INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D29/93

Penalty tax – late filing of return – requirement for audited accounts – jurisdiction of Board of Review – quantum of amount of penalty – section 82A of Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Raphael Chan Cheuk Yuen and Larry Kwok Lam Kwong.

Dates of hearing: 17 September, 26 October 1992, 17, 18 and 19 February 1993.
Date of decision: 26 October 1993.

The taxpayer was late in filing its profits tax return. It was submitted to the Board that the reason for the late filing was because the Commissioner had wrongfully insisted that the tax return should be filed with the audited accounts of the taxpayer. It was further argued that the taxpayer was allowed a grace period for filing its tax return. Finally it was argued that the amount of the penalty was excessive.

Held:

It is not ultra vires for the Commissioner to require a profits tax return to be accompanied by audited accounts. The claim that the Board had no jurisdiction to hear the appeal was likewise dismissed. It was found as a fact that even if there were a grace period, the taxpayer had exceeded such period and accordingly this ground of appeal failed. Finally it was decided that the amount of the penalty was not excessive.

Appeal dismissed.

Cases referred to:

Preston v IRC [1985] STC 282
Aspin v Estill [1987] STC 723
Attorney General v Great Eastern Railway Co [1880] 5 Appeal Cases 473
Commissioners v National Federation of Self-employed Businesses Ltd [1982] AC 617
Gosling v Veley [1847] 12 QB 326
Cape Brandy Syndicate v IRC [1921] 1 KB 71
CIR v Mayland Woven Labels Factory Ltd [1975] HKTC 627
R v Richmond Upon Thames London Borough Council ex parte McCarthy & Stone (Development) Limited [1990] 2 WLR 1294
Clinch v IRC [1974] 1 QB 76

Chief Adjudication Officer v Foster [1992] 1 QB 31
R v Oxford Crown Court ex p Smith [1990] COD 211
D2/88, IRBRD, vol 3, 125
D53/88, IRBRD, vol 4, 10
D65/90, IRBRD, vol 5, 455
D74/89, IRBRD, vol 6, 169

M Y Cheung for the Commissioner of Inland Revenue.
Philip Dykes instructed by Messrs Ho & Chan for the taxpayer.

Decision:

1. THE SUBJECT MATTER OF THE APPLICATION

1.1 The Taxpayer appealed against the penalty imposed pursuant to section 82A of the Ordinance arising out of the late filing of the Taxpayer's accounts for the year of assessment 1990/91.

1.2 Notice of appeal was lodged on behalf of the Taxpayer by its tax representative on 18 June 1992 the grounds of appeal being that:

1.2.1 the company is not liable to additional tax; or alternatively

1.2.2 the amount of additional tax assessed on the company exceeds the amount for which it is liable under section 82A; or alternatively

1.2.3 the amount of additional tax, although not in excess for which it is liable under section 82A is grossly excessive having regard to the circumstances.

2. ADDITIONAL GROUNDS OF APPEAL

2.1 When the Board sat to hear this appeal Counsel for the Taxpayer stated that he would be taking three additional grounds of appeal with respect to which the Revenue might need time to consider not only the points raised but also whether or not to call witnesses with respect to the points in question.

2.2 The points in question were that:

2.2.1 The requirement for audited accounts was ultra vires the Revenue. The Board was referred to section 51 of the Ordinance and was advised that the Taxpayer would be calling an expert on the interpretation of statutes on this point.

2.2.2 The practice of the Revenue was to treat the block extensions normally afforded to corporations with tax representatives as, effectively, extending the

period by a further three months. The Board was referred to page 39 of the January/February 1991 issue and pages 35 and 36 of the March/April 1992 issue of the official publication of the Hong Kong Society of Accountants, 'The Hong Kong Accountant'.

2.3 Although the request to add additional grounds of appeal was resisted by the Revenue, after a brief adjournment the Board felt that it was appropriate for the three issues which had been raised to be considered. Accordingly, the Taxpayer was ordered to file the additional grounds of appeal within seven days and the appeal was adjourned to dates to be fixed after an estimate of the duration of the hearing had been provided to the Clerk to the Board.

2.4 The three additional grounds of appeal were:

(i) The requirement contained in Inland Revenue Form BIR 51 ('Profits Tax Return – Corporations') that a return must be accompanied by a certified balance sheet, auditor's report and profit and loss account is ultra vires the provisions of section 51(1) of the Inland Revenue Ordinance and of no force and effect. To the extent that any alleged non-compliance with this said requirement provides the basis for action taken by the assessor under the provisions of sections 82A(l)(d) and 82A(l)(ii) of the said Ordinance, the assessor has misdirected himself in law and/or acted unlawfully and the taxpayer is by reason thereof not liable to the additional tax in the sum assessed or at all.

