

**Case No. D15/23**

**Profits Tax** – late notification of chargeability – assessment of additional tax – whether reasonable excuse – whether assessment excessive – sections 51(2), 68(4), 82A and 82B of the Inland Revenue Ordinance (‘Ordinance’)

Panel: Wu Pui Ching Teresa (chairman), Kwan Yan Tung and Tam Lon Foong Aidan.

Date of hearing: 27 September 2023.

Date of decision: 3 January 2024.

The taxpayer was a Hong Kong private limited company rendering sea and flight services. In 2018, the Inland Revenue Department (‘IRD’) informed the taxpayer it need not submit annual profits tax returns unless it commenced to earn assessable profits, in which case notification was required within 4 months after the end of the basis period. In March 2022, taxpayer’s representative informed IRD of assessable profits for 2017/18 and 2018/19 and submitted tax returns for 2017/18, 2018/19 and 2020/21 (‘Relevant Years’) in July 2022. On 13 February 2023, the Commissioner issued a notice of intention to assess additional tax for the Relevant Years. On 14 April 2023, the Commissioner issued additional tax assessments for the Relevant Years.

The taxpayer’s representative sought reduction of additional tax and submitted that the shareholders were residing outside Hong Kong, operations were outside Hong Kong, there were delays due to document delivery and management inexperience, the Covid-19 pandemic and taxpayer’s initial expectation of offshore profits exemption. IRD responded it had no authority to reduce the additional tax, and the taxpayer appealed to the Board. The taxpayer contended that it had reasonable excuse for the failure to inform the Commissioner of its chargeability within 4 months, alternatively, that the additional tax assessments are excessive.

**Held:**

Whether reasonable excuse

1. Regarding its entitlement to exemption of offshore profits, the taxpayer had not adduced any or sufficient evidence to substantiate its claim, nor was it mentioned in the written notification to IRD or written representations. In any event, taxpayer’s subjective belief about exemption did not excuse failure to comply with statutory requirements.
2. Regarding taxpayer’s shareholders residing overseas and not having sufficient knowledge and experience in financial/accounting matters, no

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

evidence was provided regarding their background or experience and the lengthy delay for 2017/18 and 2018/19. In any event, lack of knowledge or experience and place of residence were not generally accepted as reasonable excuses, as taxpayer should have known it had assessable profits even before finalizing financial statements (especially as the profits were not insubstantial), and should have consulted professionals and made arrangements earlier.

3. The taxpayer called no witness to support its argument that the failure to notify was not deliberate. In any event, oral notifications did not satisfy section 51(2), which required written notification, and the same was only given on 23 March 2022.

Whether assessment excessive

4. As accepted by the Commissioner, the delay in tax payment would be shortened to 33 months and 21 months respectively. The additional tax for the Relevant Years respectively represented 14.83%, 9.07% and 3.24% of the tax undercharged, and was computed with reference to the interest monthly compounded at the best lending rate quoted by Bank F for relevant periods. The amounts of additional tax assessed simply represented the actual loss suffered by the Commissioner as a result of the late charging.

**Obiter:**

5. Whilst pandemic and financial hardship were no longer relied upon, the Board in any event was not satisfied they were relevant or reasonable excuses. The Board was not persuaded that additional tax would have caused undue financial hardship, or that financial inability would be a reasonable excuse.

**Appeal dismissed and costs order in the amount of \$20,000 imposed.**

Cases referred to:

D25/11, (2011-12) IRBRD, vol 26, 426

D8/15, (2015-16) IRBRD, vol 30, 463

Lau Vui Cheong, instructed by Fung, Yu & Co CPA Limited, for the Appellant.  
Ko Yuk Shing and Chan King Yee, for the Commissioner of Inland Revenue.

