

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D177/98

Profits Tax – delay in submitting tax returns – additional tax as penalty – whether excessive – sections 51(1), 80 and 82A of the Inland Revenue Ordinance.

Panel: Anna Chow Suk Han (chairman), Patrick James Harvey and Douglas C Oxley.

Date of hearing: 29 January 1999.

Date of decision: 23 March 1999.

The company taxpayer failed to submit its profits tax return for the year of assessment 1996/97 by the due date of 15 November 1997 but instead, its representative submitted a letter stating that the audit of the taxpayer's books of account had been completed, pending the directors' approval of the financial statements, and enclosing tax computation showing an assessable profit of \$4,408,285. It was also promised that the tax return for the year of assessment 1996/97 would be submitted within 1 week.

On 28 November 1997, in the absence of a return, the assessor raised an estimated assessment in the amount of \$4,760,000 with tax thereon of \$785,400 which was duly settled by the taxpayer. The taxpayer objected to the estimated assessment and submitted its profits tax return, financial statements and tax computation for the year of assessment 1996/97 showing the same assessable profit of \$4,408,285 it had previously submitted.

After enquiry on certain items charged in the accounts to which the taxpayer duly replied, the assessor proposed revising the assessable profit to \$5,092,666. The taxpayer duly counter-proposed a revised assessable profit of \$4,896,668 which was accepted by the assessor and the tax thereon of \$807,950 was again duly paid by the taxpayer.

Notice to assess additional tax was given to the taxpayer by way of penalty for its failure to comply with the section 51(1) of the IRO in submitting its return on time. Written representations were submitted by the taxpayer. Additional tax was eventually assessed by the Commissioner at \$20,000. The taxpayer appeals against the assessment for additional tax on the ground that the amount is excessive in the particular circumstances of the case and in view that numerous cases of similar penalties have ranged from \$1,200 to \$3,000.

Held:

- (1) The taxpayer does not have a reasonable excuse for the late filing of the profits tax return. The only issue is whether the quantum of the additional tax is excessive in the circumstances of the case.

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- (2) In respect of the quantum of penalties in previous cases, each case has its own merits.
- (3) The Board is unable to say that the additional tax of \$20,000 being approximately 2.47% of \$807,950, the amount of tax which would have been undercharged, is excessive in view of the rule that where there are neither aggravating nor mitigating factor, the penalty should be 100% of the tax undercharged (D53/93 followed).

Appeal dismissed.

Case referred to:

D131/95, IRBRD, vol 11, 282
D24/94, IRBRD, vol 9, 226
D2/92, IRBRD, vol 7, 52
D53/93, IRBRD, vol 8, 383

Wong Yuen Wan Yee and Yeung mo-wai for the Commissioner of Inland Revenue.
Alice Cheng Wai Ching of Messrs H C Watt & Co Ltd for the taxpayer.

Decision:

The appeal

1. This is an appeal by the Taxpayer against the assessment of additional tax imposed upon it under section 82A of the Inland Revenue Ordinance (Chapter 112) ('the IRO') for the year of assessment 1996/97. The Taxpayer claims that the additional tax of \$20,000 is excessive under the circumstances applicable to the Taxpayer's case.

The facts

2. The facts of this case are straight forward and are set out as follows.

3. The Taxpayer was incorporated on 29 January 1980 and commenced the business of property investment on 12 March 1980. The Taxpayer closes its accounts on 31 March annually.

4. For the years of assessment 1990/91, 1992/93, 1993/94, 1994/95 and 1995/96, the Taxpayer filed its profits tax returns within the specified extended period. For the year of assessment 1991/92, its profits tax return was filed on 16 November 1996, one day late.

5. On 1 April 1997 the Commissioner issued the profits tax return for the year of assessment 1996/97 (Final Assessment) and 1997/98 (Provisional Payment) to the

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Taxpayer. Under the block extension scheme, the Taxpayer was required to submit the return not later than 15 November 1997.

6. On 15 November 1997, the Taxpayer's representative H C Watt & Company Ltd ('the Representative') submitted a letter dated 14 November 1997, stating that the audit of the Taxpayer's books of account had been completed, pending the directors' approval and signing of the financial statements, and that a completed profits tax return for the year of assessment 1996/97 together with audited financial statements for the year ended 31 March 1997 would be submitted to the Inland Revenue Department within 1 week after the expiry of the extended due date and, in the meantime, tax computation for the year of assessment was enclosed, showing an assessable profit of \$4,408,285.

