Case No. D8/18

Penalty tax – section 51(1) and 82A of the Inland Revenue Ordinance – failure to furnish tax return within time allowed – reasonable excuse for the delay – whether the additional tax is excessive – statutory reporting duties cannot be delegated – no duty on the part of the Department to warn a taxpayer before invoking section 82A – normal penalty of approximately 10% for late filing of returns – frivolous and vexatious appeal

Panel: Chow Wai Shun (chairman), Kwan Wai Yi Janet and Lee Tsung Wah Jonathan.

Date of hearing: 7 June 2018.
Date of decision: 6 July 2018.

The Appellant appealed against the assessment of additional tax imposed under section 82A of the Inland Revenue Ordinance for the year of assessment. The assessment was imposed for the failure of the Appellant to furnish his tax return within time allowed pursuant to a notice given to him under section 51(1) of the Ordinance. The additional tax imposed represents 10.04% of the amount of tax which would have been undercharged if the failure had not been detected.

It is not in dispute that the Appellant was late in filing the Return. The issues are whether the Appellant has any reasonable excuse for the delay and, if not whether the additional tax is excessive.

Held:

1. The importance of timely, complete, true and correct reporting by taxpayers has been repeatedly stressed by this Board (D10/12, (2012-13) IRBRD, vol 27, 280 and D30/13, (2014-15) IRBRD, vol 29, 16 followed).

2. It is the duty of taxpayers to regulate their own affairs in such a way so as to comply with the requirements of the Ordinance (D49/08, (2008-09) IRBRD, vol 23, 934 followed). Their statutory reporting duties cannot be delegated to others, including the auditors, where the choice of agents was made by the taxpayers, not by the Department. As such, a taxpayer could not escape liability for penalty tax by delegating to others and it is difficult to see how taxpayers who blame other people for their own breaches and argue that it is unfair to penalize them could hope to win the sympathy of the Board (D10/12, (2012-13) IRBRD followed).

3. It is no duty on the part of the Department to warn a taxpayer before invoking section 82A. We do not think that there is a reciprocal duty of

informing a taxpayer the decision not to invoke section 82A either (D10/12, (2012-13) IRBRD followed).

4. 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. This Board has generally accepted the normal penalty of approximately 10% for late filing of returns in the absence of any deliberate non-compliance while regarding repeated breaches an aggravating factor (D34/09, (2009-10) IRBRD, vol 24, 663, D25/11, (2011-12) IRBRD, vol 26, 426 and D20/11, (2011-12) IRBRD, vol 26, 352 followed and D21/11, (2011-12) IRBRD, vol 26, 367, D30/13, (2014-15) IRBRD, vol 29, 16, D20/11, (2011-12) IRBRD, vol 26, 352 and D10/12, (2012-13) IRBRD, vol 27, 280 considered).

5. The fact that the Department suffered no financial loss is not a mitigating factor while prompt payment of tax is another obligation of a taxpayer under the Ordinance and so is not a relevant factor (D10/12, (2012-13) IRBRD followed).

6. This Board may impose an order of costs pursuant to section 68(9) of the Ordinance against an appellant if it finds the appeal frivolous and vexatious or an abuse of the process of appeal. Further taxpayers pursuing appeals on grounds consistently rejected by the Bard in reported decisions should expect a costs order against them (D16/07, (2007-08) IRBRD, vol 22, 454 and D44/09, (2009-10) IRBRD, vol 24, 864 followed).

7. The Board has its statutory functions to perform in accordance with the Ordinance. It is not the appropriate forum to seek suggestion and advice for taxpayers like the appellant who might wish to consider pursuing any remedy against their professional agents for the latter's omission or mistake.

Appeal dismissed and costs order in the amount of $25,000 imposed.

Cases referred to:

D10/12, (2012-13) IRBRD, vol 27, 280
D30/13, (2014-15) IRBRD, vol 29, 16
D49/08, (2008-09) IRBRD, vol 23, 934
D34/09, (2009-10) IRBRD, vol 24, 663
D25/11, (2011-12) IRBRD, vol 26, 426
D20/11, (2011-12) IRBRD, vol 26, 352
D21/11, (2011-12) IRBRD, vol 26, 367
D20/16, (2016-17) IRBRD, vol 31, 338
D16/07, (2007-08) IRBRD, vol 22, 454
D44/09, (2009-10) IRBRD, vol 24, 864

Appellant in person.
Yeung Siu Fai and Tang Kim Kam, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. The Appellant appealed against the assessment of additional tax imposed under section 82A of the Inland Revenue Ordinance (Chapter 112) ('the Ordinance') for the year of assessment 2015/16 issued on 28 December 2017 ('the Assessment'). The Assessment was imposed for the failure by the Appellant to furnish his Tax Return – Individuals for the year of assessment 2015/16 ('the Return') within time allowed pursuant to a notice given to him under section 51(1) of the Ordinance. The additional tax so imposed represents 10.04% of the amount of tax which would have been undercharged if the failure had not been detected.