**Decision:**

**A. INTRODUCTION**

1. Before the Board of Review ('the **Board**') is the appeal ('the **Appeal**') commenced by Company A ('the **Taxpayer**') pursuant to section 82B of the **Inland Revenue Ordinance** (Chapter 112) ('the **Ordinance**') against the following assessments ('the **Assessments**') issued by the Commissioner of Inland Revenue ('the **Commissioner**') under section 82A of the Ordinance:

- (1) Notice of additional tax assessment in the sum of \$360,000 for the year of assessment 2017/2018 dated 14 April 2023;
- (2) Notice of additional tax assessment in the sum of \$169,000 for the year of assessment 2018/2019 dated 14 April 2023; and
- (3) Notice of additional tax assessment in the sum of \$50,000 for the year of assessment 2020/2021 dated 14 April 2023.

2. The Taxpayer contends that it has reasonable excuse for the failure to inform the Commissioner in writing that it is chargeable to tax within 4 months after the end of the basis period for each of the years of assessment 2017/2018, 2018/2019 and 2020/2021 under section 51(2) of the Ordinance and should not therefore be liable to the additional tax assessments, or alternatively, if, which is denied, the Taxpayer is liable to a penalty under section 82A of the Ordinance, the additional tax assessments are excessive, having regard to the circumstances.

3. After the hearing, the Board has decided to dismiss the Appeal and to confirm the Assessments for the reasons below.

**B. FACTUAL BACKGROUND**

4. First of all, the parties are in agreement of the material facts set out in the Agreed Statement of Facts which are reproduced as follows:

- (1) The Taxpayer was incorporated as a private limited company in Hong Kong in 2016. It closed its accounts on the 31<sup>st</sup> day of December annually.
- (2) The Taxpayer's principal activity, as described in the director's reports for the periods of 14 July 2016 and 31 December 2017 and for the years ended 31 December 2018 and 31 December 2020, was 'rendering of sea and flight services to its customer'.
- (3) The Taxpayer has issued ordinary shares of \$1 each to its shareholders since incorporation:

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

<u>Name</u>	<u>Date of issue</u>	<u>No. of shares</u>
Mr B	XX July 2016	1
Mr C	XX December 2016	3
	X November 2018	99,996

- (4) At all relevant times, the Taxpayer's directors were:

<u>Name</u>	<u>Period of appointment</u>
Mr B	14 July 2016 to 30 April 2017
Ms D	1 May 2017 to 30 March 2021
Ms E	From 31 March 2021 onwards

- (5) The Taxpayer's company secretary, auditor and tax representative have been Harris Secretaries Ltd, RLT CPA Ltd and Fung, Yu & Co CPA Ltd respectively (the '**Representative**').
- (6) On 5 February 2018, the Inland Revenue Department ('**IRD**') issued to the Taxpayer a Profits Tax return for the year of assessment 2016/2017 (the '**2017 Return**').
- (7) On 24 April 2018, the Taxpayer submitted the 2017 Return declaring that it had no business activities over the year.
- (8) On 29 November 2018, IRD issued a letter (the '**Letter**') to the Taxpayer, advising that it is IRD's practice not to call for the annual submission of Profits Tax returns by corporations in certain circumstances. As the Taxpayer fell within those circumstances, it would not therefore be required by IRD to submit annual Profits Tax returns for the time being. The Taxpayer was however reminded to notify the Commissioner once it started to earn assessable profits as follows:

'...Furthermore, it is important to **note** –

(i) If your company commences or recommences to earn assessable profits (before the set-off of any losses brought forward), then **your company must inform the Commission [sic] of Inland Revenue in writing within 4 months after the end of the basis period (the accounting period) for that year of assessment. Failure to do so may render your company liable to a fine.** If your company is in doubt as to what constitutes 'assessable profits', please consult our Department or your tax representative... **(emphasis added).**'

- (9) On 5 May 2020, IRD issued to the Taxpayer a Profits Tax return for the year of assessment 2019/20 (the '**2020 Return**').

