

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D31/99

Penalty Tax – section 82A of the Inland Revenue Ordinance – late filing of returns – whether quantum of penalty excessive – whether professional advisers' negligence a mitigating factor.

Panel: Robert Wei Wen Nam SC (chairman), Raphael Chan Cheuk Yuen and Daisy Tong Yeung Wai Lan.

Date of hearing: 28 January 1999.

Date of decision: 30 June 1999.

The taxpayer is a small company. In tax matters it relied completely on its tax representative. Upon receiving a profit tax return form, the taxpayer would simply pass it on to its tax representative without reading it. The return for the year of assessment 1995/96 was filed one year and 321 days after the due date for lodgment whereas the return for the year of assessment 1996/97 was filed 321 days after the due date. The additional tax penalties were assessed as 18% and 12% of profits tax involved respectively for the years of assessment 1995/96 and 1996/97. There was no dispute on its liability to additional tax but contended that the amount of tax assessed for each of the two years is excessive.

The mitigation circumstances raised by the taxpayer were that, (1) the taxpayer has been negligent due to a heavy workload; (2) the taxpayer has always paid tax promptly and had no intention of making any late returns; (3) the directors have trusted the performance and advice of the tax representative who has acted in good faith; and (4) the tax representatives have the responsibility for additional tax and they have learned a valuable lesson from this case.

Held:

As a taxpayer, the Company cannot take shelter behind its professional advisers' negligence, which provides no ground at all for mitigating the amount of additional tax, but is purely a matter between the Company and its advisers. The delay in filing the return in present case was inordinate and there was no mitigating factor in the circumstances of out case. The penalties are not excessive (D70/89, IRBRD, vol 5, 69 followed).

Appeal dismissed.

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Case referred to:

D70/89, IRBRD, vol 5, 69

Chan Sin Yue for the Commissioner of Inland Revenue.
Leung Ka Wing of Messrs A & T Consultants for the taxpayer.

Decision:

1. This is an appeal by a private limited company (the Company) against the additional tax assessments raised on it for the years of assessment 1995/96 and 1996/97. While not disputing its liability to additional tax, it contends that the amount of tax assessed for each of the two years is excessive having regard to the circumstance.

2. The Company is a small company trading in water-proofing building materials. In tax matters it relied practically completely on its tax representative. Upon receiving a profits tax return form, it would simply pass it on to its tax representative without reading it, not even the warning on the front page that the form **MUST** be completed and returned **WITHIN ONE MONTH** from the date of the notice, that is, 1 April 1996 and 1 April 1997 respectively, which means that the completed returns must be filed with the Inland Revenue Department on or before 1 May 1996 and 1 May 1997 respectively. The Company suffered from a false sense of security because whenever it queried the date for the filing of the tax returns, it was advised that an extension had been obtained. Mr X the managing director of the Company stated in evidence that he was shocked to receive a section 82A(4) notice that the Company had failed to file the tax returns within the time allowed and that it had the right to submit written representations to the Commissioner. He therefore spoke to Miss YM Lee the assessor and was advised that extensions would not be granted to companies with a financial year-end between April and November inclusive (such as the Company, which closes its accounts on 30 October), as the tax return forms were dated April of the following year, and that the returns must be filed within one month of that date.

3. The tax representative's letter dated 6 January 1999 had the effect of replacing the two statements of grounds of appeal both dated 11 September 1998 and is briefly as follows:

- 1) No objection is raised against the additional tax, but the Board is asked to consider the following mitigation circumstances.
- 2) It is their past experience that similar situations have not led to the imposition of additional tax. They have been negligent due to a heavy workload.

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- 3) The Company has always paid tax promptly and had no intention of making any late returns. The directors have trusted the performance and advice of the tax representative who has acted in good faith.
- 4) As tax representatives, they feel they have the responsibility for the additional tax which is difficult for them to bear as they are not a large concern. They have learned a valuable lesson from this case.

4. As Ms Chan Sin-yue, the Commissioner's representative, submitted, late filing of a return in the absence of reasonable excuses will be subject to penalties and this has always been the practice of the Revenue. Enclosed with the return form are Notes and Instructions on how to complete the form. In Note 9, under the heading 'Offences and Penalties', it is stated that the Inland Revenue Ordinance provides heavy penalties for any person who fails to comply with the requirements of a notice to make a return without any reasonable excuse.

5. As the board stated in D70/89, IRBRD, vol 5, 69: *'It had the benefit of professional advice. If the professional advisers of the Taxpayer did not warn the Taxpayer of the likely consequences of failure to file tax returns on time, this is a matter for the Taxpayer to take up with its advisers and cannot affect the quantum of the penalties. Furthermore, there is no obligation on the Inland Revenue Department to issue warnings in individual cases. The Inland Revenue Department draws attention to penalties when issuing tax return forms and also by means of television and newspaper advertisements. It is the duty of the Taxpayer to comply with the provisions of the Inland Revenue Ordinance. To protect the public revenue, the legislature has made provisions for very heavy penalties to be imposed on those who fail in their obligations under the Inland Revenue Ordinance.'*

6. As a taxpayer, the Company cannot take shelter behind its professional advisers' negligence, which provides no ground at all for mitigating the amount of additional tax, but is purely a matter between the Company and its advisers.

7. The return for the year of assessment 1995/96 was filed one year and 321 days after the due date for lodgment whereas the return for the year of assessment 1996/97 was filed 321 days after the due date.

8. Details of the additional tax assessed are as follows:

<u>Year of Assessment</u>	<u>Additional Tax Assessed</u>	<u>Profits Tax Involved</u>	<u>Percentage of Profits Tax Involved</u>
	\$	\$	
1995/96	40,000	218,665	18%
1996/97	30,000	253,506	12%

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9. The delay in filing the return in each instance was inordinate and we have not been able to find anything in the circumstances which can possibly be said to be a mitigating factor. The penalty in the one case is 18%, and in the other, 12%, of the amount of tax which would have been undercharged if the delay had not been detected. In our opinion, the penalties are not excessive.

10. It follows that this appeal fails and that the two additional tax assessments under appeal are hereby confirmed.