Case No. D57/06

Penalty tax – delay in filing the tax return – sections 68, 82A and 82B(3) of the Inland Revenue Ordinance ('IRO') – whether the taxpayer has any 'reasonable excuse' for the delay – whether proof of recklessness, or deliberate or persistent default are required – burden on the taxpayer to prove – whether the Board should act on bare allegations – directors of the taxpayer were away from Hong Kong cannot amount to a reasonable excuse - duty of taxpayer to comply with time limit for filing its tax return – approach to consider overall circumstances to assess the amount of additional tax – discretion to order costs is not confined to appeals which are obviously unsustainable – whether the conduct of the appeal was frivolous and vexatious

Panel: Kenneth Kwok Hing Wai SC (chairman), Ip Tak Keung and Horace Wong Yuk Lun SC.

Date of hearing: 28 July 2006.
Date of decision: 21 November 2006.

The taxpayer is a private company. The taxpayer was required to complete and submit the return within one month from 1 April 2005. The due date for filing the tax return was extended to 15 August 2005. On 19 August 2005, the taxpayer applied for an extension of time to 31 August 2005 for filing of the tax return. The Commissioner rejected the application for extension on 25 August 2005. On 29 August 2005, the taxpayer filed its tax return. The Commissioner assessed the taxpayer to additional tax by way of penalty in the sum of $20,000.

The grounds of appeal are that (1) the taxpayer did not intentionally, deliberately or persistently delay the filing of the profits tax return for 2004/05; (2) the delay was 'mainly caused' by the absence of the directors from Hong Kong; (3) the financial statements and relevant tax return were forwarded to the directors who left Hong Kong in late July 2005 for signature and return; (4) it was not possible for the signed documents to be signed and returned by the specified date of 15 August 2005 and a request for an extension of time was rejected; (5) the tax return was filed on 29 August 2005 and the delay was due to 'unforeseeable delay' in receiving the documents, rather than being attributable to any willful act.

The taxpayer has chosen not to call any witness to give evidence in this appeal.

Held:

1. By virtue of section 82A of IRO, unless the taxpayer has a reasonable excuse for its

delay, it is liable to be assessed to additional tax. The first question that need to be considered is whether the taxpayer has any 'reasonable excuse' for the delay.

2. The liability for assessment to additional tax provided under section 82A is not dependant upon proof of recklessness, or deliberate or persistent default. While the amount of the additional tax may depend on the circumstances (including whether the default or failure was deliberate or persistent), a taxpayer is liable to additional tax under section 82A if he has failed to file his tax return before the date specified in the assessor' s notice and he has no reasonable excuse for his delay.

3. Section 68(4) of IRO provides that the 'onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant'. Section 82B(3) further provides that the provisions in, inter alia, section 68 'shall have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax'. Accordingly, section 68(4) applies to the present appeal and the burden is upon the taxpayer to prove that the Assessment is excessive or incorrect.

4. An taxpayer who does not bother to give evidence in support of his appeal cannot expect this Board to act on bare allegations (D78/02, IRBRD, vol 17, 978, followed).

5. The mere fact that the directors of the taxpayer were away from Hong Kong either on vacation or doing business cannot in itself amount to a reasonable excuse. It is the duty of the taxpayer to observe the law and comply with the time limit for filing its tax return. It is also its duty to arrange its affairs in such a way as to be in a position to comply with its legal obligations regarding the filing of tax return. Our system of revenue cannot effectively function if the time limits for filing returns are to give away to the personal or business diaries of the directors of taxpayers.

6. Section 82A(1) provides that the maximum amount of additional tax shall not exceed treble the amount of tax which has been undercharged or 'would have been undercharged if such failure had not been detected.'

7. In setting out the particular factors that the Board would take into consideration, the Board did not mean to set out an exhaustive list of circumstances. The Board made it clear that its approach was to consider the overall circumstances in each case. Depending on the facts of any particular case, any one of the particular factors mentioned may be of varying degree of importance. Indeed a particular factor may be of no relevance at all in some cases. Having considered all the circumstances in this case, the Board is of the view that it has not been shown that the amount of additional tax assessed by the Commissioner is excessive or incorrect (D118/02,

IRBRD, vol 18,90 considered).

