

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D96/97

Penalty tax – the Board of Review has no power to extend time for filing an appeal under section 82A – ignorant of law nor financial difficulty is not a ground for appeal – the Board of Review has no power to re-open the former decision by a different Board – 100% penalty under section 82A of the Inland Revenue Ordinance.

Panel: Christopher Chan Cheuk (chairman), Michael Choy Wah Ying and Dora Lo Lai Yee.

Date of hearing: 28 July 1997.

Date of decision: 20 January 1998.

The taxpayer, Madam X carries on the trading as Herbalist Clinic Y.

This case has a long history. The Revenue commenced its investigation in 1993. Different attempts to structure acceptable assessments were made but no settlement was reached. The Commissioner made his determination on 25 September 1995, which was appealed. The appeal was heard by another Board on 7 May 1996 and the decision was made on 8 November 1996.

In between, on 29 August 1996 the Commissioner issued notice of assessment for additional tax under section 82A. When the notice was issued the taxpayer was not in Hong Kong and she did not return until 26 September 1996 which had already passed the one-month period for appeal. However, she lodged her appeal on 6 October 1996, about half a month after the appeal period had expired.

Held:

1. Section 66(1A) gives the Board power to extend the time for appeal against the determination of the Commissioner under section 64(4) only. It does not apply to the category of cases to which the present appeal belongs, that is, assessment issued under section 82A.
2. Therefore, the Board's power to extend time for appeal provided in section 66(1A) has no application to assessment issued under section 82A. Wong Wing Piu and Wong Wing Piu trading as Tai Yip Glass Co v Commissioner of Inland Revenue applied.
3. There is no other provision in the Inland Revenue Ordinance which empowers the Board to extend time for filing an appeal under section 82A.

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4. In view of the late filing of appeal in the present case, the Board has no jurisdiction to rectify such irregularity and to hear the appeal. The appeal therefore must fail.
5. It is generally accepted principle that ignorance of the law is not a ground for appeal.
6. The ground that she was in financial difficulty is not a reason for appeal. It may be a factor for the Commissioner to consider the method and time for payment.
7. The Board has no power to re-open the former decision by a different Board. The only course for her is to appeal to the Court of First Instance against the Board's decision.
8. The Board in hearing an appeal against an assessment of additional tax under section 82A has no power to challenge the original assessment of the profits tax. D93/89; D55/88 and B/R 17/72 followed.
9. Under such circumstances, the Board in the present appeal has no power to re-consider whether the former Board had rightly reached their decision in upholding the original assessment.
10. As to the rate of penalty, it is found that the usual tariff for cases of this type is about 100% of the tax undercharged. There is no reason or ground for deviation from the usual rate in the present case.

Appeal dismissed.

Cases referred to:

Wong Wing Piu and Wong Wing Piu trading as Tai Yip Glass Co v CIR, 2 HKTC
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D93/89, IRBRD, vol 6, 342
D55/88, IRBRD, vol 4, 20
BR17/72, IRBRD, vol 1, 97

Li Mak Sin Ming for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

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Appeal

1. This is an appeal by Madam X trading as Herbalist Clinic Y against the assessments by the Commissioner issued on 20 August 1996 for additional taxes in respect of the following years of assessment with the particulars as set out below:

Year of Assessment	Tax Undercharged	Section 82A Additional Tax	Additional Tax as Percentage of Tax Undercharged
	\$	\$	
1987/88	21,894	22,000	100.4%
1988/89	81,447	81,000	99.4%
1989/90	66,163	66,000	99.7%
1990/91	41,789	42,000	100.5%
1991/92	120,438	120,000	99.6%
1992/93	<u>161,668</u>	<u>162,000</u>	<u>100.1%</u>
	<u>493,419</u>	<u>493,000</u>	<u>99.9%</u>

(sic 493,399)

Proceeding

2. At the hearing the chairman of the Board, Mr Christopher Chan revealed to the tribunal that sometime in 1994 the Taxpayer consulted him and she wanted to instruct him to handle the case. She briefly outlined the nature of the matter to him but without producing any paper or disclosing any detail. She enquired about the legal fee that might incur if he were instructed to handle the case. The charging rate was quoted to the Taxpayer who needed time to consider it and left. Thereafter she never returned and the Chairman could hardly remember the case until the papers reached him. When he was consulted the matter was still at the investigation stage and no determination was made by the Commissioner.