(ii) If (which is not admitted) the taxpayer failed to comply with the requirements of section 51(1) of the Inland Revenue Ordinance by submitting an inaccurate first return on 29 November 1991 which declared an assessable profit which was in excess of the actual assessable profit which was later declared in a second return on 19 February 1992 (see (iii) below) then on the date when the taxpayer filed its second return, it was only four days outside the extended penalty free allowance period granted by concession of the Inland Revenue (see Commissioner's Circular dated 25 March 1991 paragraph 2 (iii) and the stated practice of the Commissioner as evidenced by Item A13 of the Journal of the Hong Kong Society of Accountants January/February 1991) and such tax as may be due is not substantial. The amount of additional tax sought is, in the circumstances, grossly excessive.

(iii) There has been no undercharge which has been undetected within the meaning of section 82A of the Inland Revenue Ordinance. The Taxpayer in this case submitted an inaccurate first return on 29 November 1991 declaring an assessable profit of $34,522,830. The revised second return which was submitted on 19 February 1992 declared an assessable profit for the relevant period of $32,503,206.

3. THE FACTS

The facts, which were agreed between the Taxpayer and the Revenue and placed before the Board are set out below. The sole alteration to the statement placed before the Board relates to the need to protect the identity of the Taxpayer in this case and its tax representatives.

(1) The Taxpayer, [Taxpayer named] (the 'Taxpayer') is appealing against the imposition and quantum of the additional tax assessed upon it by way of penalty for the year of assessment 1990/91.

(2) The Taxpayer was incorporated in mid-1970 under the Companies Ordinance, Hong Kong. It drew up its accounts annually to 31 March each year.

(3) The Taxpayer was represented for taxation purposes, as declared in its annual returns, by firm identified, Public Accountants for the years of assessment 1985/86 to 1989/90. The tax return for the year of assessment 1990/91 was submitted in the name of firm identified, Certified Public Accountants upon the merger of firm identified with firm identified as indicated in the director's report attached to the financial statements submitted to the Inland Revenue Department (the Department).

(4) Details of the tax return submission record of the Taxpayer for the five years preceding the one under appeal, are as follows:

Year of Assessment	Date of Issue of Return	Block Extended Due Date	Date of Submission of Return	Assessable Profit Involved $
1985/86	1-4-1986	31-10-1986	13-1-1987	5,551,380
1986/87	1-4-1987	31-10-1987	17-11-1987	3,886,060
1987/88	6-4-1988	31-10-1988	31-10-1988	363,939
1988/89	3-4-1989	15-11-1989	1-12-1989	*9,509,580
1989/90	2-4-1990	15-11-1990	29-12-1990	*4,280,805

* Returns submitted after the issuing of estimated assessments.

(5) Details of the assessments, tax assessed and tax payments for the years of assessment 1985/86 to 1989/90 are extracted as follows:

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1985/86

	Estimated Assessment		Revised Assessment	
	Amount $	Date	Amount $	Date
Profit assessed	2,000,000	14-1-87	5,551,380	13-2-87
Tax thereof	370,000		1,027,005	
Less: 1985/86 Provisional	134,524		134,524	
	235,476		892,481	
Add: 1986/87 Provisional	370,000		1,027,005	
	605,476		1,919,486	
Tax due and paid:				
First Instalment	512,976	6-3-87	1,662,735	16-3-87
Second Instalment	92,500	27-5-87	256,751	5-6-87
	605,476		1,919,486	

1986/87

	Assessment	
	Amount $	Date
Profit assessed	3,886,060	9-12-87
Tax thereof	718,921	
Less: 1986/87 Provisional	1,027,005	
	(308,084)	
Add: 1987/88 Provisional	699,490	
	391,406	

Tax due and paid:		
First Instalment	216,534	9-2-88
Second Instalment	174,872	28-4-88
	391,406	

198788

	Assessment	
	Amount $	Date
	363,939	9-12-88
Tax thereof	65,509	
Less: 1987/88 Provisional	699,490 (633,981)	
Add: 1988/89 Provisional	61,869	
Tax refunded	(572,112)	9-12-88

1988/89

	Estimated Assessment		Revised Assessment	
	Amount $	Date	Amount $	Date
Profit assessed	480,000	22-11-89	9,509,580	22-12-89
Tax thereof	81,600		1,616,628	
Less: 1988/89 Provisional	61,869 19,731		61,869 1,554,759	
Add: 1989/90 Provisional	79,200		1,569,080	