8. This Board has the power to make order for costs under section 68(9) of IRO. The discretion of the Board to order costs against an unsuccessful appellant is not expressed to be confined to appeals which are obviously unsustainable (D134/00, IRBRD, vol 16, 10 followed).

9. The Board is of the view that the conduct of the appeal by the appellant was frivolous and vexatious. Having filed an appeal on the ground that its failure to comply with the time limit for submitting tax return was 'due to unforeseeable delay in receiving the documents' and that it had the 'fullest expectation that the documents would be returned in time', the taxpayer chose not to appear to give evidence, or call any witness to give evidence, in support of its grounds of appeal. Without evidence, the taxpayer could not make out an arguable case for appeal at all. The Board is of firm opinion that the way the taxpayer conducted its appeal has wasted the time and resources of the Board and those of the Commissioner and this is a proper case for making an order for costs against the taxpayer.

Appeal dismissed and costs order in the sum of $5,000 imposed.

Cases referred to:

D78/02, IRBRD, vol 17, 978
D118/02, IRBRD, vol 18, 90
D134/00, IRBRD, vol 16, 10

Raymond Chin of Taxation and Financial Services Ltd for the taxpayer.
Ngai See Wah and Suen Lai Wan for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant against the assessment ('the Assessment') dated 31 March 2006 by the Commissioner of Inland Revenue ('the Commissioner') assessing the Appellant to additional tax by way of penalty for the year of assessment 2004/05, in the sum of $20,000.

2. The Assessment was made by the Commissioner pursuant to section 82A of the Inland Revenue Ordinance ('IRO'), which provides, inter alia, as follows:

'*(1) Any person who without reasonable excuse-*

….

(d) fails to comply with the requirements of a notice given to him under section 51(1) or (2A)…

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 –

(i) ….

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

3. Section 51(1) of IRO requires a taxpayer to furnish tax return for (inter alia) profits tax, within a reasonable time stated in a notice in writing given by an assessor.

The Relevant Facts

4. The parties have put forward an agreed Statement of Facts before the Board.

5. Based on the agreed Statement of Facts, and also the documents put before the Board, we make the following finding of facts:

(a) The Appellant is a private company incorporated in Hong Kong on 3 March 2002. It closes its accounts annually on 31 December each year.

(b) For the year of assessment 2004/05, the notice for filing profits tax return was issued to the Appellant on 1 April 2005. The Appellant was required to complete and submit the return within one month from 1 April 2005.

(c) By reason of a Block Extension Scheme for lodgement of 2004/05 tax returns ('the Block Extension Scheme'), which applied to the Appellant, the due date for filing the tax return was extended to 15 August 2005.

(d) On 19 August 2005, the Appellant applied (through its tax representative) for an extension of time to 31 August 2005 for the filing of the tax return. In its letter making the application for extension, it was *alleged* that all the directors of the Appellant had been 'on a business trip outside Hong Kong since end of July and [would] return at the end of [August] when the financial statements [could] be approved and signed'.

(e) The Commissioner rejected the application for extension on 25 August 2005.

(f) On 29 August 2005, an estimated assessment for the year of assessment 2004/05 was issued by the Commissioner pursuant to section 59(3) of IRO.

(g) On the same day, that is, on 29 August 2005, the Appellant filed its tax return which showed an assessable profits of $3,524,116.

(h) The Assistant Commissioner of Inland Revenue subsequently cancelled the estimated assessment on 26 September 2005. A notice of assessment was issued on 29 September 2005 by which the profits tax payable by the Appellant for the year of assessment 2004/05 was assessed at $616,720. The profits tax so assessed was based on the assessable profits of $3,524,116 as stated in the tax return filed by the Appellant on 29 August 2005.

(i) On 31 March 2006, the Commissioner, having considered the written representations made by the Appellant on 2 February 2006, assessed the Appellant to additional tax by way of penalty in the sum of $20,000.

