Case No. D10/12

Profits tax – imposition of penalty tax – late submission of tax return – appellant claiming to be third party's fault – whether penalty tax should be imposed – amount of penalty tax to be imposed – whether the Board should impose order on costs – sections 51(1), 59(3), 66(1), 66(3), 68(4), 68(7), 68(8), 68(9), 80(2), 82(1), 82A, 82B and Schedule 5 of the Inland Revenue Ordinance ('the Ordinance').

Profits tax – tax return – taxpayer's duty to submit true, correct and complete tax return on time – Articles 106, 107 and 108 of the Basic Law.

Panel: Kenneth Kwok Hing Wai SC (chairman), Chau Cham Kuen and Ha Suk Ling Shirley.

Date of hearing: 30 March 2012.
Date of decision: 28 May 2012.

On 1 April 2010, the Assistant Commissioner of Inland Revenue issued notice for filing profits tax return to the Appellant for the year of assessment 2009/10, and later further extended the due date for filing the same to 15 November 2010. The Appellant failed to file the return on the due date. On 6 December 2010, the Assessor raised an estimated assessment. On 15 December 2010, the Appellant's Representative submitted an explanation in response to the estimated assessment. On 10 January 2011, the Appellant submitted tax return together with tax computation and financial statements.

The Appellant was late by 1 month and 26 days from its extended due date in submitting profits tax return. The Commissioner assessed the Appellant to penalty tax at 3% (that is $7,800) of the amount of tax which would have been undercharged if the delay had not been detected. The Appellant appealed.

In a 'Statement of Facts' submitted by the Appellant's Representative (the same not being agreed by the Respondent), the Appellant put the blame for the late submission of tax return on the courier and auditors.

Held:

<u>The Board's function in tax appeal</u>

1. Whether to assess a taxpayer to penalty tax and, if so, the amount were matters for the Commissioner. It was entirely up to the Commissioner to decide whether to impose a severe or lenient penalty.

2. Once a taxpayer invoked the statutory right of appeal under section 82B of the Ordinance, he was subject to the appeal scheme under the Ordinance. In an appeal, the Board must: (a) consider the matter *de novo*; (b) perform its ultimate function to confirm, reduce, increase or annul the assessment appealed against. (Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009) 12 HKCFAR 392, Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7 considered)

Duty to submit tax return on time

3. The Appellant could not escape liability to pay penalty tax by delegating to others. A limited company must act through a natural person and it was not open to the Appellant to say it was somebody's fault.

4. The Board took a serious view of omission or understatement of income: (a) receipt and accrual of income and the total amount in the 12-month period were factual matters within the personal knowledge of a taxpayer. Such knowledge did not depend on the taxpayer having been supplied with employer's return or remembering about it; (b) in cases where the taxpayer was paid by autopay or bank deposits, the taxpayer could easily have ascertained and checked the correct total amount of income by reference to banking records; (c) carelessness or recklessness was not a licence to understate or omit one's income; (d) while an intention to evade tax was an aggravating factor, lack of intention to evade tax was not a mitigating factor; (e) there was no duty on the part of the Revenue to warn a taxpayer before implementing penalty tax; (f) payment of tax was not a relevant factor. It was the duty of every taxpayer to pay the correct amount of tax; (g) the fact that the Revenue was vigilant enough to detect the understatement or suffered no financial loss was not a mitigating factor. It was an aggravating factor if the Revenue had suffered financial loss; (h) financial difficulty or inability to pay penalty must be proved by cogent evidence; (i) in cases of incorrect return, it was wholly unrealistic for a taxpayer to ask for zero penalty. If anything, this was an indication that the taxpayer was still not taking his/her duties seriously; (j) there must be a real difference in penalty between those who mitigated their breaches by being co-operative and those who aggravated their breaches by being obstructive; (k) second or further contravention was an aggravating factor; (l) blatant breach should be punished by stiff penalty; (m) where the Board concluded that the penalty tax was excessive, the Board would reduce the assessment; (n) where the Board concluded that penalty tax was manifestly inadequate, it would increase the amount; (o) where the Board concluded that the appeal was frivolous and vexatious or an abuse of the process of appeal, it might impose an order on costs. (D16/07, (2007-08) IRBRD, vol 22, 454 considered)

Importance of grounds of appeal

5. Unless permitted by the Board, the appeal was confined to the original grounds of appeal and applications for the Board's consent to amend the grounds of appeal 'should be sought fairly, squarely and unambiguously'. (China Map Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 486 considered)

Evidence of the Appellant's Representative

6. The Appellant's representative did not claim to have personal knowledge of the matters which the Appellant's director told him about. Hence, there was no evidence on the factual basis of the grounds of appeal and the appeal.