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (10) On 27 July 2021, the Taxpayer submitted the 2020 Return, together with its audited financial statements for the year ended 31 December 2019 and the tax computation for the year of assessment 2019/20. In the 2020 Return, the Taxpayer reported assessable profits of \$14,656,917. The auditor's report was dated 15 July 2021 and the audited financial statements were approved by the Taxpayer's director on the same date.
- (11) By a letter dated 22 March 2022, the Representative informed IRD that the Taxpayer had assessable profits for the years of assessment 2017/18 and 2018/19 and requested IRD to issue the relevant Profits Tax returns to the Taxpayer. The Representative also enclosed a set of the Taxpayer's audited financial statements for the period of 14 July 2016 and 31 December 2017 and for the year ended 31 December 2018, together with tax computations for the years of assessment 2017/18 and 2018/19. The said letter and documents were received by IRD on 23 March 2022.
- (12) On 11 April 2022, IRD issued to the Taxpayer Profits Tax returns for the years of assessment 2017/18, 2018/19 and 2020/21 (the 'Returns'). Duplicates of the Returns were issued to the Taxpayer on 8 July 2022.
- (13) On 15 July 2022, the Taxpayer submitted the Returns, together with the audited financial statements for the year ended 31 December 2020 and the tax computation for the year of assessment 2020/21.
- (14) The following Profits Tax assessments were raised to the Taxpayer for the years of assessment 2017/18, 2018/19 and 2020/21 on various dates:

Year of assessment	<u>2017/18</u>	<u>2018/19</u>	<u>2020/21</u>
Assessable profits	\$14,898,366	\$12,408,055	\$10,423,149
Tax	<u>\$2,428,230</u>	<u>\$1,862,329</u>	<u>\$1,544,819</u>

- (15) The Taxpayer did not lodge any objection to the above Profits Tax assessments and the assessments became final and conclusive under section 70 of the Ordinance.
- (16) No prosecution has been instituted pursuant to section 80(2) or section 82(1) of the Ordinance against the Taxpayer in respect of the failure to inform the Commissioner of the chargeability to tax within the prescribed time for the years of assessment 2017/18, 2018/19 and 2020/21.

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (17) On 13 February 2023, the Commissioner issued to the Taxpayer a notice of intention to assess additional tax pursuant to section 82A(4) of the Ordinance (the ‘**Notice**’) in respect of the Taxpayer’s failure to inform the Commissioner in writing of the chargeability to tax within 4 months after the end of the basis period during the years of assessment 2017/18, 2018/19 and 2020/21 subject to any reasonable excuses to be provided by the Taxpayer. The penalty by way of additional tax for each offence may be up to three times the amount of the tax undercharged. Furthermore, it was stated that the Taxpayer had the right to submit written representations to the Commissioner for consideration.
- (18) By a letter dated 22 February 2023, the Taxpayer through the Representative submitted written representations in response to the Notice as follows:
- (a) ‘The [Taxpayer] was incorporated in 2016 and commenced business in 2017. Due to the lack of experience in financial and accounting matters, the completion of financial statements for the years ended 31 December 2017, 2018, and 2020 was delayed significantly...’
  - (b) ‘On 26 July 2021, [the Representative] made a telephone call to [IRD] to request for the Profits Tax Returns (the ‘PTRs’) for the years of assessment 2017/18 and 2018/19. After [a few months, the Taxpayer] did not receive the PTRs, [the Representative] followed up the status of PTRs by several calls to [IRD] on 12 October 2021, 12 January 2022, 26 January 2022 and 9 March 2022 respectively. However, the response from [IRD] was that it was still under processing.’
  - (c) ‘[The Representative] subsequently lodged with [IRD] a letter to request for the PTRs and submitted the audited financial statements and tax computation for the years of assessment 2017/18 and 2018/19 on 23 March 2022. Without receiving the PTRs, [the Representative] made a follow up call to [IRD] in early July 2022 and were [sic] told that [the Returns] were already issued in April 2022. At [the Representative’s] request, duplicate [of the Returns] were issued on 8 July 2022 and were finally filed with [IRD] on 15 July 2022...’
  - (d) ‘It is obvious that [the Taxpayer] did not have any intention of not to follow [sic] the tax filing requirement. The late submission is due to the unexpected and occasional situation as explained above.’

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (e) '[The Taxpayer] undertakes to do its best endeavour to avoid failure to comply with [the Ordinance] in the future. [The Representative] hereby crave for [IRD's] indulgence in exempting [the Taxpayer] from the application of section 82A of [the Ordinance].'

