

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D31/94

Penalty tax – late filing tax return – quantum of penalty.

Panel: William Turnbull (chairman), Foo Tak Ching and Woo Manuel Rosas.

Date of hearing: 7 July 1994.

Date of decision: 10 August 1994

The taxpayer was late in filing its profits tax return. The Commissioner imposed a penalty of 10%. The taxpayer appealed to the Board of Review. The ground of appeal was that the taxpayer had encountered difficulties because of the problems of its auditor. The proprietress of the audit firm appeared before the Board and explained that she had had problems in meeting with the deadline for her clients because of ill health. She said that the problem was such that she had subsequently closed down her accounting and auditing practice.

Held:

Though the Board had great sympathy for the auditor who had appeared before it and accepted blame the Board could not in the circumstances reduce the penalty.

Appeal dismissed.

Cases referred to:

D53/88, IRBRD, vol 4, 10

D33/89, IRBRD, vol 4, 361

D2/90, IRBRD, vol 5, 81

D29/93, IRBRD, vol 8, 233

D11/93, IRBRD, vol 8, 146

B J Brown for the Commissioner of Inland Revenue.

Lau Kam Cheuk of Messrs M Y C Lee & Co for the taxpayer.

Decision:

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This is an appeal by a private limited company (the Taxpayer) against a penalty tax assessment levied upon it in respect of the year of assessment 1992/93 because it failed to file its tax return within the stipulated time. The facts are as follows:

1. The Taxpayer was incorporated in February 1985 and commenced business in May 1985. Its principal activities were manufacturing and trading.

The Taxpayer closes its accounts annually on 31 March.

2. On 1 April 1993 a profits tax return for the year of assessment 1992/93 was issued to the Taxpayer requiring its completion and return to the Revenue within one month. An extension to 15 November 1993 was allowed under the 'Block Extension' programme.

3. In the absence of receiving the profits tax return the assessor issued an estimated assessment on 26 November 1993 in the amount of \$5,750,000 with tax thereon of \$1,006,250.

4. By a letter dated 23 December 1993 the tax representative on behalf of the Taxpayer lodged an objection against the estimated assessment dated 26 November 1993. This objection was not supported by a profits tax return.

5. The profits tax return for the year of assessment 1992/93 showing an assessable profit of \$2,614,365 was submitted to the Revenue on 31 December 1993.

6. By letter dated 4 January 1994 the assessor allowed an extension of time to 14 January 1994 for the filing of a profits tax return to validate the objection.

7. The tax return was accepted and the objection filed by the Taxpayer was settled on 18 January 1994 when a revised assessment was issued on profits of \$2,614,365 with tax thereon of \$457,513.

8. The Taxpayer had a record of failing to submit its profits tax returns within the time stipulated. The following is a table setting out the late filing of tax returns since 1987/88:

Year of Assessment	Date of Issue	Extension Allowed to	Date of Submission
1987/88	3-6-1988	-	4-2-1989
1988/89	3-4-1989	31-10-1989	22-6-1990
1989/90	2-4-1990	31-10-1990	29-12-1990
1991/92	1-4-1992	15-11-1992	28-1-1993

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9. On 26 January 1994 the Commissioner gave notice to the Taxpayer under section 82A of the Inland Revenue Ordinance (the IRO) that he proposed to assess additional tax by way of penalty for the year of assessment 1992/93 in respect of the failure by the Taxpayer to file its tax return within the time stipulated.

10. By a letter dated 16 February 1994, the representative on behalf of the Taxpayer made representations to the Commissioner.

11. On 8 April 1994 the Commissioner, having taken into account the representations, issued a notice of assessment to additional tax under section 82A for the year of assessment 1992/93 in the amount of \$40,000.

12. On 3 May 1994 notice of appeal was given on behalf of the Taxpayer to the Board of Review against this penalty tax assessment.

At the hearing of the appeal the Taxpayer was represented by its tax representative. The proprietress of the firm of certified public accountants who were the tax representative was called to give evidence.