(j) The Appellant gave notice on 13 April 2006 to appeal against the assessment of additional tax made by the Commissioner.

The Grounds of Appeal

6. According to the statement of grounds of appeal annexed with the Appellant' s notice of appeal, the following matters are *alleged* by the Appellant:

(a) it is alleged that the Appellant did not intentionally, deliberately or persistently delay the filing of the profits tax return for 2004/05;

(b) it is further alleged that the delay in filing the tax return was 'mainly caused' by the absence of the directors from Hong Kong during the period late July to early September for the purposes of annual vacation and attendance at exhibitions in Europe;

(c) upon the conclusion of the audit of the company' s accounts for the year ended 31 December 2004, the directors allegedly left Hong Kong in late July 2005 and the financial statements and relevant tax return were allegedly forwarded to them in due course for signature and return;

(d) as it was allegedly not possible for the signed documents to be signed and returned by the specified date of 15 August 2005, a request dated 19 August 2005 was forwarded to the Inland Revenue Department for an extension of time to 31 August 2005. However, the application was 'unfortunately' rejected;

(e) the tax return, together with related documents, was eventually filed on 29 August 2005; and

(f) the Appellant was of the view that the failure to lodge the said return was 'due to unforeseeable delay' in receiving the documents, rather than being attributable to any wilful act. The application for extension was not made 14 days before the expiry of the relevant time as it was allegedly [the Appellant's] fullest expectation that the documents would be returned on time.

Liability for assessment to additional tax

7. The due date for filing the Appellant's tax return was 15 August 2005. It did not do so until 29 August 2005. The Appellant was accordingly late in filing the tax return. By virtue of section 82A of IRO, unless the Appellant has a reasonable excuse for its delay, it is liable to be assessed to additional tax.

8. Accordingly, the first question that need to be considered is whether the Appellant has any 'reasonable excuse' for the delay.

9. It should also be pointed out that the liability for assessment to additional tax provided under section 82A is not dependant upon proof of recklessness, or deliberate or persistent default. While the *amount* of the additional tax may depend on the circumstances (including whether the default or failure was deliberate or persistent), a taxpayer is liable to additional tax under section 82A if he has failed to file his tax return before the date specified in the assessor's notice and he has no reasonable excuse for his delay.

No reasonable excuse established

10. Section 68(4) of IRO provides that the 'onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant'. Section 82B(3) further provides that the provisions in, inter alia, section 68 'shall have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax'. Accordingly, section 68(4) applies to the present appeal and the burden is upon the Appellant to prove that the Assessment is excessive or incorrect.

11. The Appellant, however, has chosen not to call any witness to give evidence in this appeal. Although in its statement of grounds of appeal, and also in some of the correspondence exchanged between its tax representative and the Commissioner, it was alleged that the reason for the delay was 'mainly caused' by the absence of the directors from Hong Kong during the period between late July to early September 2005, there is no evidence before the Board to substantiate this allegation. There is also no evidence from the Appellant to prove any other reasonable excuse.

12. An appellant who does not bother to give evidence in support of his appeal cannot expect this Board to act on bare allegations. As pointed out by the Board in D78/02, IRBRD, vol 17, 978 (at paragraph 5):

> '*Despite being advised that he had the burden of proving that the assessment was excessive, the Taxpayer elected not to call any evidence or give evidence himself. Since he has chosen not to give any evidence, there is no basis on which this Board can come to a view that he had a reasonable excuse for his omission or understatement*.'

13. In any event, the mere fact that the directors of the Appellant were away from Hong Kong either on vacation or doing business cannot in itself amount to a reasonable excuse. It is the duty of the Appellant to observe the law and comply with the time limit for filing its tax return. It is also its duty to arrange its affairs in such a way as to be in a position to comply with its legal obligations regarding the filing of tax return. Our system of revenue cannot effectively function if the time limits for filing tax returns are to give way to the personal or business diaries of the directors of taxpayers.

