

Case No. D14/16

Profits tax – appellant late in filing tax return – delay due to alleged mental illness of accountant – whether any ‘reasonable excuse’ in late filing – whether amount of additional tax excessive – sections 51(1), 59(3), 68(4), 80(2), 82(1), 82A, 82B of the Inland Revenue Ordinance (Cap 112) (‘IRO’)

Panel: Cissy K S Lam (chairman), Marshall H Byres and Lau Yat Ji Vicci.

Date of hearing: 17 March 2016.

Date of decision: 20 June 2016.

The Appellant was a private company with principal activity in holding and letting of investment properties. By a notice and subsequent extension scheme, the Appellant was required to complete and submit the profits tax return (‘Return’) on or before 17 November 2014 (‘Due Date’). The Appellant failed to submit the Return before the Due Date. On 26 February 2015, the Appellant filed the Return with profits tax computation and audited financial statements. The auditor’s report was issued by a certified public accountant (‘Mr A’) on 15 November 2014. The financial statements were approved by the Appellant’s directors on the same day. By reference to the Return filed, the Assessor raised additional Profits Tax Assessment on the Appellant, who also did not object to it.

On 5 June 2015, the Commissioner issued notice of intention to assess additional tax (‘Notice’) to the appellant. Having considered and taken into account the written representations made by the Appellant, the Commissioner charged additional tax by way of penalty on the Appellant in the sum of \$68,000 (‘Assessment’). The Appellant appealed against the Assessment, stating that the delay in filing the Return was due to the mental illness of Mr A who had the illusion that the Return had already been filed when in fact it had not.

Held:

Reasonable excuse

1. In order to show ‘reasonable excuse’: (a) the appellant must identify and prove an excuse; (b) the Board must be satisfied that the excuse was reasonable. (D17/08, (2008-09) IRBRD, vol 23, 301 considered)
2. The appellant had failed to prove the excuse. There was no evidence that Mr A suffered from mental illness or Mr A’s failure to submit the Return was due to his mental illness.

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3. Further and in any event, even if the alleged excuse were proved, it was not reasonable in the circumstances: (a) the appellant's directors had not acted reasonably in entrusting the preparation and submission of the Return to Mr A, knowing that he was not a person to be trusted; (b) while Mr A had no excuse for his failure to submit the Return, the appellant was likewise. (D17/08, (2008-09) IRBRD, vol 23, 301; D13/85, IRBRD, vol 2, 173; D35/13, (2014-15) IRBRD, vol 29, 147; D10/12, (2012-13) IRBRD, vol 27, 280; D101/03, IRBRD, vol 18, 940; D31/94, IRBRD, vol 9, 196; D16/96, IRBRD, vol 11, 351; D9/91, IRBRD, vol 5, 563 considered)

Whether assessment excessive

4. In cases involving failure to file profits tax returns on time, where there were neither aggravating factors nor mitigating ones, the penalty should be 10% of the tax undercharged. (D16/96, IRBRD, vol 11, 351 considered)
5. In the present case, the additional tax was reduced from \$68,000 (5.9%) to \$35,000 (3%) after taking into account the mitigating circumstances. (D56/96, IRBRD, vol 12, 1 considered)

Appeal allowed in part.

Cases referred to:

D17/08, (2008-09) IRBRD, vol 23, 301
D13/85, IRBRD, vol 2, 173
D35/13, (2014-15) IRBRD, vol 29, 147
D10/12, (2012-13) IRBRD, vol 27, 280
D101/03, IRBRD, vol 18, 940
D31/94, IRBRD, vol 9, 196
D9/91, IRBRD, vol 5, 563
D16/96, IRBRD, vol 11, 351
D56/96, IRBRD, vol 12, 1

Mr D, the Appellant's Tax Representative, for the Appellant.
Lau Wai Sum and Cheng Po Fung, for the Commissioner of Inland Revenue.

