

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D88/03

Penalty tax – late in submitting profits tax return – whether the lack of ability of appellant to pay penalty tax is a factor which should be taken into consideration – factors that affect the level of penalty - whether the assessments are excessive.

Panel: Kenneth Kwok Hing Wai SC (chairman), Edward Cheung Wing Yui and Paul Shieh Wing Tai SC.

Date of hearing: 28 November 2003.

Date of decision: 16 January 2004.

The appellant is a limited company. The appellant did not submit the profits tax return for the years of assessment 1999/2000 and 2000/01 by the respective extended deadlines. Estimated assessments were issued to the appellant. The appellant then submitted the profits tax returns. The Inland Revenue Department accepted the amounts of assessable profits tax reported by the appellant but issued additional tax assessments for the delay.

The appellant had been late in submitting profits tax return from 1996/97 to 2001/02. The appellant accepted it was wrong to be late in filing tax returns and asked for leniency. The appellant asserted that the appellant and its shareholders suffered from the financial downturn.

Held:

1. The Board assumes that the lack of ability of an appellant to pay penalty tax is a factor which should be taken into consideration. However there is no evidence of the appellant's lack of means to pay the penalty tax in this case. Merely producing a bank letter granting banking facilities to the appellant proved neither the appellant's net worth nor its cashflow position. Furthermore, there is no allegation and no evidence that the appellant suffered any more than the very many law-abiding taxpayers who filed their returns on time in those two years of assessment (D96/00, IRBRD, vol 15, 851 and Chan Min Ching trading as Chan Siu Wah Herbalist Clinic v Commissioner of Inland Revenue [1999] 2 HKLRD 586 considered).
2. The first factor listed that affects the level of penalty is the length and nature of delay. There was no investigation in this case and the returns were accepted by the

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Revenue as correct. The periods of delay in this case are shorter than other serious cases. Taking all the circumstances into consideration, the assessments are excessive and should be reduced to 15% for the year of assessment 1999/2000 and 12% (the period of delay was shorter but the appellant was late for yet another year) for the year of assessment 2000/01 (D2/90, IRBRD, vol 5, 77, D85/01, IRBRD, vol 16, 696 and D118/02, IRBRD, vol 18, 90 considered).

Appeal allowed in part.

Case referred to:

D100/97, IRBRD, vol 12, 544
D125/98, IRBRD, vol 13, 574
D31/99, IRBRD, vol 14, 341
D96/00, IRBRD, vol 15, 851
D134/00, IRBRD, vol 16, 10
D23/01 (unreported)
D32/01, IRBRD, vol 16, 268
D118/02, IRBRD, vol 18, 90
Chan Min Ching trading as Chan Siu Wah Herbalist Clinic v Commissioner of
Inland Revenue [1999] 2 HKLRD586
D2/90, IRBRD, vol 5, 77
D85/01, IRBRD, vol 16, 696

Doris Lee for the Commissioner of Inland Revenue.
Taxpayer represented by its director.

Decision:

1. This is an appeal against two assessments ('the Assessments') both dated 19 June 2003 by the Commissioner of Inland Revenue, assessing the Appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('IRO') in the following sums:

Year of assessment	Additional tax	Charge no
1999/2000	\$50,000	1-1113660-00-5
2000/01	<u>\$12,000</u>	1-1112018-01-6
Total:	\$62,000	

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2. The relevant provision is section 82A(1)(d) of the IRO for failing to comply with the requirements of a notice given to it under section 51(1).

The agreed facts

3. The agreed facts were set out in a statement of facts and we find them as facts. For the purpose of our decision, the following account suffices.

4. The Appellant is a limited company which commenced business in December 1994.

5. At all material times, the Appellant's principal business was the provision of secretarial and accounting services.

6. The Appellant closed its accounts on 31 March each year.

7. On 3 April 2000 and 2 April 2001, the Commissioner issued profits tax returns for the years of assessment 1999/2000 and 2000/01 respectively, requiring the Appellant to submit them within a month. However, under the block extension scheme, the deadline in each case was extended to 15 November.