7. In any event, the Appellant's representative was evasive and incapable of giving, or declined to give, direct answer to simple factual question, and was therefore not a credible witness.

Penalty tax

8. The Appellant had the knowledge and means of complying with the reporting duties if it had intended or taken the trouble so to do. Through carelessness, or not caring whether it complied with its reporting duties, failed to do so. The Appellant showed no or no genuine remorse. It took no steps to put its houses in order. It blamed other people for their own breaches and argued that it was unfair to penalize it. It demanded a waiver of penalty. It was difficult to see how it could hope to win the sympathy of the Board.

9. The Appellant had a long track record of filing on time. However, it behaved irresponsibly this time. The appropriate penalty would be 6% of the amount of tax which would have been undercharged if the delay had not been detected, that is from $7,800 to $15,600. (D41/89, IRBRD, vol 4, 472, D53/92, IRBRD, vol 7, 446 and D65/00, IRBRD, vol 15, 610 considered)

Costs

10. No officer of the Appellant appeared at the hearing. Instead, the Appellant sent an unqualified person who wasted the Board's time. The Appellant also tried to blame the Respondent and its auditor. The Appellant also did not propose to take any steps to ensure future compliance. The appeal was therefore frivolous and vexatious. The Appellant was ordered to pay $5,000 as costs of the Board.

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

Cases referred to:

Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009) 12 HKCFAR 392
Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7
D16/07, (2007-08) IRBRD, vol 22, 454
China Map Limited v Commissioner of Inland Revenue (2008) 11 HKCFAR 486
D41/89, IRBRD, vol 4, 472
D53/92, IRBRD, vol 7, 446
D65/00, IRBRD, vol 15, 610

Laurence Lam Ying Bon of Fast Linker Limited for the Taxpayer.
Lai Au Che Chung and Ng Chou Ping for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The Appellant is a company which closes its account on 31 March each year.

2. There was a delay of 1 month and 26 days from its Extended Due Date in its submission of the profits tax return for the year of assessment 2009/10.

3. The Commissioner of Inland Revenue assessed the Appellant to additional tax[1] under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') at 3% of the amount of tax which would have been undercharged if the delay had not been detected, that is a penalty of $7,800. The penalty tax assessment ('the Assessment') is dated 14 July 2011.

4. The Appellant appealed.

The agreed facts

5. Based on the agreed statement of facts, we make the following findings of fact.

6. The Appellant has appealed against the imposition of additional tax by way of penalty assessed upon it on 14 July 2011 under section 82A of the Ordinance for the failure to comply with the requirement of a notice under section 51(1) of the Ordinance to furnish a Profits Tax Return for the year of assessment 2009/10 ('the Return') within the prescribed time allowed.

[1] Commonly referred to as 'penalty' tax.

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

Year of assessment	Date of issue of Return	Extended due date for filing Return	Date of signing auditor's report and financial statements	Date of [IRD] receipt of Return	Period of delay in filing Return	Tax undercharged	Additional tax by way of penalty	Percentage of additional tax on tax undercharged
2009/10	1-4-2010	15-11-2010	12-11-2010	10-1-2011	1 month and 26 days	$258,904	$7,800	3%

8. The Appellant is a private company incorporated in Hong Kong in 1994. It closes its accounts annually on 31 March.

9. The Appellant's principal business activity as reported in the Return is trading of tobacco.

10. On 1 April 2010, the Assistant Commissioner of Inland Revenue issued a notice for filing Profits Tax Return for the year of assessment 2009/10 to the Appellant. The Appellant was required to complete and submit the Return within one month from 1 April 2010.