			3,123,839	
Less: Previously charged			98,931	
Tax due and paid:			3,024,908	
First Instalment	79,131	17-1-90	2,632,638	22-2-90
Second Instalment	19,800	17-4-90	392,270	8-5-90
	98,931		3,024,908	

1989/90

	Estimated Assessment		Revised Assessment	
	Amount $	Date	Amount $	Date
Profit assessed	11,700,000	30-11-90	4,280,805	11-2-91
Tax thereof	1,930,500		706,332	
Less: 1989/90 Provisional	1,569,080		1,569,080	
	361,420		(862,748)	
Add: 1990/91 Provisional	1,930,500		706,332	
	2,291,920		(156,416)	
Tax paid (Refunded)				
First Instalment	1,809,295	31-3-91	(156,416)	11-2-91
Second Instalment	482,625	18-4-91		11-2-91
	2,291,920		(156,416)	
	(Tax payable completely discharged)			

(6) On 2 April 1991, a profits tax return (BIR 51) for the year of assessment 1990/91 (the return), was issued to the Taxpayer. One of the paragraphs appearing on the return reads 'All sections of this form must be completed and returned to me within one month from the date of this notice, together with a certified copy of your balance sheet, auditor's report, and profit and loss account in respect of the basis period, and a tax computation with supporting schedules, showing how the amount of assessable profits (or loss) has been arrived at.'

(7) Under paragraph 2 (iii) of the circular of 25 March 1991 from the Commissioner of Inland Revenue (the Commissioner) to all authorised tax representatives, the compliance date specified on the 1990/91 profits tax return for the company having its accounts closed on 31 March 1991, was automatically extended under the existing block extension scheme to 15 November 1991.

(8) Paragraph (3) of the same circular also stated 'clients presently represented by you and their existing accounting codes are already recorded in the department's computer records. There is, therefore, no need to apply for a block extension in respect of these clients.'

(9) On 29 November 1991, the return as mentioned in fact (6) above declaring an assessable profit of $34,522,830 was submitted by the tax representatives in their new name firm identified by hand to the department, together with a detailed management profit and loss account.

(10) On 29 November 1991, an estimated assessment for the year of assessment 1990/91 was issued to the company under section 59(3) of the Inland Revenue Ordinance. A copy of the notice of assessment and demand for profits tax was also sent to earlier tax representative identified.

(11) Details of the 1990/91 profits tax assessment were as follows:

Year of Assessment 1990/91	
Estimated assessable profit under section 59(3) in the absence of return	$5,570,000
Profits Tax Payable	919,050
Less: Provisional Tax Charged for the Year of Assessment 1990/91	706,332
Balance Undercharged	212,718

Year of Assessment 1991/92 Provisional Tax $5,570,000 x 16.5%	919,050
Total Tax Payable	1,131,768

Due Dates of payment of tax:

	Tax Demanded	Due Dates
First Instalment	$ 902,006	31-1-92
Second Instalment	229,762	16-4-92
	$1,131,768	

(12) On 10 December 1991 a letter IR683 was sent by a senior assessor to the Taxpayer acknowledging receipt of the Taxpayer's 1990/91 profits tax return stating 'An estimated assessment was sent for the above year of assessment before I received the profits tax return, I regret that I cannot accept your return as a valid notice of objection under section 64 of the Inland Revenue Ordinance because it was not accompanied by a written notice of objection.', and 'Should the notice not be received by the above deadline, the assessment will become final and conclusive'.

(13) No objection was lodged as specified in the above form letter to the estimated assessment.

(14) On 20 January 1992, a second estimated additional assessment detailed as follows was issued:

Year of Assessment 1990/91 (Additional)

Estimated Additional Assessable Profit under Section 60 and Section 59(3) of the Inland Revenue Ordinance	$30,000,000
Tax thereon	4,950,000
Add: Additional Provisional Tax 1991/92	4,950,000
Total Additional Tax payable	$9,900,000

Due Dates for Payment of Tax:

	Tax Demanded	Due Dates
First Instalment	$8,662,500	10-3-92

Second Instalment	1,237,500	18-5-92
	$9,900,000	

(15) Through its tax representatives, the Taxpayer submitted audited accounts together with notice of objection on 19 February 1992, showing an assessable profit for the year of assessment 1990/91 as $32,503,206.

