

**Case No. D6/18**

**Penalty tax** – late tax return – reasonable excuse – whether additional tax excessive – section 82A of the Inland Revenue Ordinance

Panel: Albert T da Rosa, Jr. (chairman), Ho Wai Hin Philson and Wu Pui Ching Teresa.

Date of hearing: 20 September 2017.

Date of decision: 11 May 2018.

The Appellant failed to comply with the requirement of notices under section 51(1) to furnish the profits tax returns for the years of assessment 2012/13 and 2013/14 within the time limit under section 82A.

Penalty by way of additional tax was assessed upon the Appellant under section 82A.

The Appellant requested to reduce the additional tax imposed by 50%.

**Held:**

1. The Appellant, being a corporation, has the corporate duty to file tax returns within the stipulated time.
2. None of the following amounts to a reasonable excuse for the late filing of the Appellant:
  - The passing away of Mr D;
  - The appointment of Mr G as administrator of the estate of Mr D and as a director of the Appellant;
  - Late receipt of bank confirmation of the Appellant;
  - The 2 litigation cases on the estate of Mr. D.
3. For the amount of additional tax, the Board adopts 10% as the starting point.
4. The additional tax imposed of \$125,000 for the year of assessment 2012/13 (being 7.67% of the tax undercharged) and \$146,000 for the year

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of assessment 2013/14 (being 6.02% of the tax undercharged) is not excessive in any way or at all.

**Appeal dismissed.**

Cases referred to:

- D35/13, (2014-15) IRBRD, vol 29, 147
- D16/96, IRBRD, vol 11, 351
- D112/99, IRBRD, vol 14, 642
- D118/02, IRBRD, vol 18, 90
- D35/13, (2014-15) IRBRD, vol 29, 147
- D11/93, IRBRD, vol 8, 143
- D125/98, IRBRD, vol 13, 574
- D15/09, (2009-10) IRBRD, vol 24, 461

Ms B of Company C1, for the Appellant.

Yau Yuen Chun and Wong Ying Yan, for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. All references to sections and subsections are, unless otherwise stated, to those of the Inland Revenue Ordinance, Chapter 112 (the ‘Ordinance’).
2. Company A (the ‘Appellant’) appeals against the imposition of penalty by way of additional tax assessed upon it under section 82A for failure to comply with the requirement of notices under section 51(1) to furnish the profits tax returns for the years of assessment 2012/13 and 2013/14 (‘the 2013 Return’ and ‘the 2014 Return’ respectively) within the prescribed time allowed.

**Agreed Facts**

3. At the start of the hearing on 20 September 2017, the parties (i.e. the Appellant through its representative at the hearing, Ms B (‘Appellant’s Hearing Representative’) of Company C1 (‘Appellant’s Appeal Representative’ and the Respondent), agreed to the ‘Statement of Agreed Facts’ as filed<sup>1</sup> including the matter stated in paragraph 2 herein<sup>2</sup> which we find as fact.

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<sup>1</sup> The Appellant has filed its A1 bundle with a covering ‘List of Appendices for Statement of Witness and Statement of Agreed Facts’. However, no corresponding ‘Statement of Agreed Facts’ has been included in the A1 bundle. Further, the appendix numbers in the A-1 bundle do not correspond to those referred to in

4. Based on the Statement of Agreed Facts, and adopting its numbering system, we make the following findings of fact:

- (2) The Appellant was incorporated as a private company in Hong Kong in June 1997. It closed its accounts annually on 31 March.
- (3) The Appellant's principal activity as reported in the 2013 Return and the 2014 Return was development of properties.
- (4) (a) Mr D, Mr E and Ms F were all along the directors of the Appellant.  
(b) Mr D was all along the secretary of the Appellant.
- (5) Mr D passed away on 10 October 2013.
- (6) (a) Mr E was appointed as secretary of the Appellant from 10 October 2013.  
(b) Mr G was appointed as director of the Appellant from 20 April 2015.
- (7) According to the Employer's Return of Remuneration and Pensions filed by the Appellant for the year from 1 April 2014 to 31 March 2015, Mr G was the manager of the Appellant from 1 April 2014 to 31 March 2015.
- (8) (a) On 2 April 2013, the Assistant Commissioner of Inland Revenue ('the Assistant Commissioner') issued to the Appellant a notice for filing of the 2013 Return.  
(b) The extended due date for the 2013 Return was 15 November 2013 per paragraph 5 of the Circular Letter to Tax Representatives - Block Extension Scheme For Lodgement of 2012/13 Tax Returns ('the 2013 Circular Letter').  
(c) According to paragraph 15 of the 2013 Circular Letter, a further extension to 4 February 2014 would be available for the company with accounting date from 1 January 2013 to 31 March 2013 and sustained allowable losses for the year of

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the 'Statement of Agreed Facts' as filed in R1 but only correspond to the appendix numbers in the Statement of Witness as filed in A1 bundle.

We have therefore adopted the version in the R1 bundle as the agreed documents for the purposes of the 'Statement of Agreed Facts' and its Appendices.

<sup>2</sup> Which was paragraph (1) in the Statement of Agreed Facts as filed.

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assessment 2012/13 ('the Loss Extension'). The extension request must be received by the Department no later than 31 October 2013.