11. By reason of a Block Extension Scheme for Lodgement of 2009/10 Tax Returns which applied [also] to the Appellant, the due date for filing the Return was extended to 15 November 2010 ('the Extended Due Date'). The Appellant did not submit the Return by the Extended Due Date.

12. On 6 December 2010, the Assessor raised on the Appellant an estimated assessment for the year of assessment 2009/10 pursuant to section 59(3) of the Ordinance as follows:

	$
Estimated assessable profits	750,000
Final tax thereon	123,750

13. On 15 December 2010, the Appellant through its tax representative, that is the representative, submitted an explanation in response to the estimated assessment raised in paragraph 12.

14. On 10 January 2011, the Appellant submitted the Return together with tax computation and financial statements for the year ended 31 March 2010, reporting assessable profits of $1,569,117. The Return submitted was a duplicate one issued on 16 December 2010. The Auditor's Report was signed on 12 November 2010. The financial statements were approved and authorized for issue by the Appellant's board of directors on the same day. The Return was signed by the Appellant's director without date specified.

15. On 24 January 2011, the assessor accepted the Appellant's reported assessable profits and issued an Additional Assessment for the year of assessment 2009/10 as follows:

	$
Additional assessable profits	819,117
Additional final tax thereon	135,154

16. No prosecution under section 80(2) or section 82(1) of the Ordinance has been instituted against the Appellant in respect of the same facts.

17. On 9 May 2011, the Commissioner issued a notice of intention to assess additional tax given under section 82A(4) of the Ordinance to the Appellant in respect of its failure to furnish the Return within the prescribed time allowed. If the Department had not detected the failure, tax amounting to $258,904 would have been undercharged. 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. The Appellant was invited to submit written representations to the Commissioner.

18. By a letter dated 16 May 2011, the Appellant through the Representative, made written representations to the Commissioner.

19. On 14 July 2011, the Commissioner, having considered and taken into account the written representations, issued a notice of assessment for additional tax by way of penalty under section 82A of the Ordinance for the year of assessment 2009/10 in the amount of $7,800.

20. By a letter dated 8 August 2011, the Appellant, through the Representative, gave a notice of appeal to the Clerk to the Board of Review against the Assessment.

The relevant statutory provisions

21. Section 51(1) provides that:

> *' 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 … profits tax'.*

22. Section 66(1) and (3) provide:

> *' (1) Any person (hereinafter referred to as the Appellant) who has validly objected to an assessment but with whom the Commissioner in considering the objection has failed to agree may … either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk*

to the Board and is accompanied by a copy of the Commissioner's written determination together with a copy of the reasons therefor and of the statement of facts and a statement of the grounds of appeal'.

' (3) Save with the consent of the Board and on such terms as the Board may determine, an Appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'

23. Section 68(4), (7), (8)(a) and (9) provide that:

(4) 'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.'

(7) 'At the hearing of the appeal the Board may, subject to the provisions of section 66(3), admit or reject any evidence adduced, whether oral or documentary, and the provisions of the Evidence Ordinance (Cap 8), relating to the admissibility of evidence shall not apply.'

(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.'

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

24. Section 82A(1)(a) provides that:

' Any person who without reasonable excuse … fails to comply with the requirements of a notice given to him under section 51(1) … 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 … has been undercharged in consequence of the failure to comply with a notice under section 51(1) … or which would have been undercharged if such failure had not been detected'.

25. Section 82B(2) and section 82B(3) provide that:

82B (2) 'On an appeal against assessment to additional tax, it shall be open to the Appellant to argue that-

(a) he is not liable to additional tax;

(b) the amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A;

(c) the amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.'

82B (3) 'Sections 66(2) and (3), 68, 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'.

The Board's function in a tax appeal

26. Whether to assess a taxpayer to additional tax and, if the answer is in the affirmative, the amount of additional tax to be assessed, are matters for the Commissioner. It is entirely up to the Commissioner to decide whether to impose a severe or lenient penalty. If the taxpayer accepts the penalty and pays up, that is the end of the matter and the Board does not come in at all.

27. Section 82B confers on a taxpayer the right to appeal to the Board. Once the taxpayer invokes the statutory right of appeal, he is subject to the appeal scheme provided by the Ordinance, including the provisions referred to above and below.

