INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D22/93

Penalty tax – failure to file return in time – whether penalty excessive – section 82A of the Inland Revenue Ordinance.

Panel: Howard F G Hobson (chairman), Kenneth Kwok Hing Wai QC and Frank Wong Kuen Chun.

Date of hearing: 9 August 1993.
Date of decision: 31 August 1993.

The taxpayer failed to file its profits tax return for the year of assessment 1990/91 on time. Three estimated assessments were made on the taxpayer. The taxpayer objected to the third estimated assessment and then filed its tax return. The amount of the penalty imposed under section 82A of the Inland Revenue Ordinance was HK$100,000 representing 16.2% of the tax undercharged.

Held:

Bearing in mind the record of the taxpayer in late filing of returns in previous years the penalty was very low and could have been higher.

Appeal dismissed.

Cases referred to:

D2/88, IRBRD, vol 3, 125
D34/88, IRBRD, vol 3, 336
D43/88, IRBRD, vol 3, 405
D53/88, IRBRD, vol 4, 10
D6/89, IRBRD, vol 4, 182

Ngai See Wah for the Commissioner of Inland Revenue.
Taxpayer's manager for the taxpayer.

Decision:

This concerns an appeal against an additional tax assessment of $100,000 imposed pursuant to section 82A of the Inland Revenue Ordinance for the year of assessment 1990/91.

Background

1. On 2 April 1992 a profits tax return notice for the year of assessment 1990/91 was issued by the Inland Revenue Department requiring the Taxpayer to complete and return it within one month which was subsequently extended to 15 November 1991: no further extension was asked for.

2. Because no tax return was received from the Taxpayer, the Commissioner pursuant to section 59(3) issued an estimated assessment (the first estimated assessment) in the amount of $2,500,000 on 15 January 1992. The Taxpayer did not object to this estimated assessment, nor did it file a profits tax return.

3. On 3 September 1992 as the Taxpayer had still not then yet filed the profits tax return despite a lapse of 293 days calculated from 15 November 1991, a further estimated assessment (the second estimated assessment) was raised in the amount of $300,000. Again, the Taxpayer took no objection and failed to file the tax return.

4. On 3 December 1992 another estimated assessment (the third estimated assessment) was raised in the amount of $2,600,000 resulting in a total of $5,400,000 for the three estimated assessments. (that is $2,500,000 + $300,000 + $2,600,000). On 2 January 1993 (the last day for objecting under section 64(1)), the Taxpayer lodged a formal objection to the third estimated assessment together with the relevant profits tax return and supporting accounts for the year of assessment 1990/91.

5. That return showing assessable profits of $3,744,999 was eventually accepted by the assessor and the third estimated assessment was accordingly reduced to $944,999.

6. Following a statutory notice warning of a proposal to impose additional tax for the year of assessment 1990/91 pursuant to section 82A, the Taxpayer made representations to the Commissioner who having considered them assessed the Taxpayer to an additional tax penalty of $100,000.

Grounds of Appeal

The Taxpayer's grounds of appeal may be summarized as follows. The Taxpayer's accounts for the years of assessment 1989/90 and 1990/91 were completed in November and December 1992 respectively. The fact that the Taxpayer's submission of two years' accounts in about two months and the filing of the 1990/91 return in January 1993, shows that the Taxpayer had treated the matter of submission of the returns seriously

by increasing its manpower to speed up the procedure and complete the accounts well within three months, the additional tax for the year of assessment 1990/91 should therefore be reduced.

Furthermore, the Taxpayer's main customer was closing down which would be a great blow to the Taxpayer. [The grounds also asked the Board to 'review' a 1989/90 penalty. That however had not been challenged in time and could not therefore be reviewed by us.]

Submissions

At the hearing, the Taxpayer was represented by its manager, Mr A. The relevant provisions of section 82A and section 82B were read over to Mr A who confirmed that the Taxpayer was not suggesting that there was a reasonable excuse for failing to complete and file the return (section 82A(1)(d), rather its argument was that the $100,000 was excessive having regard to the circumstances (section 82B(2)(c)). At first Mr A mentioned that the failure to file the profits tax returns for the years of assessment 1989/90 and 1990/91 in due time was due to his negligence brought about by his ignorance of the subject matter and having only joined the Taxpayer in 1989. He said that prior to his joining, the boss completed the returns but during the material time for completing the years of assessment 1989/90 and 1990/91 accounts and returns the boss had been in the process of immigrating to Country B.

As the hearing progressed it became clearer that the Taxpayer's objection really motivated by the following alleged anomaly. The tax return for the year of assessment 1989/90 disclosed profits of $4,370,515 (with tax thereon of around $743,000) but as the return was filed late an additional tax assessment of $70,000 was imposed. The tax return for the year of assessment 1990/91 disclosed profits of $3,744,999 (with tax thereon of about $618,000) hence, it was submitted, the additional tax penalty with respect to that return should be less than the year of assessment 1989/90 whereas it was $100,000.

The representative for the Commissioner drew our attention to the following as justifying the $100,000 additional tax:

(a) There had been delays of 1 year 5 months for the 1988/89 return, about the same delay for the year of assessment 1989/90, about 293 days for the year of assessment 1990/91 and 10 months for the year of assessment 1991/92.

(b) $100,000 represents merely 16.2% of the tax undercharged as compared with $1,853,772 being the amount of the statutory maximum of treble the tax undercharged. Boards of Review have adopted a starting point of 100% of the amount of tax undercharged (see D2/88, IRBRD, vol 3, 125, D34/88, IRBRD, vol 3, 336, D43/88, IRBRD, vol 3, 405, D53/88, IRBRD, vol 4, 10 and D6/89, IRBRD, vol 4, 182).

As to Mr A's remark that he was ignorant of the subject matter, in decision D34/88, IRBRD, vol 3, 336, the Board considered that incompetency of the Taxpayer's staff was no excuse because it was the Taxpayer's duty to employ competent staff.

Conclusion

We can find no compelling reason for holding that the $100,000 additional tax for the year of assessment 1990/91 was excessive. Indeed bearing in mind at least two preceding years of late filing it appears to us that at 16.2% the penalty is very low. Granted that although the year of assessment 1990/91 undercharged tax was less than for the year of assessment 1989/90 the second penalty tax was greater than the first nevertheless we cannot accept that that circumstance should lead us to treat the second penalty as excessive. It is equally open to us to conclude that the 1989/90 penalty was far too lenient and/or that the late filing of the 1990/91 return should be viewed as a second 'offence' (albeit an inevitable one since the 1990/91 return strictly speaking could not be completed until the 1989/90 return had been completed) capable of attracting a greater penalty.

Accordingly we dismiss this appeal.