

Case No. D18/17

Penalty tax – failure to furnish return on time – whether there was reasonable excuse for the failure – whether amount of additional tax excessive – costs order – sections 51(1), 51(2), 51(2A), 68(4), 68(9), 80(2), 82(1), 82A(1)(ii), 82A(2), 82B(2)(a) and 82B(2)(c) of the Inland Revenue Ordinance ('IRO')

Costs – the appeal to be frivolous and vexatious – section 68(9) of the IRO

Panel: Lo Pui Yin (chairman), Chiu Ling Cheong Anthony and Yuen Miu Ling Wendy.

Date of hearing: 11 October 2017.

Date of decision: 7 November 2017.

The Taxpayer, Company A, appealed against the notice of assessment of additional tax of HK\$18,000 by way of penalty of the Commissioner of Inland Revenue ('the Commissioner') dated 19 May 2017 pursuant to section 82A of the IRO. The notice of appeal of the Taxpayer sought to explain that the Taxpayer furnished the Profits Tax return ('the Return') for the year of assessment 2015/16 late because there was 'time delay in finalization of the audited financial statements for the year ended 31 December 2015'. Finally, the Notice of Appeal requested a 'review' of the case and the granting of 'a concession to a reasonable amount'.

The Taxpayer was required to furnish the Return on or before 15 August 2016 but it did not do so. The Taxpayer's delay in filing the valid or complete Return was 44 days. The Taxpayer's representative submitted the following points on the Taxpayer's 'reasonable excuse': (1) The Inland Revenue Department ('the Revenue') had suffered no loss due to the failure of the Taxpayer to comply with the requirement to furnish the valid Return by the applicable due date; (2) The Revenue had not suffered from any failure to detect the Taxpayer's liability; and (3) The Taxpayer had made its best attempt to submit the Return and had no intention to delay the filing of the Return willfully.

Held:

Whether there was reasonable excuse for the failure to furnish return on time

1. Facts are not proved by bare assertions and a party must adduce evidence to prove an issue of fact he has asserted. The Board found that the assertions of fact raised in the Taxpayer's notice of Appeal unsubstantiated, and also found as substantiated the further issue of fact that the Taxpayer's representative had purported to assert during the oral hearing (D57/06, (2006-07) IRBRD, vol 21, 1061; and D10/12, (2012-13)

IRBRD, vol 27, 280 followed).

2. It is important for taxpayers furnishing true, accurate and complete returns and related documents within the stipulated time. It was the duty of the taxpayer to arrange its affairs in such a way as to be able to comply with the relevant deadline for furnishing its tax return. The Board would have held that those explanation on the part of the Taxpayer, even if supported with evidence, was not a reasonable excuse (D57/06, (2006-07) IRBRD, vol 21, 1061; D10/12, (2012-13) IRBRD, vol 27, 280; D36/13, (2014-15) IRBRD, vol 29, 161; and D20/16, (2016-17) IRBRD, vol 31, 338 followed).
3. Even if the Taxpayer were able to provide the board with evidence establishing that there was delay in the preparation of the Taxpayer's Financial Statements due to the need to include share-based payments made to employees during that financial year in accordance with the applicable Hong Kong Financial Reporting Standards, that would still not qualify as a reasonable excuse. The Board found this contention difficult to accept in the light of what appeared on the relevant documents.
4. The Board did not accept the submission of the Taxpayer's representative on 'reasonable excuse'. First, it could not be an excuse for the Taxpayer to claim that *subsequently*, it turned out that the Revenue was able to issue the Profits Tax assessment in a timely manner, and that the amount of assessment was one that had been covered by the provisional tax paid previously. The 'whole point' of the power of the Commissioner in section 82A of the IRO was to assess additional tax on the assumption that the failure to file the tax return had not been noticed (D31/94, IRBRD, vol 9, 196 followed). Secondly, the requirement for furnishing a valid tax return involved furnishing the tax return with the necessary accompanying documents, which in the case of the Taxpayer, included its financial statements. Lack of intention to delay the filing of the tax Return willfully was not a reasonable excuse. The exercise of best efforts on the part of the Taxpayer's directors, its auditor and its tax representative were of no assistance to the Taxpayer (D112/99, IRBRD, vol 14, 642 followed).

Whether the amount of additional tax was excessive

5. The Taxpayer has the burden of proof to establish that the additional tax is excessive having regard to circumstances. The correct approach is to look at the additional tax as a percentage of the amount of tax involved. There are two limbs. The first limb deals with an actual undercharge, and the second limb, which applied to this appeal, deals with 'an hypothetical undercharge'. The Revenue's basis of assessing the additional tax was based on the relevant provision of the Ordinance (D36/13, (2014-15) IRBRD, vol 29, 161 followed).

