

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D23/98

**Penalty tax** – incomplete – a financial statement signed by only one director – whether reasonable excuse – section 51(1) and 82A of the Inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum SC (chairman), Charles Chiu Chung Yee and Ng Ching Wo.

Date of hearing: 3 January 1998.

Date of decision: 8 May 1998.

The taxpayer is a company trading in polyfoam products. On 15 November 1996 which is the deadline for the taxpayer to submit a profit tax return for the year of assessment 1995/96, the Revenue received a Return from the taxpayer which was accompanied by a profit tax computation, an unsigned auditor's report and financial statements signed by one director of the taxpayer.

By a letter dated 3 December 1996, the Revenue informed the taxpayer that the lodgement of the Return on 15 November 1996 was incomplete and unacceptable because the auditor's report and financial statements were not properly certified. An objection letter dated 3 December 1996 was sent by the taxpayer to the Revenue together with an audited financial statement of the taxpayer signed by two directors and its auditor. Thereafter the Revenue imposed additional tax of HK\$20,000 on to the taxpayer. This is the appeal by the taxpayer against the imposition of such additional tax.

It was the contention of the taxpayer that the Return submitted on 15 November 1995 did not contain any incorrect information and there was no risk of any loss of revenue by that Return. The taxpayer further argued that they did not have any intention to understate any profit and the Return was signed by only one director because one of its directors was not in Hong Kong at the moment.

Held:

The absence of taxpayer's director is not a reasonable excuse for the technical breach of section 51(1) of the Inland Revenue Ordinance which requires a taxpayer to furnish any return which may be specified by the Board of Inland Revenue. However taking into account factors that the loss of revenue arising from the technical breach is merely a remote possibility, the documents were tended with the view to comply with the deadline and were prepared by the taxpayer's auditor

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and the mistake was rectified shortly thereafter, an additional tax in the sum of HK\$10,000 should be appropriate.

### **Appeal allowed.**

B J Brown for the Commissioner of Inland Revenue.  
Tang Wai Hung of Messrs S W Wu & Co for the taxpayer.

### **Decision:**

#### **The facts of this case**

1. The Taxpayer is a company incorporated on 14 November 1989. It commenced business on 9 July 1990 trading in polyfoam products.
2. On 1 April 1996, a profit tax return ('the Return') for the year of assessment 1995/96 was issued to the Taxpayer. The expiry date for submission of the return was 15 November 1996 under the normal block extension arrangement granted to tax representatives.
3. On 15 November 1996, the Return showing an assessable profits of \$3,888,820 was received by the Department. The Return was then accompanied by:
  - a. a profit tax computation;
  - b. an unsigned auditor's report and
  - c. financial statements signed by one director of the Taxpayer.
4. On the basis of these submissions, an estimated assessment of \$5,780,000 with tax charged thereon of \$953,700 was made by the Revenue on 28 November 1996.
5. By letter dated 3 December 1996, the Revenue informed the Taxpayer that the lodgement on 15 November 1996 was incomplete and unacceptable as the auditor's report and financial statements were not properly certified.
6. An objection letter dated 3 December 1996 in respect of the year of assessment 1995/96 was then sent by the Taxpayer's tax representative. This objection letter was accompanied by:
  - a. a photocopy of the Return;

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- b. audited financial statements of the Taxpayer signed by two directors and its auditor and
  - c. the profits tax computation.
7. On 16 December 1996, a revised assessment was issued by the Revenue based on the same amount of assessable profits of \$3,888,820.
8. On 10 April 1997, the Commissioner gave notice under section 82A of his proposal to assess additional tax. After taking into account submissions of the Taxpayer, the Commissioner by notice dated 22 May 1997 imposed additional tax for the year of assessment 1995/96 in the sum of \$20,000.
9. This is the appeal by the Taxpayer against the imposition of such additional tax.

### **The respective contentions**

10. The Taxpayer maintains that:
- a. the Return as submitted on 15 November 1996 did not contain any incorrect information.
  - b. there was no risk of any loss of revenue by virtue of the Return as submitted on 15 November 1996. The provisional and final assessments were all based on the figures in the Return as submitted on 15 November 1996.
  - c. it did not have any intention to understate any profit.
  - d. one of its directors was not in Hong Kong on 15 November 1996. As a result the Return was signed by only one director.
11. The Revenue maintains that:
- a. the additional tax was imposed not because of the incorrect return but because of the Taxpayer's failure to comply with section 51(1) of the Inland Revenue Ordinance (the IRO) which requires a taxpayer to 'furnish any return which may be specified by the Board of Inland Revenue'.
  - b. the Return filed on 15 November 1996 was not a valid return. It was only validated on 5 December 1996.
  - c. the absence from Hong Kong of the Taxpayer's director is not a reasonable excuse for non-compliance. A taxpayer has an obligation to arrange his affairs so as to ensure proper discharge of his statutory duty.

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- d. the amount of additional tax is not excessive. \$20,000 only amounts to 3.12% of \$641,655 being the possible amount of tax undercharged or 1.04% of the maximum penalty of \$1,924,965 under section 82A.

### **Our Decision**

12. We agree with the Revenue that there is a technical breach of section 51(1) of the IRO and the absence of the Taxpayer's director is not a reasonable excuse.

13. We are however of the view that insufficient weight is given to the fact that the loss of revenue arising from the technical breach is merely a remote possibility. The Return was after all signed by one of the directors. Unlike a management account, it was obviously prepared by the Taxpayer's auditor. The documents were tendered with the view of complying with the deadline. The mistake was rectified shortly thereafter.

14. Taking these factors into account, we are of the view that an additional tax in the sum of \$10,000 would be appropriate in the circumstances of this case.

15. We allow the appeal and order that the sum of \$10,000 be substituted as the amount of additional tax on the Taxpayer for the year of assessment 1995/96.