

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D11/95

Penalty tax – late filing of return – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Chen Yuan Chu and Andrew Wang Wei Hung.

Date of hearing: 20 October 1994.

Date of decision: 12 May 1995

The taxpayer was a private limited company which was late in filing its tax return. It had a previous history of being late in filing tax returns and had previously been penalised. The Commissioner imposed a penalty of approximately 10.5% of the tax involved. The taxpayer appealed to the Board of Review on the ground that the penalty was excessive. The taxpayer was only 25 days late in filing its tax return.

**Held:**

As the taxpayer was late in filing its return the Commissioner had the power to impose a penalty. The past record of the taxpayer must be weighed against the short delay in the year in question. Taking all factors into account a penalty of approximately 10.5% is reasonable.

**Appeal dismissed.**

Ngai See Wah for the Commissioner of Inland Revenue.

Yu Shing Tai of Joseph S T Yu & Co for the taxpayer.

**Decision:**

This is an appeal by a private limited company against an additional assessment to tax levied under section 82A of the Inland Revenue Ordinance (the IRO). The facts are as follows:

1. The Taxpayer was incorporated in Hong Kong in January 1974.
2. In respect of the year of assessment 1986/87 the Taxpayer was late in filing its tax return. The same was not filed until 11 March 1988. A penalty of \$34,000 was imposed.

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3. In respect of the year of assessment 1988/89 the Taxpayer was again late in filing its tax return. The same was filed on 26 February 1990. A penalty of \$15,000 was imposed which was approximately 10% of the tax payable.
4. In respect of the years of assessment 1989/90, 1990/91 and 1991/92 the Taxpayer filed its tax returns either on or a few days before or after the due date of 15 November in each year. Under the present guidelines the Commissioner grants extension of time to taxpayers to file their returns up to 15 November where their financial year ends on 31 March.
5. In respect of the year of assessment 1992/93 the Taxpayer was again late in filing its tax return. The period for submission of the tax return was extended up to 15 November 1993 under the block extension scheme operated by the Commissioner of Inland Revenue. The tax return was submitted on 10 December 1993.
6. Prior to the submission of the tax return the assessor had on 26 November 1993 issued an estimated assessment to profits tax for the year of assessment 1992/93 with assessable profits of \$4,540,000 and tax payable thereon of \$794,500.
7. The profits tax return when submitted disclosed assessable profits of \$4,879,766. This return was accepted by the assessor and an additional assessment to tax was issued on 14 February 1994 with additional assessable profit of \$339,766 and tax payable thereon of \$59,459.
8. On 27 April 1994 the Commissioner of the Inland Revenue gave notice to the Taxpayer of his intention to assess additional tax under section 82A of the IRO. On 20 May 1994 the tax representative for the Taxpayer submitted written representations. On 10 June 1994 the Commissioner after taking into consideration the representations and the past record of the Taxpayer issued an assessment to additional tax under section 82A of the IRO for the year of assessment 1992/93 in the sum of \$90,000.
9. On 6 July 1994 the Taxpayer gave notice of appeal to the Board of Review.

At the hearing of the appeal the Taxpayer was represented by its tax representative. He explained to the Board that the fault for not filing the tax return on time was his own. He said that the Taxpayer had provided his firm with the accounts for auditing in the middle of October 1993. His audit firm had worked as quickly as they could but unfortunately were short of staff and were not able to complete the audit in time so as to enable the profits tax return to be filed before 15 November. He said that he felt that the penalty was excessive and asked the Board to reduce the same.

The representative for the Commissioner drew the attention of the Board to the past conduct of the Taxpayer and submitted that the penalty of approximately 10.5% of the tax involved was reasonable in the circumstances. He pointed out that the fault lay with the

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Taxpayer rather than the auditor because the Taxpayer had not provided its accounts to its auditors until October.

In deciding what is a reasonable penalty in the present case two factors must be balanced against each other. On the one hand we have the persistent conduct of the Taxpayer in failing to file its tax return on time. Indeed in those years where it was able to file its tax return promptly it did so either at the very end of the extended period or just thereafter. Taxpayers who run their affairs in such a way must anticipate that they will receive substantial penalties if they are repeatedly late. Indeed if that was the only factor in the present case we would consider that a penalty of 10% would be too little.

On the other hand in the present case the Taxpayer was only 25 days late and it is unlikely that the Commissioner would have sought to impose a substantial penalty on a Taxpayer if this had been an isolated instance without any past record of delay in filing tax returns.

When one balances one factor against the other it appears to us that a penalty of approximately 10.5% of the amount of tax involved is reasonable.

For the reasons given we confirm the additional assessment to tax in the sum of \$90,000.