The Facts

2. With reference to the statement of facts filed by the Respondent and the evidence given by the Appellant at the hearing, we made the following finding of facts:

(1) The Appellant commenced his insurance business in Hong Kong under a sole proprietorship in name of Company A ('the Business') on 1 April 2000. The Appellant closes the accounts of the Business annually on 31 March.

(2) The Appellant had appointed Pentagon Business Consultants Limited as his authorized representative ('the former Tax Representative') since the year of assessment 2001/02.

(3) On 3 May 2016, the Inland Revenue Department ('the Department') issued a notice to the Appellant for filing the Return. The Appellant was required to complete and submit the Return within three months from 3 May 2016.

(4) By reason of the Block Extension Scheme for lodgment of 2015/16 tax returns, the due date for filing the Return was extended to 3 October 2016 ('the Extended Due Date').

(5) On 18 October 2016, the Department received the Return together with tax computation and financial statements for the year ended 31 March 2016 of the Business. The Return was dated 17 October 2016. In the financial statements, the Appellant reported total commission income of $6,887,278. After deducting expenses, profit

before tax was $3,615,804. According to the tax computation submitted, the assessable profits amounted to $3,653,723 after adjustments.

(6) Based on the assessable profits reported in the Return, the Assessor issued to the Appellant a notice of Profits Tax Assessment for the year of assessment 2015/16 with assessable profits of $3,653,723 and tax payable of $528,058. The Appellant did not object to the Profits Tax Assessment issued on 4 November 2016.

(7) On 26 September 2017, the Deputy Commissioner of the Department issued to the Appellant a notice of intention to assess additional tax under section 82A(4) of the Ordinance ('the Notice') in respect of his failure to file the Return by the Extended Due Date. 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 he did not have a reasonable excuse for such failure. The Deputy Commissioner invited the Appellant to submit written representations.

(8) By a letter dated 20 October 2017, the former Tax Representative made representations to the Deputy Commissioner in response to the Notice ('First Representation Letter'). Disagreeing with what the former Tax Representative said in the First Representation Letter, the Appellant made representations to the Deputy Commissioner in response to the Notice by a letter dated 23 October 2017 ('Second Representation Letter').

(9) After considering the Appellant's representations, on 28 December 2017, the Deputy Commissioner issued to the Appellant a notice of assessment to additional tax by way of penalty under section 82A of the Ordinance for the year of assessment 2015/16 in the amount of $53,000.

(10) No prosecution under section 80(2) or 82(1) of the Ordinance has been instituted against the Appellant in respect of this incident.

(11) The Appellant was assessed to penalty tax for failure to submit his Tax Return – Individuals for the year of assessment 2010/11 within the time allowed, with the relevant particulars as follows:

Year of assessment	2010/11
Date of issue of the Return	3 May 2011
Extended Due Date for filing the Return	3 October 2011
Date of the Return	25 November 2011
Date of receipt of the Return	1 December 2011

Year of assessment	2010/11
Delay in filing the Return	1 month and 28 days
Tax undercharged	$222,849
Additional tax by way of penalty imposed	$15,000
Percentage of additional tax on tax undercharged	6.73%

(12) Unbeknown to the Appellant until exchange of documents for this hearing, the Appellant also filed his tax returns for the years of assessment 2012/13 and 2013/14 late, with the relevant particulars as follows, but no penal action was taken against him:

Year of assessment	2012/13	2013/14
Date of issue of the Return	2 May 2013	2 May 2014
Extended Due Date for filing the Return	2 October 2013	3 October 2014
Date of the Return	3 October 2013	10 October 2014
Date of receipt of the Return	7 October 2013	13 October 2014
Delay in filing the Return	5 days	10 days
Tax undercharged	$518,296	$742,050

Grounds of appeal

3. The Appellant's grounds of appeal as stated in his notice of appeal received by this Board on 23 January 2018 can be summarised as follows:

(1) The delay was the responsibility of the Former Tax Representative whom he trusted before this incident.

(2) He had done his very best to avoid it happen again, after the first similar occasion with regard to the filing of his 2010/11 tax return for which the additional tax was settled by the Former Tax Representative, by sending all relevant information over as early as in April.

(3) He had no idea of the reporting deadline and the Former Tax Representative had never alerted him at all.