14. The accounting year of the Appellant ends in December each year. Between end of its accounting year and the due date of filing the tax return, the Appellant had had more than seven months to prepare and audit its accounts. That being the case, the Board cannot see how the absence of the directors in late July and August 2005 could amount to a reasonable excuse for not having the accounts ready earlier and filing the tax return in time. Indeed by reason of the Block Extension Scheme the Appellant had had more than four months from the date of the issue of the return, to complete and submit the same to the Commissioner. Moreover, even if all the directors were not in Hong Kong when the tax return was ready for signature, there was no reason why the same could not be couriered to the relevant directors for their signatures and couriered back to Hong Kong for filing. As the Appellant has not given any evidence on these matters, the Board has heard no explanation from the Appellant. We find that the Appellant has not shown any reasonable excuse for its failure to comply with the time limit for filing its tax return.

Was the additional tax excessive?

15. The next question to consider is whether the additional tax assessed by the Commissioner was excessive having regard to the circumstances. Section 82A(1) provides that the maximum amount of additional tax shall not exceed treble the amount of tax which has been undercharged or 'would have been undercharged if such failure had not been detected.' In the present case, if the failure to file tax return on 15 August 2005 had not been detected, the amount of tax that 'would have been undercharged' is $616,720. Hence the maximum amount of additional tax is $1,850,160. The amount of additional tax actually assessed by the Commissioner ($20,000) clearly does not exceed the maximum amount allowed by law. The amount is only 3.24% of the amount of tax that would have been undercharged if the failure had not been detected. The question remains, however, whether this amount is excessive in the circumstances.

16. In D118/02, IRBRD, vol 18, 90 the Board conducted an extensive review of the previous cases on additional tax imposed by way of penalty under section 82A of IRO. In paragraph 54 of its Decision, the Board set out its approach as follows:

> '*The approach of this Board is to consider the overall circumstances of each case. Factors that affect the level of penalty include:*
>
> *(a) The length and nature of the delay*
>
> *(b) The amount of tax involved;*
>
> *(c) The absence of an intention to evade;*
>
> *(d) Whether there is any loss of revenue;*
>
> *(e) The track record of the taxpayer;*
>
> *(f) The acceptance of the tax return eventually submitted without further investigation by the assessor;*
>
> *(g) The lack of education on the part of the taxpayer;*
>
> *(h) The steps taken to put the taxpayer' s house in order;*
>
> *(i) The provision of management account;*
>
> *(j) Conduct of the taxpayer before this Board.*'

17. Clearly, in setting out the particular factors that the Board would take into consideration, the Board did not mean to set out an exhaustive list of circumstances. The Board made it clear that its approach was to consider the overall circumstances in each case. Depending on the facts of any particular case, any one of the particular factors mentioned may be of varying degree of importance. Indeed a particular factor may be of no relevance at all in some cases. For example, when a taxpayer is a corporate entity, or where he has entrusted its tax affairs to a tax consultant or representative, the level of education of the taxpayer is generally of no or little relevance.

18. In the present case, the delay is relatively short, there being a lapse of 14 days between the due date for filing the tax return and the actual date of filing. On the other hand, it should not be forgotten that the due date for filing was itself an extended date in that the Appellant had already taken advantage of the extension conferred by the Block Extension Scheme.

19. It is accepted by the Commissioner that there is no loss of revenue in this case and that the tax return eventually submitted by the Appellant has been accepted without any further

investigation. There is no question of any provision of management account by the Appellant. The Appellant' s delay in filing the tax return had caused the Commissioner to have issued an estimated assessment, which had to be cancelled after the Appellant had filed its tax return (on the same day as the estimated assessment).

20. The Board however considers it important that the Appellant has elected not to give any evidence before this Board to explain to us what steps it had, or might have, taken to comply with its obligations to file the tax return in time. There is no evidence of any steps taken by the Appellant 'to put its house in order'. There being no evidence from the Appellant in that regard, this Board can only assume that no such steps had been taken by it.