- (19) On 14 April 2023, after considering the Representative's written representations, the Commissioner issued a notice of assessment and demanded for additional tax under section 82A of the Ordinance for each of the years of assessment concerned in the following sums:

Year of assessment	<u>2017/18</u>	<u>2018/19</u>	<u>2020/21</u>
Additional tax	\$360,000	\$169,000	\$50,000

- (20) The details relevant to the Appeal herein include as follows:

<u>Year of assessment</u>	<u>Deadline for notification of chargeability</u>	<u>Date of signing of audited accounts</u>	<u>Date of filing of notification of chargeability</u>	<u>Date of issue of return</u>	<u>Date of receipt of return</u>
2017/18	30-4-2018	15-7-2021	23-3-2022	11-4-2022	15-7-2022
2018/19	30-4-2019	15-7-2021	23-3-2022	11-4-2022	15-7-2022
2020/21	30-4-2021	31-1-2022	-----	11-4-2022	15-7-2022

<u>Year of assessment</u>	<u>Period of delay (days)</u>	<u>Tax undercharged</u>	<u>Additional Tax</u>	<u>Percentage of additional tax over tax undercharged</u>
2017/18	1,423	\$2,428,230	\$360,000	14.83%
2018/19	1,058	\$1,862,329	\$169,000	9.07%
2020/21	346*	\$1,544,819	\$50,000	3.24%

[\*counted up to 11-4-2022]

- (21) By a letter dated 2 May 2023, the Representative on behalf of the Taxpayer requested the Commissioner for reduction of the amounts of the additional tax assessed under the Assessments. The Representative provided the following additional explanations for consideration:

- (a) 'Mr C and Mr B are the shareholders of [the Taxpayer] holding 99.99% and 0.01% of its shares...They are citizens of Country G and did not reside in Hong Kong. [The Taxpayer] has always been managed by them outside Hong Kong. All the operations of [the Taxpayer] for the relevant years of assessment were carried out outside Hong Kong.'

- (b) '[The Taxpayer] did not have any employees in Hong Kong during the relevant years. Ms D...and Ms E...were appointed as nominee directors of [the Taxpayer]. They were not involved in any part of the operations of [the Taxpayer]...'
- (c) 'The audited financial statements of [the Taxpayer] for the first financial period from 14 July 2016 to 31 December 2017 and the financial year ended 31 December 2018 were completed on 15 July 2021 which was considerably later than expected. It was mainly due to the location of operation of [the Taxpayer] and the inexperience of [the Taxpayer's] management in financial and tax reporting.'
- (d) 'The bookkeeping and accounting of [the Taxpayer] for the relevant financial period or year were done by a service provider in Hong Kong. As all the business documents of [the Taxpayer] were kept outside Hong Kong, delivery of documents to Hong Kong for bookkeeping took a longer time. In addition, the service provider spent extra time to explain what information was required for the accounting and audit purposes and the management needed more time to understand the requirement and prepare the information.'
- (e) 'Please also take into account the effect of Covid-19 pandemic on daily work during 2019 to [sic] 2021 which caused further delay in the completion of the financial statements and tax reporting.'
- (f) '[The Taxpayer] meets the basic conditions for claiming offshore profits exemption for the relevant years of assessment including:
- No physical office or place of business in Hong Kong
  - No employees worked in Hong Kong
  - No Hong Kong customers
  - No Hong Kong suppliers
  - No agent acted on behalf of [the Taxpayer] in Hong Kong
  - All the work performed for earning the profit took place outside Hong Kong'
- (g) 'Considering that [the Taxpayer] met the above conditions, [the Representative] expected [the Taxpayer] would make a claim for offshore profits exemption and had no profits chargeable to tax. However, the management changed its mind and made a contrary decision when the first audited financial statements was [sic] almost finalized. [The Taxpayer] did not have any intention of not to follow [sic] the tax reporting and filing



requirement. The delay was caused by the unexpected and occasional situation as explained.’