Decision:

1. The Appellant was late in filing its profits tax return for the year of assessment 2013/14 ('the Return') under section 51(1) of the Inland Revenue Ordinance

(‘IRO’) and was assessed to additional tax under section 82A of IRO. By this appeal, the Appellant appeals against the Additional Tax Assessment under section 82B(1) of the IRO.

Relevant Provisions of the IRO

2. Section 51(1) provides:

‘An assessor may give notice in writing to any person requiring him within a reasonable time stated in such notice to furnish any return which may be specified by the Board of Inland Revenue for ... profits tax ...’

3. Section 59(3) provides:

‘Where a person has not furnished a return and the assessor is of the opinion that such person is chargeable with tax, he may estimate the sum in respect of which such person is chargeable to tax and make an assessment accordingly, but such assessment shall not affect the liability of such person to a penalty by reason of his failure or neglect to deliver a return.’

4. Section 68(4) provides:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

5. Section 82A(1)(d) provides:

‘Any person who without reasonable excuse ... (d) fails to comply with the requirements of a notice given to him under section 51(1) ... 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 amount of tax which ... (ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) ... or which would have been undercharged if such failure had not been detected.’

6. Section 82B(2) 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 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.'*

Statement of Facts

7. A Statement of Facts with Appendices was prepared by the IRD. The Appellant has indicated in writing that it has 'no disagreement' with the Statement of Facts. We find the facts contained therein as proved and they are reproduced (adopting the abbreviations used herein) in paragraphs 8 to 25 below. The Appendices referred to below are the Appendices to the Statement of Facts.

8. The Appellant was incorporated as a private company in Hong Kong in September 2001. It closes its accounts annually on 31 March.

9. The Appellant's principal activity as reported in the Return was holding and letting of investment properties.

10. On 1 April 2014, the Assistant Commissioner of Inland Revenue issued a notice for filing profits tax return to the Appellant. By virtue of section 51(1) of the IRO, the Appellant was required to complete and submit the Return within one month from 1 April 2014.

11. Pursuant to a Block Extension Scheme for lodgement of 2013/14 profits tax returns, which applied also to the Appellant, the due date for filing the Return was extended to 17 November 2014 ('the Extended Due Date').

12. The Appellant did not submit the Return by the Extended Due Date. On 8 December 2014, pursuant to section 59(3) of the IRO, the Assessor raised on the Appellant an estimated Profits Tax Assessment for the year of assessment 2013/14 as follows:

Estimated assessable profits	\$1,080,000
Tax payable thereon	\$168,200

13. The Appellant did not object to the said assessment and duly settled the first instalment of the tax demanded, which was due on 22 January 2015.

14. The Appellant still did not submit the Return. On 12 February 2015, pursuant to section 59(3) of the IRO, the Assessor raised on the Appellant an estimated Additional Profits Tax Assessment for the year of assessment 2013/14 as follows:

Additional assessable profits	\$540,000
Additional amount of tax payable thereon	\$89,100

The Appellant did not object to the said additional assessment.

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15. On 26 February 2015, the Appellant filed the Return together with profits tax computation and audited financial statements for the year ended 31 March 2014. The Return submitted was the original one issued on 1 April 2014. The Auditor's Report was issued by Mr A, Certified Public Accountant, on 15 November 2014. The financial statements were approved by the Appellant's directors on the same day.

16. In the Return filed, the Appellant reported assessable profits of \$6,347,603. The Return showed that it was signed by the Appellant's director on 15 November 2014.

17. On 30 March 2015, by reference to the Return filed, the Assessor raised on the Appellant an Additional Profits Tax Assessment for the year of assessment 2013/14 as follows:

Profits per return	\$6,347,603
Add: Commercial building allowance adjustment	<u>\$675,947</u>
Assessable profits	\$7,023,550
Less: Profits already assessed	<u>(\$1,620,000)</u>
Additional assessable profits	\$5,403,550
Additional amount of tax payable thereon	\$891,585

The Appellant did not object to the said additional assessment.