28. 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.

(a) In Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009) 12 HKCFAR 392, Lord Walker NPJ said in the Court of Final Appeal judgment at paragraphs 29 and 30 that the Board's function is to consider the matter *de novo* (meaning starting from the beginning; anew) and the appeal is an appeal against an assessment:

' 29. As the Board correctly observed, by reference to the decisions in Mok Tsze Fung v CIR [1962] HKLR 258 and (after the amendment of s.64 of the IRO) CIR v The Hong Kong Bottlers Ltd [1970] HKLR 581, the Commissioner's

function, once objections had been made by the taxpayer, was to make a general review of the correctness of the assessment. In Mok Tsze Fung v Commissioner of Inland Revenue, Mills-Owens J said at pp 274-275 :

"His duty is to review and revise the assessment and this, in my view, requires him to perform an original and administrative, not an appellate and judicial, function of considering what the proper assessment should be. He acts de novo, putting himself in the place of the assessor, and forms, as it were, a second opinion in substitution for the opinion of the assessor.

30. Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: CIR v Board of Review ex parte Herald International Limited [1964] HKLR 224, 237. The taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and (4)) ..."'

(b) In Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7, CA, Fuad VP said at page 23 that the Board must perform its 'ultimate function' to 'confirm, reduce, increase or annul the assessment' appealed against.

29. On an appeal to the Board:

(1) The Board, not the representative, is the fact finding body. The onus is on the Appellant through the representative to adduce intelligible evidence on how the late filing came about [section 68(4)].

(2) The Board, not the Commissioner, is the decision maker. If there is any discretion in any matter, such discretion is to be exercised by the Board.

Submitting true, correct and complete tax returns on time

30. Articles 106 and 108 of the Basic Law provide that the Hong Kong Special Administrative Region shall have independent finances and practise an independent taxation system.

31. Articles 107 and 108 of the Basic Law provide that the HKSAR shall:

(a) *taking the low tax policy*[2] *previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation; and*

(b) *follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.*

32. Direct taxation on earnings and profits is an important source of income for HKSAR.

33. While the tax rates are low and the fiscal system is narrowly based, the demands on general revenue are ever increasing.

34. Delay in submitting returns may delay the timely collection of revenue. Omission or understatement of receipts in tax returns causes loss in revenue if the returns are accepted by the Revenue as correct. Failure to notify chargeability, if undetected by the Revenue, causes loss in revenue.

35. The Revenue makes millions of assessments each year. A high degree of compliance by the taxpayers in submitting timely, correct and complete tax returns and information to the Revenue is crucial for the effective operation of HKSAR's tax system.

36. The Revenue can check the accuracy of returns, conduct field audits and prosecute suspected offenders. It can also deploy resources and manpower to copy information it received to the taxpayers.

37. It is a waste of the Revenue's limited resources to:

(a) conduct checks, investigations and audits which are avoidable had there been a high degree of compliance by taxpayers of their statutory reporting duties; and

(b) pamper taxpayers who turn a blind eye to their duty to submit timely, correct and complete tax returns and information.

38. This is also unfair to the honest and compliant taxpayers who take great care to comply and exercise due diligence in complying with their statutory reporting duties. There is no reason for the honest and compliant taxpayers exercising due diligence in the discharge of their statutory reporting duties to foot the bill. Those in breach, not those who comply, should pay.

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[2] Tax rates range from 10% to 17.5%, see Schedules 1 and 8 to the Ordinance.

39. The Appellant could not escape liability to pay penalty tax by delegating to others. A limited company must act through a natural person and it is not open to the Appellant to say 'it is somebody else's fault, not mine'.

40. Penalty tax serves two purposes – to punish the delinquent taxpayers and to deter those and other taxpayers.

41. The Board takes a serious view of omission or understatement of income, see D16/07, (2007-08) IRBRD, vol 22, 454 at paragraphs 125 to 128, where the Board cited a number of Board decisions and extracted the following principles from those cases:

(a) Receipt and accrual of income and the total amount in the 12-month period in a year of assessment are factual matters within the personal knowledge of the taxpayer. Such knowledge does not depend on the taxpayer having been supplied with employer's return(s) or remembering about employer's return(s).

