

**Case No. D3/16**

**Penalty tax** – failure to submit tax return within time – whether tax return was returned on time – whether excuse for failure reasonable – sections 51(1) and 82A(1) of the Inland Revenue Ordinance (‘IRO’)

Panel: Elaine Liu Yuk Ling (chairman), Lo Kai Chung Thomas and Anson Wong.

Date of hearing: 30 July 2015.

Date of decision: 20 April 2016.

The Commissioner issued to the Appellant, a private limited company in Hong Kong, a notice to filing a tax return for the 2013/14 year of assessment on 1 April 2014. The deadline for the Appellant to submit the tax return was 1 month from 1 April 2014, which was then extended to 15 August 2014. In absence of the Appellant’s tax return, the Commissioner estimated the assessable profits and raised Profits Tax Assessment on 5 September 2014. The Appellant objected to the Commissioner’s assessment on 11 September 2014, and filed the tax return on the same day. The Commissioner issued a notice of intention to assess additional tax under section 82A of the IRO on 9 January 2015, and invited written representations from the Appellant. After considering the written representations from the Appellant’s tax representative submitted on 19 January 2015, the Commissioner raised additional tax of \$40,000 on 9 February 2015, which was equal to 3.28% of the tax undercharged. The Appellant appealed against the assessment of additional tax. It explained that the delay in filing the tax return was caused by the change of its auditor because of the substantially increased audit fee the old auditor proposed, and the longer time required for the new auditor to carry out an audit of its accounts.

**Held:**

1. There was no dispute that the tax return was filed late, and thus the Appellant did not comply with the requirement under section 51(1) of the IRO to file its tax return on time.
2. The Appellant did not have any reasonable excuse for the non-compliance of section 51(1). The Appellant did not file any documentary or call any oral evidence at the hearing. The Appellant’s bare assertions that the delay was caused by a change of auditor did not amount to evidence (D10/12, (2012-13) IRBRD, vol 27, 280; Commissioner of Inland Revenue v Crown Brilliance Limited, unreported, HCIA 1/2015, 14 October 2015 applied).

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3. Even taking into account the Appellant's contentions, its explanation was not reasonable. It was emphasised that taxpayers had to submit tax returns in a timely manner (D10/12, (2012-13) IRBRD, vol 27, 280 followed). The Appellant knew that its auditor might increase the audit fee. And when planning for audit and the submission of the tax return, the Appellant should consider the time required for the new auditor, and negotiate with it in good time. These were the duties of the Appellant. Failure of the auditor to complete the financial statements and/or tax computations for the filing of the tax return was not a reasonable excuse for late filing (D2/90, IRBRD, vol 5, 77; D64/94, IRBRD, vol 9, 361 applied).
4. The additional tax imposed was not considered to be excessive because it was 3.28% of the tax undercharged only.
5. The appeal was frivolous and vexatious, and was without merits. It was a waste of public resources, and the Appellant shall pay the costs.

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

Cases referred to:

D10/12, (2012-13) IRBRD, vol 27, 280  
Commissioner of Inland Revenue v Crown Brilliance Limited, unreported, HCIA  
1/2015, 14 October 2015  
D2/90, IRBRD, vol 5, 77  
D64/94, IRBRD, vol 9,36

Appellant's financial controller, for the Appellant.  
Cheng Chi Ming and Chan Wan Yee for the Commissioner of Inland Revenue.

**Decision:**

**The Appeal**

1. This appeal is against the Commissioner's imposition of an additional tax by way of penalty assessed upon the Appellant under section 82A of the Inland Revenue Ordinance ('Ordinance') due to the Appellant's failure to comply with the requirement under section 51(1) of the Ordinance to furnish a profits tax return for the year of assessment 2013/2014 ('the Return') within the prescribed time allowed. The additional tax imposed is \$40,000, which represented 3.28% of the tax undercharged.

**The Agreed Facts**

2. On the basis of the statement of facts agreed by the parties, we made the following finding of facts.

3. The Appellant is a private limited company incorporated in Hong Kong in April 1998. Its principal business activity was trading of ceramic products and investment holding. The Appellant's financial year closes annually on 31 December.