18. No prosecution under section 80(2) or section 82(1) of the IRO has been instituted against the Appellant in respect of the same facts.

19. On 5 June 2015, the Commissioner of Inland Revenue ('the Commissioner') issued a notice of intention to assess additional tax under section 82A of the IRO ('the Notice') to the Appellant in respect of its failure to furnish the Return within the prescribed time allowed. If the Department had not detected the failure, tax amounting to \$1,148,885 would have been undercharged. The Notice stated that additional tax by way of penalty up to three times the amount of tax that would have been undercharged might be imposed if the Appellant did not have reasonable excuse for the failure. The Appellant was invited to submit written representations to the Commissioner.

20. By a letter dated 18 June 2015, the Appellant made written representations to the Commissioner.

21. On 14 July 2015, the Commissioner, having considered and taken into account the written representations, issued to the Appellant a notice of assessment for additional tax by way of penalty under section 82A of the IRO for the year of assessment 2013/14 in the amount of \$68,000.

22. By a letter dated 13 August 2015, the Appellant gave notice of appeal to the Clerk to the Board of Review against the assessment of additional tax.

23. Particulars of the Appellant's delay in filing the Return and the penalty

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imposed by way of additional tax are as follows:

Year of assessment	Date of issue of tax return	Extended due date	Date of auditor's report	Date of receipt of tax return	Period of delay	Tax undercharged	Amount of additional tax	Percentage of additional tax on the tax undercharged
2013/14	01-04-2014	17-11-2014	15-11-2014	26-02-2015	101 days	\$1,148,885	\$68,000	5.91%

24. Particulars of the Appellant's previous failure in filing profits tax return within 5 years are as follows:

Year of assessment	Date of issue of tax return	Extended due date	Date of auditor's report	Date of receipt of tax return	Period of delay	Tax undercharged	Amount of additional tax	Percentage of additional tax on the tax undercharged
2009/10	01-04-2010	15-11-2010	26-01-2011	08-02-2011	85 days	\$265,697	\$8,000	3.01%

25. Copies of the Appellant's profits tax return for the year of assessment 2009/10 together with the profits tax computation, submitted on 31 January 2011, are at Appendix 9. A copy of the covering letter dated 1 February 2011 together with the Appellant's audited financial statements for the year ended 31 March 2010, submitted on 8 February 2011, are at Appendix 10. A copy of the notice of assessment for additional tax by way of penalty under section 82A of IRO for the year of assessment 2009/10 in the amount of \$8,000 issued on 3 August 2011 is at Appendix 11. (Editor's note: The Appendices are omitted in this published version.)

Evidence and Facts

26. Three witnesses gave evidence on behalf of the Appellant, namely, Mr B and his elder brother, Mr C, both directors of the Appellant, and the Appellant's current tax representative Mr D. We accept that they are honest witnesses trying to give evidence as best they could according to their knowledge and recollection.

27. On the evidence, we find the relevant facts as contained in paragraphs 28 to 45 hereinbelow proved.

28. The Appellant is a small, family-owned operation. The directors are the two brothers and their mother.

29. The Appellant's accounting documents consist mainly of tenancy agreements, rental receipts and bank statements.

30. At all material times, the Appellant's accounts were prepared and audited by Mr A.

31. Mr C and Mr A's elder brother were friends at school, whereby Mr C has known the family, including Mr A, for a very long time. Mr C and Mr A's elder brother

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have remained close friends and they have entered into business adventures together.

32. It was due to the dilatoriness of Mr A that the Appellant's tax return for the year of assessment 2009/10 was filed late, for which the Appellant received an assessment of additional tax (see paragraph 24 above). Since the sum was not large, the Appellant did not appeal.