- (d) Mr G instructed Company C2 ('the Representative') to apply the Loss Extension. The Appellant was therefore granted a further extension to file the 2013 Return up to 4 February 2014.
- (9) (a) On 27 February 2014, as the Appellant did not submit the 2013 Return within the stipulated time, the Assessor, pursuant to section 59(3) of the Ordinance, issued to the Appellant an estimated Profits Tax Assessment for the year of assessment 2012/13 as follows:

	\$
Estimated assessable profits	<u>3,900,000</u>
Tax payable thereon	<u>633,500</u>

- (b) By a letter dated 17 March 2014, the Representative on behalf of the Appellant requested holdover of tax under the estimated Profits Tax Assessment for the year of assessment 2012/13 and applied an extension for lodgement of objection up to 31 August 2014.
- (c) By a letter dated 21 March 2014, the Assistant Commissioner rejected the request and informed the Appellant that as the 2013 Return was still outstanding, the Representative's letter dated 17 March 2014 was not a valid notice of objection.
- (10) (a) On 1 April 2014, the Assistant Commissioner issued to the Appellant a notice for filing of the 2014 Return.
- (b) Under paragraph 5 to the Circular Letter to Tax Representatives - Block Extension Scheme For Lodgement of 2013/14 Tax Returns ('the 2014 Circular Letter'), the extended due date for filing the 2014 Return was 17 November 2014.
- (c) According to paragraph 21 of the 2014 Circular Letter, a future extension of time beyond the extended due date would be granted in the most exceptional circumstances. Any request for such extension should be in writing made at least 14 days in advance of the relevant expiration date of the block extension.

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- (11) On 18 June 2014, Mr G was granted the letters of administration as an administrator of the estate of Mr D.
- (12) The Department did not receive any request from the Appellant for further extension of time for filing the 2014 Return.
- (13) (a) On 8 December 2014, as the Appellant did not submit the 2014 Return within the stipulated time to the Assessor, pursuant to section 59(3) of the Ordinance, the Assessor issued to the Appellant the following estimated Profits Tax Assessment for the year of assessment 2013/14:

	\$
Estimated assessable profits	<u>4,100,000</u>
Tax payable thereon	<u>666,500</u>

- (b) On 11 September 2015, as the 2014 Return was still outstanding, the Assessor issued to the Appellant the following Additional Estimated Profits Tax Assessment for the year of assessment 2013/14:

	\$
Additional assessable profits	<u>1,500,000</u>
Additional Tax payable thereon	<u>247,500</u>

- (14) On 6 October 2015, the Appellant submitted the following documents:
- (a) A completed 2013 Return with audited financial statements for the year ended 31 March 2013 and tax computation. In the return, assessable profits of \$9,943,765 were reported.
- (b) A completed 2014 Return with audited financial statements for the year ended 31 March 2014 and tax computation. In the return, assessable profits of \$14,768,786 were reported.
- (15) On 22 March 2016, the Assessor issued to the Appellant the following Additional Profits Tax Assessment for the year of assessment 2012/13 and Second Additional Profits Tax Assessment for the year of assessment 2013/14 in accordance with the returns:

Year of Assessment	<u>2012/13</u>	<u>2013/14</u>
	\$	\$
Profits per return	9,943,765	14,768,786
<u>Less: Profits already assessed</u>	<u>3,900,000</u>	<u>5,600,000</u>

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Year of Assessment	<u>2012/13</u>	<u>2013/14</u>
	\$	\$
Additional assessable profits	<u>6,043,765</u>	<u>9,168,786</u>
Additional tax payable thereon	<u>997,221</u>	<u>1,512,849</u>

- (16) No prosecution under section 80(2) or section 82(1) of the Ordinance has been instituted against the Appellant in respect of the failure to furnish the 2013 Return and the 2014 Return within the prescribed time allowed.
- (17) On 25 November 2016, the Commissioner of Inland Revenue ('the Commissioner') issued a notice of intention to assess additional tax under section 82A of the Ordinance to the Appellant ('the Notice') in respect of the failure to furnish the 2013 Return and the 2014 Return within the prescribed time allowed.

If the Department had not detected the failure, tax amounting to \$1,630,721 and \$2,426,849 would have been undercharged for the years of assessment 2012/13 and 2013/14 respectively. 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 any reasonable excuse for the failure. The Appellant was invited to submit written representations to the Commissioner.

- (18) By a letter dated 14 December 2016, the Representative on behalf of the Appellant made written representations to the Commissioner.
- (19) By a letter dated 18 January 2017, the Assessor asked the Appellant about the reason for applying the Loss Extension for the 2013 Return given that the 2013 Return showed assessable profits of [<sup>3</sup>]9,943,765.
- (20) By a letter dated 16 February 2017, the Representative on behalf of the Appellant replied the Assessor's letter dated 18 January 2017.
- (21) On 17 May 2017, the Commissioner, having considered and taken into account the written representations, issued to the Appellant the notice of assessment for additional tax by way of penalty under section 82A of the Ordinance for the years of assessment 2012/13 and 2013/14 in the amount of \$125,000 and \$146,000 respectively.

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<sup>3</sup> The '\$' sign was omitted in the Statement of Agreed Facts as filed but we find as fact in paragraph 5 herein that the '\$' sign must presumably have been agreed to.

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- (22) By a letter of 31 May 2017, the Representative requested the Commissioner to reduce the penalty to 10% of the additional tax charged. The Assessor over the phone advised the Representative of the appeal procedure.
- (23) By a letter of 13 June 2017, the Appellant through the Representative gave notice of appeal to the Clerk to the Board of Review against the Additional Tax Assessments for the years of assessment 2012/13 and 2013/14.
- (24) A summary of approval signatures of the Appellant’s audited financial statements for the years ended 31 March 2009 to 2014 is as follows:

Appendix	Year ended	Date of approval	Mr D	Ms F	Mr E	Mr G
21	31-03-2009	26-11-2010	✓	✓		
22	31-03-2010	26-11-2010	✓	✓		
23	31-03-2011	05-01-2012	✓		✓	
24	31-03-2012	15-11-2012	✓	✓		
9	31-03-2013	30-09-2015			✓	✓
10	31-03-2014	30-09-2015			✓	✓