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

6. The Board found that in considering whether the additional tax assessed was excessive in a case of delay in furnishing a return, the Board would consider the overall circumstances of each case. The list of factors was not exhaustive. The fact of a particular case would affect the degree of importance of one or more of those factors (D31/94, IRBRD, vol 9, 196; D55/94, IRBRD, vol 9, 331; D43/95, IRBRD, vol 10, 298; D96/00, IRBRD, vol 15, 851; D57/06, (2006-07) IRBRD, vol 21, 1061; D20/16, (2016-17) IRBRD, vol 31, 338 followed).
7. The Board found that the Commissioner acted reasonably to taking into account the fact that the Taxpayer had a record of not furnishing its Profits Tax returns on time. The continuing contributing factor of failure to comply with timely furnishing of tax returns was suggestive of lack of motivation on the part of Taxpayer and those taking care of its auditing and tax affairs ‘to put its house in order’ (D16/96, IRBRD, vol 11, 351 followed).
8. The Board found the Taxpayer’s appeal to be frivolous and vexatious, and ordered the Taxpayer to pay the sum of \$5,000.

Appeal dismissed and costs order in the amount of \$5,000 imposed.

Cases referred to:

D57/06, (2006-07) IRBRD, vol 21, 1061
D10/12, (2012-13) IRBRD, vol 27, 280
D36/13, (2014-15) IRBRD, vol 29, 161
D20/16, (2016-17) IRBRD, vol 31, 338
D31/94, IRBRD, vol 9, 196
D112/99, IRBRD, vol 14, 642
D55/94, IRBRD, vol 9, 331
D43/95, IRBRD, vol 10, 298
D96/00, IRBRD, vol 15, 851
D16/96, IRBRD, vol 11, 351

Winnie Ip of Tricor Services Limited, for the Appellant.
Tsang Yuk King and Lai Yee King, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Taxpayer, Company A, appeals against the notice of assessment of additional tax by way of penalty of the Commissioner of Inland Revenue dated 19 May

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

2017. The Inland Revenue Department ('Revenue') assessed the additional tax in the amount of HK\$18,000 pursuant to section 82A of the Inland Revenue Ordinance (Chapter 112), in respect of the Taxpayer's failure to furnish a Profits Tax return for the year of assessment 2015/16 within the prescribed time allowed.

2. The Notice of Appeal lodged on behalf of the Taxpayer with the Office of the Clerk to the Board of Review seeks to explain that the Taxpayer furnished the Profits Tax return for the year of assessment 2015/16 late because there was 'time delay in finalization of the audited financial statements for the year ended 31 December 2015'. It is said on behalf of the Taxpayer that it had incurred extra time to prepare the financial statements in order to include share-based payments made to employees during that financial year in accordance with the applicable Hong Kong Financial Reporting Standards. It is also said on behalf of the Taxpayer that the directors of the Taxpayer 'are not stayed in Hong Kong and with frequent business travel arrangements. Therefore, the auditors had taken extra time to communicate with the management of the [Taxpayer] to understand the details of the scheme of the share-based payments and resolve the various auditing issues'. The directors did not return to their office until the middle of August 2016. The return was finalized thereafter and submitted to the Revenue on 18 August 2016. The Taxpayer's representative thus states in the Notice of Appeal that there was 'no willful intention to delay the filing of the Return', the Taxpayer and its directors 'had put their best effort to complete the Tax Return and pay the tax payment. Our client would also make all effort to avoid any late filing in the future.' Finally, the Notice of Appeal requested a 'review' of the case and the granting of 'a concession to a reasonable amount'. As to 'reasonable amount', the Notice of Appeal appears to question the basis of assessing additional tax and suggests that the duration of the late filing and not the assessable profit should be the reference.

3. The parties to this Appeal have agreed on a Statement of Agreed Facts. This Board finds the facts stated in the Statement of Agreed Facts, which are set out below, as facts. These facts will be summarized in the next section.

4. The Taxpayer, represented by Ms Winnie Ip of Tricor Services Limited, the authorized tax representative of the Taxpayer, did not call any witness to give oral evidence.

5. The Revenue, represented by Ms Tsang Yuk-king, Senior Assessor of the Inland Revenue Department, did not call any witness to give oral evidence.