(16) On 2 March 1992, a notice was issued by the department advising the Taxpayer that the tax amount under objection had been held over unconditionally pending the result of the objection. Details of the amount so held over are as follows:

	Tax Demanded	Due Dates
First Instalment	$7,776,962	10-3-92
Second Instalment	1,110,994	18-5-92
	$8,887,956	

(17) Full amounts of the instalments on the notice mentioned in paragraph (16) above were paid by the Taxpayer duly on due dates.

(18) The additional estimated assessment was also revised on 2 March 1992 by the department to $26,933,206 as per the profit shown in the audited accounts less the amount already assessed under the first estimated assessment.

(19) Details of the assessments, tax assessed and tax payments for the year of assessment 1990/91 are extracted as follows:

1990/91

	Estimated Assessment	
	Amount $	Date
Profit assessed	5,570,000	29-11-91
Tax thereof	919,050	
Less: 1990/91 Provisional	706,332	

	212,718	
Add: 1991/92 Provisional	919,050	
	1,131,768	
Tax due and paid:		
First Instalment	902,006	31-1-92
Second Instalment	229,762	16-4-92
	1,131,768	

	Additional Estimated Assessment		Revised Assessment	
	Amount $	Date	Amount $	Date
Profit assessed	30,000,000	20-1-92	26,933,206	2-3-92
Tax thereof	4,950,000		4,443,978	
Add: 1991/92 Provisional	4,950,000		4,443,978	
	9,900,000		8,887,956	
Tax due and paid:				
First Instalment	8,662,500	10-3-92	7,776,962	10-3-92
Second Instalment	1,237,500	18-5-92	1,110,994	18-5-92
	9,900,000		8,887,956	

(20) The amounts of tax assessed on the various assessments for the year of assessment 1990/91 mentioned in paragraph (19) above have been duly paid on due dates.

(21) On 12 March 1992, the Commissioner of Inland Revenue issued a notice to the Taxpayer under section 82A(4) of the Inland Revenue Ordinance, advising the Taxpayer of his intention to assess additional tax under section 82A. The

notice invited written representations from the Taxpayer not later than 10 April 1992.

(22) The Taxpayer, through its representatives, made representations to the Commissioner on 6 April 1992.

(23) The Commissioner on 19 May 1992, issued to the Taxpayer a notice of assessment and demand for additional tax under section 82A for the year of assessment 1990/91 in the amount of $400,000.

(24) The Taxpayer, through its representatives [firm identified] lodged an appeal to the Clerk to the Board of Review on 18 June 1992.

4. PRELIMINARY POINT OF THE TAXPAYER IN THE HEARING

4.1 The Counsel for the Taxpayer who was instructed to argue the first additional ground of appeal, namely the power of the Commissioner to require audited accounts, handed in a bundle of authorities. He then drew the Board's attention to the decision of the Court of Appeal in CIR v Mayland Woven Labels Factory Ltd [1975] HKTC 627 and stated that the basis of that case was that the demand for documents were not within the power of the Commissioner. The Taxpayer's submission would be that the requirement to produce audited accounts puts a charge on a taxpayer, something which was not authorised by the Inland Revenue Ordinance ('the Ordinance'). The Board were also advised that the representative of the Revenue would challenge the jurisdiction of the Board to deal with that question.

4.2 The representative of the Revenue stated that the Revenue relied on two cases namely Preston v IRC [1985] STC 282 and Aspin v Estill [1987] STC 723.

4.3 The Board was referred to passages in both of these cases.

4.4 Counsel for the Taxpayer stated that the challenge to the authority of the Commissioner would be supported by reference to the authorities which related to illegal acts by taxing authorities. Neither was authority for the proposition that the taxpayer could not raise a defence on public law before the Board.

4.5 In response to a question from the Board the representative to the Revenue provided no answer as to why the Commissioner had not elected to seek a judicial review save for the comment that the power conferred by the Ordinance related to routine cases, as opposed to cases of the nature before the Board.

The Board decided that it was not precluded from hearing the case and advised the parties that it would continue to hear the appeal.

5. SUBMISSION FOR THE TAXPAYER

5.1 Counsel advised the Board that form BIR 51 is a form which the Board of Inland Revenue had caused to be published under the provisions of section 51(1) of the Ordinance for the purpose of obtaining tax returns relating to profits tax under part IV of the Ordinance.

5.2 Counsel read section 51(1) to the Board and then referred the Board to section 86 which gives the Board of Inland Revenue power to specify forms 'which may be necessary for carrying this Ordinance into effect'. It was noted that failure to comply with the requirements of the notice given to a person under section 51(1) was a criminal offence under the provisions of section 80(2)[D] and that the penalty could be a fine of $5,000 and a further fine of treble the amount of tax undercharged.

