

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D40/94

Penalty tax – late filing of return – estimated assessment – over payment of tax – quantum of penalty – section 82A of Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Jao Yu Ching and E M I Packwood.

Date of hearing: 12 May 1994.

Date of decision: 6 October 1994

The taxpayer was late in filing its tax return. An estimated assessment was issued and paid which was in excess of the amount of the profit made by the taxpayer and which was shown in the tax return. The taxpayer paid the estimated assessment and the excess amount was refunded to the taxpayer in due course. The taxpayer appealed on the ground that a penalty should not have been imposed and that the quantum of 10% was excessive.

Held:

The Commissioner was entitled to impose a penalty because the taxpayer was late in filing its return. The quantum of the penalty was not excessive.

Appeal dismissed.

D2/88, IRBRD, vol 3, 125
D43/88, IRBRD, vol 3, 405
D74/89, IRBRD, vol 6, 169
D34/88, IRBRD, vol 3, 336
D42/89, IRBRD, vol 4, 479
D105/89, IRBRD, vol 6, 384
D78/89, IRBRD, vol 6, 186
D49/91, IRBRD, vol 6, 277
D52/91, IRBRD, vol 6, 296
D53/91, IRBRD, vol 6, 404
D5/92, IRBRD, vol 7, 84
D11/93, IRBRD, vol 9, 143

Ngai See Wah for the Commissioner of Inland Revenue.
Ip Ho Chuen Ryan of Jonathan Tang & Ip for the taxpayer.

Decision:

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This is an appeal by a private limited company (the Taxpayer) against the imposition of additional tax by way of penalty under section 82A of the Inland Revenue Ordinance (the IRO) for the year of assessment 1991/92. The facts are as follows:

1. The Taxpayer was incorporated in Hong Kong in late 1969. A profits tax return for the year of assessment 1991/92 was issued to the Taxpayer on 1 April 1992 and should have been completed and returned to the Inland Revenue Department (the Revenue) within one month.
2. On 20 November 1992 the tax representative of the Taxpayer wrote to the Revenue to ask for an extension of time to 15 December 1992 for the filing of the profits tax return for the year of assessment 1991/92. The request was rejected by the Revenue on 26 November 1992.
3. On 27 November 1992 the assessor issued an estimated assessment to the Taxpayer on an assessable profit of \$15,560,000 with tax payable thereon of \$2,567,400.
4. On 23 December 1992 the tax representative for the Taxpayer lodged an objection against the estimated assessment. The objection was not accompanied by a profits tax return for the year of assessment 1991/92.
5. On 5 January 1993 the Taxpayer submitted its profits tax return for the year of assessment 1991/92 showing assessable profits of \$5,111,505.
6. After clarification of some information, on 26 March 1993 the assessor issued to the tax representative a proposed computation of tax for the year of assessment 1991/92 as follows:

	\$	
Profit Per Return		5,111,505
Add: Donation to Organization A (not an approved charitable organisation)		<u>500</u> \$5,112,005
Less: Profit on Sale of Fixed Assets	\$2,294	
Dividend Received from Listed Investment	<u>15,750</u>	<u>18,044</u>
Revised Assessable Profit		<u>\$5,093,961</u>

7. On 30 April 1993 the Taxpayer accepted the proposed revised assessable profit of \$5,093,961 with tax assessable thereon of \$840,503.

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8. On 3 June 1993 the assessor issued a letter to advise the Taxpayer that a notice of refund of profits tax would be issued to the Taxpayer in due course and that any tax due on the previous assessment had been fully discharged.
9. On 28 June 1993 a revised assessment was issued. The provisional tax assessed previously which had previously been charged and paid was utilized to set off the final tax as assessed for the year of assessment 1991/92, part thereof, was used to pay provisional tax for the following year, namely for the year of assessment 1992/93, and the balance was refunded to the Taxpayer.
10. On 27 September 1993 the Commissioner gave notice to the Taxpayer under section 82A of the IRO that he proposed to assess the Taxpayer to additional tax by way of penalty in respect to the year of assessment 1991/92.
11. On 22 October 1993 the Taxpayer submitted representations to the Commissioner with regard thereto.
12. On 5 November 1993 the Commissioner, having considered and taken into account the representation made, assessed the Taxpayer by way of penalty to additional tax for the year of assessment 1991/92 in the sum of \$84,000.
13. On 4 December 1993 the Taxpayer gave notice to the Board of Review appealing against the additional penalty tax assessment.

At the hearing of this appeal the tax representative for the Taxpayer appeared on behalf of Taxpayer. He submitted that there were three main issues in this case namely, whether any tax had been 'undercharged' within the meaning of section 82A of the IRO; whether section 82A of the IRO is applicable to a case where there is a net over payment of tax; and if the preceding grounds of appeal fail whether the amount of additional tax imposed is excessive in the circumstances.

The tax representative submitted that there was no tax in default because the company had paid excessive provisional profits tax for the year of assessment 1991/92 and the public revenue did not suffer in consequence of the failure by the Taxpayer to submit its profits tax within the time specified. The tax representative submitted that there was no tax undercharged and that in fact tax had been overcharged.

The tax representative pointed out that there was no intention of trying to obtain any benefit from delaying the submission of the profits tax return in question because there had been a net over payment.

The tax representative pointed out that this was a minor case involving a delay of only one month and twenty days. The representative then submitted that the quantum of the penalty was excessive.