The Agreed Facts

6. The Taxpayer is a private company incorporated in Hong Kong in 2007. It closes its accounts annually on 31 December.

7. The Taxpayer's principal business activity as reported in its tax returns was provision of marketing and sales services and investment holding.

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

8. On 1 April 2016, the Revenue issued a Profits Tax return for the year of assessment 2015/16 to the Taxpayer ('the Return'). By virtue of section 51(1) of the Inland Revenue Ordinance, the Taxpayer was required to complete and submit the Return within one month from 1 April 2016.

9. Pursuant to a Block Exemption Scheme for Lodgment of the Profits Tax returns for the year of assessment 2015/16, which was applicable to the Taxpayer, the due date for filing the Return was extended to 15 August 2016.

10. On 18 August 2016, the Taxpayer submitted the Return together with profits tax computation for the year ended 31 December 2015, reporting assessable profits of HK\$1,785,235. The Return was signed by a director of the Taxpayer with the date specified as 15 August 2016.

11. By a letter dated 13 September 2016, the Assistant Commissioner of Inland Revenue informed the Taxpayer that she was unable to accept the Return lodged as being a complete return in accordance with the law as it was not supported by audited accounts.

12. On 28 September 2016, the Revenue received the audited financial statements of the Taxpayer for the year ended 31 December 2015.

13. It was agreed between the parties that the period of delay on the part of the Taxpayer in filing the valid Return was 44 days. This was because the valid Return was regarded as being received by the Revenue on 28 September 2016 as the financial statements were received by the Revenue on that day.

The Commissioner's Assessment of Additional Tax

14. The Commissioner issued on 3 April 2017 notice of intention to assess additional tax given under section 82A(4) of the Inland Revenue Ordinance, stating that the Return was not filed by the due date with the profits involved being HK\$1,785,325 and the amount of tax involved HK\$274,563.

15. The Taxpayer's tax representatives submitted written representations. It was emphasized in the written representations that the Taxpayer had tried the best attempt to complete the filing in the earliest possible time allowed. The late submission of the Return was explained to be due to circumstances involving 'time delay in finalization of the audited financial statements for the year ended 31 December 2015', 'the directors of the Company are not stayed in Hong Kong and with frequent business travel arrangements', and 'the directors of the Company were on business trip and could not return to the office until mid of August 2016', all of which were later on reproduced in the Notice of Appeal described above. The tax representatives asked that the Revenue would grant a concession to the Taxpayer.

16. The Commissioner issued the notice of assessment and demand for additional tax under section 82A of the Inland Revenue Ordinance in respect of the Profits

Tax in the year of assessment 2015/16 on 19 May 2017. The additional tax was assessed to be HK\$18,000.

The Submissions of the Parties

17. Ms Ip for the Taxpayer submitted that although the Taxpayer agreed that it was late in furnishing the Return by 44 days, the Revenue did issue the Profits Tax assessment for the year of assessment 2015/2016 on 14 October 2016 and the Taxpayer had paid the Profits Tax assessed. Ms Ip also submitted that the Profits Tax assessed for the year of assessment 2015/2016 in fact was within the provisional tax assessed and paid under the previous year of assessment. Ms Ip therefore submitted that the Revenue suffered or incurred no loss in relation to the late filing of the Return by the Taxpayer.

18. Ms Ip took issue on the Revenue's observation that the Auditor's Report and Financial Statements of the Taxpayer were dated 4 July 2016 against the signatures of the auditor and the directors of the Taxpayer. Ms Ip contended that the date of 4 July 2016 should be regarded as denoting the date of the information in the Financial Statements in respect of which the auditor would take responsibility under the Auditor's Report. Ms Ip therefore appeared to deny that the suggestion that 4 July 2016 was the date of signature of those two documents by the relevant individuals.

19. Ms Ip tried to explain how the valid Return was furnished. Ms Ip claimed that one of the directors of the Taxpayer was able to come to Hong Kong and signed the Return and the Taxpayer's Financial Statements earlier; and the other director was only able to come to Hong Kong on a later date to sign the Financial Statements. Ms Ip then claimed that therefore, the Taxpayer's representative was able to furnish the Return together with the Profits Tax computation on 18 August 2016. Ms Ip thus claimed that the Taxpayer had made its best attempt to submit the Return and had no intention to delay the filing of the Return wilfully.