4. On 1 April 2014, the Assistant Commissioner of Inland Revenue issued to the Appellant a notice for filing the Return. Pursuant to section 51(1) of the Ordinance, the Appellant was required to complete and submit the Return within one month from 1 April 2014.

5. A Block Extension Scheme for lodgment of 2013/14 profits tax returns, which applied to the Appellant, gave the Appellant further time to file the Return by 15 August 2014 ('the Extended Due Date').

6. The Appellant did not submit the Return by the Extended Due Date. The Appellant has not lodged any application for extension of time to file the Return.

7. On 5 September 2014, the Assessor raised on the Appellant an estimated assessment for the year of assessment 2013/14 pursuant to section 59(3) of the Ordinance as follows:

Estimated assessable profits	\$6,050,000
Tax payable thereon	\$988,250

8. On 11 September 2014, the Appellant, through its tax representative lodged an objection against the estimated assessment for the year 2013/14 on the ground that the estimated assessable income are incorrect.

9. On the same date, the Appellant filed the Return together with the audited financial statements for the year ended 31 December 2013 ('Financial Statements') and the tax computation, whereby the Appellant reported assessable profits of \$7,462,128. The Return was signed by the Appellant's director, Mr A. The Financial Statements were approved for issue by the Appellant's board of directors on 8 September 2014 and the Auditor's Report was signed by Company B on the same date.

10. On 23 September 2014, the Assessor accepted the Appellant's objection and issued a revised assessment for the year of assessment 2013/14 based on the assessable profits reported by the Appellant in the Return as follows:

Revised assessable profits	\$7,462,128
Revised tax payable thereon	\$1,221,251

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11. There is no prosecution against the Appellant in respect of the same facts under section 80(2) or section 82(1) of the Ordinance.

12. On 9 January 2015, the Commissioner of Inland Revenue ('the Commissioner') issued to the Appellant a notice of intention to assess additional tax under section 82A of the Ordinance ('the Notice') in respect of its failure to furnish the Return within the prescribed time allowed. If the Inland Revenue Department had not detected the failure, the tax amounting to \$1,221,251 would have been undercharged. The Notice stated that an 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 a reasonable excuse for the failure. The Appellant was invited to submit written representations to the Commissioner.

13. The Appellant, through its tax representative, submitted a written representation on 19 January 2015, stating that the late submission of the Return was due to the Appellant's change of auditor. Much time was taken by the retiring auditor to provide the information to the incoming auditor and therefore, according to the Appellant, it caused the delay in the filing of the Return.

14. On 9 February 2015, the Commissioner having considered and taken into account of the written representation submitted on 19 January 2015, issued a notice of assessment for additional tax by way of penalty under 82A of the Ordinance in the amount of \$40,000.

15. Particulars of the Appellant's delay in filling the Return and the additional tax by way of penalty are as follows:

Return issue date	Return extended due date	Date of audited financial statements	Date of receipt of the Return	Period of delay	Tax undercharged	Amount of additional tax by way of penalty	Percentage of additional tax on tax undercharged
01-04-2014	15-08-2014	08-09-2014	11-09-2014	27 days	\$1,221,251	\$40,000	3.28%

16. By a letter dated 2 March 2015, the Appellant lodged its appeal to the Board against the Commissioner's imposition of the additional tax.

### Grounds of appeal

17. The Appellant's grounds of appeal as stated in its notice of appeal on 2 March 2015 and a letter dated 5 June 2015 can be summarised as follows:

- (1) The Appellant's previous auditor repeatedly quoted unacceptable audit fee every year. The worst case was an increase of fee by 100% in 2010. In 2013, the previous auditor asked for 25% adjustment as compared with the fee for the year of 2012. The Appellant decided to engage another auditor who charged less.