33. Because of the close relationship between Mr C and Mr A's family, Mr B and Mr C decided to retain Mr A as the Appellant's auditor despite his far from satisfactory performance. But Mr B and Mr C have since kept a close eye on Mr A to make sure that he met all requisite deadlines. This assiduity paid out for the next 3 years. For the years of assessment 2010/11, 2011/12 and 2012/13, the Appellant's tax returns were duly filed.

34. For the year of assessment in question, namely 2013/14, as demonstrated by the Whatsapp messages, Mr B had the accounting records ready for Mr A to audit by 23 September 2014. In October 2014, Mr B had sent several Whatsapp messages to Mr A to urge him to complete the audit with expedition. Mr C went to Mr A's office and signed the Return together with profits tax computation and audited financial statements for the year ended 31 March 2014 on 15 November 2014 (Saturday). Mr A promised that he would deliver the Return, or have it delivered, to the Revenue in time for the extended deadline of 17 November 2014 (Monday).

35. As the Return was complete and ready for filing by 15 November 2014 and the only outstanding step was its submission, Mr B and Mr C honestly believed that Mr A would do it. There was simply no reason for Mr A not to submit the completed Return and accounts to the Revenue.

36. On 1 December 2014, Mr A sent Mr C a Whatsapp message indicating that the Return had been sent by courier and asking for payment of his fee. This, as it turns out, was untrue. Mr A pressed for payment in further Whatsapp messages on 2 and 3 December.

37. The Whatsapp messages between Mr A and Mr B and Mr C respectively did not show anything wrong with Mr A. Mr A seemed to be able to communicate with Mr B and Mr C normally.

38. When Mr B and Mr C received the estimated profits tax assessment of 8 December 2014, they honestly, though mistakenly, believed that because the lapse of time was short, being only 3 weeks from 17 November 2014, the Revenue had not got round to a proper assessment of the profits tax.

39. It was only when they received the second assessment of estimated additional profits tax of 12 February 2015 that Mr B and Mr C sensed that something was amiss.

40. 19 February 2015 was the first day of the Chinese New Year. Because of

the intervening Chinese New Year holidays, Mr C managed to go to Mr A's office on 26 February (8th day of the Chinese New Year). Mr A shared his office with several other accounting firms. Mr A was not at the office, but with the help of people who shared the office with Mr A, Mr C managed to find the Return together with the ancillary documents inside Mr A's desk. Mr C noticed that the financial statements were signed by him alone, whereas there were spaces for two directors to append their signatures. Not sure whether signatures of two directors were necessary, he took the financial statements home and asked his mother, also a director of the Appellant, to sign, where after he immediately delivered the Return and the ancillary documents to the Revenue that same day.

41. Mr C tried to find out what was wrong, but could not get an explanation from Mr A. Mr A's family told Mr C that Mr A had been exhibiting strange behaviour such as sitting in Restaurant E doing nothing all day.

42. Mr B admitted that when Mr A failed to properly handle the Appellant's tax return for the year of assessment 2009/10, he was already aware that Mr A was mentally unwell. We find that the same must also be known to Mr C, who was actually closer to Mr A and his family than Mr B.

43. Mr C is involved in one Company F, a company owned by Mr A's elder brother and Mr A likewise failed to submit the tax return for Company F, as a result of which Company F was prosecuted by the Revenue in May 2015. Mr C was asked by Mr A's elder brother to appear in court on behalf of Company F in May 2015 and Mr A's brother gave him 3 medical receipts relating to Mr A to produce in court, namely: one receipt issued by Dr G dated 28 April 2014 and two receipts issued by Clinic H dated 24 and 31 January 2015 respectively.

44. Having spoken to Mr A's family and in the absence of a conceivable explanation for the non-submission of the Return, Mr C came to the conclusion that it was Mr A's mental illness which caused him to behave the way he did.

45. Mr D got to know Mr A in 2009 and became colleagues in 2010. But Mr D soon discovered that Mr A had something wrong mentally and his performance was not up to standard. Mr D wanted to fire Mr A, but Mr A was later persuaded to resign. A copy of the Notification of Resignation of Secretary and Director filed with the Companies Registry in December 2011 shows that Mr A resigned as director of one Company J in November 2011.