20. Ms Ip lastly objected to the amount of the additional tax assessed. Ms Ip contended that there was no tax undercharged involved in the present case. Ms Ip also contended that the past record of the Taxpayer of late filings should not be taken into account because the reasons for late filing on the previous occasions were different. Ms Ip again emphasized that the Taxpayer had no intention to 'walk away' from tax liability and not furnish the Return; and that in the present circumstances, the Revenue did not suffer from any failure in detecting tax liability, as the Revenue had been supplied since 18 August 2016 with the Profits Tax computation stating the Taxpayer's liability to pay Profits Tax.

21. Ms Tsang for the Revenue referred to the Taxpayer's Notice of Appeal and made submissions to the matters raised therein. Ms Tsang submitted that the Taxpayer's grounds of appeal did not establish or constitute a reasonable excuse for its failure to furnish the Return within the prescribed time limit, so that it was liable to additional tax. Particularly, Ms Tsang referred to the previous decisions of the Board of Review in support of her submission that the Taxpayer's lack of intention to delay the furnishing of the Return and its payment of tax could not be accepted as constituting

reasonable excuse. Ms Tsang also referred to the date on the Auditor's Report and the Taxpayer's Financial Statements to suggest that the Taxpayer's claim that it had tried its best was not borne out by the facts. Ms Tsang further pointed to the lack of any evidence before this Board to substantiate the claim in the Notice of Appeal that extra time was spent on preparing the Financial Statements in accordance the Hong Kong Financial Reporting Standards. Rather, Ms Tsang suggested that the date of the Audited Report and the Financial Statements against the signatures showed that the audited accounts were approved and audited well before the extended due date of the Return. Ms Tsang turned to the claim on the Notice of Appeal that the directors of the Taxpayer were outside Hong Kong at the material time, indicating that this could not be a reasonable excuse, and that there was no explanation offered for the delay in furnishing the Return (and of furnishing an incomplete Return under the law). Ms Tsang also submitted that the Taxpayer had not discharged its burden of showing that the amount of the additional tax assessed on it was excessive; and that the amount was not excessive in the light of the its past filing history and length of the delay in furnishing the valid Return. Rather it was a reasonable amount that adequately reflected the particular circumstances. In this respect, Ms Tsang emphasized that the assessment of additional tax as a penalty serves the twin purposes of punishing the delinquent taxpayers and deterring those and other taxpayers. The Board of Review had taken the view recently that for repeat offending taxpayers, it was not excessive to assess additional tax at 10 to 20% of the tax undercharged. In the Taxpayer's case, Ms Tsang observed, the amount of additional tax assessed was 6.56% of the tax undercharged.

22. Ms Tsang also replied to the points Ms Ip raised in oral submission at the hearing. Ms Tsang pointed out that the Taxpayer had not placed any evidence before this Board to show the exact date of signing of the Auditor's Report and Financial Statements. There was also no evidence to show how the Auditor's Report and Financial Statements came to be signed affected the furnishing of the valid Return. The previous track record of the Taxpayer in filing tax returns is relevant since it had carried on business in Hong Kong continuously in the previous years of assessment, so its duty to comply with the statutory requirement to furnish a tax return applied continuously. Ms Tsang referred to previous decisions of the Board of Review to refute Ms Ip's submissions about there being no undercharge in tax, the Taxpayer having paid tax on time, and the Taxpayer's proffered explanation and excuse that its directors were away from Hong Kong.

Discussion and Findings

23. Section 82A(1) and (2) of the Inland Revenue Ordinance provides:

'(1) Any person who without reasonable excuse-

(a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person; or

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) *makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance; or*
- (c) *gives any incorrect information in relation to any matter or thing affecting his own liability (or the liability of any other person) to tax; or*
- (d) *fails to comply with the requirements of a notice given to him under section 51(1) or (2A); or*
- (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 amount of tax which-

- (i) *has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct; or*
 - (ii) *has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.*
- (2) *Additional tax shall be payable in addition to any amount of tax payable under an assessment, or an additional assessment under section 60.'*

24. Section 51 of the Inland Revenue Ordinance makes provision in sub-sections (1) and (2A) for the giving of notices to persons requiring them to furnish a return for property tax, salaries tax or profits tax, or the person's total income within a reasonable time stated in such notice. Sub-section (2) provides for the duty of a person chargeable to tax to inform the Commissioner in writing that he is so chargeable not later than 4 months after the end of the basis period for the relevant year of assessment unless he has already been required to furnish a return under sub-section (1).

