

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D32/01

Penalty tax – taxpayer’s return filed late – failure to inform Commissioner within time allowed his chargeability to tax – whether reasonable excuse for late filing existed – likelihood for continuing default without detection – sections 51(1), 51(2), 66(3), 68(4), 82A(1)(d) and 82A(1)(e) of the Inland Revenue Ordinance (‘IRO’).

Panel: Kenneth Kwok Hing Wai SC (chairman), Stephen Lau Man Lung and Dora Lo Lai yee.

Date of hearing: 16 March 2001.

Date of decision: 11 May 2001.

On 26 May 1987, the taxpayer registered as a sole proprietor of Company A. On 1 May 1998, the Inland Revenue Department (‘IRD’) issued a tax return (‘the Return’) to the taxpayer to be returned within three months. No return was filed. The audit team of the IRD conducted an audit on Company A’s accounts on 23 September 1999. After inquiry from the taxpayer, tax returns were filed on 29 November 1999.

It was revealed that the taxpayer had failed to give notice in relation to its tax return for the year of assessment 1996/97 and failed to inform the IRD that it was chargeable to profits tax for the years of assessment 1997/98 and 1998/99. Further, the tax undercharged amounted to 100% of the assessable profits.

The Commissioner, on 19 July 2000, gave notice to the taxpayer to charge additional tax under section 51(1) of the IRO for the various defaults. The taxpayer objected, inter alia, that he had not received the Return.

Held:

1. It was not open to the taxpayer to argue that he had not received the Return for the year of assessment 1996/97. He had not sought consent to rely on this ground, not having inserted it in his grounds of appeal: sections 66(3) and 82B(3) of the IRO.
2. The taxpayer’s case had changed from that of ‘late return’ before the assessments to ‘non-receipt of return’ after the assessments. In any case, there was no compelling reasons to allow an application to rely on this ground now: section 66(3) of the IRO.

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3. The taxpayer's evidence was untruthful. Further, no reasonable excuses for default were found.
4. The fact that the taxpayer was detected by the audit team to be in default (rather than his having been forthright in relation to the omission) was one of the factors pointing to the additional tax not being excessive.
5. Since the appeal was frivolous and vexatious, the taxpayer was required to pay the sum of \$5,000 as costs of the Board.

Appeal dismissed and a cost of \$5,000 charged.

Yue Wai Kin for the Commissioner of Inland Revenue.

Lam Yiu Hoi Peter of Messrs Y H Lam & Company for the taxpayer.

Decision:

1. This is an appeal against the following assessments (' the Assessments') all dated 26 September 2000 by the Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the IRO in the following sums:

Year of assessment	Additional tax	Charge number
	\$	
1996/97	160,000	3-2466277-97-7
1997/98	145,000	3-3857611-98-1
<u>1998/99</u>	<u>58,000</u>	3-1968918-99-4
Total:	<u><u>363,000</u></u>	

2. For the year of assessment 1996/97, the relevant provision is section 82A(1)(d) of the IRO for failing to comply with the requirements of the notice given to the Taxpayer under section 51(1) to furnish the tax return - individuals for the year of assessment within the time allowed.

3. For the years of assessment 1997/98 and 1998/99, the relevant provision is section 82A(1)(e) of the IRO for failing to comply with section 51(2) to inform the Commissioner in writing that the Taxpayer was chargeable to tax not later than four months after the end of the respective basis period for the respective year of assessment.

The agreed facts

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4. Based on the agreed statement of facts, we make the following findings of fact.
5. The Taxpayer has at all material times been the sole proprietor of Company A (‘ the Business’). On 26 May 1987, he registered the Business under the Business Registration Ordinance, reporting that the date of commencement of business was 26 May 1987 and that the nature of business was buying and selling of health and medical products.
6. On 1 May 1997, the IRD issued the tax return - individuals for the year of assessment 1996/97 (‘ the Return’) to the Taxpayer, requiring him to complete and return it to the IRD within three months from the date of issue. The Taxpayer did not return the Return. The IRD had not followed up the matter.
7. On 23 September 1999, an audit team from the IRD visited the registered address of a business registered in the name of the Taxpayer’ s wife (‘ the Wife’ s Firm’) to conduct an audit of her business, saw the signboard of the Business, and asked the Taxpayer who was the proprietor of the Business. The Taxpayer said he was the sole proprietor. At that time it was the Taxpayer who received the audit team. The Taxpayer was the general manager of the Wife’ s Firm and his wife’ s representative. The Taxpayer disclosed that the Business commenced business in mid-1996 and had not until then submitted tax returns for the following reasons:
 - (a) The Taxpayer concentrated on operating the Business and had been receiving medical treatment (mercury whole blood as high as 22.8 mcg/L, the reference range being lower than 5 mcg/L).
 - (b) Heavy workload plus mental pressure arising from disharmony in his relationship with his wife.
 - (c) He commenced operating his own business and had to rely on accountants to arrange accounts for tax reporting as he was not familiar with accounting.
 - (d) The turnover rate of accountants was high, their qualities were not satisfactory, and the accounting and taxation company which he used disappeared.

