
The Court decided Section 82A(1) Assessments Can't be imposed on Signers of Corporate Tax Returns

*December 2018
Issue 14*

In brief

The Court of First Instance (CFI) handed down its judgment on *Koo Ming Kown and Another v Commissioner of Inland Revenue (the Commissioner)* on 23 November 2018. The case concerns the validity of assessments to additional tax raised by the Commissioner under section 82A(1)(a) against the appellants, being the directors of a company who signed the profits tax returns, for incorrect statements made therein. The CFI concluded that where a company has been required by notice issued to it under section 51(1) to make a return, it is the company, rather than the individual who signs the document, that furnishes, or makes, the return in compliance with the requirements of the notice. Accordingly, section 82A(1)(a) does not permit a penalty assessment to be made on the appellants.

On the facts of the case, it appears that the Inland Revenue Department (IRD) adopted a wide interpretation on section 82A, and in practice, had a tendency to flout the doctrine of separate legal personality of a company (the Doctrine) in taking punitive actions under section 82A(1)(a) against the taxpayers by relying on section 57(1), which provides that the directors shall be answerable for doing certain things as under the Inland Revenue Ordinance (IRO). The CFI, to a certain extent, reinstated the Doctrine in the reading of section 82A(1)(a). The court commented that where an act is done by an officer in the company's name, the law does not automatically without careful consideration make the individual officer liable together with the company for the consequences of the act. Having said that, CFI also remarked that personal liability could be attached to delinquent officers of a company in appropriate cases upon prosecution under section 80. Where there is wilful intent to evade or assist the company to evade tax, the corporate officers may also be prosecuted under section 82.

Separately, the CFI also casts doubt on whether tax adjustments made under sections 16, 17, 61 and / or 61A by the IRD, even if it is determined by the Board of Review (the Board), could lead to making of "incorrect return" when instituting administrative penalties under section 82A.

In detail

Background of the case

The appellants were the directors of a Hong Kong incorporated company. The case originates from a tax audit. As the profits tax assessments issued to disallow the intercompany charges pursuant to sections 16, 17, 61 and 61A were left unpaid, the company was wound up by the court on petition of the Commissioner¹. In considering the punitive

actions on the discrepancies discovered in the tax audit, the Commissioner took steps to invoke section 82A(1)(a) against both appellants, alleging that they had made incorrect returns by understating the company's assessable profits. The Commissioner contended that: (i) the appellants made the returns because they signed them; and (ii) that they were required, by virtue of section 57(1) of the IRO, to make these returns on behalf of the

company. Thus, the directors could be liable under section 82A(1)(a). Having considered all the written representations and submissions, the Commissioner instituted the penalty assessments to each of the appellants. The appellants appealed to the Board against the assessments to additional tax but the appeals backfired as the penalties were increased by the Board². With leave given by the CFI, the appellants appealed under section 69 on grounds involving questions of law.

The questions of law

The key questions of law, amongst others, considered by the CFI in this case are:

- (i) Whether a director who signed the company’s return “make” the tax return³ on behalf of the company which could make him personally liable to the additional tax under section 82A; and
- (ii) If the answer to question (i) above is yes, whether, by confirming the determination issued by the Deputy Commissioner on the assessments raised to a corporate taxpayer, the taxpayer’s returns could be considered as “incorrect” in determining any penalty assessments on corporate officers who signed the return of the corporate taxpayer.

In summary, the judgments of the CFI are in favour of the appellants by saying no to both questions.

Personal liability to administrative penalties under section 82A on directors who signed the return

The CFI has carefully examined the legal intent of section 82A by reviewing the legislative history of the section and analysed the construction of sections 51(1), 57(1) and 82A(1)(a), and commented that:

- A director signed the declaration at the end of the tax return is not the same as to making a return of the company.
- Where the IRO empowers the assessor to require a person to furnish a return or information on behalf of another, it does so in explicit and clear terms.
- Where a company has been required by notice issued to it under section 51(1) to make a return, it is the company, rather than the individual who signs the document, that furnishes, or makes, the return in compliance with the requirements of the notice.
- Being made answerable for doing certain things pursuant to section 57(1) is not equivalent to being required to make a return on behalf of another person for the purposes of section 82A(1)(a).

- There is no specific provision for making the person who signed the returns, in addition to the corporate taxpayers, potentially liable for the administrative penalty under section 82A(1)(a); nor was there any indication of the legal intent in the legislative materials of any possibility of these persons being held liable.
- It is mistaken to think that no personal liability could attach to delinquent officers. In appropriate cases, it appears that corporate officers can be prosecuted and made liable under section 80(4) for aiding and abetting the company’s breach of section 80(2) or under section 101E of the Criminal Procedure Ordinance (Cap 221).

For the above reasons, the CFI concluded that section 82A(1)(a) does not permit administrative penalty assessments to be made on the appellants.

When an assessment becomes conclusive it does not mean the relevant return is incorrect for the purposes of administrative penalty assessments

Having concluded section 82A(1)(a) is not applicable to corporate officers who signed the return, the CFI made the following notable comments on whether the return could be considered as incorrect when the assessments are final and conclusive under section 70 for the purposes of instituting administrative penalty assessments:

- The Board decided that the expenses were not deductible under sections 16 and 17 in the original assessments on the corporation and the assessments are final and conclusive under section 70. However this does not necessary lead the conclusion that the returns were incorrect within the meaning of section 82A, especially in the case of applying section 82A to the corporate officers who signed the returns of the corporation.
- Where the Commissioner and the Board, on exercising a statutory power under section 61A to

counteract the tax benefit, it would be arguable that the tax returns were not incorrect in deducting the intercompany charges from the assessable profits. In other words, it questionable to say the deduction is incorrect.

Consequently, the CFI considered that the Board’s decision is not conclusive as against the appellants in this case.

The takeaway

The judgments of the CFI, to a certain extent, reinstated the Doctrine in the reading of the punitive provisions and denied the application of section 82A(1)(a) to corporate officers who signed the returns of a corporation. Nevertheless, as above-discussed, it is mistaken to think that no personal liability could attach to delinquent officers. It is also worth to note that where, as contemplated by section 82A(1)(a), a person is expressly required to make a return on behalf of another person, for example, agents of non-resident persons under sections 20A and 53. In such cases, the person making the returns could be liable to punitive actions under section 82A(1)(a). The CFI judgment also leaves room to taxpayers to argue whether the tax adjustments on assessable profits made by the IRD, even confirmed by the Board, would necessarily equal to making of incorrect return, especially when section 61A is invoked.

Endnotes

1. The Board’s decision in this case can be accessed via this link: <https://www.info.gov.hk/bor/en/docs/d4108.pdf>
2. The Board’s decisions in these cases can be accessed via these links: <https://www.info.gov.hk/bor/en/docs/D3216.pdf>
<https://www.info.gov.hk/bor/en/docs/D3316.pdf>
3. In D32/16, the Board had also decided against the appellants on the ground of section 82A(1)(c). The CFI quashed the Board’s decision as the Commissioner had never relied on the section either in his assessments or before the Board as a separate head of liability.

Let's talk

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