8. The Appellant did not submit either return by the extended deadline and the following estimated assessments were issued to the Appellant:

1999/2000

Date	Assessable profits (\$)		Tax payable (\$)
8 March 2001	Assessable profits	20,000	3,200
17 May 2001	Additional assessable profits	10,000	1,600
	Total:	30,000	4,800

2000/01

Date	Assessable profits (\$)		Tax payable (\$)
19 February 2002	Assessable profits	30,000	4,800
16 May 2002	Additional assessable profits	20,000	3,200
	Total:	50,000	8,000

9. On 30 July 2002, the Appellant submitted the profits tax returns for the years of assessment 1999/2000 and 2000/01 reporting assessable profits of \$1,562,679 and \$391,914 respectively.

10. The amounts of assessable profits tax reported by the Appellant in the returns for the years of assessment 1999/2000 and 2000/01 were accepted by the Revenue as correct and further

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additional profits tax assessments were issued to assess the Appellant at the proper amounts for these two years.

11. The delay, the amount of tax involved and the Assessments are summarised as follows:

A. Year of assessment	B. Amount of assessable profits reported (\$)	C. Amount of tax undercharged or would have been undercharged (\$)	D. Amount of estimated profits by date of return (\$)	E. Difference (\$) (B – D)	F. Amount of additional tax (\$)	G. % (F/C)
1999/2000	1,562,679	250,020	30,000	1,532,679	50,000	20%
2000/01	391,914	62,706	50,000	341,914	12,000	19.4%

12. The Appellant had been late in submitting profits tax return from 1996/97 to 2001/02:

Year of assessment	Period of delay	No of estimated assessments
1996/97	2 months 16 days	1
1997/98	7 months 6 days	3
1998/99	28 days	1
1999/2000	20 months 15 days	2
2000/01	8 months 15 days	2
2001/02	4 days	Nil

The appeal hearing

13. Before the hearing of the appeal, Ms Doris Lee submitted a bundle of the following authorities:

- (a) D100/97, IRBRD, vol 12, 544;
- (b) D125/98, IRBRD, vol 13, 574;
- (c) D31/99, IRBRD, vol 14, 341;
- (d) D96/00, IRBRD, vol 15, 851;
- (e) D134/00, IRBRD, vol 16, 10;
- (f) D23/01, unreported; and

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(g) D32/01, IRBRD, vol 16, 268.

14. At our request, Ms Lee furnished us and the Appellant with a copy of D118/02, IRBRD, vol 18, 90.

15. The Appellant accepted that it was wrong to be late in filing tax returns and asked for leniency. The Appellant asserted that the Appellant and its shareholders suffered from the financial downturn.

Our decision

Appellant's financial position & the Chan Min-ching case

16. Ms Lee cited D96/00 and contended that financial difficulty is neither a reasonable excuse nor a valid ground of appeal. We do not think D96/00 went as far as contended. D96/00 seems to us to be a decision on the facts in that case.

17. If D96/00 went as far as Ms Lee suggested, then it and other Board of Review decisions which held that financial difficulties of the taxpayers were irrelevant are in conflict with the *obiter dictum* of the Honourable Madam Justice Yuen in Chan Min-ching trading as Chan Siu Wah Herbalist Clinic v Commissioner of Inland Revenue [1999] 2 HKLRD 586 at pages 589 & 590 (emphasis added):

‘Question (3) in the case stated was as follows: Whether the Board’s decision based on the reasons given for dismissing the appeal is bad in law. These reasons are stated in para. 16(b)-(e) of the decision.

Section 82B(2)(c) provides that on an appeal against assessment to additional tax, it shall be open to the appellant to argue that (a) he is not liable to additional tax; (b) the amount of additional tax assessed on him exceeds the amount for which he is liable under s. 82A; (c) the amount of additional tax, although not in excess of that for which he is liable under s. 82A, is excessive having regard to the circumstances.