5.3 Section 18(2)(a) also made it an offence for a person, without reasonable excuse, to make an incorrect return by omitting or understating anything in respect of which he is required by the Ordinance to make a return.

5.4 The submission to be made on behalf of the Taxpayer was that the requirement contained in the notice that a corporate taxpayer should provide a certified balance sheet, auditor's report and profits and loss account is ultra vires the powers conferred upon the Board of Inland Revenue by the legislature and such requirement cannot be said to be incidental to or consequential upon the powers conferred upon the Board of Inland Revenue by the legislation. Additionally it is contended that 'particulars' could only be sought of the person to which a notice under section 51(1) is addressed there is no power to require the involvement of third parties in completing the return.

5.5 The Ordinance does not expressly provide in section 51(1) that the Board of Inland Revenue shall have the power to require taxpayers to submit returns to an assessor accompanied with the documentation specified in the notice the express provision contained in section 51(1) are:

(a) that an assessor may issue a notice in writing to any person requiring him or her within a reasonable time [to be specified in the notice] to furnish a return relating to property tax, salaries tax, or interest tax [as defined in the relevant parts of the Ordinance],

(b) that the Board may specify the return which the assessor may require and may specify the particulars to be provided by the person to whom a notice is given by the assessor and the form in which the particulars must be returned.

5.6 If the legislation does not expressly authorise the Board of Inland Revenue to require a person to whom a notice is given by the assessor to provide the

documentation sought in the notice the power can only arise by legislative implication. When interpreting the express words of an enactment to see whether there is a legislative implication the test to be applied, it was submitted, was that set out in section 174 of Bennion's 'Statutory Interpretation', second edition 1992 at page 366, which the Board was advised to read:

'The question whether an implication should be found within the express words of an enactment depends on whether it is proper, having regard to the accepted guides to legislative intention, to find the implication; and not on whether the implication is "necessary", or "obvious".'

5.7 It was submitted that the test whether the express power to specify particulars sought and the form in which they were to be provided is an implied ancillary power was whether it came within the meaning of the rule in Attorney General v Great Eastern Railway Co [1880] 5 Appeal Cases 473. This rule was as stated as being 'that whatever is fairly incidental to those things which the Legislature has authorised by an Act of Parliament ought not, unless expressly prohibited, to be held 'ultra vires'. The Board was referred to sections of the speeches of Lord Selbourne and at Lord Blackburn at pages 478 and 481, respectively, of the report.

5.8 It was then submitted that the requirement that any person to whom a notice is sent by an assessor should provide a return with the documentation sought is not a requirement which is fairly incidental to the main purposes of the Ordinance because providing such return involves the person on whom the duty is imposed an expenditure not authorised by the Ordinance and which expenditure can also be regarded as a charge imposed by the Board of Inland Revenue for the discharge of its statutory duties under the Ordinance.

5.9 Counsel acknowledged that the Board of Inland Revenue had certain statutory powers and duties with respect to the collection of revenue and suggested that these powers and duties were probably not materially different from those described by Lord Diplock at pages 636 and 637 of Commissioners v National Federation of Self-employed Businesses Ltd [1982] AC 617. Although a broad managerial discretion exists to do that which will secure the efficient collection of revenue, such a discretion would not permit the Board of Inland Revenue to require a taxpayer to incur expenditure not directly authorised by the Ordinance.

5.10 That there can be no government impost without clear statutory authority is, in Counsel's word, 'ancient'. It is stated by Wilde CJ in Gosling v Veley [1847] 12 QB 326 that:

'The rule of law that no pecuniary burden can be imposed upon the subjects of this country by whatever name it may be called, whether tax, due, rate or toll,

except upon clear and distinct legal authority, established by those who seek to impose the burden, has been so often the subject of legal decision that it may be deemed a legal axiom, and requires no authority to be cited in support of it.'

5.11 Counsel again refers the Board to Bennion's Code, section 271, which was read to the Board as follows:

'It is a principle of legal policy that a person should not be penalised except under clear law. The court, when considering in relation to the facts of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should assume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him in a way which was not made clear.'

Bennion's main principle was refined at section 278 which concerns 'economic interests' and is stated as follows:

'One aspect of the principle against doubtful penalisation is that by the exercise of state power the property or other economic interests of a person should not be taken away, impaired or endangered, except under clear authority of law.'

5.12 Counsel submitted that by 'economic interests' it is contended that any form of pecuniary burden imposed (or any benefit which is taken away) is included.