- (h) ‘Kindly appreciate the current market situation and the slow recovery of small to medium size enterprises like [the Taxpayer]. A significant amount of additional tax will be a severe blow to [the Taxpayer]...’
- (22) On 11 May 2023, IRD issued a letter to the Taxpayer advising that IRD had no authority to consider the Taxpayer’s request above and that the Taxpayer may consider lodging an appeal to the Board of Review.
- (23) By a letter dated 12 May 2023, the Representative on behalf of the Taxpayer submitted a notice of appeal to the Board of Review against the Assessments.

### C. DISCUSSION

5. The issues to be determined in the Appeal are:

- (1) Whether the Taxpayer should be held liable for payment of additional tax under section 82A of the Ordinance for failing to comply with section 51(2) of the Ordinance in the years of assessment 2017/18, 2018/19 and 2020/21.
- (2) If so, whether the amounts of the additional tax charged are excessive.

6. Under section 68(4) of the Ordinance, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Taxpayer.

#### ***Relevant statutory provisions and cases***

7. According to section 51(2) of the Ordinance:

*‘Every person chargeable to tax for any year of assessment shall inform the Commissioner in writing that he is so chargeable not later than 4 months after the end of the basis period for that year of assessment unless he has already been required to furnish a return under the provisions of subsection (1).’*

8. Section 82A of the Ordinance provides:

*‘(1) Any person who without reasonable excuse—*

*...*

*(e) fails to comply with section 51(2), shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the undercharged amount.*

...

*(4) Before making an assessment of additional tax, the specified authority must—*

*(a) give notice to the person that the specified authority proposes to assess additional tax and the notice must—*

*(i) inform the person of the following—*

*(A) for additional tax to be assessed under subsection (1) – ...the alleged failure to comply with section 51(2)...;*

...

*(b) consider and take into account any representations and evidence that the specified authority may receive under paragraph (a)...'*

9. Pursuant to section 82B of the Ordinance:

*'(2) 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 section 82A;*

*(c) the amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.*

*(3) Sections 66(2) and (3), 68...shall, so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.'*

10. In D25/11 (2011-12) Volume 26 Inland Revenue Board of Review Decision 426, the taxpayer informed the Commissioner of its assessable profits 7 months and 10 days late. The Commissioner assessed additional tax of \$16,000 on the taxpayer, representing 2.89% of the tax undercharged.

11. The Board of Review in that case took the view that the additional tax assessed was extremely mild, which merely reflected the actual loss suffered by IRD as a result of the late charging without any penalizing objective. At the same time, it was reiterated as follows:

- (1) The proper operation of the low tax rate system in Hong Kong was dependent upon taxpayers submitting detailed and accurate tax information punctually.
- (2) Lateness in informing the Commissioner of a taxpayer's chargeability to tax or submitting tax return would result in undercharging of tax or lateness in charging tax. The conduct would waste IRD's limited resources and was unfair to other taxpayers.
- (3) The primary objective of additional tax penalty was to penalize the infringing taxpayers and to deter them and other taxpayers from infringing. The same principles applied in determining penalty for lateness in informing the Commissioner of the chargeability to tax and submitting tax returns.
- (4) The factors to be taken into account were non-exhaustive, including:
  - (a) Negligence or recklessness in submitting the tax return was inexcusable;
  - (b) Deliberate tax evasion was a serious crime and an aggravating factor for imposing additional tax penalty. Unintentional tax evasion was not a reasonable excuse, nor was it a mitigating factor;
  - (c) Paying tax punctually was a responsibility of a taxpayer and was therefore not a relevant factor in considering the additional tax to be charged;
  - (d) The fact that IRD discovered the infringement was not a mitigating factor. The fact that there was no actual loss suffered by IRD was also not a mitigating factor. On the other hand, the fact that there was undercharging of tax or late charging of tax as result of the infringement was an aggravating factor;
  - (e) The burden of proof and the burden of persuasion of impecuniosity or inability to pay the penalty of additional tax were on the taxpayer;
  - (f) Where there was an infringement, it was unrealistic to request for a total exemption of tax penalty, which would otherwise

show that the taxpayer was still unaware of the responsibility to submit detailed and accurate tax information punctually;

- (g) Cooperation with IRD was a mitigating factor;
- (h) Adopting effective measures to prevent further infringement was an important mitigating factor. Conversely, pointlessly blaming IRD or others was an aggravating factor;
- (i) Subsequent infringement was an aggravating factor;
- (j) Publicly infringing would be heavily penalized;
- (k) The Board of Review could reduce the penalty if it was excessive and *vice versa*; and
- (l) An appellant might be ordered to pay the costs of the Board of Review if the appeal was frivolous, vexatious or an abuse of the appeal process.

