

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D1/95

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

Panel: William Turnbull (chairman), Erwin A Hardy and Peter F Rhodes.

Date of hearing: 10 January 1995.

Date of decision: 7 April 1995

The taxpayer was a private limited company which was late in filing its profits tax return. The Commissioner imposed a penalty of 34.1% of the amount of tax involved. The basis for this penalty was that the taxpayer was five months late in filing its return and had been repeatedly late in previous years.

Held:

The penalty was excessive and should be reduced to an amount of approximately 10% of the amount of tax involved. Although the taxpayer had previously been late in filing its returns, it had steadily improved its record until the year in question. Part of the blame lay with the auditors of the taxpayer and the taxpayer had taken steps to change its auditors.

Appeal partly allowed.

Woo Sai Hong for the Commissioner of Inland Revenue.

Dominic Tai Kiun Ngee of Messrs Charles H C Cheung for the taxpayer.

Decision:

This is an appeal by a private limited company against an additional tax assessment for the year of assessment 1992/93 raised under section 82A of the Inland Revenue Ordinance (the IRO). The facts are as follows:

1. The Taxpayer was incorporated in June 1985.
2. On 18 August 1993 the assessor issued an estimated assessment to profits tax in respect of the year of assessment 1992/93 in the sum of \$1,710,000. No objection was lodged against this assessment by the Taxpayer.

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3. On 31 December 1993 the tax representative of the Taxpayer lodged a profits tax return for the year of assessment 1992/93 showing assessable profit of \$3,147,839.
4. On 25 February 1994 the assessor raised an additional assessment on the Taxpayer in the amount of \$1,470,421 being the difference between the reported profit and the previously estimated profit after adjustment.
5. On 25 May 1994 the Commissioner gave notice to the Taxpayer that he proposed to assess the Taxpayer to additional tax by way of penalty in respect of the year of assessment 1992/93 in respect of the late filing of its profits tax return.
6. On 8 June 1994 the Taxpayer submitted representations to the Commissioner. On 14 July 1994 the Commissioner having considered and taken into account the representations made, issued notice of assessment to additional tax in respect of the year of assessment 1992/93 in the sum of \$190,000.
7. The Taxpayer lodged an appeal to the Board through its tax representative against this assessment to additional tax by way of penalty.

At the hearing of the appeal the Taxpayer was represented by its tax representative. The representative confirmed that in previous years the Taxpayer had been late in filing its tax returns but pointed out that the longest delay had been 96 days in 1989 (4 November 1989) and that in the succeeding three years the delay had steadily reduced until the return was only twelve days late in 1992 (12 August 1992). He said that in respect of the year in question the fault apparently lay with his own audit firm. The audit work had been completed on 18 July 1993. The financial statements were signed on 13 September 1993 but had not been delivered to the Inland Revenue Department until 31 December 1993. He said that he could not offer any explanation for the delays except that there had been a serious breakdown in the internal control procedures of his own firm. He informed the Board that the business of the Taxpayer had grown tremendously during the years in question which had placed considerable administrative pressure on the Taxpayer. The Taxpayer had strengthened its accounts team to cope with the growth of the Taxpayer and had also appointed another firm to be their tax representative. He said that so far as his own firm was concerned they had implemented new control procedures. The representative referred the Board to other penalty tax cases and submitted that in all of the circumstances the penalty imposed in this case was excessive.

The representative for the Commissioner said that the Taxpayer closed its accounts on 31 December in each year and was required to file profits tax returns by 31 July. This it had failed to do. He said that the issue of an estimated assessment was not relevant. He drew attention to the late filing of returns in four previous years. He said that the penalty imposed by the Commissioner was 34.1% of the amount of tax involved. He said that the delay was five months and had been repeated for many years. He then drew the attention of the Board to a number of cases where penalties in the range of 30 to 40% have been imposed.

With due respect to the Commissioner and his representative we find the penalty to be excessive. We have not referred to the cases cited to us by the representative

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for the Commissioner because they were all substantially different and much more serious than the case before us. We consider this case to be similar to many cases which have come before previous Board of Review and in which penalties of approximately 10% of the tax involved have been imposed. It is true that the Taxpayer was late in filing its returns in previous years but the longest delay was only 96 days and in respect of the year immediately before the year in question the Taxpayer was only 12 days late. The tax representative was very frank, open and honest before the Board and said that he could not explain why his firm had not been able to file the tax return in respect of this particular year within the stipulated time. He accepted full blame and apparently his firm had been replaced by the Taxpayer.

In all of the circumstances we consider that a penalty of approximately 10% of the amount of tax involved would be appropriate. Accordingly we order that the penalty tax assessment against which the Taxpayer has appealed should be reduced from \$190,000 to \$55,600.