- (25) A summary of the Appellant’s delay in filing of the 2013 Return and the 2014 Return and its previous failure in filing profits tax returns for the years of assessment 2008/09 to 2011/12 is as follows:

Year of assessment	Date of issue	Due date	Date of receipt	Period of delay	Tax undercharged	Action taken	Amount of fine/penalty	Percentage of additional tax on the tax undercharged
					\$		\$	
2008/09	01-04-2009	16-11-2009	06-12-2010	1 year and 21 days	83,958	Prosecution	2,500	-
2009/10	01-04-2010	15-11-2010	06-12-2010	21 days	90,393	-	-	-
2010/11	01-04-2011	15-11-2011	19-01-2012	2 months and 4 days	202,515	Additional Tax under 82A	6,500	3.20%
2011/12	02-04-2012	15-11-2012	19-11-2012	4 days	599,782	-	-	-
2012/13	02-04-2013	15-11-2013	06-10-2015	1 year 10 months and 21 days	1,630,721	Additional Tax under 82A	125,000	7.67%
2013/14	01-04-2014	17-11-2014	06-10-2015	10 months and 19 days	2,426,849	Additional Tax under 82A	146,000	6.02%

5. The ‘\$’ sign was omitted in paragraph (19) in the Statement of Agreed Facts as filed but we find as fact that the ‘\$’ sign must presumably have been agreed to by both parties.

**The Ordinance**

6. Section 51(1) provides

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*‘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—*

*(a) property tax, salaries tax or profits tax; or*

*(b) property tax, salaries tax and profits tax,*

*under Parts 2, 3, 4, 10A, 10B, and 10C.’*

7. The material parts of Section 82A provides:

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

*(a) ... ; **or***

*(b) ...; **or***

*(c) ...; or*

*(d) ***fails to comply with the requirements of a notice*** given to him under section 51(1) or (2A); **or***

*(e) ...,*

****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.’*  
[Emphasis added.]

8. 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.

### **Basis Of Appeal**

9. In its notice of appeal: ('the Notice of Appeal') the Appellant requested to reduce the additional tax imposed by 50% for the following reasons ('the Grounds of Appeal')

- 9.1. Mr D, who passed away on 10 October 2013, was solely responsible for the daily operations, negotiation of contracts and agreements and for following up the process of all businesses of the Appellant. Other directors, Mr E and Ms F, rarely managed the Appellant's business.
- 9.2. Mr G was granted the letters of administration as the administrator of the estate of Mr D on 14 October 2014. He was appointed as a director of the Appellant on 20 April 2015.
- 9.3. Mr G immediately recognized and verified all matters conducted by Mr D. He contacted banks to re-activate the accounts and to amend the signatures which were time-taking in the process. Bank confirmation was finally received in September 2015.
- 9.4. The Appellant had no intention of making late submission of tax returns.
- 9.5. The Appellant paid tax on time.

10. After stating the grounds, the Appellant's representative state in its Notice of Appeal,

'We are therefore much appreciated it if you could consider to lower the penalty to 50% of the original set as the symbolic punishment.' [Emphasis added.]

11. Implicit in such position, i.e. that the Appellant is merely asking for a reduction in amount, may well be the Appellant's acceptance that the grounds and circumstances set out in paragraph 9 herein (even if proven) would have formed no reasonable excuse for the purposes of S82A but only amounted to mitigating factors for reduction of the additional tax. Such would be a very strange position to be taken if professional advice had in fact been obtained from the Appellant's Appeal Representative.

12. The Respondent has fairly accepted that the issues for the Board's decision includes:

- 12.1. whether the Appellant has without reasonable excuse failed to furnish the 2013 Return and the 2014 Return respectively within the prescribed time allowed and thus should be assessed for additional tax under section 82A of the Ordinance; and

12.2. if the answer to paragraph 12.1 herein is in the affirmative, whether the amounts of additional tax of \$125,000 assessed for the year of assessment 2012/13 (being 7.67% of the tax undercharged) and \$146,000 assessed for the year of assessment 2013/14 (being 6.02% of the tax undercharged) are excessive.

13. It is the duty of this Board to hear the case de novo. See D35/13, (2014-15) IRBRD, vol 29, 147 at 153 paragraphs 32 and 33:)

‘32. ... Once the taxpayer invokes the statutory right of appeal, he is subject to the appeal scheme provided by the Ordinance ...

33. *Hong Kong’s appellate courts have held that the Board must*

(1) *consider the matter from the beginning, anew; and*

(2) *perform its “ultimate function” to “confirm, reduce, increase or annul the assessment” appealed against.’*

14. Thus, if the answer to paragraph 12.1 herein is in the affirmative, it is also our duty to consider what the correct amount of additional tax should be and to increase or decrease the same as we think appropriate.

### **Evidence**

15. Pursuant to the directions of the hearing given by the chairman under section 68AA the Appellant filed a signed written statement of Mr G.

16. Apart from the matters in the Statement of Agreed Facts, the signed written statement of Mr G included the following matters which were not agreed to by the Respondent:

‘(a) Background of the Company

(i) ...

(vi) *Shareholders*

	No. of shares held	Transfer shares on 30/Sept/2015	No. of shares held after transfer
Mr D	9,999	(9,999)	-
Mr E	1	1,999	2,000
Ms F	-	2,000	2,000
Mr G	-	2,000	2,000
Shareholder H	-	2,000	2,000

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	No. of shares held	Transfer shares on 30/Sept/2015	No. of shares held after transfer
Shareholder J	-	2,000	2,000
	<u>10,000</u>	<u>-</u>	<u>10,000</u>

(vii) ...