5.13 He went on to state that this principle was to be applied with particular rigour in the case of a taxing statute. Although the ascertainment of legislative intention is always the paramount objective. The Board was referred to the quotation of Rowlatt J in his judgment in Cape Brandy Syndicate v IRC [1921] 1 KB 71:

'In a taxing act one has to look at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in. Nothing is to be implied. One can only look fairly at the language used.'

5.14 Counsel conceded that the requirement regarding supporting documentation saves the Board of Inland Revenue expenditure which would otherwise be incurred in vetting and checking returns, refer CIR v Mayland Woven Labels Factory Ltd. However it was not permissible for the Board of Inland Revenue to pass on the cost of scrutinising returns by imposing the requirement that the taxpayer be put to the expense of providing an audited return. Such an impost can never be regarded as being 'fairly incidental' to the discharge of a statutory duty. The Board was referred to R v Richmond Upon Thames London Borough Council ex parte McCarthy & Stone (Development) Limited [1990] 2 WLR 1294 a case dealing with the right of a local authority to levy a charge on

developers for enquiries relating to speculative redevelopment and development proposals. At page 32 Slade LJ stated:

'If Parliament has imposed on a local authority a duty, but has not at the same time seen fit to authorise it to impose charges on members of the public as a price for the performance of that duty, it is not open to the authority to invoke either the principle of Attorney-General v Great Eastern Railway Co, 5 Appeal Case 473 or section 111(1) [of the Local Government Act 1972] by claiming that the imposition of charges is "calculated to facilitate" or "conductive or incidental to" the discharges of such duties.'

5.15 Counsel did acknowledge that if the Board of Inland Revenue were to advise taxpayers that submitting audited returns enhanced the prospects of an assessment being made without the need for the assessor to have recourse to the powers contained in section 51(3), such advice would be consistent with the exercise of a 'good management' power under section 51(1).

5.16 The word 'particulars' means particulars to be supplied by the person to whom a notice is given and not by a third party. 'Particulars' which may be sought under section 481 of the Income and Corporation Taxes Act 1970 mean particulars to be supplied by the person to whom the notice is given, see Clinch v IRC [1974] 1 QB 76. Alternatively, even if particulars may be required to be supplied by or through the agency of a third party it is unreasonable of the Board of Inland Revenue to have as a general requirement that all persons on whom a BIR 51 notice is served should be required to provide the documentation required. Such a requirement may be oppressive or inordinately burdensome and therefore invalid, refer Clinch v IRC. All that is necessary for the purpose of securing accurate returns is that the person completing a return be required to certify its accuracy in the knowledge that the certification of an inaccurate return may result in the imposition of penalties.

6. Evidence for the Taxpayer

Counsel for the Taxpayer called two witnesses.

6.1 The First Witness

6.1.1 In chief:

6.1.1.1 Having sworn in English the witness gave his full name and address and stated that he was a professional accountant. He was actually employed by a company in the group for which the Taxpayer was a member and he was responsible for, inter alia, the Taxpayer's accounts and tax affairs. The witness produced a technical briefing prepared by the Hong Kong Society of Accountants which appears in the Hong Kong Society of Accountants Journal

and deals with meetings between the Society's Tax Committee and the Commissioner of Inland Revenue.

6.1.1.2 He then stated that the initial block extension for the Taxpayer was from 1 April 1991 to 15 November 1991 and that the grace period referred to in the technical briefing took that date to be 15 February 1992. The audited accounts were lodged on 19 February 1992 that was four days late.

6.1.2 Under Cross-examination:

The witness stated that his knowledge of the block extensions came from the Journal published by the Hong Kong Society of Accountant as well as from practical experience of dealing with the tax matters of the group.

6.2 The Second Witness

6.2.1 In chief:

6.2.1.1 Having sworn in English the witness gave his full name and address and stated that he was a certified public accountant. He stated that he was a partner of the tax representatives, a firm of certified public accountants.

6.2.1.2 He gave a brief history of the amalgamations between firms with which he had been associated over the years.

6.2.1.3 He was referred to the statement of agreed facts and advised the Board that in the year of assessment 1987/88 and in the year of assessment 1989/90 there were tax refunds due. He also acknowledged that the return for the year of assessment 1987/88 was the only return filed within time. In all other years the returns were filed within the grace period. The Board was referred to a notice of assessment and/or notice of refund of profits tax for the year of assessment 1991/92 issued by the Revenue on 3 February 1993 which showed an over-payment of some $3,260,000 of tax. The tax for that year was actually off-set against that overpayment.

