

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D9/94

**Penalty tax** – estimated assessment – failure to object to assessment – whether ground for appeal against penalty tax assessment.

Panel: William Turnbull (chairman), Lester Kwok Chi Hang and Kenneth Ting Woo Shou.

Date of hearing: 10 March 1994.

Date of decision: 3 May 1994

The taxpayer failed to file tax returns in respect of a number of years. In respect of the first year of assessment an estimated assessment was issued to which the taxpayer did not object. The Inland Revenue Department investigated the affairs of the taxpayer in respect of subsequent years. Following the conclusion of the investigation the Commissioner imposed additional tax by way of penalty on the taxpayer under section 82A of the Inland Revenue Ordinance. The taxpayer objected to one penalty tax assessment only, namely, that in respect of the first year of assessment which was based on the estimated assessment against which the taxpayer had not objected. The taxpayer submitted that he had failed to object to the estimated assessment because of incorrect advice he had received from his professional advisor.

Held:

There was no evidence before the Board which would prove to the satisfaction of the Board that it was the fault of the professional advisor. However even if this were the case it would be of no avail to the taxpayer.

**Appeal dismissed.**

Case referred to:

D27/90, IRBRD, vol 5, 203

Wu Hon Keung for the Commissioner of Inland Revenue.  
Johnny Chan of Messrs Johnny Chan & Co for the taxpayer.

**Decision:**

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This is an appeal by a taxpayer against a penalty tax assessment made against him under section 82A of the Inland Revenue Ordinance. The facts are as follows:

1. The Taxpayer was the sole proprietor of a business which commenced operation in May 1972. In February 1985 the business was taken over by a limited company which the Taxpayer had formed. The unincorporated business ceased operation in March 1986.

2. The profits tax returns and the supporting accounts submitted by the Taxpayer for the unincorporated business for the years of assessment from 1982/83 to 1985/86 provided the following information:

<b>Year of assessment</b>	<b>Basis Period (year ended)</b>	<b>Date of Issue</b>	<b>Date of Filing Return</b>	<b>Profits Per Return</b>	<b>Assessed Profits after Adjustment</b>
				\$	\$
1982/83	31-3-1983	6-4-1983	31-10-1983	69,544	32,336
1983/84	31-3-1984	2-4-1984	12-6-1984	103,767	62,776
1984/85	31-3-1985	1-4-1985	13-8-1985	110,366	29,374
1985/86	31-3-1986	1-4-1986	14-11-1986	136,436	270,495

3. In early 1989 the assessor commenced an investigation into the tax affairs of the Taxpayer and on 14 February 1989 raised an estimated additional assessment on the Taxpayer in respect of the year of assessment 1982/83 showing estimated additional assessable profits of \$600,000.

4. By letter dated 28 July 1989 the former tax representative for the Taxpayer lodged a late objection to this estimated assessment on the ground that it was incorrect and excessive. The reason given for the late objection was 'due to incidental omission' by the Taxpayer.

5. In 11 September 1989 the Taxpayer accompanied by his former tax representative attended an interview with two investigation officers at the Inland Revenue Department. He was informed that his tax affairs were being investigated from the year of assessment 1982/83 onwards. The former tax representative enquired about the late objection to the estimated additional assessment for the year of assessment 1982/83 and the officers informed the Taxpayer and the former tax representative that there was no justification for accepting the late objection. The additional assessment had become final and conclusive.

6. By letter dated 22 September 1989 the Taxpayer was informed that the late objection could not be accepted as a valid notice of objection under section 64 of the Inland

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Revenue Ordinance because it was not received within one month after the date of the notice of assessment.

7. By letter dated 17 April 1991 the Taxpayer changed his tax representative to the present tax representative.

8. By letter dated 15 April 1992 the present tax representative submitted an assets betterment statement for the Taxpayer showing an overall profit of \$5,050,033 and an overall discrepancy of \$3,800,424 during the period from 1 April 1983 to 31 March 1991. No assets betterment statement for the year ended 31 March 1983 was submitted.

