

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D46/89

Penalty tax assessment– delay in filing tax return – incompetent staff and lack of education and knowledge of tax – section 82A of the Inland Revenue Ordinance.

Panel: Della P H Chan (chairman), Peter A Hall and Vincent Lo Wing Sang.

Date of hearing: 26 June 1989.

Date of decision: 5 September 1989.

The taxpayer carried on business in partnership. The taxpayer failed to file the profits tax return for the year of assessment 1985/86 within the time specified (as extended). In October 1986, an estimated assessment was issued with assessable profits of \$450,000. On 2 February 1987, the profits tax return was eventually filed showing profits of \$2,208,407. This return was accepted by the Commissioner. The Commissioner assessed penalty tax on the taxpayer in the amount of \$50,000 because of the late filing of the return. The taxpayer appealed against the quantum of the assessment.

Held:

The penalty tax assessment was not excessive. It was no excuse for the taxpayer to argue that his book-keeper was incompetent and that the taxpayer was ignorant of accounting and taxation.

Appeal dismissed.

Case referred to:

D1/83, IRBRD, vol 2, 36

D24/84, IRBRD, vol 2, 136

Au Ting Yuk for the Commissioner of Inland Revenue.

Alex Wu Kwok Kuen of Au Young, Leung & Co for the taxpayer.

Decision:

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This is an appeal by the Taxpayer against assessment to additional tax issued by the Commissioner of Inland Revenue under section 82A of the Inland Revenue Ordinance for the year of assessment 1985/86.

The relevant facts which were not disputed were as follows:

1. The Taxpayer and Mr X were equal partners of a company ('the company') which commenced business in January 1982.
2. For the three years preceding the year of assessment in question, the company filed its profits tax returns as follows:

<u>Year of Assessment</u>	<u>Date of issue of BIR 52</u>	<u>Extension granted to</u>	<u>Date of receipt of BIR 52</u>
1982/83	31-10-1983	29-2-1984	1-3-1984
1983/84	25-4-1984	31-7-1984	14-9-1984
1984/85	1-4-1985	31-7-1985	12-2-1986

3. On 1 April 1986, profits tax return for the year of assessment 1985/86 was issued to the company pursuant to section 51(1) of Inland Revenue Ordinance requiring the return to be completed and returned within one month from the date of issue. The company through its tax representative applied for an extension of time which was granted to 31 July 1986. The company failed to submit the profits tax return within the extension granted.
4. On 20 October 1986, an estimated assessment for the year of assessment 1985/86 was issued to the company under section 59(3) of the Inland Revenue Ordinance with the assessable profit estimated at \$450,000. No objection was lodged by the Taxpayer against the estimated assessment and the tax assessed was duly paid.
5. On 2 April 1987, the company finally submitted its profits tax return for the year of assessment 1985/86 returning profits at \$2,208,407. This was accepted by the Commissioner.
6. On 5 May 1987, additional profits tax assessment was issued to the company for the year of assessment 1985/86 and the additional tax was paid on due date.
7. On 13 July 1987, the Commissioner of Inland Revenue gave notice to the Taxpayer under section 82A(4) of the Inland Revenue Ordinance of his intention to assess additional tax under section 82A.
8. On 30 July 1987, the Taxpayer through his representative, Mr K K Wu, submitted his representations.

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9. On 28 August 1987, the Commissioner, after taking into account the Taxpayer's representations, issued a notice of assessment and demand for additional tax under section 82A for the year of assessment 1985/86 in the amount of \$50,000.
10. On 15 September 1987, the Taxpayer through his representative gave notice of appeal against the assessment to additional tax. A statement of the grounds of appeal accompanied the notice of appeal.