The assessors said that the tax return of the Business should be submitted as soon as possible. The assessors then continued to audit the business and financial matters of the Wife’ s Firm.

8. On 18 November 1999, the assessor issued to the Taxpayer a duplicate tax return - individuals for the year of assessment 1996/97, and tax returns - individuals for the years of assessment 1997/98 and 1998/99 to file his returns.

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9. On 29 November 1999, the Taxpayer, through his tax representative, submitted tax returns for the years of assessment 1996/97 to 1998/99 with all relevant accounts and computations of profits tax.

10. The Taxpayer's tax returns disclosed the following information:

Year of assessment	Date of issue of return	Date of receipt of return	Amount of profit reported \$	Number of days late
1996/97	1-5-1997	30-11-1999	1,140,522	852
1997/98	18-11-1999	30-11-1999	1,254,749	0
1998/99	18-11-1999	30-11-1999	582,254	0

11. After reviewing the returns, the IRD agreed that the amounts of profits reported were correct. The assessor prepared a form stating the amounts of understated assessable profits for the years of assessment 1996/97 to 1998/99 and presented it to the Taxpayer at the meeting on 22 March 2000 for his signature. As the Taxpayer merely agreed that there was late reporting but did not agree that there was any understatement of assessable profits; and as the tax representative expressed the view that the form was unfair to the Taxpayer in that the form assumed that the profits reported/assessed was '0' in arriving at the amount of understatement of assessable profits, the assessor was requested to prepare a suitable agreement. The assessor said the format of the form had been laid down. The Taxpayer agreed to discuss the matter further with his tax representative before making a decision. On 23 March 2000, the form with the Taxpayer's signature, together with a letter of explanation were sent to the assessor.

12. The amounts of assessable profits after investigation and the amounts of tax undercharged are as follows:

Year of assessment	Assessable profits before investigation \$	Assessable profits after investigation \$	Understated assessable profits \$	Tax undercharged \$
1996/97	-	1,140,522	1,140,522	171,078
1997/98	-	1,254,749	1,254,749	169,391
1998/99	-	<u>582,254</u>	<u>582,254</u>	<u>74,651</u>
Total	<u>-</u>	<u>2,977,525</u>	<u>2,977,525</u>	<u>415,120</u>

The total amount of understated assessable profits is 100% of the assessable profits after investigation.

13. On 19 July 2000, the Commissioner gave the Taxpayer notice under section 82A(4) of the IRO of her intention to assess the Taxpayer to additional tax for his failure to comply with the

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requirements of the notice given to him under section 51(1) of the IRO for the year of assessment 1996/97, and for failing to inform the Commissioner in writing that he was chargeable to tax for the years of assessment 1997/98 and 1998/99 within the period prescribed under section 51(2) of the IRO.

14. On 16 August 2000, the Taxpayer, through his tax representative, made written representations to the Commissioner.

15. After considering and taking into account the Taxpayer's representations, the Commissioner issued the following additional tax assessments under section 82A of the IRO:

Year of assessment	Tax undercharged	Additional tax under section 82A	Additional tax as percentage of tax undercharged
	\$	\$	%
1996/97	171,078	160,000	94
1997/98	169,391	145,000	86
1998/99	<u>74,651</u>	<u>58,000</u>	<u>78</u>
Total	<u>415,120</u>	<u>363,000</u>	<u>87</u>

16. On 25 October 2000, the Taxpayer, through his tax representative, gave notice of appeal to the Board of Review under section 82B of the IRO against the additional tax assessments for the years of assessment 1996/97 to 1998/99.

The appeal hearing

17. The Taxpayer was represented at the hearing of the appeal by Mr Lam Yiu-hoi, Peter, of Messrs Y H Lam & Co, certified public accountants.

18. At the end of Mr Lam Yiu-hoi, Peter's submissions, we asked him if there was any reason why we should not increase the additional tax if we should consider the Assessments inadequate and whether there was any reason why we should not order costs against the Taxpayer if we should dismiss the appeal. At the end of Mr Lam Yiu-hoi, Peter's submissions on these two points, we told the parties that we were not calling on Mr Yue Wai-kin who represented the Respondent and that we would give our decision in writing.