9. The assessor collected the relevant information and compiled an assets betterment statement which was issued to the Taxpayer on 8 June 1992 showing an overall profits/income of \$11,393,892 and an overall discrepancy of \$10,978,684 during the period from 1 April 1983 to 31 March 1989.

10. Having considered the representations submitted by the present tax representatives the assessor prepared a schedule of adjustments to the assets betterment statement which he had produced revising the discrepancy to \$7,547,111. This was accepted by the Taxpayer during a meeting at the Inland Revenue Department on 6 July 1993 at which the present tax representative was present.

11. The following is a comparative table of the assessable profits/income before and after the investigation and the amount of tax undercharged:

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Head of charge	Year of assessment	Profits/ income before investigation	Profits/ income after investigation	Profits/ income understated	Tax that would have been charged if the returns were accepted as correct or the failure to comply Section 51(2) had not been detected	Tax charged after investigation	Tax undercharged
		\$	\$	\$	\$	\$	\$
Profits Tax	1982/83	32,336	632,336	600,000	NIL	94,850	94,850
Profits Tax	1983/84	62,776	409,329	346,553	338	61,398	61,060
Profits Tax	1984/85	29,374	1,571,679	1,542,305	NIL	267,184	267,184
Salaries Tax	1985/86	NIL	2,081,329	2,081,329	NIL	353,825	353,825
Salaries Tax	1986/87	NIL	2,689,413	2,689,413	NIL	457,200	457,200
Salaries Tax	1987/88	NIL	392,562	392,562	NIL	64,772	64,772
Salaries Tax	1988/89	<u>NIL</u>	<u>494,949</u>	<u>494,949</u>	<u>NIL</u>	<u>76,717</u>	<u>76,717</u>
		<u>124,486</u>	<u>8,271,597</u>	<u>8,147,111</u>	<u>338</u>	<u>1,375,946</u>	<u>1,375,608</u>

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12. On 11 August 1993 the Commissioner gave notice to the Taxpayer that he proposed to assess the Taxpayer to additional tax in respect of the incorrect profits tax returns for the years of assessment 1982/83 to 1984/85 and the failure by the Taxpayer to comply with section 51(2) of the Inland Revenue Ordinance to inform the Commissioner that he was chargeable to salaries tax for the years of assessment 1985/86 to 1988/89.

13. By letter dated 31 August 1993 the Taxpayer submitted representations to the Commissioner.

14. On 15 September 1993 the Commissioner after considering the representations of the Taxpayer issued notices of assessment and demands for additional tax under section 82A of the Inland Revenue Ordinance as follows:

<b>Year of Assessment</b>	<b>Tax Undercharged \$</b>	<b>Section 82A Additional Tax \$</b>
1982/83	94,850	128,000
1983/84	61,060	80,600
1984/85	267,184	356,900
1985/86	353,825	477,700
1986/87	457,200	607,700
1987/88	64,772	80,700
1988/89	<u>76,717</u>	<u>89,600</u>
	<u><u>1,375,608</u></u>	<u><u>1,821,200</u></u>

15. By letter dated 13 December 1993 the present tax representative gave notice of appeal to the Board of Review against the 1982/83 assessment to additional tax. No appeal against the 1983/84 to 1988/89 assessments to additional tax was lodged.

At the hearing of the appeal the new tax representative appeared before the Board of Review and the Taxpayer was called to give evidence and be cross examined. The present tax representative submitted that the Taxpayer did not object within one month to the estimated assessment issued in respect of the year of assessment 1982/83 because the former tax representative had failed to advise the Taxpayer of any time limit within which an objection must be lodged. He said that the Taxpayer had paid additional tax of \$94,850 assessed on estimated profits of \$600,000 which he need not have paid and thus had already been penalised. He said that subsequently the Inland Revenue Department had conducted an investigation in respect of six subsequent years. He said that the Taxpayer objected to the penalty tax assessment in respect of the year of assessment 1982/83 because it had been raised not as a result of the investigation but because the Taxpayer had not filed an objection in time. In his evidence the Taxpayer attempted to place all of the blame for his failing to

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object to the estimated assessment on the former tax representative. He said that he passed all documents over to his accounting clerk as he did not understand English and left everything to him. He went on to say that he passed all correspondence with the Inland Revenue Department to his former tax representative.