At the hearing, the Taxpayer was represented by his tax representative, Mr K K Wu. He submitted as reasons for the delay in filing the tax return the incompetence of the Taxpayer's book-keeper, the Taxpayer's ignorance of accounting work and taxation law and the negligence of the professional accountant, namely himself, in failing to apply for further extension of time for filing the profits tax return. The Taxpayer gave evidence. He said that due to his low standard of education, he was unable to assess the qualification of the book-keeper, that he was not aware of her incompetence until informed by Mr Wu. However, he did not offer any explanation as to why he did not replace the book-keeper after her incompetence was made known to him and she was allowed to carry on working until she resigned some time later. He said that he and his partner did not know how much profits were made by the company and did not check the books of accounts or bank statements to verify the amount of profits made. He said that his only concern was that the company's bank account should have sufficient fund to pay staff's salaries fortnightly. We find it difficult to believe that the Taxpayer had absolutely no idea of how much profits the company was making and that he did not realise that the estimated assessable profits for the year in question were substantially lower than the actual profits made.

Mr Wu referred to the statement of the grounds of appeal (fact No 10 supra). The Taxpayer's representative submitted that the amount of assessable profits for 1985/86 was voluntarily reported by the Taxpayer and not discovered under tax inspection, that the offence was merely a late submission of profits tax return and should not attract such a heavy penalty, that the Taxpayer did not have any intention to evade tax, that when the profits tax return was finally filed, it was accepted by the Commissioner as correct, that the profits tax return for the year 1984/85 was similarly filed out of time but no additional tax under section 82A was imposed, and that the Taxpayer had taken positive actions to prevent non-compliance with the filing of tax returns by employing better qualified accounting staff in 1986.

The representative for the Commissioner submitted that it is the Taxpayer's obligation to file timely and correct profits tax returns, and incompetent staff, limited education and ignorance of tax law cannot be accepted as reasonable excuses. He cited Board of Review Decisions D1/83 and D24/84. The representative further submitted that had there been any evidence of wilful evasion, the case would not have been handled as a section 82A case but would have been a criminal case. He submitted that the Commissioner was generous in not imposing any penalty for the year of assessment 1984/85 but it cannot

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be taken as a matter of course that he will not impose a penalty for the subsequent year. Lastly, the representative stated that the profits tax return for the year 1986/87 was issued on 1 April 1987, with extension of time granted to 31 July after Mr Wu, the tax representative, applied for extension of time but the return was not submitted until 3 September 1987 after expiration of the time extended.

On the facts before us, we have no hesitation in dismissing this appeal. None of the reasons advanced by the Taxpayer for the delay in filing the profits tax return can be considered as a reasonable excuse in not complying with section 51 of the Inland Revenue Ordinance. The Taxpayer, despite his limited education, was fully capable of running a profitable business. He must be aware that tax returns have to be filed in respect of the business and it is his duty to ensure that correct tax returns are filed within the time permitted. When he fails in his duty, he cannot excuse himself by blaming it on the incompetence of staff. The engagement of qualified and competent staff is his own responsibility and he has to take the consequences if he fails to take proper measures in engaging staff. Neither can lack of accounting knowledge, nor ignorance of law and limited education be considered as reasonable excuses. As for negligence of the professional accountant, this again cannot be accepted as an excuse. Whether the professional accountant has been negligent or not and whether the Taxpayer has any recourse against him are not matters to be dealt with by us.

We now turn to the question whether the penalty imposed is excessive in the circumstances.

The Taxpayer had a history of not filing the company's profits tax returns within the time stipulated or extended. The Taxpayer argued that as the Commissioner did not impose a penalty on the Taxpayer for a similar offence for the year before that is, 1984/85, penalty should not be imposed for the year of assessment in question. There is no merit in this argument. On the contrary, the blatant admission of similar conduct in the past would, if anything, be an aggravating factor. We agree with the submissions made by the representative for the Commissioner in reply to the other grounds of appeal.

The mitigating circumstances which we find in this case are that the amount of assessable profits for 1985/86 was voluntarily reported by the Taxpayer and not discovered as a result of tax investigation and further that when the profits tax return was eventually filed, it was accepted by the Commissioner as correct. However, in reporting the assessable profits and filing the profits tax return, the Taxpayer was doing no more than discharging his obligation under the Inland Revenue Ordinance.

The additional tax imposed by the Commissioner in the present case is 13.3% of the tax undercharged or 4.4% of the maximum provided under section 82A. We find the penalty lenient and not at all excessive in the circumstances. Accordingly, we dismiss this appeal and the additional tax assessment is hereby confirmed.