Our decision

19. The onus of proving that the Assessments are excessive or incorrect is on the Taxpayer, sections 68(4) and 82B(3) of the IRO.

Alleged non-receipt of the Return

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20. At the hearing of the appeal, Mr Lam Yiu-hoi, Peter and the Taxpayer asserted that the Taxpayer had not received the Return.
21. This ground is not in the Taxpayer's statement of grounds of appeal and it is not open to the Taxpayer to rely on this ground, sections 66(3) and 82B(3) of the IRO.
22. Mr Lam Yiu-hoi, Peter made no application for consent under section 66(3) to rely on this ground. Had he applied, we would not have been inclined to grant the application. Until shortly before the hearing of the appeal, the Taxpayer repeatedly represented to the IRD that this was a case of late return, see paragraphs 6, 7, 10, 11 and 14 above. Had the Taxpayer asserted at any time prior to the issue of the Assessments that he had not received the Return, the Commissioner could have, if he was so minded, proceeded under section 82A(1)(e) of the IRO for failing to comply with section 51(2) to inform the Commissioner in writing that the Taxpayer was chargeable to tax not later than four months after the end of the basis period for the year of assessment 1996/97. Making no assertion of non-receipt of the Return until after the issue of the Assessments meant the Respondent had lost the option of proceeding against the Taxpayer for failure to comply with section 51(2). This is a powerful, if not compelling, reason against acceding to the application had Mr Lam Yiu-hoi, Peter applied under section 66(3).
23. Further and in any event, we do not for one moment believe the Taxpayer's assertion that he had not received the Return.
- (a) Non-receipt of the Return was not one of the reasons put forward by the Taxpayer at the 23 September 1999 meeting. If the Taxpayer had not received the Return, he would naturally have said that he had not submitted tax returns because he had not received any of them. This had nothing to do with accounting or legal knowledge. This had everything to do with stating the true factual position. The assessors said that the tax return of the Business should be submitted as soon as possible. If the Taxpayer had not received the Return, he would naturally have said he could not complete the Return since he had not received it.
 - (b) At the 22 March 2000 meeting, the Taxpayer insisted that it was a case of late return.
 - (c) The representations dated 16 August 2000 were presented by Mr Lam Yiu-hoi, Peter's firm, Messrs Y H Lam & Co. The Taxpayer 'apologises for his failure to comply with section 51(1) ...' and non-receipt of the Return was not one of the reasons given for such failure.

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- (d) The grounds of appeal in the letter dated 25 October 2000 were presented by Mr Lam Yiu-hoi, Peter's firm, Messrs Y H Lam & Co, contending that the Taxpayer had reasonable excuses for filing 'late' returns and that the penalty for 'late' filing of tax returns was excessive.
- (e) The Taxpayer is an untruthful witness. After asserting that he had not received the Return, he virtually muted himself. He did not respond in any way to almost all other questions asked of him. He was far from deaf or dumb, and was sufficiently alert to interrupt Mr Lam Yiu-hoi, Peter in the course of his submission.

Whether reasonable excuse

24. The Taxpayer put forward the following in his grounds of appeal as 'reasonable excuses for filing late returns:

- (a) Ill health: He was in ill health condition for a long period of time from the beginning of 1995 up to present.
- (b) Family circumstances: In early 1995, [the Taxpayer] was not in harmony with his wife and was not satisfied being a manager in his wife's company. He started his own business [the Business] in 1996.
- (c) Work pressure: He had work pressure and psychological burden because he had to manage his own company and his wife's company and his whole energy was spent in visiting customers, meeting suppliers and attending other affairs of the two companies.
- (d) Reliance on staff: As he had no accounting knowledge, he had to rely on accounting staff and accounting firms to prepare the accounts for filing tax returns. Unfortunately, all accounting staff or accounting firm worked for short period or disappeared which caused the delay of filing tax returns.'

25. We do not accept that the Taxpayer had been as sick as he would have us believed. He allegedly started the Business in 1996 and had been managing the Business and the Wife's Firm, after having allegedly been in ill health since the beginning of 1995. He could not have been too sick to file tax returns had he had the will to do so.

26. We do not accept that there was any or any material matrimonial disharmony. On the Taxpayer's own case, he had been managing the Wife's Firm and was his wife's representative during the visit by the audit team on 23 September 1999. On the Taxpayer's own case, he chose to start the Business with full knowledge of the alleged matrimonial disharmony and in these

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circumstances he must comply with the requirements of the IRO in relation to the Business. Further and in any event, we are not persuaded that matrimonial disharmony is a reasonable excuse.