(viii) *Mr D, Key Director of the Company*

My father, Mr D was solely responsible in managing the daily operations and negotiation of contracts and agreements and following up the process of all businesses of the Company while he was alive in the position.

He passed away on 10 October 2013.

As a matter of fact, other directors Mr E and Ms F rarely managed this particular part of the Company's business.

(ix) *Mr G, a son and the administration of estate of Mr D*

I am the eldest son and was granted as the administration of estate on 18 June 2014 and registered successfully on 14 October 2014. I was appointed as an additional director on 20 April 2015 for taking over of the business matters of the Company, after negotiations with consensus among the family members.

I am now the one who is mainly responsible in dealing with all matters including daily operations, negotiation of contracts and agreements and following up the process of all businesses of the Company, replacing the position and role of my father.

It was my first time being a director of a company. I was inexperienced in managing and dealing with the matters of the Company but I am now trying hard to learn.

(b) Statement

(i) *Recognition of background and assets of the Company*

As mentioned in (a)(viii) above, my father was the only one who solely responsible in all businesses of the Company until he passed away. I was ignorant to the background and assets

of the Company, even the storage location of documents kept by my father, including profits tax return for Y/A 2012/13.

I had the “right to know” since 14 October 2014. I emphasized that before that date, all of assets of my father were frozen, including the Company. It was time-consuming and complex in the procedures of assets recognition and inheritance, approximately six months had been taken, at least.

Besides, it was also time-taking in waiting for the relevant parties such as banks for re-activating and taking-over the accounts and signatures amendment instead of my father.

It was a complicated task in the amendment process as the inheritance process is required to be completed before any amendment from banks. Hence, it is difficult to meet the tight tax deadline set by Inland Revenue Department (IRD).

(ii) *Incorrect information given by mistake but without intention*

*I regret that I mistakenly predicted there should be no sales and gain on disposals of properties of the Company for the Y/A 2012/13 and wrongly instructed the tax representative for requesting extension of filing the tax return with the ground that allowable losses predicted submitted on 31 October 2013. [Italics added]*

I instructed the tax representative for requesting further extension for Y/A 2012/13 until 31 August 2014, with stating the reasons of decease of my father and need more time for preparation of accounts and documents and also attached with the certificate of death for reference submitted on 20 March 2014. However, IRD did not accept the application.

The consideration was at the initial stage of the process of recognition and verification of all matters conducted by my father. I was ignorant to the consequences of incorrect information given and had no intention for any information hidden for purpose of understatement of tax payable.

I had actively collected the information required and contacted with relevant parties once I was successfully inherited, in order to submit the said tax returns with audited financial statements and tax computations as soon as possible.

(iii) *Accounts for Y/A 2012/13 & 2013/14 were pending until inheritance procedures completed*

I did not participate in any business of my father when he was alive. I have been already trying the best in picking-up all the matters conducted by my father. I emphasized that I could do nothing until the completion of inheritance process in which the whole procedures were handled by the legal professionals such as solicitors.

I contacted accounting and audit firms and other relevant parties such as banks and lawyers for required documents since January 2015 in order that management accounts could be well prepared and hopefully the accounts of captioned year of assessment could be finalized as soon as possible.

Thus, the management accounts and audit accounts for Y/A 2012/13 and 2013/14 were commenced since April and August 2015 respectively, duplicated bank statements were completely issued in July 2015 and bank confirmations and audited financial statements were finally issued in September 2015.

(iv)<sup>4</sup> *Additional tax under section 82A of IRO of Profits Tax for Y/A 2012/13 & 2013/14*

There should be only approximately six months taken since I was appointed as director, to furnish the audited financial accounts and file the tax returns to IRD for Y/A 2012/13, 2013/14 and 2014/15.

The failure of submission of said tax returns for the captioned years of assessment by due date is mainly due to the complex inheritance procedures as well as the bank accounts taking-over and signatures amendment. The procedures involved legal and professional techniques in which I could only be a passive role and patiently wait for the notification from lawyers and banks during the process.

I am an inexperienced director, after appointed as a director, I have made every effort to direct the Company back to normality including paying tax before due date.

I admit that portion but not all of fault should be borne by the Company leading to late submission of said tax returns. I hereby apply for lowering the penalty to 50% of the original

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<sup>4</sup> Originally wrongly numbered as (iii) in the signed written statement as filed.

set as the symbolic punishment.

Calculation is as follows:

[... table omitted ...]’

17. At the beginning of his evidence, Mr G properly drew our attention to page 3 of his signed written statement at the first paragraph of (b) (ii) and would like to correct himself:

17.1. the Paragraph states

‘I regret that I mistakenly predicted there should be no sales and gain on disposals of properties of the Company for the Y/A 2012/13 and wrongly instructed the tax representative for requesting extension of filing the tax return with the ground that allowable losses predicted submitted on 31 October 2013.’

17.2. Mr G clarified:

‘... I did not make any prediction. Secondly, I did not know any information or data because I didn’t have any data or figures. All my brothers and sisters, including me, did not ask any questions about my father’s business. Thirdly, my accountant needed such data and information, but I could not provide them. So I asked my representative to prepare the account later, and submit the return later. That’s basically the idea.’

18. That would, therefore, be tantamount to Mr G reneging on the first sentence of paragraph (8) (d) of the Statement of Agreed Facts<sup>5</sup> as well.

19. Mr G also sought to amend the numbering on page 4 of his signed written statement such that the second paragraph numbered ‘(iii)’ now reads ‘(iv)’.

20. Save for the matters in paragraphs 17.2 and 19 herein, Mr G gave evidence in chief which adopted his signed written statement.