3. As in many cases before us the matter was originally handled by an accountancy firm and when it came to hearing the Taxpayer appeared in person and explained any contradiction in the submission on the ground that the accountant in charge had failed to explain to her or had failed to conduct the case properly.

Facts of the Case

4. This case has a long history. The Revenue commenced its investigation in 1993. There was a lengthy process of correspondences, a number of interviews being

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conducted and different attempts to structure acceptable assessments but no settlement was reached. The Commissioner made his determination on 25 September 1995.

5. The Taxpayer representative duly lodged the appeal on behalf of the Taxpayer and at the verge of hearing the accountancy firm withdrew representation. The Taxpayer appeared in person before another Board. The appeal was heard on 7 May 1996 and the decision was made on 8 November 1996.

6. On 20 August 1996 the Commissioner after complying with all the requirements as set out in section 82A issued the notice of assessment of additional tax as set out in paragraph 1 above. When the notice was issued the Taxpayer was not in Hong Kong and she did not return until 26 September 1996 which had already passed the one-month period for appeal. However the Taxpayer lodged her appeal on 6 October 1996, about half a month after the appeal period had expired.

Application for leave

7. The Taxpayer applied for extension of time for lodging the appeal. Mrs Li Mak Sin-ming, senior assessor acting for the Revenue, was very fair and reasonable: she did not oppose the application but left it to the Board to decide.

8. The Board fully appreciates the difficulty of the Taxpayer who had no one to inform her of the assessment while she was not in Hong Kong. But our hands were tied by a decision in High Court, Miscellaneous Proceedings No. 1510 of 1985, Wong Wing Piu and Wong Wing Piu trading as Tai Yip Glass Co v Commissioner of Inland Revenue, 2 HKTC 134, which has held that the Board's power to extend time provided in section 66(1A) has no application to assessment issued under section 82A. As section 66(1A) gives the Board power to extend the time for appeal against the determination of the Commissioner under section 64(4) only and does not apply to the category of cases to which the present appeal belongs, the Board has to find whether there is any other provision in the Ordinance that empowers the Board to extend time for filing an appeal under section 82A but has found none. The only conclusion we can draw is that the Board has no jurisdiction to rectify such irregularity and to hear the appeal. The appeal therefore must fail.

The Taxpayer's Case

9. The Taxpayer will feel very aggrieved if we do not deal with the grounds of her appeal after hearing. The Taxpayer raised three grounds of appeal: (a) the Taxpayer was ignorant of the law, (b) she had no money to pay and (c) the assessment was unreasonable and excessive.

10. It is a generally accepted principle that ignorance of the law is not a ground for appeal and it is not necessary for us to elaborate and explain as our whole society rests on the rule of law. Once the plea of ignorance were allowed, it would throw our whole legal system into disarray.

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11. The second ground that she was in financial difficulty is not a reason for appeal. It may be a factor for the Commissioner to consider the method and time for payment.

12. The only sustainable ground is that the assessment is excessive and unreasonable. She and her witness gave evidence to support such argument by pointing out to us that the former Board failed to take into consideration many aspects of her case and that her former tax representative had failed to properly advise her. We must say that this Board has no power to re-open the former decision by a different Board. The only course for her is to appeal to the Court of First Instance against the Board's decision. We have considered the former decisions by various Boards in D93/89, IRBRD, vol 6, 342, D55/88, IRBRD, vol 4, 20 and BR17/72, IRBRD, vol 1, 97 and all of them point in one direction that the Board in hearing an appeal against an assessment of additional tax under section 82A has no power to challenge the original assessment of the profits tax. Under such circumstances we have no power to re-consider whether the former Board had rightly reached their decision in upholding the original assessment. The present Board has no jurisdiction to entertain the Taxpayer's claims though supported by testimony given by other witnesses that she had gambled in casino and won a lot of money and that she was financially assisted by her friend. All these factors, the Taxpayer claimed, the former Board had failed to take into consideration in reaching its decision.

13. The only aspect we have to consider is whether the rate of penalty imposed is reasonable. We have taken into consideration all former cases and find that the usual tariff for cases of this type is about 100% of the tax undercharged. We find no reason or ground for deviation from the usual rate and accordingly we have no alternative but to dismiss the appeal.

Decision

14. For reasons set out above we have come to conclusion that the Taxpayer has failed to discharge her burden of proof and the appeal is bound to fail. Accordingly we dismiss the appeal and uphold the assessments by the Commissioner as set out in paragraph 1 above although there is a minor mistake at the arithmetics of adding taxes undercharged which, we find, does not affect our decision at all.