25. The Taxpayer appeals against the assessment of the Commissioner of additional tax under section 82A(1) of the Inland Revenue Ordinance. The Taxpayer's appeal is governed by section 82B of the Inland Revenue Ordinance. Section 82B(2) and (3) provides:

- (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;*

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (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, 68AA, 68AAB, 68A, 69 and 70 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.'*

26. Section 68 of the Inland Revenue Ordinance accordingly applies to the Taxpayer's appeal before this Board. Section 68(4) provides that the appellant shall have the onus of proof, which, in the context of an appeal governed by section 82B, refers to the burden to establish one of the three sub-paragraphs of section 82B(2).

27. This Board has found as facts the facts that are set out in paragraph 6 to 13 above. In summary, the Taxpayer was required to furnish the Return on or before 15 August 2016 but it did not do so. It was agreed between the parties that the Taxpayer's delay in filing the valid or complete Return was 44 days.

28. This Board has clarified with Ms Ip representing the Taxpayer that the Taxpayer's appeal against the additional tax assessed by the Commissioner is focused on the issues stipulated in section 82B(2)(a) and (c) of the Inland Revenue Ordinance. In respect of the question of the Taxpayer's liability, Ms Ip accepted that the Taxpayer had not furnished the valid Return before the relevant due date of 15 August 2016 and that there was no prosecution under section 80(2) or section 82(1) of the Ordinance against the Taxpayer on the same facts. Hence in respect of the question of the Taxpayer's liability, the critical issue is whether there was a reasonable excuse for the Taxpayer's failure to furnish the valid Return before the relevant due date.

29. The Taxpayer had asserted in the Notice of Appeal several issues of fact, including: (1) The late filing of the Return was due to the time delay in finalization of the audited financial statements for the year ended 31 December 2015; (2) The Taxpayer had incurred extra time to prepare the financial statements in accordance with the applicable Hong Kong Financial Reporting Standards to include share-based payments to employees; (3) The auditors had taken extra time to communicate with the management of the Taxpayer to understand the details of the share-based payment scheme to employees since the directors of the Taxpayers did not stay in Hong Kong and had frequent business travel arrangements; (4) The directors of the Taxpayer were on business trip and could not return to the office until mid-August 2016. However, the Taxpayer's representative had not adduced any oral and/or documentary evidence before this Board to substantiate any of these asserted facts. On the other hand, the Revenue referred to the date on the Auditor's Report and Financial Statements against the signatures to challenge the Taxpayer's factual assertions, since that date was 4 July 2016, and according to the Revenue, tended to

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

suggest that the Taxpayer's directors were able to approve the audited accounts on that earlier date with about one month to spare before the extended deadline for furnishing the Return. At the hearing, Ms Ip, for the Taxpayer, raised further issues of fact, including the course of events that led to the signing of the Return, the signing of the Auditor's Report and the Financial Statements of the Taxpayer and the furnishing of the Return, presumably in an attempt to rebut the Revenue's suggestion that these documents were in fact signed on 4 July 2016. Yet Ms Ip had adduced no evidence before this Board on those further issues of fact, even though the Revenue had made that observation on the date of signing of these documents in a paper entitled 'Other relevant facts not included in the SOAF' distributed to the Taxpayer's representative prior to the hearing.

30. The Board of Review had stated repeatedly that facts are not proved by bare assertions and that a party must adduce evidence to prove an issue of fact he has asserted; see Case No D57/06, (2006-07) IRBRD, vol 21, 1061 at paragraph 12; and Case No D10/12, (2012-13) IRBRD, vol 27, 280 at paragraph 50.

31. This Board therefore finds as unsubstantiated the assertions of fact raised in the Taxpayer's Notice of Appeal and described above. This Board also finds as unsubstantiated the further issues of fact that Ms Ip had purported to assert during the oral hearing.

32. The Board of Review has underlined the importance of taxpayers furnishing true, accurate and complete returns and related documents within the stipulated time in its Decisions, including Case No D57/06 (above), Case No D10/12 (above), Case No D36/13, (2014-15) IRBRD, vol 29, 161, and Case No D20/16, (2016-17) IRBRD, vol 31, 338. These cases establish a consistent approach on the part of the Board of Review with respect to an assessment of additional tax in view of the appellant's failure to furnish a return within the time stated in the assessor's notice (or pursuant to an applicable Block Extension Scheme for Lodgement of Returns, an extended date for furnishing the return), which can be summarized as follows:

- (1) The first question that the Board is to consider in the appeal is that of liability to additional tax. It is often agreed between the parties that the appellant has not furnished a valid return on or before the relevant due date, so that the question for determination becomes whether the appellant has any 'reasonable excuse' for the delay in furnishing the return.
- (2) Liability for assessment to additional tax is not dependent upon proof of recklessness, or deliberate or persistent default.
- (3) It is the duty of the appellant to observe the law and comply with the time limit for furnishing its return. It is also its duty to arrange its affairs in such a way as to be in a position to comply with its legal obligations regarding the furnishing of its return. The system of revenue cannot effectively function if time limits for furnishing returns are to give way to the personal or business diaries of the

directors of taxpayers. Hence the mere fact that the directors of the appellant were away from Hong Kong either on vacation or doing business cannot in itself amount to a reasonable excuse.