27. On alleged work pressure, the Board of Review has said times and again that it was the duty of the Taxpayer to regulate its own affairs in such a way so as to comply with the requirements of the IRO. Insofar as he chose to spend 'his whole energy in visiting customers, meeting suppliers and attending other affairs of the two companies', he chose to put them before complying with the requirements of the IRO. Intentional non-compliance is no excuse.

28. With nearly \$3,000,000 in assessable profits for the three years in question, the Taxpayer should have employed or instructed a person or persons competent to handle his accounting and taxation matters. There is no allegation and no evidence of the competence of any of the accounting staff or accounting firms said to have been employed.

29. It is trite law that ignorance of law is no excuse. The Taxpayer has not shown any proper concern in complying with his duty to file tax returns on time and his duty to notify the IRD of his chargeability. In our decision, his failure to submit the Return within the time allowed and his failures to notify the IRD of his chargeability are inexcusable.

Whether excessive having regard to the circumstances

30. Mr Lam Yiu-hoi, Peter, contended that 'the penalty for late filing of tax returns was excessive in the circumstances of this case:

- (a) The late filing was not a deliberate act to postpone the payment of tax or attempt to evade tax.
- (b) There was no actual loss of revenue by the IRD apart from the element of interest.
- (c) [The Taxpayer] made great efforts to comply with the filing of tax returns: placing recruitment advertisements continuously, attempting to contact accounting firm for the purpose of filing tax returns.
- (d) He was co-operative throughout the field audit. According to the assessor in charge of the field audit, [the Taxpayer] was a good man and very co-operative, the assessor also expressed his sympathy for him.
- (e) The accounts and tax returns filed by him were accepted by the IRD as correct.

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- (f) In the year of assessment 1996/97, he commenced his proprietary business which did not have any bad record.
- (g) The penalty for his late filing in this case ranging from 78% to 94% of the tax paid as compared to that of deliberate evasion of tax which, in many cases, is around 80% to 100%.’

31. This is a case where the Taxpayer did not file the Return for the year of assessment 1996/97 and did not inform the IRD of his chargeability for the years of assessment 1997/98 and 1998/99. There is no contention when, if at all, the Taxpayer might eventually comply with the requirements of the IRO in respect of the three relevant years of assessments. But for the fact the audit team chanced to notice the existence of the Business on 23 September 1999 the Taxpayer’s defaults might well have continued. The fact that, **upon detection of the Taxpayer’s defaults**, the IRD now suffers no actual loss of revenue except the element of interest pales in significance. The Taxpayer had had the benefit of retaining the profits without being assessed to a single cent in tax. We do not understand what the ground of appeal that the Taxpayer ‘made great efforts to comply with the filing of the tax returns’ meant in the light of the Taxpayer’s assertion at the hearing of the appeal that he had not received the Return. He did not retain Messrs Y H Lam & Co, certified public accountants, until after having been informed of the audit team’s interests in the Wife’s Firm. We are confident that the Commissioner had taken the extent to which the Taxpayer had been co-operative into consideration before deciding on penalty assessments of 94%, 86% and 78%.

32. This is not the first case where a defaulting taxpayer’s remorse and co-operation seemed to disappear suddenly upon the issue of the penalty assessments after a discount had been given by the Commissioner on account of remorse and co-operation. In this case, the Taxpayer asserted that he had not received the Return. In Bundle A1, the Taxpayer blamed the IRD for not following up on the default in submitting the Return. It is the duty of the person on whom a notice under section 51(1) is given to comply with the notice within the time allowed. The IRD has no duty to follow up and the fact that the IRD has not is no licence and no excuse for non-compliance by such person and is not a mitigating factor. No follow up would have been necessary had such person complied with his statutory duty. If a Board of Review should conclude that the Commissioner had been misled into giving a discount, the Board of Review may have to consider increasing the Commissioner’s assessment.

33. The maximum amount for which the Taxpayer is liable is three times the amount of tax undercharged or which would have been undercharged. We have carefully considered all the points raised on behalf of the Taxpayer orally and in writing, including those under the section above on whether there was any reasonable excuse. In our decision, none of the Assessments is excessive.

Disposition

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34. We dismiss the appeal and confirm the Assessments.

Costs order

35. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. The Taxpayer tried to lie his way out of his liability to pay additional tax for the year of assessment 1996/97 by asserting that he had not received the Return. He has wasted the time and resources of the Board of Review and those of the IRD by putting forward obviously unsustainable arguments in an attempt to get away from his liability to pay a total of \$363,000 in additional tax and in an attempt to reduce the amount. Pursuant to sections 68(9) and 82B(3) of the IRO, we order the Taxpayer to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the tax charged and recovered therewith.