(4) This incident might be considered his first offence or even not so because the delay was caused by the Former Tax Representative.

(5) Without any delay, he paid all tax payable and the Department had not incurred any additional administrative cost.

(6) He had fired the Former Tax Representative (which took place consequential to the latter's representation to the notice of intention to assess additional tax given under section 82A(4) and, in his oral submission at the hearing, he would have done so even earlier if he

had been notified of either of the other two similar occasions once it occurred) and so there would be no reason for similar non-compliance again.

The relevant provision of the Ordinance

4. 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 additional tax of an amount not exceeding treble the amount of the tax which has been undercharged in consequence of such failure or which would have been undercharged if such failure had not been detected.

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

6. Section 82B(3) provides, *inter alia*, that section 68 so far as it is applicable has effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.

7. 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.

8. 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 1 of Schedule 5, which shall be added to the tax charged and recovered therewith.*'

9. The amount specified in Part 1 of Schedule 5 is $25,000.

Decision

10. It is not in dispute that the Appellant was late in filing the Return. The issues are whether the Appellant has any reasonable excuse for the delay and, if not, whether the additional tax is excessive.

11. The importance of timely, complete, true and correct reporting by taxpayers has been repeatedly stressed by this Board: see, for examples, D10/12, (2012-13) IRBRD, vol 27, 280 and D30/13, (2014-15) IRBRD, vol 29, 16. Did the Appellant have any reasonable excuse for such delay in furnishing the Return?

12. In essence, the Appellant put the blame to the former Tax Representative and repeatedly stressed that he had done his very best to ensure timely compliance. In his evidence, the Appellant submitted that he sent, via his secretary, documents to the former Tax Representative as early as in April 2016, within a month after the end of the relevant financial year. He also produced the travel records of both himself and his wife issued by the Immigration Department, confirming that during the relevant period he nor his wife was outside Hong Kong for any considerable period of time such that they remained contactable to facilitate any enquiry that the former Tax Representation might have and any action they might be asked to take. Further, he was not aware of, or made aware of by the former Tax Representative, the reporting deadline. It was the Appellant's submission that not having heard from the former Tax Representative meant that things were in their good hands. In his evidence, he told this panel of his honest belief that his secretary had made follow-up calls to the former Tax Representative asking for progress but he would have found it petty to be constantly on the latter's shoulder.

13. While we cast no doubt on the evidence given by the Appellant, we hold none of these would amount to any reasonable excuse under section 82A of the Ordinance.

14. This Board has made it clear, time and again, that it is the duty of taxpayers to regulate their own affairs in such a way so as to comply with the requirements of the Ordinance: D49/08, (2008-09) IRBRD, vol 23, 934, paragraph 40. Their statutory reporting duties cannot be delegated to others, including the auditors, where the choice of agents was made by the taxpayers, not by the Department: D10/12, above, paragraph 57. As such, a taxpayer could not escape liability for penalty tax by delegating to others: D10/12, paragraph 39, and it is difficult to see how taxpayers who blame other people for their own breaches and argue that it is unfair to penalize them could hope to win the sympathy of the Board: D10/12, paragraph 42.

15. Although the Appellant expressed concern about the relatively small font size of, albeit printed in bold, the reporting deadlines on the front page of the Return, he could read them when he was pinpointed to them during the cross-examination. He also acknowledged that he could recall the usual one-month deadline for individual taxpayers since he was under an employment before running his sole proprietorship. In our view, he could have noted the three-month deadline if he had attended to it.

16. In answering a series of questions from the panel, the Appellant confirmed that he sent the blank Return over via his secretary to the former Tax Representative as soon as he received it from the Department. He also confirmed that the Return was not filled out by himself but he signed on it undated after the former Tax Representative completed it and sent the same back to him together with the accounts and financial statement of the Business. He believed that the date chop was subsequently affixed by the former Tax Representative. He had never asked for a dated copy for his own record, which we are of the view that he should have, probably together with a copy of the covering letter that the former Tax Representative addressed to the Respondent. It appears to us that the Appellant had never changed his approach and practice even after the imposition of additional tax for late return for the year of assessment 2010/11.

17. At one point of time during the hearing, the Appellant attempted to blame the Department for not having brought to his attention earlier of the two late returns for the years of assessment 2012/13 and 2013/14. Had he been informed of those two incidents, he would have fired the former Tax Representative much earlier and the basis on which the additional tax in dispute was charged would not have occurred.