(b) In cases where the taxpayer was paid by autopay or deposits into the taxpayer's bank account, the taxpayer could easily have ascertained and checked the correct total amount of income by reference to the banking records.

(c) Carelessness or recklessness is not a licence to understate or omit one's income.

(d) While an intention to evade tax is undoubtedly an aggravating factor, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax.

(e) There is no duty on the part of the Revenue to warn a taxpayer before invoking section 82A.

(f) Payment of tax is not a relevant factor. It is the duty of every taxpayer to pay the correct amount of tax. If he/she does not pay tax, on time or at all, he/she will be subject to enforcement action.

(g) The fact that the Revenue was vigilant enough to detect the understatement is not a mitigating factor. The fact that the Revenue suffered no financial loss is not a mitigating factor. It is an aggravating factor if the Revenue has suffered financial loss.

(h) Financial difficulty or inability to pay the penalty must be proved by cogent evidence.

(i) In cases of an incorrect return, it is wholly unrealistic for a Taxpayer to ask for zero penalty. If anything, this is an indication that the taxpayer is still not taking his/her duties seriously.

(j) There must be a real difference in penalty between those who mitigate their breaches by being co-operative and those who aggravate their breaches by being obstructive.

(k) A second or further contravention is an aggravating factor. If a taxpayer does not get the message from the Revenue's or the Board's treatment of the first or earlier contraventions and does 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.

(l) A blatant breach should be punished by a stiff penalty.

(m) In cases where the Board concludes that the additional tax assessment is excessive, the Board will reduce the penalty assessment.

(n) In appropriate cases where the Board concludes that the additional tax assessment is manifestly inadequate, the Board will increase the additional tax assessment.

(o) Where the Board concludes that the appeal is frivolous and vexatious or an abuse of the process of appeal, the Board may impose an order on costs.

42. From time to time, taxpayers like the Appellant who have the knowledge and means of complying with the reporting duties if they have intended or taken the trouble so to do. Through carelessness, or not caring whether they comply with their reporting duties, fail to do so. They show no or no genuine remorse. They take no steps to put their houses in order. They blame other people for their own breaches and argue that it is unfair to penalize them. They demand a waiver of penalty. It is difficult to see how such taxpayers could hope to win the sympathy of the Board in such cases.

The importance of the grounds of appeal

43. The grounds of appeal govern the scope of the admissible evidence and they define the issues on appeal, section 68(7).

44. Unless permitted by the Board under section 66(3), the appeal is confined to the original grounds of appeal and applications for the Board's consent to amend the grounds of appeal 'should be sought fairly, squarely and unambiguously'[3].

[3] See China Map Limited v Commissioner of Inalnd Revenue (2008) 11 HKCFAR 486 at paragraphs 9 and 10.

> *' 9. By its representative, each of the Taxpayers put forward the grounds of appeal that the profits in question "were capital in nature and were not assessable to Profits Tax or alternatively that the assessment was excessive". None of the Taxpayers pursued its alternative ground that the assessments were excessive. That left only one question raised by the grounds of appeal given in accordance with s.66(1). Did the profits in question arise from the sale of capital assets? But at the hearing before us, Mr Patrick Fung SC for the Taxpayers contended that there was an antecedent question. Were the profits in question from the carrying on of a trade, profession or business?*
>
> *10. No such question is raised by the Taxpayers' grounds of appeal given in accordance with s.66(1). But Mr Fung contended that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised such a question. For this contention, Mr Fung relied on an exchange between the Board's chairman and the Taxpayers' counsel (not Mr Fung or his junior Ms Catrina Lam). That exchange took place after the close of the evidence and during final speech. By its nature, such a question is fact-sensitive and its answer inherently dependent on evidence. For a tribunal of fact to entertain such a question after the close of the evidence would be unusual and plainly inappropriate if done without offering the party against whom the question is raised an opportunity to call further evidence. No such opportunity was offered to the Revenue. We do not think that the Board is to be treated as having consented under s.66(3) to the Taxpayers relying on a fresh ground which raised the antecedent question for which Mr Fung now contends. If and whenever s.66(3) consent is sought, it should be sought fairly, squarely and unambiguously. Nothing of that kind occurred in this case.'*

The appeal hearing

45. Officers of the Appellant had better things to do than to attend the hearing of this appeal. It sent an unqualified person – the Representative – who was not a lawyer and who was 'not a qualified CPA'.