21. The Appellant only called Mr G to give evidence.

22. None of Mr D, Mr E, and Ms F, who were at different times during the relevant period officers (whether as director or secretary) of the Appellant was called as witness to give evidence for the Appellant.

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<sup>5</sup> Para 4(8) (d) herein.

23. None of the solicitors, tax representatives, and others, who were involved at the material time was called to give evidence and no explanation was proffered for not calling them.

### **Discussions And Findings**

#### ***The 2013 Return and the 2014 Return Submitted Out of Time***

24. Given the parties' agreement in the 'Statement of Agreed Facts' the following matters are not disputed by the Appellant:

24.1. An assessor has issued a notice to the Appellant pursuant to Section 51(1) of the Ordinance for the years of assessment 2012/13 and 2013/14 respectively; (See paragraphs 4 (8) herein for the year of assessment 2012/13 and 4 (10) herein for the year of assessment 2013/14 respectively.)

24.2. The Appellant has failed to comply with the requirements of such notices within the time limit under section 82A; (See paragraph 4 (9) herein for the year of assessment 2012/13 and paragraphs 4 (12) and 4 (13) herein for the year of assessment 2013/14 respectively.)

24.3. The period of delay and the amount (and percentage) of tax undercharged are stated in the last 2 rows of the table in paragraph 4 (25) herein i.e.

(a) For the year of Assessment 2012/13 the tax undercharged was \$1,630,721 (7.6%) with a delay of 1 year, 10 months and 21 days; and

(b) For the year of Assessment 2013/14 the tax undercharged was \$2,426,849 (6.02%) with a delay of 10 months and 19 days.

#### ***No Prosecution***

25. There was also no prosecution for such failure. (See paragraph 4 (16) herein.)

#### ***Was there any Reasonable excuse?***

##### 1st Excuse

26. The Appellant alleges that '[Mr D] ... was solely responsible for the businesses of the [Appellant]. ... [Mr E and Ms F] rarely managed the business of the [Appellant]' and submits that after the death of Mr D, Mr G had a difficult time in gathering the necessary information to comply with the notices to file the 2013 Return and the 2014 Return.

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27. The Respondent takes issue with the Appellant's allegation that Mr D was solely responsible for the Appellant's business and that Mr E and Ms F rarely managed the Appellant's business.

28. The Respondent submits

28.1. Mr E and Ms F were all along directors of the Appellant. They had involvement in the Appellant's affairs before the passing away of Mr D on 10 October 2013. For instance,

- (a) On 29 November 2007, Mr E together with Mr D signed the banking services and account application form to open the Appellant's bank accounts in Bank L.
- (b) On 26 November 2010 and 15 November 2012, Ms F together with Mr D approved the Appellant's financial statements for the years ended 31 March 2009, 2010 and 2012.
- (c) On 5 January 2012, Mr E together with Mr D approved the Appellant's financial statements for the year ended 31 March 2011.

28.2. The Appellant, being a corporation, has power to file tax returns within the stipulated time despite the passing away of Mr D on 10 October 2013:

- (a) According to the memorandum and article of association of the Appellant, a director had various powers including management of the business, delegating to others the management of the company's affairs and passing written resolutions in directors' meeting.
- (b) The passing of the written resolutions by Mr E and Ms F pursuant to article 31(e) of the memorandum and article of association on 20 April 2015 to appoint Mr G as authorized signatory of the Appellant is a strong evidence that they had sufficient power and ability to file tax returns for the Appellant despite the passing away of Mr D.
- (c) On 30 September 2015, Mr E together with Mr G approved the Appellant's financial statements for the years ended 31 March 2013 and 2014.

28.3. The Appellant, being a corporation, has duty to file tax returns within the stipulated time despite the passing away of Mr D on 10 October 2013:

- (a) Under section 57(1) of the Ordinance, *'The secretary, manager and any director ... of a corporation ...shall be answerable for doing all such acts, matters, or things as are required to be done under the provisions of this Ordinance [and the Respondent submits that includes filing returns] by such corporation ...'*
- (b) Mr E and Ms F were also directors of the Appellant at all relevant times.
- (c) Mr E was appointed as the secretary of the Appellant on 10 October 2013.
- (d) Mr G was a manager of the Appellant from 1 April 2014.

28.4. Thus the passing away of Mr D is not a reasonable excuse for the lengthy delay in the present case (i.e. 1 year, 10 months and 21 days for the 2013 Return and 10 months and 19 days for the 2014 Return) for the following reasons:

- (a) 2013 Return was issued on 2 April 2013 (i.e. about 6 months before the passing away of Mr D on 10 October 2013) and was due on 15 November 2013. If the Appellant really intended to file the 2013 Return on time, the preparation and audit of the 2012/13 financial statements, even if they were not yet completed, should at least be in the final stage already. However, according to the witness statement, the management account of the Appellant for the year of assessment 2012/13 was only commenced since April 2015.
- (b) The 2014 Return was issued on 1 April 2014 and due on 17 November 2014. The Appellant did not apply for further extension of time for filing the 2014 Return.
- (c) Mr E and Ms F were all along directors of the Appellant, and Mr G was a manager of the Appellant from 1 April 2014. If the Appellant had real intention to file its tax returns on time, it should be able to do so.
- (d) The Appellant had been late in filing its tax returns for the past 4 consecutive years (i.e. from 2008/09 to 2011/12) when Mr D was still handling the Appellant's business.

29. The Appellant does not dispute the facts as revealed in the documents referred to in paragraph 28 herein.

30. When asked by the Board as to how, given that he says he had not participated in the affairs of the Company during the lifetime of his father, it was possible that he (Mr G) was in a position to know and gave evidence as to the fact that in the same period during the lifetime of his father, the other officers of the Appellant had never participated in the affairs of the Appellant, all that Mr G could say was:

‘... For my father, he is a conservative man and has quick temper. His business would have to be done by himself alone, and he will not let others to get involved in it. He lived outside independently alone. So I, my brother and sisters, none of us would ask any questions about his business; not to mention about participation.’

