

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D56/87

Penalty assessment – whether penalty excessive – s 82A of the Inland Revenue Ordinance.

Panel: Henry Litton QC (chairman), Stephen M L Lau and David K P Li.

Date of hearing: 7 January 1988.

Date of decision: 22 January 1988.

The taxpayer was the proprietor of a small business who understated his sales in his profits tax returns. He had been warned of the possibility of penalties prior to estimated assessments being made. The Commissioner imposed a penalty equal to 23% of the maximum permitted. The taxpayer claimed that the penalty was excessive.

Held:

The penalty was excessive.

Appeal dismissed.

Mr Yeung Kwai Cheong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal against the imposition by the Commissioner of penalty by way of additional tax under section 82A of the Inland Revenue Ordinance.
2. The Appellant was the sole proprietor of a small business, carrying on business as a small scale sub-contractor. The business involved the provision of plumbing services, including the installation and repairs of water works for restaurants and domestic flats.
3. This appeal originally involved four years of assessment: 1977/78 to 1980/81 but, at the hearing before the Board of Review, the Appellant stated that his appeal was confined to the year of assessment 1980/81.
4. In relation to the year of assessment 1980/81, the assessable profits returned by the Appellant were originally in the sum of \$84,135. After investigation, the assessor made

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an estimated assessment of profits in the sum of \$190,000. The Appellant had lodged no objection to the estimated assessment in the sum of \$190,000. Accordingly, the profits under-charged amounted to \$105,865 and the tax payable under personal assessment in consequence of the understated profits amounted to \$23,094.

5. The Commissioner was of the opinion that the Appellant had, without reasonable excuse, made incorrect profits tax returns for the year of assessment in question and, accordingly, on 3 December 1984 the Commissioner gave notice to the Appellant that he proposed to assess the Appellant to additional tax under the provisions of section 82A.

6. In response to the notice, the Appellant submitted to the Commissioner written representations. After taking into account the Appellant's representations, the Commissioner issued a Notice of Assessment for additional tax under section 82A in the sum of \$16,400. This represented 68% of the tax under-charged (or 23% of the maximum amount of penalty that the Commissioner could have imposed). It is against this imposition of penalty that the Appellant has appealed.

7. The Appellant was, at one time, represented by a firm of certified public accountants, Messrs A. By a letter dated 26 April 1984, Messrs A stated to the assessor that the profits of the business, as previously submitted in the returns, had to be revised and, in respect of the year of assessment 1980/81 it was to be as follows:-

<u>Assessable profit</u>		
<u>Year</u>	<u>Per return</u>	<u>Revised</u>
1980/81	HK\$84,135	HK\$99,135

8. Subsequent to the letter dated 26 April 1984, the Appellant attended an interview with the assessor accompanied by his tax representative. This was held on 16 July 1984. At this interview, the Appellant was invited to explain a discrepancy of \$460,000 in sales, based upon vouchers disclosed by the Appellant. This discrepancy the Appellant was unable to explain. Accordingly, the assessor rejected the revised figure of \$99,135 put forward in the tax representative's letter of 26 April 1984 and, using a gross profit ratio of approximately 18%, arrived at his figure of \$190,000 for the assessable profits. As we have stated above, there has been no objection lodged by the assessor against this estimated assessment.

9. Some time after 16 July 1984, Messrs A ceased to act for the Appellant.

10. At an interview with the Appellant (appearing in person) held on 16 August 1984, the basis of the estimated assessment of \$190,000 was discussed. The note of that interview, which was produced at the hearing, shows that the Appellant's attention was drawn to the following points:-

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- (a) The proposed quantum of assessable profits for 1980/81 would be subject to approval of senior officers;
- (b) Upon approval, assessments would be issued to the Appellant; he had the right of objection if he disagreed; and
- (c) Penalty action would be considered by the Commissioner after the settlement of the basic tax.

11. A note of that interview was sent to the Appellant on 13 September 1984. The Notice of Assessment, in the sum of \$190,000, was issued on 17 September 1984.

12. At the hearing before us, the Appellant alleged that he was misled by the assessor at the interview in August 1984 into believing that if he accepted the estimated profits in the sum of \$190,000 there would be no imposition of penalty. We reject this allegation. It is inconsistent with the note of the interview sent to the Appellant which made quite clear what the position was; that is to say, that the imposition of penalty was a matter which required consideration by the Commissioner. The assessor could have made no such representations as alleged.

13. At the hearing before us, the assessor, Mr Ma Shun Ming, gave evidence. He deposed to the fact that what the Appellant was told was as contained in the note of interview. We accept Mr Ma Shun Ming's evidence.

14. In this case, the Appellant was plainly liable to additional tax. The additional tax assessed on him was in no way excessive, having regard to the circumstances of this case. We accordingly reject this appeal.