46. The Representative was critical of the Inland Revenue Department for assessing penalty tax.

47. Despite the fact that he worked at the same address as CPA1, the Representative felt able to blame CPA1.

The grounds of appeal and the Tax Representative's other written communications

48. There are spelling and grammatical errors, irrelevance, unintelligibility and other issues in the grounds of appeal and other written communications prepared by the Representative. We use the phrase 'written exactly as it stands in the original' to avoid the repeated use of the word '*sic*'.

49. The Appellant's grounds of appeal dated 8 August 2011 prepared by the Representative read as follows (written exactly as it stands in the original):

> ' We are instructed by the directors of the [Appellant] to file an appeal on ground of unforeseeable predicament in order to waive the imposed penalty in sum of HK$ 7,800 – against the [Appellant].
>
> As we already duly and respectively explained to the Inland Revenue Department in earlier correspondence, hereby we follow up the procedure to state the true fact to the Board of Review and expect a fair view to be given to the appeal.
>
> The [Appellant] complied with the deadline to submit the Profit Tax Return for the year 2009/10 with the audited financial statements for the year delivered by a courier. Only found out that the documents had never reached the Inland Revenue Department when having received an Estimated Assessment Notice later. After conducting an internal enquiry, the outcome indicated that the courier had ruined and misplaced the parcel without giving a true confession. Please see our attached copy of the letter dated 15 December 2010 to the Inland Revenue.
>
> When making approach to the auditors for another set of the Audit Report for the year, our clients were misled to believe that they would be preparing the reports for the directors to append their signatures again. But in fact, the urgent matter was not being followed by the auditors namely [**CPA1**]. Neither our clients were informed that the auditors were having internal disputes in their office followed by the consequence of de-registration in the Hong Kong Institute of the Certified Public Accountants. The directors were only given the latest notification that the auditors became no longer duly able to sign the audit reports as required again. Without any delay, action to seek for new auditors was instantly taken. [**CPA2**] was decisively appointed in extremis to complete the audit reports. Please see the attached copy of the letter dated 16 May 2011 to the Inland Revenue.
>
> It was undesirable to find out that the Inland Revenue Department still insisted to demand an additional tax in sum of HK$ 7,800 – by way of penalty. The [Appellant] had been falling into unforeseeable events to encounter misfortune in which the directors could not have done any better under the circumstances.

> Despite the unprofessional let down by the auditors, it is more disappointing that the Inland Revenue Department have never appreciated the directors' effort to handle the entire misfortune and dilemma in particular they also have a business to manage under immense pressures in some recessive economies world-wise. To review on the evidence provided with the letters in reply, it is strongly supportive to prove how much responsible the directors were being to envisage the problems which happened beyond their control at the time.
>
> It is extremely difficult to accept such an unjustifiable verdict along with a heavy penalty, Furthermore the [Appellant] has already fully paid the profit tax for the year in two demands accordingly. The record of the [Appellant] is always good and regards itself as a substantial and honest tax payer in contribution.
>
> A waiver to erase this heavy burden to the [Appellant] by the Board of Review is expected as we believe being obligatory is worth to reward with justice. Your positive reply would be appreciated. Thank you for your kind consideration.'

No factual basis

50. The Board has said on many occasions that, in default of agreement by both parties, facts are to be proved by adducing evidence on the relevant facts, not by tax representatives' bare assertions.

51. In the letter dated 6 February 2012 giving notice of hearing of appeal, the Clerk asked the parties to file witness statements. No witness statement had been filed.