31. None of Mr D, Mr E, and Ms F who were at different times during the relevant period officers (as director or secretary) of the Appellant was called as witness to give evidence for the Appellant. They are the direct witnesses and could and should have been called by the Appellant.

32. Mr G may know from his personal experience that his father was a conservative man and had quick temper. But his further conclusion that the father’s business ‘would have to be done by himself alone, and he will not let others to get involved in it’ is however no more than a mere speculation given that his case was that he was not involved in the business. There is no explanation as to why he would know first-hand that ‘my brother and sisters, none of us would ask any questions about his business; not to mention about participation’. There is not even an assertion that he had known of the matters hearsay from his siblings; he did however mention that ‘I will notify my sister and brother in Hong Kong. I will invite them to drink tea and have discussion together. Also, I will call another brother in the United States. So, all things are transparent.’

33. We reject this part of Mr G’s evidence as a mere speculation on his part. We also accept the Respondent’s submission on the issue.

34. In the premises, we reject the 1st excuse.

#### 2nd Excuse

35. To the extent that the Appellant is using the fact that Mr G was granted the letters of administration as the administrator of the estate of Mr D on 14 October 2014 and was appointed as a director of the Appellant on 20 April 2015 as an excuse for the late filing, the Respondent submits:

35.1. The letters of administration were granted to Mr G on 18 June 2014 and registered in the land registry on 14 October 2014. According to the schedule of assets and liabilities of Mr D (the Deceased) as at date of death attached to the letters of administration, the estate of Mr D relevant to the present case was 9,999 shares of Appellant. In other words, the direct effect of the letters of administration was

on the Appellant's shareholding, not on its operation or management. The appointment of Mr G as administrator of the estate of Mr D, no matter on 18 June 2014 or 14 October 2014, is not a reasonable excuse for late filing of 2013 Return and 2014 Return by the Appellant.

35.2. Having regard to the following facts, the Respondent submits that the appointment of Mr G as a director of the Appellant on 20 April 2015 was also not a reasonable excuse for the late filing of the 2013 Return and the 2014 Return by the Appellant:

(a) Although Mr G was appointed as a director of the Appellant on 20 April 2015, he instructed Company C2 ('the Representative') to apply the Loss Extension for the 2013 Return on 31 October 2013. Furthermore, he was a manager of the Appellant from 1 April 2014. He paid tax for the Appellant on 14 July 2014. He contacted accounting and audit firms, bank and lawyer for the required documents since January 2015.

It is clear that he was fully aware that the 2013 Return was outstanding no later than 31 October 2013 and had involvement in the Appellant's affairs before he was appointed as a director of the Appellant on 20 April 2015.

(b) Mr E and Ms F were all along directors of the Appellant. They had power and duty to file the 2013 Return and the 2014 Return for the Appellant but they did not do so.

36. The Respondent's submissions are well-founded, valid and convincing. This Board is dealing with the obligation of the Appellant, which is a corporate body, to file tax return. We are not concerned with the obligation of an individual. Whether grant of probate or letters of administration of the estate of any individual has been made does not have any logical relationship on the ability of a corporate body to file its tax return. Neither has this been explained or demonstrated by the Appellant to be relevant save and except by making the mere allegation that somehow a logical relationship exists.

37. We therefore also reject the 2nd excuse as a reasonable excuse.

### 3rd Excuse

38. The 3rd excuse is that the Appellant took time to obtain bank confirmation which was only finally received in September 2015.

39. The Respondent submits

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39.1. Mr E and Ms F were all along the directors of the Appellant. They passed written resolutions to appoint Mr G as the authorized signatory of the Appellant on 20 April 2015. There is no information to show why they had not appointed Mr G or other person to obtain the bank confirmation earlier.

39.2. The Appellant's financial statements for the years ended 31 March 2013 and 2014 were both qualified by the auditor, Messrs M Y Lau & Co, in reliance of the limitation of the audit work on the 'bank balance' as follows:

(a) 'Our audit work is limited as we had not been able to obtain the independent confirmation with the bank in respect of the total (bank) balances'

(i) we have not obtained all the information and explanations that we considered necessary for the purpose of our audit; and

(ii) we were unable to determine whether proper books and accounts had been kept.'

39.3. It is doubtful whether the considerable time (if so) spent on obtaining the bank confirmation is the real reason leading to the late filings.

40. We agree with the submissions of the Respondent. Here again, we fail to see any logical connection between the grant of probate or administration and the inability (if any) of the Appellant in obtaining its own bank records.

41. None of the solicitors, tax representatives, banks and others involved at the material time was called to give evidence and no explanation was proffered for not calling them.

42. We therefore reject the 3rd excuse with equal force.

4th Excuse

43. The 4th excuse is that there were 2 litigation cases which had a significant adverse impact on the Appellant's ability to file the returns in time.

44. But none of the grounds of appeal, the Statement of Agreed Fact, and the Witness Statement of Mr G as filed ever referred to any litigation or any case having any impact on the late filing of the relevant returns.

45. The Appellant's Hearing Representative only raised for the first time the question of litigation during her opening at the hearing submitting

‘ ... after the father passed away, due to the complex inheritance procedures, for the late submission of the profit tax return, the administration of estate was grant to the [Mr G] on 18 June 2014. It’s finally registered successfully is on 14 October 2014.

