

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D33/89

Penalty assessment – failure to comply with notice under section 51(1) of the Inland Revenue Ordinance – liability to be assessed to penalty tax and quantum thereof – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Terence Tai Chun To and Ronny Wong Fook Hum.

Date of hearing: 11 July 1989.

Date of decision: 18 August 1989.

The taxpayer carried on a sole proprietorship business. The taxpayer failed to file a tax return for the year of assessment of 1986/87 after extensions of time had been granted and when the tax return was filed it was twelve months after the final extension date had expired. An estimated assessment had been made which was substantially less than the returned profit. The amount of tax undercharged was \$457,292 and a penalty of \$170,000 was imposed by the Commissioner. The taxpayer appealed on the ground that a section 82A penalty cannot be imposed where the taxpayer ultimately files a correct tax return and pays his full tax liability. It was submitted that the taxpayer was away from Hong Kong and too busy to handle his tax affairs and that this constituted a reasonable excuse. It was further submitted that if the taxpayer ultimately files a tax return and was submitted that as only one year of assessment was involved the penalty was excessive.

Held:

There was no substance whatsoever in the grounds of appeal. The taxpayer has consistently and continually ignored his obligations under the Inland Revenue Ordinance. The excuses and submissions put forward were of no substance. The taxpayer had no reasonable excuse for failing to fulfill his obligations and the quantum of the penalty was not excessive.

Appeal dismissed.

Wu Hon Keung for the Commissioner of Inland Revenue.

David Lit Kam Leung of Tang Lit & Co for the taxpayer.

Decision:

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This is an appeal by a taxpayer against an additional tax assessment imposed upon him under section 82A of the Inland Revenue Ordinance in respect of the year of assessment 1986/87.

The facts are as follows:

1. The Taxpayer carried on a sole proprietorship business which commenced trading in April 1979. The nature of the business was import, export and commission agent.
2. In previous years, estimated assessments under section 59(3) of the Inland Revenue Ordinance due to the non-lodgment of returns within the extended due date period were issued. The following table provides the relevant information pertaining to the lodgement history:

<u>Year of Assessment</u>	<u>Return Issued on</u>	<u>Extended Date for Lodgement</u>	<u>Estimated Assessment Under s 59(3) (date of issue)</u>	<u>Return Submitted on</u>
1984/85	1-4-85	31-10-1985	12-3-1986	14-4-1986
1985/86	1-4-86	31-10-1986	3-2-1987	3-3-1987

3. A profits tax return for the year of assessment 1986/87 was issued to the Taxpayer for completion in April 1987. Extensions of time were granted up to October 1987.
4. In the absence of lodgment of a profits tax return for the year of assessment 1986/87, the assessor, in January 1988, raised on the Taxpayer the following profits tax assessment under the provisions of section 59(3) of the Inland Revenue Ordinance:

Estimated assessable profits	<u>\$1,500,000</u>
Tax payable thereon	<u>\$ 255,000</u>

No objection was lodged against this assessment.

5. In October 1988 the profits tax return for the year of assessment 1986/87 was lodged disclosing an assessable profit of \$2,689,958. In December 1988 the assessor raised an additional assessment of \$1,189,958, thus making a combined assessment, when taken with the estimated assessment, of an assessable profit equal to that disclosed in the return (\$1,500,000 + \$1,189,958 = \$2,689,958).

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6. The Commissioner was of the opinion that the Taxpayer had, without reasonable excuse, failed to comply with a notice under section 51(1) of the Inland Revenue Ordinance for the year of assessment 1986/87. By a notice of February 1989, the Commissioner informed the Taxpayer that he intended to assess him to additional tax under section 82A of the Inland Revenue Ordinance for that year.
7. On a later day of February 1989 the Taxpayer's tax representative submitted to the Commissioner on behalf of the Taxpayer representations in pursuance of section 82(A)(4)(a)(ii).
8. In March 1989, the Commissioner, having considered and taken into account the Taxpayer's representations, issued a notice of assessment and demand for additional tax under section 82A for the year of assessment 1986/87 in the amount of \$170,000.
9. In April 1989, the tax representative gave notice of appeal to the Board on behalf of the Taxpayer against the said assessment for additional tax.

At the hearing of the appeal the representative for the Taxpayer appeared and made submissions on his behalf. The Taxpayer himself was also called to give evidence. The representative submitted that there were four grounds of appeal. Firstly a penalty should not be imposed under section 82A of the Inland Revenue Ordinance if a person fails to submit a return but ultimately files a correct tax return and pays his full tax liability. Secondly the Taxpayer was away from Hong Kong and was too busy to handle his tax affairs and this constituted a reasonable excuse. Thirdly if the Taxpayer ultimately files a tax return and the tax is paid, then there is no undercharge to tax. Fourthly as this only involves one year of assessment the amount of the penalty should be less than if the Taxpayer had failed to file tax returns on more occasions and therefore the quantum of the penalty is excessive.

With due respect to the Taxpayer and his representative we find no substance whatsoever in this appeal. The Taxpayer has consistently and continually ignored his obligations under the Inland Revenue Ordinance. His excuse is that he was too busy and was away from Hong Kong for lengthy periods of time. At the hearing of the appeal evidence was given that the Taxpayer was away during the period in question for lengthy and frequent visits. However there was no evidence that these visits in anyway impeded the ability of the Taxpayer to run his business properly, maintain proper accounts, or file tax returns. However even if his visits overseas did affect his ability to maintain proper accounts and file tax returns, it is still no excuse. It is the duty of all taxpayers who carry on business in Hong Kong to so regulate their affairs that they are able to comply with their obligations under the Inland Revenue Ordinance. This is not a simple case of an individual with little or no business knowledge or education who fails in his obligations under the Inland Revenue Ordinance. This is a case of a sophisticated trader who chose to run his business without any respect for our tax laws. This conduct cannot be tolerated. The Inland Revenue Ordinance imposes substantial penalties on those who fail in their obligations

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under the Inland Revenue Ordinance. In such cases the Commissioner or Deputy Commissioner are empowered to impose penalties by way of additional assessments to tax of amounts up to three times the amount of tax undercharged. In this case the Commissioner has taken a lenient view and has imposed a penalty of \$170,000 by way of additional tax. The amount of tax undercharged is \$457,292. Whilst the amount of the penalty in dollar terms is substantial, the amount of profit made by the Taxpayer was likewise substantial and his disregard for the obligations imposed upon him by the Inland Revenue Ordinance was also substantial.

We find that the Taxpayer had no reasonable excuse for failing to fulfill his obligations under the Inland Revenue Ordinance and that the amount of the additional tax imposed upon him by the Commissioner in the circumstances is not excessive. Accordingly we dismiss the appeal and confirm the assessment appealed against in the sum of \$170,000.