Case No. D60/86

Board of Review:

H. F. G. Hobson, *Chairman*, P. A. Hall and Ambrose H. C. Lau, *Members.*

17 February 1987.

Additional Tax—Section 82A of the Inland Revenue Ordinance—whether additional tax excessive.

The appeal is concerned with two assessments to additional tax made by the Commissioner of Inland Revenue pursuant to Section 82A of the Inland Revenue Ordinance for the years 1982/83 and 1983/84. The grounds of appeal are that the penalty taxes were excessive having regard to all the circumstances.

Held:

In the matter of imposing penalty taxes there is no universal yardstick and each case is governed by its own given circumstances. On the facts, the penalty taxes were not excessive.

Appeal dismissed.
(Note: The Appellant has subsequently appealed to the High Court.)

Lo Chan Ming for the Commissioner of Inland Revenue.
Stewart Bates Q.C. for the Appellant.

Reasons:

This Appeal is concerned with two assessments to additional tax (herein "penalty taxes") made by the Commissioner of Inland Revenue pursuant to S. 82A of the Inland Revenue Ordinance for two consecutive years, namely 1982/83 in the amount of $3,500,000 and 1983/84 in the amount of $700,000 upon the Appellant company.

The grounds of appeal are that the penalty taxes were excessive having regard to all the circumstances.

From agreed facts or evidence on oath by Mr. S, a Director of the Appellant, the following emerged.

1. The Appellant, a subsidiary of a large group of companies, made profits largely through property development sales and lettings.

2. In the three tax years preceding the two under review it had failed tax returns either timeously or only a few days out of time and had been assessed to the profits (or in one case, the loss) shown in those returns and had paid the taxes concerned. The Appellant's accounting year ends on the 31st July.

3. *1982/83:* On the 6 April 1983 the Revenue sent a return, referrable to the year of assessment 1982/83 (i.e. corresponding to the Appellant's accounting year 1 August 1981 to 31 July 1982), to the Appellant which, subject to any extension given, should have been filed by the 6 May 1983.

4. On the 30 May 1983, the Appellant's tax representative wrote to the Revenue asking for an extension till 14 June 1983 "as the accounts are in the course of audit".

5. On the 27 June 1983 the Revenue refused the request: the refusal was made 13 days after the extension request.

6. (*a*) On the 7 August 1983, the Appellant having failed to file the 1982/83 Return, the Assessor raised an *estimated assessment* (S. 59(3)) for that year of $1,000,000 subtracting therefrom a loss of $569,157 carried forward from the preceding year's accounts, leaving a taxable balance of $430,843 upon which the tax for 1982/83 was $71,089.

   (*b*) The estimated assessment included provisional tax for 1983/84 of $165,000 likewise based upon $1,000,000.

7. No objection was taken within the requisite 30 day period to the 1982/83 estimated assessment nor for the 1983/84 provisional estimated assessment and the taxes concerned were paid on the 14 November 1983.

8. *1983/84:* On the 2 April 1984 the Revenue sent the Appellant the 1983/84 Return which was required to be filed by the 2 May 1984.

9. On the 8 August 1984, the 1983/84 Return not having been filed, the Assessor raised an *estimated* assessment in the amount of $60,000,000 for that year.

10. On the 23 August 1984 the Assessor raised on *additional assessment* is the sum of $40,000,000 for the year 1982/83; i.e. additional to the $1,000,000 estimated assessment referred to at 6(*a*) above.

11. On the 4 September 1984, the Appellant's representative objected to the *additional assessment* at 10 above and at the same time filed a Return showing a profit of $32,807,078.

12. On the same day the tax representative also objected to the *estimated* assessment at 9 above and filed the 1983/84 Return showing a profit of $7,024,612.

13. The Commissioner in response to the objections at 11 and 12 above:

(*a*) reassessed the 1982/83 profits from the former $430,843 (tax paid thereon $71,089) to $32,807,087 (with tax payable thereon of $5,319,256), and

(*b*) reassessed the 1983/84 profits at $7,024,612 down from the $60,000,000 referred to 9 above.

14. On the 23 July 1985, the Commissioner notified the Appellant under S. 82A(4) of his intention to raise penalty taxes for 1982/83 and 1983/84. This notice gave the Appellant until 12th August to make representations. (S. 82A(4)(iii) says the notice shall "specify the date, not earlier than 21 days from the date of service of the notice, by which representation … must be received …": that date should have been the 13th August but this discrepancy was not pursued by the Appellant before us.)