*The reference to ‘having regard to the circumstances’ gives a wide discretion to the Board of Review. In my view, the reason why the Taxpayer failed to keep accurate records (as referred to in para. 16(b) of the Decision) and **her ability or lack of it to pay additional tax** (as stated in para. 16(c) of the Decision) would appear to me to be matters which the Board of Review **should have taken into account as part of the “relevant circumstances”** as referred to in s. 82B(2)(c).*

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...

In conclusion, therefore, in relation to Question (3) of the case stated, my view is that in relation to para. 16(b) and (c), the failure on the part of the Board to consider those factors may have been bad in law.'

18. Neither party has advanced any argument on whether it is wrong in principle to impose a financial penalty which is beyond the means of an appellant and whether the power of the Commissioner to allow payment by instalments is a sufficient answer. Whether the lack of ability of an appellant to pay penalty tax is a relevant circumstance is not an issue we should decide without hearing full arguments.

19. For the purpose of this appeal, we assume that it is a factor which should be taken into consideration. The real objection to the Appellant's contention is that there is no evidence of the Appellant's lack of means to pay the penalty tax in this case. Merely producing a bank letter granting general banking facilities to the Appellant proved neither the Appellant's net worth nor its cashflow position.

20. Furthermore, there is no allegation and no evidence that the Appellant suffered any more than the very many law-abiding taxpayers who filed their returns on time in these two years of assessment.

D118/02

21. D118/02 is a landmark case on penalty tax. Mr Ronny Wong Fook Hum SC, chairman of the Board of Review, chaired the panel and sat with two deputy chairmen of the Board of Review as members. On late return cases, the Board said this in paragraph 54:

'The approach of this Board is to consider the overall circumstances of each case. Factors that affect the level of penalty include ...'

22. The first factor listed is the length and nature of the delay. D2/90, IRBRD, vol 5, 77 and D85/01, IRBRD, vol 16, 696 were cited as authorities. In D85/01, the Board made the point at paragraph 53 that:

'In the case of a late but correct return, the primary consideration is the degree of lateness.'

Whether excessive

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23. D85/01 was a late returns and incorrect returns case. On the late return aspect, the appellant was a repeat offender. On 27 January 1999, the Revenue started an investigation which took 18 months to complete. An oral warning was given on 11 January 2000 but the appellant did not submit his 1998/99 return until 29 February 2000, a delay of 3 ½ months. The return was accepted by the Revenue as correct and the Board reduced the penalty tax from 106.7% to 20%, see paragraphs 10, 15, 60, 71, 82, 87 to 90.

24. D118/02 was a late return case in respect of one year of assessment. The delay was three years and nine months. The appellant there was reckless in relation to his obligations under the IRO and refrained from submitting any return until the Revenue had undertaken an extensive investigation. The Board considered an assessment at 20% of the tax involved reasonable and allowed the appeal to that extent, see paragraphs 58 to 63.

25. Ms Doris Lee sought to support the assessments on the following grounds:

- (a) the very long periods of delay;
- (b) the repeated issue of estimated assessments;
- (c) frequent lateness; and
- (d) this was the first punishment despite repeated defaults in the past.

26. Compared with D85/01 and D118/02, this is a less serious case. There was no investigation in this case and the returns were accepted by the Revenue as correct. The periods of delay in this case are shorter than the period in D118/02.

27. The onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant, sections 82B(3) and 68(4).

28. Taking all the circumstances into consideration, the Assessments are excessive in our decision and should be reduced to 15% for the year of assessment 1999/2000 and 12% (the period of delay was shorter but the Appellant was late for yet another year) for the year of assessment 2000/01.

Disposition

29. We allow the appeal and reduce the Assessments as follows:

Year of assessment	Additional tax (\$)	Charge number	Amount of additional tax as reduced by us (\$)
1999/2000	50,000	1-1113660-00-5	Reduce to 37,500

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2000/01	12,000	1-1112018-01-6	Reduce to 7,500
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