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- (2) The audit work carried out by the new auditor involved certain work procedures such as verifying the account opening balances, understanding the structures and operations of the Appellant. As a result, more time was required.
- (3) The Appellant is one of the members of the Company C Group ('Group'). The Group has four factories in four different areas of the Mainland China, including Province D, Province E, Province F and City G. The new auditor needed a lot of time to conduct on site audit to rectify the inter-company figures.
- (4) The physical stock take should be carried out at around the end of December 2013. Due to the change of the auditor, the stock take was extended to May 2014. The total quantities of stocks was around 25 million pieces with value of \$74,952,000.
- (5) The new auditor has its own working plan and timetable for its jobs in 2014. Due to the Appellant's 'sudden join in', the starting time of the audit had been delayed.

**The relevant provisions of the Ordinance**

18. By virtue of section 51(1) of the Ordinance, 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 for profits tax.

19. Section 59 of the Ordinance provides that:

*'(1) Every person who is in the opinion of an assessor chargeable with tax under this Ordinance shall be assessed by him as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return under section 51(1) ...'*

*'(3) 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.'*

20. Under section 82A(1) of the Ordinance, any person who without reasonable excuse fails to comply with the requirements of a notice given to him under section 51(1), shall be liable to be assessed to an additional tax of an amount not exceeding treble the amount of the tax which has been undercharged in consequence of the failure to comply

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with a notice under section 51(1) or the amount of tax which has been undercharged if the failure is not detected.

21. The excepted situation was where prosecution under section 80(2) or 82(1) of the Ordinance has been instituted in respect of the same facts. There was no such prosecution instituted against the Appellant. This case does not fall within the exception.

22. Pursuant to section 68(4) of the Ordinance, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

23. Sections 68(8)(a) and 68(9) of the Ordinance provide that:

*‘(8)(a) After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon.’*

*‘(9) Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the Appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.’*

24. The amount specified in Part I of Schedule 5 is \$5,000.

**Decision**

25. The issues before the Board in this appeal are:

- (1) whether the Appellant has failed to comply with the requirements of a notice given to it under section 51(1) of the Ordinance; and
- (2) if it has so failed, whether the Appellant has any reasonable excuse.

26. The answer to the first issue is clear. It is not in dispute that the Return was filed late and accordingly, the Appellant has not complied with the requirements of a notice given to it under section 51(1) of the Ordinance. The Appellant has confirmed this once again at the hearing before the Board.

27. The issue in dispute was whether the Appellant has any reasonable excuse for the non-compliance.

28. The gist of the Appellant’s grounds of appeal was that the delay was caused by the change of auditor as a result of a fee increase by the Appellant’s previous auditor, which the Appellant described as unacceptable.

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29. The Appellant relied on bare assertions in its Notice of Appeal and oral submission at the hearing. There was no documentary evidence filed in support of these assertions. The Appellant chose not to call any evidence at the hearing despite clear direction has been given for the filing of witness statements. These bare assertions, without more, do not amount to evidence. (D10/12, (2012-13) IRBRD, vol 27, 280; Commissioner of Inland Revenue v Crown Brilliance Limited, unreported, HCIA 1/2015, 14 October 2015). This appeal can be disposed of at this stage for lack of evidence to support the alleged reason for the delay.

30. Be that as it may, even if the Board takes into account the Appellant's contentions summarised in the Notice of Appeal and further elaborated in the oral submission at the hearing, we do not consider these constitute a reasonable excuse under section 82A of the Ordinance.

31. The importance for taxpayers to submit tax returns in a timely manner has been explained in the Board's decision in D10/12, (2012-13) IRBRD, vol 27, 280.

32. It was the Appellant's own assertion that its auditor has substantially increased the audit fee in the past few years. The Appellant should anticipate that the auditor might also increase their fee for the year in issue. The Appellant should therefore approach the auditor in a timely manner to make sure that in case a change of auditor was required, they could still file the Return in time.

33. No doubt the Appellant knew that the Group has four factories in different areas of the Mainland. The Appellant was also fully aware of the time required for stock taking. It is just common commercial sense that more time would be required for a new auditor to complete the audit work, in particular the new auditor would, as suggested by the Appellant, have their own work schedule. In planning for the audit and the submission of the Return, the Appellant should take all these into account and negotiate with the auditor in good time to enable the completion of the Return for timely filing. These are the duties of the Appellant.