It was explained to the Board that a problem had arisen because the proprietress of the tax representative had been seriously ill and had undergone medical treatment overseas at the time when the audited accounts of the Taxpayer would have been completed and when the tax return should have been filed. She had returned to Hong Kong as soon as she was able to do so and had personally attended to this matter as quickly as she was able. As a result of her ill health she had notified the Taxpayer that she would not be able to continue to be either its auditor or represent it in its tax affairs. Indeed she had decided to close down her accounting practice and her auditing business. When giving evidence to the Board she did so with complete sincerity and though she had arranged for a colleague to represent her she also addressed the Board personally. It was quite apparent that she was a person of high integrity and that this case caused her much distress. Indeed she appeared to accept full responsibility for the delay which she felt had been caused by her sickness.

It was also explained to the Board that the problem of filing a tax return on time had been compounded by the fact that the Taxpayer was operating a factory in Country A and had not been able to complete its accounts in Country A because of problems in so doing.

The representative for the Taxpayer also submitted that there had been no undercharge to tax because an estimated assessment had been issued. It was pointed out to the tax representative that this part of his submission was without any substance.

The representative for the Commissioner submitted that the sickness of the auditor and the problems in keeping accounts in Country A were not reasonable excuses. He drew attention to the fact that the Taxpayer had been late in filing its tax returns in

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previous years and submitted that a penalty which was only 8.74% of the amount of tax which was charged was not excessive.

The representative for the Commissioner referred us to the following Board of Review decisions:

D53/88, IRBRD, vol 4, 10
D33/89, IRBRD, vol 4, 361
D2/90, IRBRD, vol 5, 81
D29/93, IRBRD, vol 8, 233
D11/93, IRBRD, vol 8, 146

It is well established that where a taxpayer fails to file its tax return within the stipulated time the Commissioner has a discretion to impose a penalty unless the taxpayer has a reasonable excuse. The amount of the penalty cannot exceed three times the amount of tax which would have been undercharged if the failure to file a tax return had gone unnoticed. It is completely irrelevant that there was an estimated assessment issued and it is also irrelevant that provisional tax may have been paid in advance. The whole point of section 82A is to empower the Commissioner to impose a penalty on the assumption that the failure to file a tax return had not been noticed. If the failure to file a tax return had never been found out then no tax would ever have been assessed. The basis of section 82A is theoretical and not factual.

It is no excuse to say that the Taxpayer had difficulty in producing its audited accounts because some of the information was in Country A. It is the duty of the Taxpayer to ensure that it can keep its accounts properly. It has a statutory obligation under the Companies Ordinance in Hong Kong to keep proper accounts and it likewise has obligations under the IRO to file proper tax returns. It is the duty of the directors of the Taxpayer to ensure that it fulfils its statutory obligations. It is appropriate to take into account the fact that the Taxpayer has been late in filing its tax returns in previous years.

In previous decisions of this Board of Review it has been held that penalties in the range of 10% to 20% of the amount of tax involved would be appropriate depending upon the circumstances. In the present case probably a penalty of not less than 10% would have been appropriate if there were no other extenuating circumstances.

However it is necessary to look at the case from another point of view, that is, in relation to the illness of the auditor. In normal circumstances we would take the point of view that it is the obligation of the Taxpayer to file its tax return and that the Taxpayer cannot put the blame on its auditor. However in the present case the facts are a little different. It is the auditor herself who has come before the Board and with great sincerity explained her difficulty caused by her serious illness. This is not a situation of a taxpayer placing the blame upon its auditor.

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We have great sympathy for the lady in question and it would appear that the Commissioner has likewise had sympathy in the circumstances and there is no doubt why the Commissioner has decided to impose a penalty of less than 10%.

In all of the circumstances we are not able to say that the amount of the penalty is excessive and accordingly we confirm the amount of the penalty as assessed by the Commissioner.