- (4) The appellant could not escape liability to additional tax by delegating to others. A limited company must act through a natural person and it is not open to such an appellant to say that 'it is someone else's fault, not mine'.
- (5) Lack of intention to evade tax is not a reasonable excuse, since no taxpayer should have the intention to evade tax.
- (6) Additional tax is assessed as a penalty to serve two purposes: punishing the delinquent taxpayers and deterring those and other taxpayers.
- (7) Delay in furnishing returns may delay the timely collection of revenue. This is of importance in the case of Hong Kong which has low tax rates and a narrowly based fiscal system. Thus a high degree of compliance by taxpayers in submitting timely, correct and complete returns and information to the Revenue is crucial to the effective operation of Hong Kong's tax system.
- (8) There is no duty on the part of the Revenue to warn a taxpayer before assessing additional tax.
- (9) It is a waste of the Revenue's limited resources to (a) conduct checks, investigations and audits which are avoidable had there been a high degree of compliance by taxpayers of their statutory reporting duties; and (b) pamper taxpayers to turn a blind eye to their duty to submit timely, correct and complete tax returns and information. This is also unfair to the honest and compliant taxpayers who take great care to comply and exercise due diligence in complying with their statutory reporting duties. There is no reason for the honest and compliant taxpayers exercising due diligence in the discharge of their statutory reporting duties to foot the bill.

33. Hence, even if the Taxpayer were able to provide this Board with evidence establishing that its directors had, due to their travelling, been unable to sign the Return and the Financial Statements of the Taxpayer until after the extended due date for furnishing the Return as a matter of fact, this would not have availed the Taxpayer. This Board endorses the previous decisions of the Board of Review that it is the duty of the taxpayer to arrange its affairs in such a way as to be able to comply with the relevant deadline for furnishing its tax return and that the system of revenue in Hong Kong cannot effectively function if time limits are to give away to the personal or business diaries of the directors of taxpayers. This Board would have held that this explanation on the part of the Taxpayer, even if supported with evidence, was not a reasonable excuse.

34. Also, even if the Taxpayer were able to provide this Board with evidence establishing that there was delay in the preparation of the Taxpayer's Financial Statements due to the need to include share-based payments made to employees during that financial year in accordance with the applicable Hong Kong Financial Reporting Standards, that would still not qualify as a reasonable excuse. The Hong Kong Financial Reporting Standards are not anything new. It is reasonable to assume that the Taxpayer's auditor was familiar with them and was in a position to advise on this matter in a timely manner, and then organize his work to ensure compliance with the deadlines of the different filing requirements, including that for the furnishing of the Return. In any event, this Board finds this contention difficult to accept in the light of what appears on the relevant documents: The share-based payments made to employees were itemized separately in the Profits Tax computation but not in the Financial Statements.

35. As a result, Ms Ip's submissions on the Taxpayer's 'reasonable excuse' are limited to the following points: (1) The Revenue had suffered no loss due to the failure of the Taxpayer to comply with the requirement to furnish the valid Return by the applicable due date; (2) The Revenue had not suffered from any failure to detect the Taxpayer's tax liability; and (3) The Taxpayer had made its best attempt to submit the Return and had no intention to delay the filing of the Return wilfully.

36. This Board finds argument (1) cannot possibly get off the ground. As stated above, the Taxpayer has the duty to comply with the requirement under the Inland Revenue Ordinance to furnish the Return by the relevant deadline. It has not done so. It cannot possibly be an excuse, still less a reasonable one, for the Taxpayer to claim that *subsequently*, it turned out that the Revenue, by its industry and efficiency, was able to issue the Profits Tax assessment in a timely manner, and that the amount of the assessment was one that had been covered by the provisional tax paid previously. The Board of Review had stated in Case No D31/94, IRBRD, vol 9, 196 at 199 that it is irrelevant that provisional tax had been paid in advance, bearing in mind that the 'whole point' of the power of the Commissioner in section 82A was to assess additional tax on the assumption that the failure to file a tax return had not been noticed.