Why the date is October is because **there are court case** between his father’s partner and [Mr G]. So, that involved legal and professional techniques between this procedure. So at this moment, their family become a passive role. They can’t do anything to report the profit to Inland Revenue because the administrator is not grant to [Mr G]. So due to this complex procedures, they take around one year to complete.’

46. Mr G gave evidence as follows

*‘In the past, all the documents and bank affairs or matters or relevant documents of my father’s company were not in the knowledge of myself and my brothers and sisters. We did not know about those information. When dealing with my father estate, there were two issues. Firstly, that would be the lawsuit in the High Court. Not until 16 October 2014, the relevant estate administration documents were ready. There will be a significant delay of time because of those several issues. I didn’t have any figures.’*

47. Apart from the very cryptic evidence of the Witness stated above, the court cases only featured in the documents filed as follows:

47.1. The Letter from the Appellant’s Appeal Representative to the Respondent dated 28 August 2017 when the Appellant proposed to add the following to the Statement of Agreed Facts (which was ultimately rejected by the Respondent):

‘For the period from 20 March 2014 to 30 June 2015, [Mr G] was in the process of accusing [Mr K] on behalf of the Company, for the cancellation of caveat in order that the court could issue the deceased’s estates of [Mr D] to him as soon as possible (Re Court case HCAP 10/2014) ... ’

47.2. Item 10 (d) of the Additional Schedule of Assets and Liabilities of the estate of of Mr D,

*‘10 Chose in Action*

(a) ...

(d) *Claim against [Mr K] for HK\$717,400.00 being 1/2 share of the compensation for settlement of and legal costs in respect*

*of High Court Action No 949 of 2009'*

48. In any event, as submitted by the Respondent
- 48.1. although it was stated in the Representative's letter dated 29 August 2017 that Mr G was in legal proceeding with Mr K on the estate of Mr D during the period from 20 March 2014 to 30 June 2015, there is no evidence that this was the reason leading to the late submissions of the 2013 Return and the 2014 Return by the Appellant. Furthermore, it is also not a ground of appeal properly raised and included in the notice of appeal and therefore could not be relied on by the Appellant without the consent of the Board.<sup>6</sup>
- 48.2. in the oral closing submission, even though the 2 cases are still outstanding, apparently the Appellant could file the profits tax return for 2012 to 2013 up to 2015-16 without delay. It is thus clear that the legal proceedings should not constitute the real reason of the late submission of the returns.
49. As mentioned in the hearing, we have only allowed the evidence to be given on a *de bene esse* basis. In the end, we are not persuaded under section 66(3) that this new ground should be allowed. In any event, we further find that neither of the 2 court cases could have any adverse impact on the Appellant's ability to file the tax return in time and are irrelevant.
50. We accordingly also reject the 4th excuse.

Conclusion on Excuses

51. We would further like to add that in D16/96, IRBRD, vol 11, 351, although the Board accepted that the taxpayer had difficulty in finalizing its accounts because of delay it experienced with the subcontractors in the mainland of China, it considered that the failure to lodge tax return within the time extended was not unavoidable. The Board pointed out that compliance with the provisions of the Ordinance was not optional and it was not a matter of simply 'doing your best'<sup>7</sup>
52. Contrary to the submissions made by the Appellant's Hearing Representative in her oral closing that 'The problem is about [Mr E] and [Ms F], they do not perform their duty as directors.', it is clear that what is at issue in the case before this Board is not the personal obligations of Mr G but the corporate duty of the Appellant.
53. We have for the reasons above found against the Appellant on all 4 excuses.

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<sup>6</sup> Section 66(3)

<sup>7</sup> IRBRD 351 at 356 paragraph 2.

## Quantum

### *Starting Point*

54. This Board has to decide whether the amount of additional tax of \$125,000 assessed for the year of assessment 2012/13 (being 7.67% of the tax undercharged) and \$146,000 assessed for the year of assessment 2013/14 (being 6.02% of the tax undercharged) is excessive and if not what the correct quantum should be.

55. The taxpayer in D112/99, IRBRD, vol 14, 642 was late in submission of tax return by 45 days and was imposed additional tax at 8.69% of tax undercharged. The Board dismissed the appeal and held the following:

*‘33. As in various past decisions of this Board, we adopt the penalty starting point for late filing of return at 10% of the tax undercharged or tax that would have been undercharged if the taxpayer is a first offender, the delay is unintentional and the Revenue has suffered no loss.’*

56. The Board in D118/02, IRBRD, vol 18, 940 held that the overall circumstances of each case should be considered in determining the level of additional tax. Factors that affected the level of additional tax included the following<sup>8</sup>:

- ‘(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 this Board.’*

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<sup>8</sup> Paragraph 44 of the decision.

57. Having taken into account these cases, we adopt 10% as the starting point and proceed to consider if there exists any aggravating and/or mitigating factor.

**Aggravating and Mitigating Factors**

58. In D35/13, (2014-15) IRBRD, vol 29, 147 at 157 paragraph 48(k) ‘A second or further contravention was an aggravating factor. If a taxpayer did not get the message from the Revenue’s or the Board’s treatment of the first or earlier contraventions and did not take proper steps to ensure full and complete reporting of income, a heavier penalty should, as a general rule, be imposed for subsequent contraventions.’

59. In D11/93, IRBRD, vol 8, 143, the fact that the assessor has raised an estimated assessment in the absence of a return did not mitigate the taxpayer’s delay in filing a return; this fact was immaterial when assessing the quantum of additional tax.

60. In D125/98, IRBRD, vol 13, 574, the intention to defraud or delay payment of tax was an aggravating factor; its absence was not a mitigating factor; the fact of improved compliance did not itself constitute a reasonable excuse.