34. The Appellant was given more than 7 months (from 1 January 2014 to 15 August 2014) to prepare the audited accounts. There was ample time available to the Appellant to make the necessary arrangements including taking proper steps to replace its auditor.

35. There is no evidence or allegation that the auditor was at fault or oversight. Even if it was due to the delay of the auditor, that was a matter between the Taxpayer and the auditor. The Appellant could not escape its duty to report in time by simply delegating the task to others.

36. It has been repeatedly held by the Board that the responsibility to submit the Return in time was on the Appellant. Failure of the auditor to complete the financial

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statements and/or the tax computation for the filing of the return was not a reasonable excuse for the late filing.

37. In D2/90, IRBRD, vol 5, 77, the Appellant's tax representative appeared at the hearing before the Board and accepted full responsibility for the delay in filing the Appellant's tax returns because of shortage of staff. The Board dismissed the appeal in that case and held that it did not constitute a reasonable excuse. The taxpayer has to be responsible for the filing of the return in time.

38. In D64/94, IRBRD, vol 9, 361, the Appellant submitted that it had been pressing its then auditor to complete the audit but the auditor was unable to do so. The failure to file the return in time was outside its control. The Board in that case considered it not a reasonable excuse for the delay. The Board held that :

*' The Board accepts that it is the responsibility of each taxpayer to comply with the requirements of the IRO and that the responsibility is not excused if a taxpayer elects to place his tax affairs in the hands of a tax representative. Accordingly, the action or lack of action on the part of a taxpayer's tax representative is irrelevant to the disposal of appeals of this nature.'*

*' ... the default of the then auditor is not an excuse; the Taxpayer is liable for the consequences of the auditor's default.'*

39. In the present case, if it was the suggestion of the Appellant that the delay was caused by the auditor, it did not assist the Appellant as the delay by the auditor did not constitute a reasonable excuse for the late filing.

40. The Appellant has a record of filing its profit tax returns late for the past four consecutive years. The particulars are as follows:

Year of assessment	Return issue date	Return extended due date [Note]	Date of receipt of the return	Period of delay	Assessable profits	Tax undercharged
2009/10	01-04-2010	15-11-2010	02-12-2010	17 days	\$10,857,561	\$1,791,497
2010/11	01-04-2011	15-08-2011	30-08-2011	15 days	\$3,863,604	\$637,494
2011/12	02-04-2012	15-08-2012	28-08-2012	13 days	\$2,717,582	\$436,401
2012/13	02-04-2013	15-08-2013	28-08-2013	13 days	\$6,042,506	\$987,013

Note: Starting from the year of assessment of 2010/11, the return extended due date was 15 August as the Appellant changed its accounting year end date from 31 March to 31 December.

41. These repeated failures of the Appellant plainly suggest that the Appellant did not attach much importance to the timely submission of the Return.



42. The Appellant made no contention that the additional tax is excessive. For the sake of completeness, we point out that under section 82A(1) of the Ordinance, the Commissioner may impose an additional tax of an amount not exceeding treble the amount of tax undercharged. We do not consider the additional tax imposed, which was 3.28% of the tax undercharged, is excessive.

**Disposition of the appeal and costs**

43. By reason of the above, we dismiss the appeal and confirm the Commissioner's imposition of an additional tax against the Appellant in the sum of \$40,000 for the year of assessment 2013/14.

44. We consider this appeal to be frivolous and vexatious. The appeal was without merits. The Appellant failed to adduce proper oral or documentary evidence to support its grounds of appeal notwithstanding that clear directions on filing of evidence were given before the hearing. A majority part of the oral submission made at the hearing was irrelevant to the appeal. It was a waste of public resources and the Appellant shall pay the costs. The Appellant is ordered to pay costs in the sum of \$5,000, which sum should be added to the additional tax as increased and recovered therewith.