18. It is clear that there is no duty on the part of the Department to warn a taxpayer before invoking section 82A: D10/12, above, paragraph 41(e). We do not think that there is a reciprocal duty of informing a taxpayer the decision not to invoke section 82A either. Because of the relatively short delay of 5 and 10 days respectively in those two years of assessment, it is within the discretion of the Department not to have taken any penal action against the Appellant. The attempt only reinforces our view that the Appellant intended to escape his liability for penalty tax by shifting the blame to others.

19. From the analysis above, we do not find that the Appellant has any reasonable excuse for late filing of the Return.

20. Is the additional tax excessive or incorrect?

21. 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. This Board has generally accepted the normal penalty of approximately 10% for late filing of returns in the absence of any deliberate non-compliance while regarding repeated breaches an aggravating factor: D34/09, (2009-10) IRBRD, vol 24, 663 and D25/11, (2011-12) IRBRD, vol 26, 426. For example, in D20/11, (2011-12) IRBRD, vol 26, 352, the taxpayer who had been warned by the Department for late return was late again by 2 months and 18 days. The additional tax equivalent to 13.31% of the tax which would have been undercharged was raised to 20%. Similarly, in D21/11, (2011-12) IRBRD, vol 26, 367, the additional tax was raised from 7% to 20% of the tax undercharged. On the other hand, the Respondent also drew to our attention a few other instances where the Board tended to be more lenient. For example, in D30/13, (2014-15) IRBRD, vol 29, 16, the taxpayer was late in the submission of tax returns in 3 out of 4 consecutive years of assessments while on the last occasion the delay was 59 days. The additional tax represented 17.55% of the tax which would have been undercharged. Similarly, in D20/16, (2016-17) IRRBD, vol 31, 338, the taxpayer was late for the third time within 5 years and was assessed additional tax equivalent to 15.67% of the tax undercharged. Lastly, in D10/12, (2012-13) IRBRD, vol 27, 280, the corporate taxpayer with a long track record of compliance was late by 1 month and 26 days. The additional tax was raised from just 3% to 6%.

22. This is not the Appellant's first contravention. The fact that the additional tax imposed on the Appellant for the year of assessment 2010/11 was actually paid by the former Tax Representative is a matter between the two of them. Vis-à-vis the Department, the breach was committed by the Appellant.

23. The Appellant submitted that he had paid all tax payable without delay and there was no additional administrative cost incurred by the Department. However, the fact that the Department suffered no financial loss is not a mitigating factor while prompt payment of tax is another obligation of a taxpayer under the Ordinance and so is not a relevant factor: D10/12, above, paragraphs 41(f) and (g).

24. In light of the decisions above and the facts of this appeal, we do not consider the additional tax imposed on the Appellant, which was 10.04% of the tax undercharged, is incorrect or excessive.

Disposition of the appeal

25. By reasons of the above, we dismiss the appeal and confirm the imposition of an additional tax against the Appellant in the sum of $53,000 for the year of assessment 2015/16.

Costs order

26. This Board may impose an order of costs pursuant to section 68(9) of the Ordinance against an appellant if it finds the appeal frivolous and vexatious or an abuse of the process of appeal: D16/07, (2007-08) IRBRD, vol 22, 454, paragraph 128(o). Further, taxpayers pursuing appeals on grounds consistently rejected by the Board in reported decisions should expect a costs order against them: D44/09, (2009-10) IRBRD, vol 24, 864, paragraph 24.

27. From the analysis above, this appeal was without merits. We consider this to be frivolous and vexatious.

28. In his submission, the Appellant told the panel that he was advised by some of his friends not to pursue this appeal because of the real and high risk of losing it. Despite his acknowledgment of the risk associated with this appeal, he chose to continue in order to see what suggestion and advice this Board may offer to taxpayers like him who suffered for the mistake committed by others.

29. This Board has its statutory functions to perform in accordance with the Ordinance. It is not the appropriate forum to seek suggestion and advice for taxpayers like the Appellant who might wish to consider pursuing any remedy against their professional agents for the latter's omission or mistake.

30. We, therefore, also consider this appeal a waste of public resources.

31. All the decisions of this Board cited above come with a costs order in the amount specified in Part 1 of Schedule 5 at the relevant times. In rare cases has this Board ordered costs below the specified amount. The specified amount used to be $5,000 but it has been increased to HK$25,000 since April 2016.

32. We cannot find any guidance as to whether the amount of costs needs be proportionate to the amount of additional tax. In fact, we do believe that even the current specified amount is far from sufficient to cover the full costs of this Board for a half-day hearing like this.

33. Therefore, we order the Appellant to pay costs pursuant to section 68(9) of the Ordinance in the sum of $25,000, which sum should be added to the additional tax as increased and recovered therewith.