15. After an extension of time, on the 16 August 1985 the Appellant's tax representatives wrote—"The Company accepts that there has been dilatoriness in lodging the profits tax returns … and wishes to express its regrets." No explanation for the delays was offered. He then went on to propose that the penalty taxes be exacted on the basis of 11.25% p.a. on the difference in the taxes concerned viz. loss of interest for the periods from the time the tax was due until the tax was paid of $527,332 for 1982/83 and $112,750 for 1983/84.

Mr. S gave evidence to the effect that he was the manager of the Appellant until 1984 when late in that year he became a director. He looked upon Mr. and Mrs. W as his boss, the Appellant's accountant was Mr. T, Mr. M was in charge of sales of property and Mr. S himself was concerned with general administration and property management. He said Mr. T was group accountant as well as the Appellant's accountant. Mr. T, according to Mr. S, sent the Appellant's 1982/83 accounts (for the year ending 31 July 1982) to its auditors in the latter part of May 1983. Mr. T became ill some time in June 1983 shortly whereafter the auditors returned the accounts to the Appellant with comments, which Mr. S said related to verification of certain figures in the accounts. Mr. T was off work for 12 to 15 months, returning, so Mr. S thought, about August 1984. Each week it was believed that Mr. T would soon be back to work, consequently nothing was done about the accounts. Mr. S said Mr. T was "the only person who knew exactly what was going on so far as the accounts were concerned—no Mr. T no accounts". Mr. T had been with the group for 20 years and knew his way round the old fashioned style accounts. Mr. S said the group has about 15 personnel engaged in the accounts office.

In cross examination Mr. S acknowledged that two particular companies belonged to the group but was unsure whether Mr. T's absence would affect the making of returns of those companies. Mr. S was in no position to offer a first hand explanation of how Mr. T was able to sign the balance sheet of one of those companies on the 28 June 1983 and its Return on the 6 October 1983 despite the fact that he was said to be off work. Nor could Mr. S explain how Mr. T came to sign another Tax Return dated 9 July 1984 relating to yet another company in the group. It also appeared that Mr. S himself had signed Tax Returns for

another company in the group on the 20 May 1983 and 18 April 1984—within the period of T's alleged absence; again Mr. S gave no explanation as to how he'd managed to satisfy himself that those Returns were satisfactory without the prior approval of Mr. T, Mr. S said he was told Mr. T had retired about one year ago though he still came to the office from time to time to "clear up things because he is the person who knows everything".

Mr. S's testimony was entirely unsatisfactory. He lacked or appeared to lack the knowledge required to explain some of the most straightforward questions. No explanation was forthcoming as to why Mr. T or one or other of the Ws was not called to give more direct evidence nor why a doctor's certificate could not be produced, nor why Mr. T's illness had not been put forward by the Appellant's representative as a reason to seek extensions nor why it was not mentioned in the letter by the tax representative at 15 above in response to the invitation to make representations as to why penalties taxes should not be raised.

Accordingly we are not at all convinced by the excuse of Mr. T's illness.

We then turn to the question of whether the two penalty taxes are excessive in the other known circumstances, namely that the Appellant was being penalized not for filing an incorrect return but for failing to file a return. We do not think that the latter is necessarily more excusable than the former. It was then submitted that the penalties were very much higher than some others mentioned in certain Board of Review cases to which we were referred. None of those cases suggests that there is any universal yardstick, all are governed by their own given circumstances. In this last respect we should mention that it became apparent during the hearing that estimated assessments had had to be raised successively on two other companies in the group and we do not believe that the raising of those estimates was a direct result of Mr. T's alleged illness.

The penalties which could have been exacted in the case before us were:—

—	1982/83 actual tax liability	$5,319,256	
	deduct tax paid on the basis of the estimated assessment at 6(*a*) above	71,089	
		$5,248,167	undertaxed

Maximum penalty 3 x $5,248,167 = $15,744,501.
The $3,500,000 penalty is 22.23% of this maximum.

—	1983/84 actual tax liability	$1,159,060	

tax paid on the basis of the estimated assessment at 6(*b*) above	165,000	
	$ 994,060	undertaxed

Maximum penalty 3 x $994,060 = $2,982,180.
The $700,000 penalty is 23.47% of this maximum.

Accordingly we do not consider the penalty taxes in this case to be excessive in the circumstances, consequently the appeal is dismissed.