7. On 28 November 1997, in the absence of a return the assessor raised on the Taxpayer under section 59(3) of the IRO, an estimated assessment in the amount of \$4,760,000 for the year of assessment 1996/97 with tax thereon of \$785,400 payable by two instalments on 20 January 1998 and 20 April 1998 respectively. The 2 instalments were respectively settled by the Taxpayer on 19 January 1998 and 10 April 1998.

8. On 11 December 1997, the Taxpayer, through its Representative, lodged a notice of objection dated 10 December 1997 against the estimated assessment for the year of assessment 1996/97. In support of the objection, the profits tax return for the year of assessment 1996/97, the financial statements and tax computation for the year ended 31 March 1997 were submitted. The tax computation for the year of assessment 1996/97 shows the same assessable profit as that shown on the tax computation submitted on 15 November 1997.

9. On 19 December 1997 the assessor issued a letter of enquiry on repairs and maintenance, decoration and directors' emolument charged in the accounts for the year ended 31 March 1997. The Representative replied the assessor by a letter dated 9 January 1998.

10. On 13 March 1998, the assessor proposed a revised computation for the year of assessment 1996/97, revising the assessable profit to \$5,092,666.

11. On 24 March 1998, the Representative proposed to the assessor a revised computation for the year of assessment 1996/97 under its letter dated 23 March 1998, proposing a revised assessable profit of \$4,896,668.

12. The assessor accepted the said proposed revised assessable profit and on 9 April 1998 issued a revised assessment and demand for tax for the year of assessment 1996/97 under section 64(3) of the IRO with the revised assessable profit of \$4,896,668 and the tax thereon of \$807,950 and the balance of the tax payable on 21 May 1998. The balance of the tax was settled by the Taxpayer on 15 May 1998.

13. On 2 July 1998, pursuant to section 82A(4) of the IRO, the Commissioner gave notice to the Taxpayer proposing to assess additional tax on the Taxpayer under that section

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by way of penalty in respect of the year of assessment 1996/97 as the Taxpayer had failed to comply with section 51(1) of the IRO.

14. On 20 July 1998, the Taxpayer, through its Representative, submitted written representations in respect of the Commissioner's notice issued on 2 July 1998 under its letter 17 July 1998.

15. On 14 August 1998, the Commissioner, having considered and taken into account the Taxpayer's representations, issued a notice of assessment for additional tax in respect of the year of assessment 1996/97 in the amount of \$20,000.

16. On 9 September 1998, the Representative on the Taxpayer's behalf gave notice of appeal to the Board of Review against the said assessment for additional tax in terms of section 82B of the IRO.

17. At the hearing of the appeal, Miss Alice Cheng Wai-ching of the Representative, represented the Taxpayer and Mrs Wong Yuen Wan-ye and Miss Yeung Mo-wai represented the Respondent (the CIR). No evidence was adduced. Written submissions were respectively made by the parties.

The Taxpayer's case

18. It was submitted on behalf of the Taxpayer that given the particular circumstances of the case, the additional tax of \$20,000 is excessive.

19. The particular circumstances relied upon by the Taxpayer are briefly stated as follows.

20. The Taxpayer's delay in filing its profits tax return for the year of assessment 1996/97 was only for a period of 25 days while all its previous returns for years of assessments 1990/91, 1992/93, 1993/94, 1994/95 and 1995/96 were all filed within the specified extended periods and the return for the year of assessment 1991/92, was filed only one day late, that is, on 16 November 1996.

21. The Taxpayer had no intention to evade the payment of tax. A tax computation and its supporting schedules were sent to the Respondent (the CIR) on due date and these tax computation and supporting schedules showing assessable profits of \$4,408,285 were the same as those subsequently sent with the Taxpayer's tax return and audited financial statements on 10 December 1997. The tax computation with its supporting schedules enabled the Respondent to raise assessment for the year of assessment 1996/97 with estimated profits of \$4,760,000 with tax thereon of \$785,400 payable by two instalments which were settled by the Taxpayer on due dates. Consequently, there had not been any tax undercharged due to the Taxpayer's failure to comply with the notice under section 51(1) and moreover, there would not be any tax which would have been undercharged if such failure had not been detected.