The Grounds of Appeal

46. By his letter to this Board dated 13 August 2015, Mr C on behalf of the Appellant stated as follows:

'I have written a letter dated 14 June 2015 that due to the mental illness of the auditor, [Mr A], who had the illusion that the profit tax return has already been filed (in fact it has not). As a consequence, I only found out that the profit tax return has not been filed when I received a letter of

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notice from your honorable Department in February 2015. After that, I tried several means to contact the auditor and was unable to find him. Nevertheless, the auditor's colleague found the unfiled tax return in his office and I immediately arranged to submit to your honorable Department.

Now I would like to present the medical certificate of the auditor (as per attached Supporting document1), [Mr A] as supporting evidence for the late filing. I confess that it is my duty to send the tax return timely but I carelessly believed the auditor's ability. However, you may please check my Company is an honest taxpayer and would follow the rules and regulations of your honorable Department. Now I have changed the tax representative (previously [Mr A]) in order to enhance better control on the tax matter in the future (as per attached Supporting document 2). Hopefully you would be so kind as to exempt our Company from any tax liabilities concerning this late filing of the tax return for the above mentioned year of assessment.'

47. The letter dated 14 June 2015 referred to therein presumably is a mistake and was a reference to the Appellant's letter to the Commissioner dated 18 June 2015. In both letters, Mr C alleged the same reason for the delay, namely the mental illness of Mr A, except that in the letter of 13 August 2015, the 3 medical receipts were enclosed in support.

Authorities

48. At our request, Miss Lau representing the Commissioner has done an extensive research on the meaning of 'reasonable excuse' and helpfully referred us to a number of authorities. In particular, we refer to the following cases:

- D17/08, (2008-09) IRBRD, vol 23, 301
- D13/85, IRBRD, vol 2, 173
- D35/13, (2014-15) IRBRD, vol 29, 147
- D10/12, (2012-13) IRBRD, vol 27, 280
- D101/03, IRBRD, vol 18, 940
- D31/94, IRBRD, vol 9, 196
- D9/91, IRBRD, vol 5, 563
- D16/96, IRBRD, vol 11, 351

- D56/96, IRBRD, vol 12, 1

Our Decision

49. The issue in the present case is:

- (1) Whether the Appellant had any 'reasonable excuse' within the meaning of section 82A(1) of the IRO in its late filing of the Return, whereby it is not liable to the additional tax;
- (2) If the answer to (1) is no, whether the amount of additional tax is excessive having regard to the circumstances.

50. On issue (1), following D17/08, paragraph 268, to prove a reasonable excuse in accordance with section 68(4) of the IRO:

- a. the Appellant must identify and prove an excuse; and
- b. the Board must be satisfied that that excuse is reasonable.

51. What is the excuse identified by the Appellant? According to the Appellant's letter to this Board dated 13 August 2015, the failure to submit the Return in time was 'due to the mental illness' of Mr A 'who had the illusion' that the Return had already been filed when in fact it had not.

52. Has the Appellant proved this excuse? We think not.

53. There is no evidence that Mr A suffers from mental illness. The receipt issued by Dr G is obviously irrelevant, being concerned with 'Gastritis Gallstone'. As regards the 2 receipts issued by Clinic H, they prove no more than that Mr A has consulted a Dr K, who was a specialist in psychiatry, and received medication following the consultations. We agree with Miss Lau for the Commissioner that a person may consult a psychologist or psychiatrist for many reasons other than psychological/psychiatric impairments. The receipts per se do not prove that Mr A suffered from mental illness or the nature or extent of Mr A's mental illness, if any. According to Mr A's family, Mr A has been exhibiting strange behaviour, but such behaviour cannot be equated to mental illness. The Whatsapp messages showed that Mr A could communicate normally. There is nothing in them to show that Mr A had anything but a sane functional mind.

