

**Case No. D50/06**

**Penalty tax** – late tax return – whether additional tax excessive – section 82A of the Inland Revenue Ordinance ('IRO').

Panel: Patrick Fung Pak Tung SC (chairman), Robert Law Chi Lim and Brossa Wong Yeuk Ha.

Date of hearing: 21 June 2005.

Date of decision: 6 October 2006.

Additional tax of \$23,000 (4.99% of the amounts of profits tax payable) was assessed and demanded as the taxpayer failed to submit its tax return in time. The delay amounted to one month and seven days.

The taxpayer appealed and contended that the breakdown of the computer system in the office of the tax representative which caused the delay would have constituted to a 'reasonable excuse' and should justify a non-charging or a reduction of the additional tax.

**Held:**

1. The taxpayer has failed to prove that the additional tax assessed and demanded is incorrect or excessive.
2. The primary obligation for filing a tax return is squarely on the taxpayer.
3. The tax representative should have contacted the IRD once her computer system broke down otherwise she should have started preparing the tax return afresh from the books and accounts of the taxpayer.
4. As the usual starting point for section 82A is 10%, a 4.99% additional tax is not incorrect or excessive in all the circumstances.

**Appeal dismissed.**

Cases referred to:

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

D100/97, IRBRD, vol 12, 544

D118/02, IRBRD, vol 18, 90

D31/94, IRBRD, vol 9, 196

Wong Ka Yee of Honest Accounting Services Co Ltd for the taxpayer.

Pong Shu Wing and Chung Hon Cheung for the Commissioner of Inland Revenue.

**Decision:**

**The appeal**

1. This is an appeal by the Appellant ('the Taxpayer') against the notice of assessment and demand for additional tax for the year of assessment 2003/04 issued by the Respondent ('the Commissioner') against the Taxpayer on 8 March 2005 pursuant to section 82A of the Inland Revenue Ordinance Chapter 112 ('IRO').

2. The additional tax assessed and demanded is in the sum of \$23,000 being 4.99% of the amount of profits tax payable and paid for the same year of assessment, namely, \$461,098.

**The facts**

3. The relevant facts are very simple. The Taxpayer was originally obliged to submit its tax return by the beginning of May 2004 under section 51 of the IRO. There was then an automatic extension of the deadline to 16 August 2004 under the block extension scheme of the Inland Revenue Department ('the IRD'). The Taxpayer did not submit its tax return until 23 September 2004. The delay amounted to one month and seven days.

4. As explained by or on behalf of the Taxpayer to the Commissioner in correspondence and by Ms Wong of Honest Accounting Services Co Ltd ('the Tax Representative') to the Board on the hearing of the appeal, the immediate cause of the delay was the breakdown of the computer system in the office of the Tax Representative.

**The law**

5. Section 51(2) of the IRO imposes on a person chargeable to tax an obligation to file a tax return within time. In the present case, there is of course no dispute by the Taxpayer that it was late in doing so.

6. The relevant parts of section 82A of the IRO reads as follows :

**‘82A. Additional tax in certain cases**

(1) *Any person who without reasonable excuse –*

...

(e) *fails to comply with section 51(2), shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which –*

...

(ii) *has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.’*

7. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant.

**The case of the Taxpayer**

8. The Taxpayer did not send anybody from itself to appear at the hearing of the appeal. It was represented only by Ms Wong of the Tax Representative.

9. Ms Wong gave evidence to the effect that the entire computer system in her office was rendered inoperative on 3 August 2004 because it contracted a ‘virus’. Some computer expert who charged only \$700 attended her office and took away some computer equipment or soft-discs and only reported to her two weeks later that the information about the Taxpayer stored in the computer could not be traced. She therefore had to work afresh from the books and accounts of the Taxpayer before the Tax Return could be filed.

10. According to Ms Wong, in her office, there were originally two persons working and now there is only herself. She is not a qualified accountant. The Tax Representative charged the Taxpayer only \$5,500 for the job of helping it to prepare and file the tax return. She did not think it was of any use to inform the IRD about the delay that was going to occur. The books and accounts of the Taxpayer were not very voluminous or complicated.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

11. The Taxpayer's case is that the breakdown in the computer system in the office of the Taxpayer constitutes a 'reasonable excuse' for the delay in submitting its tax return to justify a non-charging of the additional tax. In any event, in all the circumstances, the amount of additional tax should be reduced.

**Our decision**

12. We have considered all the circumstances of the case and the previous decisions of the Board to which our attention has been drawn, including Cases Nos. D100/97, IRBRD, vol 12, 544, D118/02, IRBRD, vol 18, 90 and D31/94, IRBRD, vol 9, 196.

13. We have come to the conclusion that the Taxpayer has failed to discharge the onus of proving that the additional tax assessed and demanded is incorrect or excessive for the reasons set out below.

14. The law is well-established that a taxpayer cannot hide behind the fact that he has given everything to his accountant to handle. The primary obligation for filing a tax return is squarely on the taxpayer. A taxpayer has the responsibility of providing his accountant or tax representative all the necessary information in time to enable the latter to prepare and submit the tax return in time.

15. In the present case, once the Tax Representative knew that there was a breakdown in the computer system, it should have started preparing for the tax return afresh from the books and accounts unless it had got the blessing of the IRD to do otherwise. If Ms Wong had contacted the IRD, she would most probably have been reminded of the obligation of the Taxpayer. Between 3 and 16 August 2004, there was still a period of about two weeks.

16. Having made assessable profits of nearly \$3,000,000 for the year, the Taxpayer could have afforded to go to a more substantial firm who would be more likely to be aware of the importance of filing a tax return in time as opposed to the Tax Representative which is obviously in very small operation.

17. Bearing in mind the fact that the usual starting point for section 82A cases is 10% and the fact that the Taxpayer was guilty of delay (albeit only four days) on a previous occasion and received a warning from the Commissioner, we are unable to say that a 4.99% additional tax is incorrect or excessive in all the circumstances.

18. We should point out that in Case No D31/94, IRBRD, vol 9, 196 the reason for the delay was the ill health of the proprietress of the audit firm for the taxpayer. The Board held that although it had great sympathy for the auditor, it would not reduce the penalty of 8.74% of the amount of the tax payable.

**Conclusion**

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

19. We, therefore, dismiss the appeal of the Taxpayer and confirm the assessment and demand for additional tax by the Commissioner against the Taxpayer.