12. In D8/15 (2015-16) Volume 30 Inland Revenue Board of Review Decisions 463, the taxpayer informed the Commissioner of the chargeability to tax 13 months and 16 days late. The Commissioner assessed additional tax of \$90,000 on the taxpayer, representing 5.94% of the tax undercharged. The taxpayer requested for exemption of the additional tax, submitting, among others, lack of understanding of the laws of Hong Kong and that its director was not cooperative etc.

13. It was held in that case that the taxpayer had failed to discharge the burden of showing reasonable excuse under section 82A(1) of the Ordinance. The amount of additional tax assessed by the Commissioner was only \$5,852 more than the actual loss suffered and was lenient. As the appeal was frivolous, vexatious and an abuse of the process, the taxpayer was ordered to pay the costs of the Board of Review.

***Whether there was any reasonable excuse?***

14. In the present case, the Taxpayer had assessable profits for the years of assessment 2017/18, 2018/19 and 2020/21. It is not in dispute that the Taxpayer was required, under section 51(2) of the Ordinance, to inform the Commissioner in writing of the chargeability to tax within 4 months after the basis period for the relevant years of assessment. The respective deadlines for the years of assessment 2017/18, 2018/19 and 2020/21 were 30 April 2018, 30 April 2019 and 30 April 2021.

15. The Taxpayer failed to comply with the requirement of section 51(2) of the Ordinance in that the written notification dated 22 March 2022 in respect of the Taxpayer's chargeability for the years of assessment 2017/18 and 2018/19 was received by IRD on 23 March 2022 and no written notification was given by the Taxpayer for the year of assessment 2020/21 before the issue of the Profits Tax return on 11 April 2022. Subject

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

to reasonable excuse being shown, the Taxpayer should be assessed additional tax under section 82A of the Ordinance.

16. The Taxpayer submits that there was reasonable excuse on its part as follows.

17. First, the Taxpayer submits that its two shareholders, Mr C and Mr B, are citizens of Country G not residing in Hong Kong at the material times. As they have always been managing the Taxpayer outside Hong Kong, all the operations of the Taxpayer for the relevant years of assessment were carried out outside Hong Kong. The Taxpayer originally took the view that it should meet the conditions for exemption of offshore profits and hence there were no profits chargeable to tax. The Taxpayer therefore did not take any action to inform IRD until the management changed its mind and decided not to claim exemption when the first audited financial statements were almost finalized in July 2021.

18. The Board is not satisfied that any of the above matters would constitute reasonable excuse for the Taxpayer.

19. First of all, other than producing the Employer's Return of Remuneration and Pensions for the years of assessment 2017/18 and 2018/19 filed with IRD and the Statement of Travel Records of Mr C and Mr B during the period of 1 April 2017 and 31 March 2019 issued by the Hong Kong Immigration Department, the Taxpayer has not adduced any or any sufficient evidence to substantiate its claim of entitlement to exemption of offshore profits, which was allegedly only abandoned by its management later on.

20. The Commissioner has identified many different questions which they submit that the Taxpayer should satisfactorily address and answer in order to fill in the gaps of its case. For present purpose, it is not necessary for the Board to decide whether these questions are indeed all valid and justified. What is of more importance is that the Taxpayer has elected not to call any witness to testify in the Appeal and as such the Commissioner is not being able to test the Taxpayer's case in cross-examination.