61. In D15/09, (2009-10) IRBRD vol 24, 461, the taxpayer was a repeated offender of late submission of return. It appealed against additional tax of \$20,000 (being 0.018% of the tax undercharged) on the ground that the account team of their [a name country] office just started to handle the set of account of [a named] business and it took the taxpayer extra time to obtain all necessary information for issuance of audited financial statement for the year. Furthermore, it had no intention to delay the return filing. The Board held that they were not reasonable excuses nor mitigating factors for late filing with following reasons:

‘34. Further and in any event, the asserted factual basis, even if established, did not constitute any reasonable excuse. The appellant had a statutory duty under section 51C to keep sufficient records in the English or Chinese language of its income and expenditure to enable the assessable profits of its business to be readily ascertained. The appellant knew as early as mid-2007 that its overseas accounting team was new. If it had any or any real intention to file its profits tax return on time, it should have taken proper and effective steps since mid-2007 to put its house in order. The appellant had December year ends and by the extended due date, it had more than 7 ½ months since 31 December 2007 to finalise its audited financial statements and tax computations and to submit the profits tax return. Failure to do so evidences its disrespect for statutory duties and disregard of the Commissioner’s advice or warning.’

‘38. None of the points raised in the grounds of appeal is a mitigating factor having regard to the circumstances in this case:

- (1) *New accounting team – We repeat paragraph 34 above.*
- (2) *No intention to delay the return filing – The relevant issue is whether the appellant intended to file its profits tax return on time and whether it had exercised due diligence in complying with its reporting duties. In the circumstances of this case, the appellant had plainly not exercised due diligence and its attitude was clearly cavalier.’*

62. In D35/13, (2014-15) IRBRD, vol 29, 147, the fact that the Revenue suffered no financial loss was not a mitigating factor. It was on the other hand an aggravating factor if the Revenue had suffered financial loss. [See paragraph 48(g) of that decision.]

63. We note that it is not the first time that the Appellant was late filing its tax returns but as the Respondent has not insisted, we have decided not to take any such late filing into account as a factor aggravating the penalty.

64. In such circumstances we do not find the additional tax imposed to be excessive in any way or at all.

### ***Interest***

65. As this is a late filing case and the late filing has not prevented the Respondent from issuing assessment in the absence of tax returns, and the Respondent is not asking for interest, we exercise our discretion not to impose any interest.

### **Procedural Issues**

66. Lastly, we would like to express at this juncture our concerns over the competence of the professional parties engaged by the Appellant and whether they have rendered the Board the assistance on par with the usual professional standard to be expected of the parties to an appeal.

67. The performance of the Appellant’s Appeal Representative and the Appellant’s Hearing Representative are far from satisfactory.

68. In so far as the Appellant’s Appeal Representative is concerned, we reiterate our observations in the paragraph concerning

68.1. the state of the bundles and the pagination system adopted,

68.2. and we also reiterate our observations in paragraphs 49 herein concerning the grounds.

69. In so far as the Appellant’s Hearing Representative is concerned,

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69.1. She does not have a proper grasp of the procedures involved in the Board hearing, the need to have evidence before a point could be submitted, the standard required for examination in chief and the onus of proof.

69.2. She treated allegations as self-evident proof of the matters alleged and attempted almost to give evidence in her capacity as the representative for a number of times.

70. We observe that there could well be potential questions of professional competence issues concerning those involved namely the Representative, the solicitors in advising the Appellant in its filing of the relevant tax returns and concerning the Appellant's Appeal Representative and the Appellant's Hearing Representative in the conduct of the appeal before us. As the Board is not the proper forum to determine such issues and such advisors and the representatives in question have not had the chance to of presenting their respective sides of the case before us, we make no findings on any of the said issues.

71. Sections 4 and 68(5) of the Ordinance impose duty of confidentiality on all involved as regards these proceedings. The exception under section 68(5) relates only to report of the appeal

*'... in such publications as may be approved by the Secretary for Justice in such a manner that the **identity of the appellant** is not disclosed'*

and the practice extends to redacting any information which would lead to the appellant being identified. Such confidentiality is not something which can be waived by the appellant.

72. Given the duty of confidentiality, we would not be in a position to refer the conduct of any of the professional advisors involved to the relevant professional body concerned. But even if the identities of the professional advisors could be disclosed in a report under section 68(5), the relevant professional advisor may be severely prejudiced in any such disciplinary proceedings in not being able to identify the Appellant and deal with the evidence relating to what happened with the Appellant in the proceedings before this Board. The Appellant may likewise be hampered in any attempt to recover loss from its professional advisors if it is able to establish that there is any default in the conduct of this appeal by them.

73. It is hoped that the administration may look into the matter and consider working with the professional bodies to establish procedures that would both cater for the protection of confidentiality of the taxpayer and allow the professional bodies to deal with disciplinary matters in camera in appropriate cases so that the taxpayers could be sufficiently protected.

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74. Hitherto, the names of the appellant's representative in Board cases are published to state the fact of their having appeared without disclosing the identity of the taxpayers involved. However, the present case is the first case where adverse comments which may call for disciplinary investigation on those representing an appellant have been made. We would direct that without their consent the names of the Representative, Appellant's Appeal Representative, and the Appellant's Hearing Representative shall not be disclosed in the reported and redacted version of the decision to be published. Such restraint on the Board's part should not be automatically expected in the future.

**Costs**

75. We were originally minded to order the Appellant to pay costs pursuant to sections 82B(3) and 68(9) which will be added to the Assessment.

76. But in this connection we note the inability to refer the matter to the professional bodies involved and thus the inability of the Appellant to recover from the professional advisers.

77. We refrain from making such costs order.

**Conclusion And Disposal**

78. The appeal is dismissed and the additional tax affirmed.