The present tax representative confirmed to the Board that the Taxpayer had accepted and paid all of the section 82A penalties except for that imposed with regard to the year of assessment 1982/83 which was the subject matter of this appeal.

The representative for the Commissioner took us through the facts and pointed out that the estimated assessment for the year of assessment 1982/83 had become final and conclusive for all purposes of the Inland Revenue Ordinance. He cited to us D27/90, IRBRD, vol 5, 203.

The representative for the Commissioner drew our attention to the pattern of unreported profits and income as set out in fact 11 above and pointed out that the Taxpayer had only declared a small part of his actual profits and income in subsequent years. He said that this suggested that in respect of the year of assessment 1982/83 the Taxpayer had no doubt likewise incorrectly returned his profits for the business that he then owned and was operating. He pointed out that whilst the Taxpayer was suggesting that the amount of the estimated assessment was unjustified, in fact it may have been too small.

With regard to the claim by the Taxpayer that he was ignorant of the law and was not warned by his former tax representative regarding the time limit for objecting to assessments the representative for the Commissioner pointed out that one year before the Taxpayer's tax affairs were subject to investigation the Taxpayer had lodged a late objection against a 1985/86 original profits tax assessment and this late objection had been rejected by the Commissioner. This meant that the Taxpayer was fully aware of the time limits relating to objection to assessments.

The representative for the Commissioner then pointed out to the Board that the average understatement of profits and income by the Taxpayer for the years of assessment 1983/84 and 1984/85 was about 95% of his true profits. Coincidentally the estimated additional profit of \$600,000 for the year of assessment 1982/83 was likewise 95%.

Finally the representative for the Commissioner pointed out that when imposing the penalties the Commissioner had viewed this case as a whole and had imposed penalties for the year of assessment 1982/83 in the same relevant proportions to the other years namely approximately 1.3 times the tax undercharged.

The submission made by the present tax representative is ingenious but without any merit. First of all the former tax representative was not called to give evidence or to explain the allegations made that the fault was that of the former tax representative. All we have before us are assertions made by the present tax representative and the evidence by the Taxpayer himself which was hardly satisfactory. We found the evidence of the Taxpayer to be vague and inconclusive.

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However even if we were to accept the submission made by the present tax representative and place the blame on the former tax representative it would be of no avail to the Taxpayer in this case. No evidence was given to this Board to suggest that the estimated profits of \$600,000 for the year of assessment 1982/83 was incorrect. It appeared to be immaterial to the present tax representative whether or not the Taxpayer had under declared his profits in respect of the year in question. His one and only point before the Board was that the Taxpayer had failed to object in time. The present tax representative was invited to address the Board on this point and to explain to the Board what was incorrect in the estimated assessment and what was the true profit of the Taxpayer in respect of the year in question. This he was unable to do. It appeared that no enquiry had been made by the present tax representative relating to what was the true profit of the Taxpayer in respect of the year of assessment 1982/83 and the Taxpayer when giving evidence made no reference to what was his true profit. As the representative for the Commissioner pointed out it may well have been substantially in excess of the estimated assessment of \$600,000.

The Taxpayer has not challenged any of the subsequent six penalties imposed upon him but has only sought to challenge the first penalty on the specious ground that he failed to lodge objection in time.

In the circumstances we have no hesitation in dismissing this appeal and confirming the additional assessment against which the Taxpayer has appealed of penalty tax imposed under section 82A of \$128,000 in respect of the year of assessment 1982/83.