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22. The Taxpayer had been attentive to the enquiries made by the Respondent (the CIR) and also responded quickly to the revised computation proposed by the Respondent.

23. While the Taxpayer did not challenge the Respondent's (the CIR's) power to invoke section 82A of the IRO, as opposed to prosecute or compound under section 80 of the IRO, it was submitted that the penalty should only be a token fine. Numerous cases of compounding notices under section 80 of IRO with penalties ranging from \$1,200 to \$3,000 imposed, were cited.

24. The Representative explained at length the reason for the Taxpayer's delay in filing of the tax return although it was aware that the Taxpayer's delay caused by the indecision of the Taxpayer's directors on the proposed revaluation of investment properties, might not constitute a reasonable excuse for the delay. Nonetheless, given the particular circumstances of the Taxpayer's case stated above and comparing with the fines imposed under section 80(2)(d), the additional tax of \$20,000 was unreasonably high.

25. The Representative also referred the Board to two Board of Review decisions:

D131/95, IRBRD, vol 11, 282

D24/94, IRBRD, vol 9, 226

The Respondent's (the CIR's) case

26. Mrs Wong on behalf of the Respondent submitted that by failing to file the profits tax return for the year of assessment 1996/97 within the specified time, the Taxpayer caused an undercharged of tax in the sum of \$807,950, that is, 16.5% on the assessable profit of \$4,896,668, and under section 82A of the IRO, the Taxpayer was liable to an additional tax not exceeding 300% of the tax undercharged. The additional tax of \$20,000 being only 2.47% of the tax undercharged or 0.82% of the maximum additional tax permitted under the law, was therefore not excessive.

27. It was further submitted that the filing of management account was not a compliance with section 51(1) of the IRO and that the filing of tax computation alone, carried even less weight than that of the filing of management account.

28. Though estimated assessment was raised by the Respondent in the absence of profit tax return, the fact remained that the profit tax of \$807,950 had been undercharged in consequence of the Taxpayer's failure to submit the return on time. It was quoted to us from Board case D2/92, IRBRD, vol 7, 52 that:

'The Dodge case makes it clear that estimated assessments do not affect the liability of a taxpayer to penalties under section 82A. Likewise, estimated assessments do not affect the quantum of a penalty to be imposed under section 82A.'

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29. The maximum fine that may be imposed under section 80(2)(d) of the IRO has been increased with effect from 19 July 1995 to a fine at level 3, that is, \$10,000. The penalty of \$20,000 was therefore not unreasonably high.

30. Regarding the compounding notices, it was explained to the Board that under section 80(5) of the IRO, the Commissioner may compound section 80(2)(d) offence and compound offences are normally issued in new cases and in cases involving losses in previous years where it is considered not appropriate to raise estimated assessment immediately when the returns are overdue.

The determination

31. It is clear from the reason given for the delay of filing of the profit tax return that the Taxpayer does not have a reasonable excuse for the late filing of the same. The only issue for the Board to decide is, whether the quantum of the additional tax is excessive under the circumstances of the case.

32. Miss Cheng for the Taxpayer has referred the Board to a number of cases where compounding offences were issued and fines of ranging from \$1,200 to 3,000 were imposed. It suffices to say that each case has its own merits.

33. Mrs Wong for the Respondent (the CIR) referred the Board to Board Review Case D53/93, IRBRD, vol 8, 383 where it stated that 'the rule that has been consistently followed by the Board is that where there are neither aggravating factors nor mitigating ones, the penalty should be 100% of the tax undercharged'. The additional tax in question is in the sum of \$20,000 being approximately 2.47% of the tax undercharged of \$807,950.

34. The Board has carefully considered the detailed submission by the Taxpayer's Representative. Taking into account all the particular circumstances of this case, the Board is unable to say that the additional tax of \$20,000 being approximately 2.47% of the amount of tax which would have been undercharged, is excessive. Accordingly, we dismiss the appeal and confirm the additional tax assessment of \$20,000 against which the Taxpayer has appealed.