52. What the Representative did in this case was to send the letter dated 13 March 2012 to the Clerk to the Board of Review giving her a 'Statement of Facts'. It reads as follows (written exactly as it stands in the original):

> ' [The Appellant] is a private company incorporated in Hong Kong [in 1994]. The [Appellant]'s registered office is at … the principal business activity is trading of tobacco.
>
> The [Appellant] was obliged to comply with the Company Ordinance and to submit the Profit Tax Return for the year of assessment 2009/10 to the Inland Revenue Department. An extension for filing the Return with the audited financial statements for the year had been granted up to 15 November 2010. The Board of Directors engaged [CPA1] to be the auditors in order to complete the audit work in time to satisfy the scheduled submission. The directors were notified to approve the audit reports in completion for the year ended as at 31 March 2010 and duly append their signatures upon the financial statements on 12 November 2010. As an usual convenience as before, the auditors would

> deliver the Profit Tax Return attached with the signed audit reports for the year to the Inland Revenue Department on or before 15 November 2010. The submission of such the documents was confirmed by [CPA1] afterwards but did not return the spare sets of the audited financial statements in a reasonably limited time as they should have been.
>
> It was an amazement to the directors when they received an Estimated Profit Tax assessment dated 6 December 2010 … issued by the Inland Revenue Department. After having contacted the auditors and had a response later, it was confirmed by the auditors that the delivery had gone astray owing to a mistake made by a courier who had been dismissed sometime ago. The directors duly informed the Inland Revenue Department in writing … and intended urging the auditors to submit another spare set of the audit reports as early as possible. The matter had been raised in a subsequent manner to [CPA1] but really epitomizing an intricacy at time. The directors had wasted no time and immediately sought for other auditors [CPA2] in order to take up the work and complete what ever required. Another Profit Tax Return attached with a signed copy of the audit reports for the year was again submitted as sooner as 10 January 2011. The [Appellant] received an Additional Assessment on 24 January 2011 and duly complied to pay the tax demand. The Inland revenue issued a letter on 9 May 2011 … demanding an explanation for the late submission and the Tax Representative of the [Appellant] duly replied on 16 May 2011 …
>
> The Inland Revenue Department reviewed the matter and decided to penalize the [Appellant] by imposing a fine in sum of HK$ 7,800- … The [Appellant] filed an appeal on 8 August 2011 … to the Board of Review but still paid the fine on 12 September 2011 when waiting for the processing of an appeal.
>
> In truth and documents finding, the [Appellant] has found that one of the partners of [CPA1] applied a court injunction on 2 March 2010 … against the other partner to disclose documents of the audit company and a writ of summons … was later issued against … by his partner on 11 February 2012. This is solid evidence that the directors of the [Appellant] were kept in the dark to foresee any wrong doings in the audit company but perceptively responsible to take up the crisis solution as much quickly as possibly under the dodged circumstances.'

53. This 'Statement of Facts' had not been agreed by the Revenue. The Representative gave evidence upon oath. He claimed to have personal knowledge of the matters by having spoken to 'the director'. Taking that on its face value, he had personal knowledge of his conversations with 'the director' but he did not claim to have personal knowledge of the matters which 'the director' told him about. There is thus no evidence on the factual basis of the grounds of appeal and the appeal for want of factual support.

The Representative not a credible witness

54. In any event, we find as a fact that the Representative is not a credible witness.

Date	Event
12 November 2010	Auditor's Report signed
12 November 2010	Financial Statements approved by the Appellant's board of directors
undated	Return signed
6 December 2010	Estimated assessment
15 December 2010	Explanation
16 December 2010	Duplicate Return issued
10 January 2011	Duplicate Return with tax computation and financial statements filed

The Representative was evasive and incapable of giving, or declined to give, a direct answer to a simple factual question. He was asked why, **upon discovering the Revenue's non-receipt of the Return**, he did not send a copy of the Return to the Revenue. The Representative said:

> ' Because the normal practice - procedure between the client and the auditor, because when the auditor send all the document - a bundle of document including the financial statement as I mentioned earlier on that including the engagement letter, declaration of emolument, confirmation of debtor/creditor to the director to sign; they signed and then they return the whole bunch back to the auditor, the auditor will certify that. Yes, because they - the auditor would not certify any document before the director signed, it's always done afterwards.
>
> Okay, this is why the habit when the directors returned the whole bunch, they signed already and returned the whole bunch to auditor. They are expected certified by the auditor himself and then will deliver one set of the financial statement to the IRD and they will collect the other document in their working file, such as engagement letter and the rest, such as another copies of the financial statement and a copy of the profits tax return back to the client. This is why I'm saying there - there was a failure only found out later on; everybody believed on 15 November there was no failure because the submission was done.'