54. In a Whatsapp message on 1 December 2014, Mr A said that the Return had already been 'sent by courier' and asked Mr B for payment of his fee. This is evidence that Mr B was misled to believe that the Return had been duly filed when it was not. But it is not evidence that Mr A was suffering from mental illness. There could be many reasons why Mr A chose to tell the untrue.

55. Mr C believed that Mr A suffered from 'mental illness' and 'had the illusion' that the Return had already been filed when in fact it had not, but this belief was

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purely Mr C's speculation; the true reason remains a mystery.

56. Mr D was clearly unhappy with Mr A and considered that Mr A had made a mess of the work and ruined his business. But that was back in 2010/2011 and is not evidence of the competence or mental state of Mr A in 2014/2015.

57. On the evidence, we find that the Appellant has failed to prove either that Mr A suffered from mental illness or that Mr A's failure to submit the Return was due to his mental illness.

58. Even assuming that the alleged excuse could be proved, is such an excuse reasonable in the circumstances? Again we think not.

59. This is not a case where Mr A was beset with an unforeseen illness or accident. Mr A has clearly not been performing well for some time and the brothers have been aware of Mr A's condition. One must distinguish two very different situations – one is where a person is met with an accident or is taken ill with no prior symptom, and the other is where a person has been ill for some time. In the former case, it may be argued that the illness or the accident is so totally unforeseeable and out of one's control that one is hampered from doing what ought to be done. In the latter case, on the other hand, the same argument is not viable. A known illness or condition simply means that one should be more vigilant in putting one's house in order.

60. Mr B and Mr C could have been more vigilant by engaging a more responsible auditor to take over their tax affairs or by overseeing every necessary step up to and including the submission of the Return. Instead they chose to entrust the preparation and submission of the Return to Mr A knowing that he was not a person to be trusted. While we accept that this was done with the best of intentions, given the close relationship between Mr C and Mr A's whole family, it was nonetheless a conscious risk taken by Mr C and Mr B, and they must accept the consequence. Mr B and Mr C's decision to continue to place the Appellant's accounts in the hands of Mr A was an unsound decision afflicted with personal sentiments, but little business sense. It was not a reasonable excuse. It did not satisfy the reasonable excuse test propounded in D17/08. Nor, in our view, do Mr B and Mr C satisfy the 'Clapham omnibus' (or in the Hong Kong version 'the man on the MTR') 'reasonable man' test propounded in the earlier cases [D13/85].

61. Likewise even assuming that Mr A was suffering from mental illness, it clearly did not happen in a day. As the Appellant said in its submission, a person who suffers from mental illness may not suffer from the symptoms all the time and he may be normal some times. Knowing his own condition, Mr A should have taken steps to ensure that his work was not compromised. There can be no proper excuse for him to fail to submit the Return.

62. Mr B and Mr C seem to think that if it was Mr A's fault, the Appellant is not responsible. That is a misguided view of the Appellant's responsibilities.

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63. It has been said time and again that a taxpayer, in particular a corporate taxpayer, cannot escape responsibility by putting the blame on its staff and agent. ‘A limited company must act through a natural person and it is not open to [the corporate taxpayer] to say “it is somebody else’s fault, not mine” ’ [D35/13 paragraph 46; D10/12 paragraph 39]. The statutory duty to file tax return in time falls fairly and squarely on the taxpayer [D35/13, paragraph 60]. If instead of preparing the accounts himself, he chooses to engage an accountant to do it for him, the duty to file the return on time remains with him. It has not gone to the accountant. The taxpayer cannot escape liability by delegating that duty to others [D10/12, paragraph 57; D101/03, paragraph 25; D31/94, at page 199]. ‘Compliance with the provisions of the IRO is not optional; it is not a matter of simply “doing your best” ’ [D16/96, at page 356].