6.2.1.4 He also referred to the technical briefing in the Journal of the Hong Kong Society of Accountants and stated that the tests for penalties were whether the tax being substantial and whether the return was not filed within the grace period which, for the Taxpayer for the relevant year, should have been 15 February 1992. He also pointed out that the Commissioner had a discretion as to whether to compound or impose a penalty.

6.2.1.5 The witness pointed out that the management accounts had been lodged with the return on 29 November 1991. This date was after the expiration of the block extension but within the grace period referred to in the technical journal. An estimated assessment was also raised by the Revenue on 29 November

1991. He stated that in his experience this document would not have been mailed by the department for several days after the date on which it was printed by the department's computer. He also stated that under normal circumstances a corporation with a year ending of 31 March would pay its first instalment of tax in February and the second in May. In the case of the Taxpayer the differences in the dates were minute.

6.2.2 Cross-examination:

6.2.2.1 He stated that he had been in practice since 1970 and was aware of the block periods and grace periods not only from the Journal of the Hong Kong Society of Accountants but also from his dealings with the Inland Revenue Department.

6.2.3 Re-examination:

He stated that he was also a chartered secretary and acknowledged that audited accounts were required for an annual general meeting to be presented to shareholders. The annual general meeting could be a year after the close of the accounts.

6.2.4 He subsequently agreed with the Board that the requirement of the Ordinance was that an annual general meeting had to be held in each calendar year and that not more than fifteen months should elapse between annual general meetings and that accounts should have been audited within the previous nine months.

7. CONCLUDING SUBMISSION

Counsel for the Taxpayer then submitted that the Taxpayer's record drew the Revenue's attention to the position. If the grace period of three months from 15 November 1992 applied the Taxpayer had lodged his return a mere four days late. Had the Commissioner been aware that tax in excess of that which was due had been prepaid perhaps the Commissioner would only have imposed a nominal penalty. This was not a case of concealment. Whilst there had been delays proper accounts were filed and the Inland Revenue Department had obtained what it required from the Taxpayer. Bearing in mind that minute periods of delay a nominal penalty should have sufficed.

8. SUBMISSION FOR THE REVENUE

The submission on behalf of the Revenue, which was in writing, was divided into three sections, each section dealing with a specific ground of appeal.

8.1 Ultra Vires:

8.1.1 It was submitted that the short answer to the proposition was that the Court of Appeal in CIR v Mayland Woven Labels Factory Limited was clear and unambiguous and was a decision which was binding on the Board.

8.1.2 The Board lacked authority to conduct a judicial review, the proper forum for which was the High Court, refer Preston v IRC, Aspin v Estill and Chief Adjudication Officer v Foster [1992] 1 QB 31.

8.1.3 All the cases cited on behalf of the Taxpayer including R v Oxford Crown Court ex p Smith [1990] COD 211 dealt with the jurisdiction of the Court not an inferior and fact-finding tribunal such as the Board of Review. On the authorities cited the Board was invited not to make any finding on that issue.

8.1.4 The Revenue had no arguments with the Taxpayer over the authorities cited by the Taxpayer or the principles stated to have emerged from those authorities. However, the Revenue regarded all those authorities as irrelevant. The Revenue's position was that the requirement that the return be supported by documentation is incidental to the main purpose of the Ordinance, namely the collection of tax. For the purpose of computing the amount of tax payable the 'assessment profit' of a taxpayer has to be determined. The computation of 'assessable profit' necessarily starts with the actual profits of the taxpayer. To those profits must be added the non-deductible items and deducted from the profit must be the non-taxable items. The auditor's report and financial statements, all of which are readily available from corporate taxpayers, provide reliable and accurate information as to the profit of a company and the other data relevant to the assessment of tax. They conveniently serve as documents supporting the profit figure reported by the corporate taxpayers. The requirement for their provision is incidental to the computation of the tax liability and hence the collection of tax.

8.1.5 The presence of audited accounts does not lessen the assessor's work imposed upon him by section 59. In discharging his duties the assessor has to examine and scrutinise the return and accounts, irrespective of whether the accounts are audited, as is the case for corporate taxpayers or unaudited, as is the case for non-corporate taxpayers. No scrutinising or vetting work has therefore been passed to the corporate taxpayers as alleged.