37. This Board also finds argument (2) not to be a reasonable excuse. Argument (2) is similar to argument (1) to a large extent, albeit that reliance was placed on the facts that the Revenue had received the signed Return and the tax computation on 18 August 2016. However, it is clear that the requirement for furnishing a valid tax return involves furnishing the tax return with the necessary accompanying documents, which in the case of a company like the Taxpayer, includes its financial statements. This Board again emphasises the Board of Review's consistent holding that it is the duty of the taxpayer to arrange its affairs in such a way as to be in a position to comply with its legal obligations regarding the proper furnishing of tax return.

38. As to point (3), as stated above, the Board of Review has consistently held that lack of intention to delay the filing of the tax return wilfully is not a reasonable excuse. No taxpayer should have such an intention; see Case No D112/99, IRBRD, vol 14, 642 at paragraph 30. The circumstances that the Taxpayer's representative has sought to put

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

before this Board of the exercise of best efforts on the part of the Taxpayer's directors, its auditor and its tax representative are of no assistance to the Taxpayer.

39. For the reasons set out above, this Board finds that the Taxpayer has no reasonable excuse in respect of its failure to furnish the Profits Tax return for the year of assessment 2015/16, together with the related documents within the prescribed time allowed.

40. This Board now turns to the Taxpayer's claim that the amount of the additional tax is excessive having regard to the circumstances.

41. The Taxpayer has the burden of proof to establish that the additional tax is excessive having regard to the circumstances; see the Inland Revenue Ordinance sections 68(4), 82B(3).

42. The Board of Review has made clear in Case No D36/13 (above) that additional tax is assessed in terms of a percentage of the amount of the tax which has been undercharged or which would have been undercharged if the failure in question had not been detected. The maximum, stipulated in section 82A of the Inland Revenue Ordinance, is 'an amount not exceeding treble the amount of tax ...'. Thus the correct approach is to look at the additional tax as a percentage of the amount of tax involved.

43. Ms Ip has sought to challenge the basis of the Revenue assessing additional tax based on the amount of Profits Tax actually assessed on the Return that was thereafter validly furnished. Section 82A(1)(ii) of the Inland Revenue Ordinance provides for the basis of assessing additional tax in the case of failure to comply with the statutory requirement to furnish a tax return following a notice to do so from the Revenue: '(ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected'. There are two limbs. As the Board of Review quoted Liu J of the High Court in Case No D36/13, (2014-15) IRBRD, vol 29, 161 at paragraph 46, the first limb deals with an actual undercharge and the second limb, which applies to this Appeal, deals with 'an hypothetical undercharge - a hypothetical situation in a case where the failure was in fact detected - thus enabling the same penalty to be computed on a hypothetical sum of what would have been undercharged if such failure had not been detected'. The Revenue's basis of assessing the additional tax is based on the relevant provision of the Inland Revenue Ordinance, which has been explained by the High Court and the Board of Review previously. This Board rejects Ms Ip's contention on this point.

44. This Board has been referred to the following cases on the proper approach of assessing the amount of additional tax: Case No D31/94 (above), Case No D55/94, IRBRD, vol 9, 331, Case No D43/95, IRBRD, vol 10, 298, Case No D96/00, IRBRD, vol 15, 851, Case No D57/06 (above), Case No D36/13 (above), Case No D20/16 (above). This Board finds that in considering whether the additional tax assessed is excessive in a case of delay in furnishing a return, the Board of Review considers the

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

overall circumstances of each case. Factors that can affect the level of the additional tax include:

- (a) The length and nature of the delay;
- (b) The amount of tax involved;
- (c) The absence of an intention to evade;
- (d) Whether there is any loss of revenue;
- (e) The track record of the taxpayer;
- (f) The acceptance of the tax return eventually submitted without further investigation by the assessor;
- (g) The lack of education on the part of the taxpayer;
- (h) The steps taken to put the taxpayer's house in order;
- (i) The provision of management account;
- (j) Conduct of the taxpayer before the Board of Review.

This list of factors is non-exhaustive. The facts of a particular case will affect the degree of importance of one or more of these factors. Sometimes one or more of these factors may have no relevance in the circumstances of the case. The Board of Review has illustrated this in Case No D57/06 (above) with the example of the factor of lack of education of the taxpayer generally being one of no or little relevance where the taxpayer is a corporate entity or where the taxpayer has entrusted its tax affairs to a tax representative.