64. We agree with these observations as a matter of law. As a matter of logic and common sense, it is also easy to understand the rationale behind these observations. In a corporation, there can be a good number of directors, accounting staff and supporting staff. If a corporate taxpayer is allowed to escape liability by putting the blame on the negligence or indolence of its staff or agent, then there will be no lack of candidates to put the blame on. So it has been held not to be a reasonable excuse to say that the courier has mislaid the documents [D10/12]; or that the auditors have internal dispute within their office and could not act promptly [D10/12], or that the accounts department staff were not able to maintain the accounts properly [D9/91, at page 567], or that there was miscommunication between the taxpayer and his accountant [D35/13], or that it was the fault of the bank/attorney that the return was not submitted [D101/03].

65. In the same premises, in the present case, it is not a reasonable excuse for the Appellant to simply say that it was the fault of the auditor, not the directors. To borrow the words of the Board in D10/12, the choice of agents was made by the taxpayer, not by the Revenue. The Appellant is responsible for the fault of its auditor as much as its directors.

66. In the circumstances, we find that a reasonable excuse has not been proved.

67. Turning to issue (2), it was said in D16/96 that ‘In cases involving failure to file profits tax returns on time, the Board of Review has consistently followed the guideline that where there are neither aggravating factors nor mitigating ones, the penalty should be 10% of the tax undercharged.’

68. Having considered all the evidence, we think that there are mitigating circumstances:

- (1) As demonstrated by the Whatsapp messages, Mr B had the accounting records ready for Mr A to audit by 23 September 2014.
- (2) In October 2014, Mr B had sent several Whatsapp messages to Mr A to urge him to complete the audit with expedition.

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- (3) Mr C was misled by Mr A's promise to deliver the Return or have it delivered before the deadline.
- (4) Mr C was misled by Mr A's Whatsapp message on 1 December 2014 to believe that the Return had been filed.
- (5) When Mr B and Mr C received the first estimated Profits Tax Assessment of 8 December 2014, they honestly, though mistakenly, believed that because the lapse of time was short, being only 3 weeks from 17 November 2014, the Revenue had not got round to a proper assessment of the profits tax.
- (6) Upon receipt of the second estimated Additional Profits Tax Assessment in February 2015, Mr C took reasonably prompt action in view of the intervening Chinese New Year to locate, and eventually file, the Return and ancillary documents on 26 February 2015.
- (7) The directors have since engaged new auditors to avoid any further contravention.
- (8) The directors were co-operative with the Revenue.

69. In D56/96, in circumstances not dissimilar to the present case, where 'the delay was completely the fault of the former CPA, caused substantially by the ill-health of the sole proprietor', the Board there, after considering previous authorities on quantum, decided to reduce the penalty from \$150,000 (3%) to \$20,000 (0.41%).

70. Although the Appellant had defaulted once in the year of assessment 2009/10, Mr B and Mr C did take care to comply with the deadline in the next 3 years of assessment. Taking into account all the circumstances, we consider it appropriate to reduce the additional tax from \$68,000 (5.9%) to \$35,000 (roughly 3%).

Conclusion

71. In summary,

- (1) The excuse alleged by the Appellant is that the failure to submit the Return in time was 'due to the mental illness' of Mr A 'who had the illusion' that the Return had already been filed when in fact it had not. On the evidence, we find that the Appellant has failed to prove this excuse.
- (2) Further and in any event, even if the alleged excuse were proved, it is not reasonable in the circumstances. First of all, Mr B and Mr C themselves had not acted reasonably in entrusting the preparation and submission of the Return to Mr A knowing that he was not a

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person to be trusted. Secondly, Mr A certainly had no excuse for his failure to submit the Return and the Appellant is likewise responsible for Mr A's failure.

- (3) Regarding the quantum, there are mitigating circumstances and a reduction in the additional tax is appropriate.

72. In the premises, we allow the appeal in so far as the amount of additional tax is excessive having regard to the circumstances and we order that the assessment be reduced to the sum of \$35,000 (roughly 3%).