55. He shared the same office as CPA1. The inherent probabilities and we find as facts that they are related and would have been able to obtain from CPA1 such information as was needed for the conduct of the appeal. Yet he was most unhelpful to the Board and chose to give unintelligible answers. He felt able to criticize CPA1. He should have credited the Board with a bit of common sense.

56. What he wrote and said was unintelligible, to say the least. By way of example, he wrote:

> ' [CPA2] was decisively appointed in extremis to complete the audit reports'.

The Appellant's turnover for the year in question was $113,144,520. There was simply not enough time for the Appellant to go through the audit process. Nor do we see why it should, the Auditor's Report having been signed on 12 November 2010 and the financial statements having been approved and authorized for issue by the Appellant's board of directors on the same day.

Consideration of grounds of appeal

57. It is factually false to allege that the Appellant 'complied with the deadline' to file the Return. The truth of the matter is that the Appellant did not and it tried to blame others. The Appellant's statutory reporting duties could not be delegated to the courier or the auditors. The choice of agents was made by the Appellant, not by the Revenue. The Representative merrily continued to share office with CPA1.

58. We do not understand what CPA2 'was decisively appointed in extremis to complete the audit reports' was intended to mean. The Appellant would have been better served if the Representative had used plain English which made sense. In any event, we are not satisfied on a balance of probabilities that CPA2 was appointed to 'complete the audit reports'. There was no need to, it being an agreed fact that CPA1 had already signed the audit reports.

59. We do not accept on a balance of probabilities that the directors were responsible or 'much responsible'. They could have filed a copy of the Return and the financial statements audited by CPA1 immediately upon discovering the non-receipt by the Revenue. There was no explanation and no intelligible explanation why they did not.

60. There is no evidence of (heavy) financial difficulty or inability to pay the penalty or a higher penalty at $15,600 plus costs of $5,000. The Appellant's turnover was $113,144,520 and its assessable profits amounted to $1,569,117. The best way to avoid any further penalty is to take positive steps to ensure compliance. It could have saved expenses spent on over unmeritorious appeals.

61. There was no basis for criticizing the Revenue.

62. It tried to shirk responsibility by blaming its CPA which operated under the same roof.

63. In short, none of the grounds of appeal succeeds.

Performing our ultimate function

64. That the Board's function includes the reduction or increase of the Assessment and the Board should reduce or increase, as the case may be, in appropriate cases.

65. The following are early examples of the Board's increase of the penalty assessments:

(1) In D41/89, IRBRD, vol 4, 472, the Board increased the penalty assessment from 65% to 100%.

(2) In D53/92, IRBRD, vol 7, 446, the Board increased the penalty assessments from $104,000 to $348,950, that is 200% of the tax involved.

(3) In D65/00, IRBRD, vol 15, 610, the Board increased the penalty assessment from 75% to 100%.

66. We must perform our ultimate function and decide *de novo*.

67. The Appellant had a long track record of filing on time. However, it behaved irresponsibly this time. We conclude that the appropriate penalty is 6% and the Assessment should be increased to 6% of the amount of tax which would have been undercharged if the delay had not been detected, that is increased from $7,800 to $15,600.

68. No officer of the Appellant appeared at the hearing. It sent an unqualified person who wasted the Board's time. The Appellant also tried to blame the Revenue and CPA1 who shared an office with him.

69. We have not been told of any steps having been taken to ensure future compliance.

70. We consider this appeal to be frivolous and vexatious.

71. We see no reason why other taxpayers should bear the costs of such a waste of public resources. Pursuant to sections 82B(3) and 68(9), the Appellant should be ordered to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the additional tax as increased and recovered therewith.

Disposition of the appeal and costs

72. The Assessment **is increased from $7,800 to $15,600** under sections 82B(3) and 68(8)(a).

73. The Appellant is **ordered to pay** the sum of **$5,000 as costs** of the Board, which $5,000 shall be added to the additional tax as increased to $15,600 and recovered therewith.