21. As submitted by the Commissioner, the Taxpayer's assertions should be viewed by the Board with scrutiny. It is clear that the Taxpayer did not mention its present claim in the written notification to IRD dated 22 March 2022. Nor did the Taxpayer raise it the written representations to IRD dated 22 February 2023 seeking IRD's 'lenient consideration', 'indulgence' and waiver of the additional tax. In the latter correspondence, the Taxpayer merely stated that 'due to the lack of experience in financial and accounting matters, the completion of financial statements for the years ended 31 December 2017, 2018 and 2020 was delayed significantly' and it was 'obvious' that the Taxpayer did not have any intention of not following the tax filing requirements.

22. In any event, even if the Taxpayer's case is to be believed, it is still not going to get the Taxpayer anywhere. The importance of a taxpayer's duty to submit detailed and accurate tax information punctually has been emphasized times and again by the Court and the Board of Review. The Taxpayer's subjective belief that it was entitled to be exempted from offshore profits would not avail the Taxpayer from its duty to comply

with the statutory requirements.

23. Second, the Taxpayer submits that its two shareholders did not have sufficient knowledge and experience to operate the financial and accounting matters, thereby causing breach of the statutory requirements of section 51(2) of the Ordinance. At the material times, the two shareholders were also residing overseas.

24. The Board has no reservation rejecting such submission. Not only has the Taxpayer adduced no evidence to show the educational background and commercial experience of its two shareholders in the first place, more importantly, lack of knowledge or experience and the place of residence of a taxpayer are not generally regarded or accepted as reasonable excuses.

25. Section 51(2) of the Ordinance merely requires a taxpayer chargeable to tax for any year of assessment to inform the Commissioner in writing that he is so chargeable not later than 4 months after the end of the basis period for that year of assessment unless he has already been required to furnish a return under the provisions of subsection (1). The Taxpayer should have known that it had assessable profits for the relevant years of assessment even before the finalization of the respective financial statements, especially when the assessable profits in question were not insubstantial.

26. Should it be the Taxpayer's case that its shareholders were not knowledgeable or experienced in the financial and accounting matters and were further residing overseas, there were all the more reasons for the Taxpayer to take reasonable steps early enough to consult professionals and to make appropriate arrangement.

27. In the present case, as highlighted by the Commissioner, the delays in giving notification by the Taxpayer to IRD of the chargeability were approximately 4 years and 3 years for the years of assessment 2017/18 and 2018/19 respectively. The Taxpayer has adduced no single shred of evidence to show what it had done, if at all, resulting in such long delays.

28. Third, the Taxpayer argues that the failure to file notification of chargeability with IRD within the stipulated time period is not a deliberate act, relying on the fact that it had requested IRD over the phone in July 2021 to issue Profits Tax returns for the years of assessment 2017/18 and 2018/19, followed by several other calls afterwards.

29. The Commissioner on the other hand disputes this, submitting that it does not have any record of any such calls. As mentioned, the Taxpayer has not called any witness to testify on this in the Appeal. In any event, even if the Taxpayer's case is to be believed, the alleged oral notifications by the Taxpayer to IRD do not satisfy section 51(2) of the Ordinance, as it requires a taxpayer chargeable to tax for any year of assessment to inform the Commissioner in writing. On the Taxpayer's case, even though it saw fit to call IRD first in July 2021, requesting for issue of the Profits Tax returns for the years of assessment 2017/18 and 2018/19, it only gave IRD notification of chargeability in writing for the two years of assessment on 23 March 2022.

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

30. Lastly, the Taxpayer no longer relies on the pandemic and its financial hardship in support as grounds of appeal. But even if the Taxpayer seeks to rely on them in the Appeal, the Board is not satisfied that the pandemic is relevant to the Taxpayer's failure or can be accepted as reasonable excuse on the Taxpayer's part. Nor is the Board persuaded, on the existing evidence, that the imposition of the additional tax by the Commissioner would have caused undue financial hardship to the Taxpayer, or the Taxpayer's financial inability, if any, can be accepted as a reasonable excuse.

31. In light of the above matters, the Board accepts the Commissioner's submission that the Taxpayer has plainly disregarded its statutory obligations under section 51(2) of the Ordinance during the years of assessment 2017/18, 2018/19 and 2020/21 and should be liable to additional tax under section 82A of the Ordinance.