8.1.6 The claim that the requirement to provide the audited accounts involves the person upon whom the duty is imposed in expenditure not authorised by the Ordinance and which expenditure can also be regarded as a charge imposed by the Board of Inland Revenue for the discharge of its statutory duties was incorrect. It is not the Board that places an obligation upon a corporate taxpayer to have its financial statements audited. Audited accounts are a requirement of the Companies Ordinance and are required irrespective of the Inland Revenue Ordinance. The requirement of section 51 (1) to provide audited accounts merely means that the taxpayer supports its return by an

already existing document. Accordingly, the requirement cannot be described as oppressive or inordinately burdensome. The Board should not allow the appeal on this ground.

8.2 Additional Tax excessive:

8.2.1 The position the Revenue adopted was that return was filed three months and four days late. The circular referred to by the Taxpayer on block extensions explained the department's policy as follows:

All requests for extensions beyond the normal block extension date should be submitted by letter at least fourteen days in advance of the expiration date; and

Any failure to file timely returns could result in section 82A action or compounded penalty action.

8.2.2 The Taxpayer, through its tax representative, was well aware of the department's policies. The Taxpayer chose not to apply for an extension additional to the normal block extension and submitted a late return. Accordingly the Taxpayer has to bear the consequences which flow from this neglect.

8.2.3 The tax in question was substantial. The total amount of tax demanded was $10,019,724. $4,656,696 was related to the final tax for the year of assessment 1990/91 and $5,363,028 was for the provisional tax for the year of assessment 1991/92. Had section 51(1) been complied with the additional tax of $7,700,000 payable on 10 March 1992 would have become payable on 31 January 1992. Accordingly, there was a loss of interest opportunity for the Revenue on a substantial sum of money.

8.2.4 The Board was then referred to several of its decisions dealing with the calculation of penalty with the position including, D2/88, IRBRD, vol 3, 125 and D53/88, IRBRD, vol 4, 10. The Board's attention was also drawn to D65/90, IRBRD, vol 5, 455 and D74/89, IRBRD, vol 6, 169 and the reasons for reduction analysed by the representative.

8.3 No liability for penalty:

8.3.1 The Board was reminded of the provisions of section 51(1) and also the fact that the 'return' filed by the Taxpayer on 29 November 1991 did not contain specified particulars and, in the words of McMullin JA in CIR v Mayland Woven Labels Factory Ltd was only 'a bald recital of statistical detail'.

8.3.2 The return was only filed on 19 February 1992. The meaning of section 82A is clear and unambiguous, refer D2/88, and as the penalty amounts to 100% of the

tax liability, the starting point for penalties, the Taxpayer's argument on this ground must fail.

9. REPLY OF THE TAXPAYER'S REPRESENTATIVE

The substantial point in the reply on behalf of the Taxpayer related to the issue of jurisdiction for the Board to entertain the appeal under the first of the amended grounds of appeal. It was so pointed out that under the provisions of part XI of the Ordinance the 'correctness' of the assessment is an issue, refer section 68(4). This can be distinguished from the quantum. There can be no 'correct assessment' if it is made in excess of statutory powers. Additionally, the rights of appeal to the High Court and to the Court of Appeal are consistent with the existence of a 'broad' jurisdiction rather than a narrow and mechanical 'accounting jurisdiction'.

10. REASONS FOR THE DECISION

10.1 Ultra Vires:

The Board is bound by the decision of the Full Court in CIR v Mayland Woven Labels Factory Ltd. Accordingly, the Board is unable to accept the Taxpayer's submission that the Commissioner's requirement that a return is accompanied by audited accounts was ultra vires. The Board does not consider that the authorities cited with respect to putting a taxpayer to expense are in any way relevant in that the requirement for an audit is not an arbitrary decision on the part of the Commissioner but a requirement of the Companies Ordinance, chapter 32. The Board was also satisfied that it had authority to hear and dispose of the appeal.

10.2 Additional Tax excessive:

The Ordinance provides for penalties if returns are not filed within the applicable statutory period. Recognition of the fact that few, if any, corporations are able to have an audit, as opposed to management accounts, completed within the time specified in the return has resulted in the concept of the block extension. Additional extensions may be applied for but those are in the discretion of the Commissioner. In this instance no additional extension was sought and the Board can see no reason why, in those circumstances, it should interfere with the Commissioner's decision to impose the penalty appealed.

10.3 No liability for penalty:

Whether or not the Revenue, as a matter of practice, allow a grace period for the filing of returns after the expiration of the block extension is something which, in the opinion of the Board, is irrelevant to this appeal. The relevant

agreed fact is that the return in question was filed on 19 February 1991, namely four days after the expiration of the alleged grace period. Accordingly, the Board is not required to make any finding as to whether or not this additional grace period is, in fact, allowed by the Commissioner.

11. DECISION

For the reason given this appeal fails.