

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D17/84

*Board of Review:*

William Turnbull, *Chairman*; E. J. V. Hutt & Lee Wing-kit, *Members*.

#### **27 November 1984.**

S. 82A Inland Revenue Ordinance—penalty assessment—repeated understatement after earlier investigation—whether additional tax excessive.

The appellant had penalty assessment imposed upon him for the years from 1970/71 to 1975/76. The appellant continued to understate his assessable profits for the years from 1976/77 to 1978/79. The Commissioner issued additional penalty assessments. The appellant appealed on the ground that the assessments were excessive.

*Held:*

The appellant's conduct was inexcusable and the additional assessments were not excessive.

Appeal dismissed.

Chan Shiu-yuen for the Commissioner of Inland Revenue.

T. M. Ho & Co. for the appellant.

*Reasons:*

This is an appeal against penalty assessments made by way of additional tax assessments imposed under section 82A of the Inland Revenue Ordinance covering 3 years of assessment namely 1976/77, 1977/78 and 1978/79. The representative for the Tax Payer informed the Board that all grounds of appeal were withdrawn other than that relating to the argument that the amounts of additional tax which has been assessed by way of penalty were excessive.

The relevant facts are quite simple. In November 1978 the Inland Revenue Department commenced making enquiries into the affairs of the Tax Payer. The Tax Payer was operating a metal company business and apparently he did not keep accurate financial records of his business. Following enquiries it was found that the Tax Payer had been understating his profits in tax returns lodged for the years from 1970/71 to 1975/76 inclusive. Additional assessments to profits tax were issued and in addition penalty assessments under section 82A were also issued.

The enquiries made by the Inland Revenue Department extended over the period from November 1976 until February 1980 a period of some 3 years.

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During that period of 3 years the Tax Payer filed 3 further tax returns for the years 1976/77, 1977/78 and 1978/79. These 3 returns continued to understate the assessable profits by considerable sums. The first of these 3 returns for the year 1976/77 was filed on 9 January 1978, well over one year subsequent to the commencement of the enquiries by the Inland Revenue Department into the affairs of the Tax Payer. Initial profits tax assessments were issued based on the profits disclosed by the Tax Payer in the returns filed by him. However the returns filed were not accepted by the Inland Revenue Department who challenged the same and proposed that an asset betterment statement be compiled. The tax representative for the Tax Payer proposed that an alternative basis should be adopted namely an arbitrary gross profit percentage calculated on sales should be used. Negotiations then followed concerning the quantum of sales and rate of gross profit. Eventually an agreement was reached between the Tax Payer and the Commissioner leading to additional assessments for profits tax for the 3 years being issued as follows:—

<i>Year of Assessment</i>	<i>Profits disclosed by Tax Payer</i>	<i>Assessed Profits as per Tax Payer's Return</i>	<i>Additional Assessible Profits</i>	<i>Additional Profits Tax Assessed</i>
1976/77 .....	\$ 80,136	\$12,020	\$1,351,764	\$202,764
1977/78 .....	\$511,790	\$76,768	\$ 688,714	\$103,307
1978/79 .....	\$536,351	\$80,452	\$1,081,699	\$162,254

(In the course of the hearing of this appeal the Tax Payer's representative produced an asset betterment statement to show that the assessment based on agreed gross profits percentages were excessive. This betterment statement was not substantiated by any evidence and was produced notwithstanding the fact that in his statement of facts the Tax Payer's representative had placed on record that the arbitrary gross profit method had been adopted at the Tax Payer's request because of the difficulties involved in compiling an asset betterment statement.)

Following the issuing of assessments for profits tax based on the agreed figures the Commissioner issued further assessments under section 82A of the Ordinance as follows:—

<i>Year of Assessment</i>	<i>Tax undercharged</i>	<i>Additional Tax</i>	<i>Percentage</i>
1976/77 .....	\$202,764	\$336,800	166%
1977/78 .....	\$102,307	\$162,100	157%
1978/79 .....	\$162,254	\$240,700	148%

The representative for the Tax Payer argued against these section 82A assessments. He said that the profits tax assessments had been based on an arbitrary gross profits percentage which overstated the actual profits of the Tax Payer. He stated that the profits tax assessments were accepted by the Tax Payer because he wished to have an early settlement of the case and was unaware of the fact that he would be penalised with heavy additional tax. He further submitted that the problem had arisen because of the fault of the Commissioner who had delayed taking action whilst the original years of assessment prior to 1975 and

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1977 were being settled. He submitted that in reality this was all one matter and should not be divided into two separate cases.

With due respect this Board is unable to accept any of the submissions made by the Tax Payer's representative. This is not the case of a small businessman with limited resources unable to obtain professional advice and not able to understand the complexities of taxation. The business turnover in the first two years in question was agreed as being in excess of \$15,000,000 and in the third year in excess of \$25,000,000. The Tax Payer submitted accounts prepared by a professional firm of accountants and tax representatives. Whatever excuses the Tax Payer may have had prior to November, 1976 he certainly should have known of his obligations when his business became the subject matter of enquiries by the Inland Revenue Department. This case does not relate to the filing of one tax return immediately following the institution of the Inland Revenue Department enquiries but 3 separate tax returns the last of which was filed on 10 March 1980 for the year of assessment 1978/79 which understated the Tax Payer's profits by almost 100%. The profits returned were \$536,351 but after investigation the profits were assessed at \$1,618,050. The conduct of the Tax Payer is inexcusable. It is hard to understand why the Tax Payer would have filed incorrect returns knowing that he was the subject matter of detailed enquiries. The only reason given by his representative was that there was some problem with the opening stock of the business which subsequently had been resolved by the Tax Payer forming a limited liability company. The Tax Paper himself chose not to give evidence.

In the circumstances this Board does not find the three additional assessments issued under section 82A excessive and dismisses the appeal.