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The representative cited the following Board of Review decisions:

D2/88, IRBRD, vol 3, 125
D43/88, IRBRD, vol 3, 405
D74/89, IRBRD, vol 6, 169
D34/88, IRBRD, vol 3, 336
D42/89, IRBRD, vol 4, 479

The representative for the Commissioner drew the attention of the Board to the 'block extension scheme' operated by the Commissioner. He pointed out that under this scheme the Taxpayer had been given an extension of time up to 15 November 1992 which is 229 days after the closing date of the accounts of the Taxpayer, namely, 31 March 1992. He said that on 27 November 1992 it was noted that the profits tax return had not been submitted by the Taxpayer and an estimated assessment had been issued. When an objection was issued to the estimated assessment the profits tax return for the year of assessment 1991/92 did not accompany the objection. The profits tax return was returned to the Revenue on 5 January 1993 which was 51 days after the extended period of 15 November 1992 had expired or 280 days after the closing date of the relevant accounts.

The representative for the Commissioner went on to submit that the Taxpayer was clearly in default in filing its tax return. This gave the Commissioner the power to impose a penalty. He then pointed out that the quantum of the penalty which the Commissioner is empowered to impose is an amount not exceeding three times the amount of tax which would have been undercharged if the failure to file a tax return had not been detected. He submitted that the payment of provisional tax was not relevant to the assessment of penalty tax or the quantum of the amount thereof.

Having dealt with the power of the Commissioner to impose a penalty and the quantum which the Commissioner was empowered to impose the representative then submitted that the quantum which the Commissioner had imposed in this case was not excessive.

The representative for the Commissioner drew attention to the previous record of the Taxpayer in filing its tax return and pointed out that the Taxpayer had been consistently late and on some occasions was over one year late. The following is a table of the filing of tax returns in respect of previous years:

Year of Assessment	Date Return Issued	Date Return Received
1986/87	1-4-1987	28-4-1988
1987/88	6-4-1988	17-7-1989
1988/89	3-4-1989	22-1-1990
1989/90	2-4-1990	24-12-1990
1990/91	2-4-1991	10-1-1992

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1991/92

1-4-1992

5-1-1993

The representative for the Commissioner said that the Commissioner had imposed the penalty of \$84,000 which was only 10% on the amount of the tax involved and submitted that this was a minimum for cases of this type.

The representative for the Commissioner cited the following Board of Review decisions:

D105/89, IRBRD, vol 6, 384

D78/89, IRBRD, vol 6, 186

D49/91, IRBRD, vol 6, 277

D52/91, IRBRD, vol 6, 296

D53/91, IRBRD, vol 6, 404

D5/92, IRBRD, vol 7, 84

D11/93, IRBRD, vol 9, 143

We found the submission put forward on behalf of the Taxpayer to be without merit. The representative for the Taxpayer has submitted that there was no undercharge to tax but in fact an overcharge. That may have been the actual situation but it is not to what the IRO refers. The IRO had set up a theoretical situation for the calculation of penalty tax. The legislature has provided a simple and expedient way of calculating the maximum amount which the Commissioner can impose. The legislature has chosen to adopt a theoretical situation of what would be the case if the failure to do something had never been found out. Obviously the failure has been found out but that is not material. If the Taxpayer had never filed its tax return then theoretically it would never have paid any tax. That being the case it must follow logically that the amount of tax which would have been undercharged would have been the full amount of the tax which was eventually assessed. In the case before us that would have been \$840,503 and the maximum amount of penalty which the Commissioner can impose is three times that amount.

The facts of this case are a little unusual because it seems that the profit made by the Taxpayer in the year in question was substantially less than in the previous year. As we know, provisional tax is charged in respect of each year of assessment based on the profit made in the previous years. Unless an application has been made to reduce the same, this provisional amount is paid prior to the actual amount being assessed and any adjustment brought to account. Apparently the decline in the profit of the Taxpayer were such that the provisional tax assessed with regard thereto lead to a refund of part of the amount paid when the profits of the Taxpayer for the year of assessment 1991/92 were eventually ascertained and assessed. There is of course nothing unusual about this situation and it is a common occurrence for taxpayers whose profits decline in relation to the preceding year. Of course, had the Taxpayer kept its accounts up to date and maintained accurate management accounts it could have applied to have the provisional tax for the year in question reduced. However it is well recognised that when deciding whether or not the

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Commissioner can impose a penalty, provisional tax and estimated assessments are totally disregarded.

That then leads us to the question of the quantum of the penalty imposed in this case.

The Commissioner has imposed a penalty of approximately 10% of the tax involved. Clearly he has taken a lenient view in this case. We do not find the amount of the penalty to be excessive. Indeed if anything it is too little. Clearly the Commissioner has taken into account the fact that the Taxpayer has over paid his tax in respect of this year and in due course received a refund. At the hearing of the appeal no mitigating circumstances were submitted to the Board other than the fact that the delay in filing the return was not a long period of time. However, it was 51 days late beyond the already extended period of time.

On the other hand we have the information provided by the representative for the Commissioner which was not challenged by the Taxpayer. That is that the Taxpayer has been consistently late in filing its profits tax returns for many years and on occasions has been very late indeed. Taxpayers who consistently disregarded their obligations under the IRO must expect to suffer the consequences.

For the reasons given we dismiss this appeal and confirm the penalty assessment against which the Taxpayer had appealed.