

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D100/97

Additional tax – delay in submitting profits tax return – duty of the taxpayer to regulate its own affairs to comply with the Inland Revenue Ordinance – whether additional tax of 9.83% excessive – burden of proof on taxpayer.

Panel: Kenneth Kwok Hing Wai SC (chairman), Cheung Wai Hing and David A Morris.

Date of hearing: 9 October 1996.

Date of decision: 26 January 1998.

The taxpayer delayed submitting its profits tax return for 38 days and was assessed by the Commissioner to additional tax under section 82A of the Inland Revenue Ordinance ('the IRO') in the sum of \$18,000 ('the Assessment') which was 9.83% of the amount of the tax involved.

The taxpayer appealed on the grounds that the delay was due to its directors not having the time to finalise the company accounts and that the Assessment of 9.83% was excessive.

Held:

- (1) It is the duty of the taxpayer to regulate its own affairs in such a way so as to comply with the requirements of the IRO.
- (2) The Board (by a majority, one member dissenting) found that the taxpayer had failed to discharge the burden of proving that the Assessment was excessive (sections 82B(3) and 68(4) of the IRO).

Appeal dismissed.

Cases referred to:

D64/94, IRBRD, vol 9, 361
D72/94, IRBRD, vol 10, 32
D53/93, IRBRD, vol 8, 383
D33/89, IRBRD, vol 4, 359

Fung Song Hong for the Commissioner of Inland Revenue.

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Shing Kwan Siu Ping of Messrs M S P Shing & Co for the taxpayer.

Decision:

1. This is an appeal against the assessment dated 5 February 1996 by Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance (the IRO), Chapter 112 in the sum of \$18,000.

2. The year of assessment is 1994/95 ('the Relevant Year of Assessment'). The relevant provision is section 82A(1)(d) in respect of the requirements of the notice given to the Taxpayer under section 51(1) of the IRO to furnish profits tax return. The amount of tax involved is \$183,161. \$18,000 is 9.83% of the amount of tax involved. The delay is 38 days.

The facts

3. From the agreed 'Statement of Facts', and the evidence before us at the hearing, we make the following findings of fact.

3.1 The Taxpayer was incorporated in Hong Kong on 9 July 1992 and commenced business on 1 September 1992. It was engaged in import, export and general trading.

3.2 The Taxpayer closes its accounts annually on 31 December.

3.3 The Taxpayer has never been late in the submission of profits tax returns.

3.4 On 3 April 1995, a profits tax return for the Relevant Year of Assessment ('the Return') was issued to the Taxpayer under section 51(1) of the IRO, requiring the Taxpayer to complete and return the same within one month from that date. However, under the block extension scheme of the Inland Revenue Department ('IRD'), the deadline was extended to 31 July 1995.

3.5 On 18 August 1995, and in the absence of a profits tax return, the assessor raised an estimated profits tax assessment for the Relevant Year of Assessment in the sum of \$370,000 with tax payable thereon of \$61,050. The due dates under the estimated assessments were 20 November 1995 and 12 February 1996.

3.6 On 6 September 1995, the Taxpayer's representative, ('the Representative') lodged valid objection notice to the estimated assessment on the ground that the estimated assessment was lower than the actual assessable profit and furnished a duly completed return in respect of the Relevant Year of Assessment showing assessable profits of \$1,110,067 in support. The Return was received by IRD on 7 September 1995. The delay is thus 38 days.

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3.7 The Return was accepted by IRD as correct and on 22 September 1995, the assessor raised revised profits tax assessment for the Relevant Year of Assessment with assessable profits of \$1,110,067, with tax payable thereon of \$183,163. The deadlines for payment of tax were 28 November 1995 and 22 February 1996, and the Taxpayer paid tax in time.

3.8 On 2 January 1996, the Commissioner gave notice to the Taxpayer in terms of section 82A(4) of the IRO that he proposed to assess the Taxpayer to additional tax by way of penalty for the Relevant Year of Assessment in respect of the failure to comply with the requirements of the notice given to it under section 51(1) of the IRO.

3.9 On 9 January 1996, the Representative submitted written representations to the Commissioner.

3.10 On 5 February 1996, the Commissioner, having considered and taken into account the Representations, assessed the Taxpayer to additional tax under section 82A of the IRO in the sum of \$18,000 for the Relevant Year of Assessment ('the Assessment').

3.11 The due date for payment under the Assessment was 7 March 1996 and additional tax was duly paid by the Taxpayer in time.

3.12 On 15 February 1996, the Taxpayer lodged its appeal against the Assessment.

The appeal

4. The reasons given by the Taxpayer for the 38 days' delay were that:

(a) due to the extensive travel by Director X, this gave him little time to finalise the accounts for the year ended 31 December 1994;

(b) Director X had to spend time looking for office space in July 1995 instead of attending to the audit queries due to the sudden termination of the sub-lease; and

(c) the audited financial statements were sent to the directors for approval on 18 August 1995, but Director Y was on vacation for the whole of August 1995 due to the sudden death of his wife.

5. The short answer is that it was the duty of the Taxpayer to regulate its own affairs in such a way so as to comply with the requirements of the IRO. In any event, the 'vacation' of Director Y due to the sudden death of his wife was in August 1995, which was after the deadline of 31 July 1995.

6. The Taxpayer contended that the Assessment was excessive on the grounds that:

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- (1) The Taxpayer had never been late in filing returns;
- (2) The Taxpayer had no intention to delay the payment of tax;
and
- (3) IRD had suffered no loss in tax revenue, alternatively, loss in tax revenue for only 8 days (based on the 8 days between the respective due dates for the first instalments under the estimated assessment and the revised assessment);

and sought to rely on D64/94 and D72/94.

7. The representative for the Respondent (the CIR) drew our attention to sections 51(1), 82A, and 68(4) of the IRO, and 4 decisions of the Board of Review, namely:

- (a) D53/93,
- (b) D33/89,
- (c) D64/94,
- (d) D72/94.

8. The representative for the Respondent (the CIR) sought to rely on the 5% surcharge under section 71(5) to support his contention that the Assessment was not excessive. The argument is that as 5% surcharge can be imposed for a delay of merely a day in the payment of tax, the penalty of 9.83% is not excessive. While it is perfectly true that we have 5% surcharge for delay of merely a day in payment of tax, the surcharge for delays up to 6 months in payment of tax remains to be 5% [see section 71(5A)]. If the 5% surcharge under section 71(5) for delays up to 6 months in the payment of tax is a relevant consideration in penalty tax cases, this is a cogent reason why the penalty of 9.83% in this case for delay of 38 days in the submission of the Return is excessive.

Our Decision

9. Under sections 82B(3) and 68(4) of the IRO, the burden of proving that the Assessment is excessive or incorrect is on the Taxpayer.

10. We have carefully considered everything which the Representative had said and all the materials before us. Two of us were not persuaded that the Taxpayer has discharged the burden of proving that the Assessment is excessive. A minority of one dissented and would have substantially reduced the Assessment had he not been in the minority. Under section 65(4), our decision is that we dismiss the appeal and confirm the Assessment.