45. The Commissioner assessed the additional tax that the Taxpayer shall pay to be HK\$18,000 where the amount of tax that would have been undercharged had the failure been not detected was HK\$274,563. The additional tax assessed is 6.56% of the amount of tax involved.

46. The Revenue has placed before this Board information of the Taxpayer's previous failures in furnishing Profits Tax returns within the prescribed time allowed:

Year of assessment	2010/11	2011/12	2012/13	2013/14
Date of issue of the return	1 Apr 2011	2 Apr 2012	2 Apr 2013	1 Apr 2014
Extended due date for filing the return	15 Aug 2011	15 Aug 2012	15 Aug 2013	15 Aug 2014
Date of receipt of return by Revenue	3 Oct 2011	21 Aug 2012	21 Aug 2013	11 Sep 2014
Period of delay in filing the return	49 days	6 days	6 days	27 days
Tax undercharged	\$591,937	\$270,549	\$477,354	\$281,789
Additional tax by way of penalty	\$18,000	nil	nil	\$18,000

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

Year of assessment	2010/11	2011/12	2012/13	2013/14
Percentage of additional tax on tax undercharged	3.04%	N/A	N/A	6.39%

47. This Board finds that the Commissioner acted reasonably in taking into account the fact that the Taxpayer has a record of not furnishing its Profits Tax returns on time. This is because of the duty of taxpayers to comply with the requirement of the Inland Revenue Ordinance to furnish the tax return on time; as the Board of Review stated in Case No D16/96, IRBRD, vol 11, 351 at 356, 'it is not a matter of simply "doing your best".' Ms Ip for the Taxpayer accepted during the hearing before this Board that the Taxpayer had not furnished its Profits Tax returns on time in the previous four years but contended that some of the reasons that led to the failure to furnish the tax return on previous occasions were not present in the circumstances of this Appeal. This Board notes that while there appeared to have been specific reasons for one of the years of assessment, one reason has continuously contributed to the failure, namely the difficulty of communicating with and obtaining the signatures of the directors of the Taxpayer, who have been operating offshore and were travelling at the material times. The continuing contributing factor of failure to comply with timely furnishing of tax returns is suggestive of lack of motivation on the part of the Taxpayer and those taking care of its auditing and tax affairs "to put its house in order". Another matter is that the Taxpayer's representative made pledges on behalf of the Taxpayer that it would make efforts not to delay the furnishing of the tax return in the future in the two previous occasions when it was asked to provide a written representation when the Commissioner proposed to assess additional tax. Yet, the Taxpayer had continued to fail to furnish the tax return on time in the following years. The above records (including the previous written representations and the additional tax assessed by the Commissioner assessed previously) are clearly relevant matters for the Commissioner to consider in assessing the additional tax payable this time.

48. Indeed, this Board is of the opinion that the Commissioner was well entitled to assess additional tax at a level well above 7% of the amount of tax that would have been undercharged in the light of the circumstances of the Taxpayer's failure this time, and the Taxpayer's record in failing to furnish its tax return on time. Previous decisions of the Board of Review had suggested that a starting point of 10% of the amount of tax that would have been undercharged was appropriate for a first offender, where the delay was unintentional and the Revenue had suffered no loss; see Case No D16/96 (above) at 356; Case No D112/99 (above) at paragraph 33. Yet, the Commissioner had maintained the assessment at a level below 7% for the present occasion.

49. Ms Ip has stated for the Taxpayer that it would comply with the statutory requirement of furnishing the tax return on time. However, this Board has not heard from Ms Ip any steps having been taken to ensure future compliance. This Board is unable to take a more lenient view than the lenient approach that the Commissioner has already taken on this occasion.

50. For the reasons set out above, this Board rejects the Taxpayer's ground of appeal that the amount of the additional tax is excessive having regard to the circumstances.

Conclusions

51. The Taxpayer has failed to establish any of the three grounds specified in section 82B(2) of the Inland Revenue Ordinance. The Taxpayer's appeal is dismissed. This Board confirms the additional tax assessed by the Commissioner.

52. This Board considers that the Taxpayer's grounds of appeal were, on analysis, thoroughly unmeritorious. This Board also considers that the Taxpayer has chosen to come before this Board with no evidence to substantiate its assertions on the facts. This Board therefore finds the Taxpayer's appeal to be frivolous and vexatious. This Board therefore exercises its power under section 68(9) of the Inland Revenue Ordinance to order the Taxpayer to pay the sum of \$5,000 as costs of the Board of Review, such sum to be added to the additional tax assessed and recovered therewith.