are hereby confirmed.