***Whether the Assessments are excessive?***

32. The Board equally does not accept the Taxpayer's alternative case that the Assessments are excessive.

33. The respective due dates for payment of tax for the years of assessment 2017/18 and 2018/19 and 2020/21 were 20 October 2022 and 15 September 2022. Had the Taxpayer duly complied with section 51(2) of the Ordinance, the assessments for the years of assessment 2017/18, 2018/19 and 2020/21 would have been raised earlier and the Taxpayer would have been required to pay the tax on 1 January 2019, 1 January 2020 and 1 January 2022 respectively.

34. The Commissioner fairly accepts that even though the Profits Tax return for the year of assessment 2019/2020, which was filed by the Taxpayer on 27 July 2021, cannot strictly speaking be regarded as a written notification under section 51(2) of the Ordinance, it may nonetheless be viewed that the Commissioner could have known the Taxpayer's chargeability for the years of assessment 2017/18 and 2018/19 on 27 July 2021.

35. By taking 27 July 2021 as the date of notification, the due date for payment of tax for the years of assessment 2017/18 and 2018/19 could be advanced from 20 October 2022 to a hypothetical date of 31 October 2021, by allowing a period of three months after July 2021 for issue and filing of tax returns for the years of assessment 2017/18 and 2018/19, processing of those returns, raising of assessments and setting of due dates for tax payment etc. In such case, the delay in tax payment for the years of assessment 2017/18 and 2018/19 by the Taxpayer would be shortened to 33 months and 21 months respectively.

36. The maximum amount of additional tax that can be assessed under section 82A(1) of the Ordinance is three times the amount of tax undercharged. In the present case, the respective amounts of additional tax for the years of assessment 2017/18, 2018/19 and 2020/21 are \$360,000, \$169,000 and \$50,000, representing 14.83%, 9.07% and 3.24% of the tax undercharged.

37. As explained by the Commissioner, the respective amounts of additional tax for the years of assessment 2017/18, 2018/19 and 2020/21 were computed with reference to

(2023-24) VOLUME 38 INLAND REVENUE BOARD OF REVIEW DECISIONS

the interest monthly compounded at the best lending rate quoted by the Bank F for the periods from February 2019 to October 2021, February 2020 to October 2021 and February 2022 to September 2022 respectively. The amounts of compound interest for the years of assessment 2017/18, 2018/19 and 2020/21 are 14.83%, 9.12% and 3.38% of the tax undercharged respectively, and are equal to or are slightly higher than the percentages of the additional tax as tabulated below:

Year of assessment	Normal due date	Hypothetical / actual due date	No. of months of tax payment delayed #	Tax undercharged \$	Additional tax \$	Percentage of additional tax on tax undercharged	Hypothetical / actual compound interest
2017/18	1/1/2019	31/10/2021*	33	2,428,230	360,000	14.83%	14.83% *
2018/19	1/1/2020	31/10/2021*	21	1,862,329	169,000	9.07%	9.12% *
2020/21	1/1/2022	15/9/2022	8	1,544,819	50,000	3.24%	3.38%

\*Hypothetical due date / compound interest

# In computing the number of months, the month in which tax is normally due is not counted

38. It can hardly be disputed by the Taxpayer that the amounts of additional tax assessed simply represent the actual loss suffered by the Commissioner as a result of the late charging. In respect of the Taxpayer's submission that it has since the year of assessment 2021/22 adopted measures to ensure compliance with the tax filing requirements under the Ordinance, the Board notes that it is already the case herein that no penalty element has been included in the additional tax assessed by the Commissioner. It is contrary to sense and logic that a taxpayer should be allowed to enjoy a better position than he would have compiled with the law.

39. In the premises, the Taxpayer has failed to show that the Assessments appealed against are excessive or incorrect in any way under section 68(4) of the Ordinance.

#### **D. CONCLUSION**

40. For all these reasons, the Appeal is dismissed and the Assessments are confirmed. The Taxpayer is further ordered to pay the costs of the Board in the sum of \$20,000 under section 68(9) of the Ordinance.