21. The failure by the Appellant to take steps to put its house in order is aggravated by the fact that its failure was apparently committed after it had been given prior warning of the consequences of default. As pointed out above, by reason of the Block Extension Scheme, which applied to the Appellant, the due date for filing tax return was extended to 15 August 2005. The terms of the Block Extension Scheme were set out in a Circular Letter to Tax Representatives dated 31 March 2005 issued by the Commissioner. Paragraph 21 of the Block Extension Scheme reminded the taxpayers (whose time limits for filing tax returns had been extended thereunder) of the consequences for failing to lodge returns by the extended due dates, as follows:

> 'In all cases where a return has not been lodged by the extended due date, estimated assessments will be issued or penalty proceedings commenced. Tax representatives should remind their clients that if they fail, without reasonable excuse, to file returns on time or to report chargeability, they will be exposed to the risk of action being taken under sections 80 or 82A. Practitioners should have noted an increase in these actions in recent times. Taxpayers who have persistently filed late returns are almost certain to face penalty action.'

22. The Appellant has taken advantage of the extension given under the Block Extension Scheme. The Appellant should have been aware, and its tax representative should have reminded them, of the consequences for failing to lodge returns by the extended due date. That action may be taken for such failure under section 82A, and further that there had been an increase in these actions in recent times, were expressly pointed out in the terms of the Block Extension Scheme itself. Yet, despite the warning, the Appellant had failed to arrange its affairs in such as way as to comply with the extended due date for filing the return. We find that this is an aggravating factor relevant to the consideration of the amount of additional tax that should be imposed.

23. Moreover, the Appellant does not have an unblemished record for delay in filing tax return. The documents put before the Board shows that in the year of assessment 2003/04, the Appellant had also been late in filing its tax return and had accepted a compounding offer from the Commissioner to pay $3000 in respect of the delay. We have no evidence before us what exactly was the length of delay in that particular year of assessment, nor have we got any evidence of the amount of assessable profits for that year. We are not able to tell from the documents what

percentage the amount of compounding offer bears to the amount of assessable profits, and we are not able to assess how serious was the delay in the previous year of assessment. All we can say is that the Appellant does not have a clear track record, and it had been penalized before for failing to submit tax return on time. This is the second time that the Appellant has committed such failure, and for reasons mentioned above, it has apparently done so with its eyes open.

24. In opposing the appeal, Mr Ngai representing the Commissioner has referred us to the Penalty Policy issued by the Commissioner. We do not find such references helpful. The Penalty Policy is not binding on this Board, and there is nothing to show that the Policy was formulated in accordance with previous decisions of the Board or the Court. It is self-serving for the Commissioner to declare a policy and then seek to support an appeal based on its own policy, without showing that the policy is itself grounded upon any statutory authority or judicial decisions. As a matter of principle, we question whether we should have regard to the Penalty Policy of the Commissioner when considering whether an amount of additional tax assessed by the Commissioner is excessive or not.

Decision

25. Having considered all the circumstances in this case, the Board is of the view that it has not been shown that the amount of additional tax assessed by the Commissioner is excessive or incorrect.

26. The appeal is accordingly dismissed and we confirm the penalty tax assessment appealed against.

Costs

27. This Board has the power to make order for costs under section 68(9) of IRO. As pointed out by the Board in D134/00, IRBRD, vol 16, 10 the discretion of the Board to order costs against an unsuccessful appellant is not expressed to be confined to appeals which are obviously unsustainable.

28. In the present case, we are of the view that the conduct of the appeal by the Appellant was frivolous and vexatious. Having filed an appeal on the ground that its failure to comply with the time limit for submitting tax return was 'due to unforeseeable delay in receiving the documents' and that it had the 'fullest expectation that the documents would be returned in time', the Appellant chose not to appear to give evidence, or call any witness to give evidence, in support of its grounds of appeal. Without evidence, the Appellant could not make out an arguable case for appeal at all. We are of the firm opinion that the way the Appellant conducted its appeal has wasted the time and resources of the Board and those of the Commissioner and this is a proper case for making an order for costs against the Appellant. We accordingly order the Appellant to pay $5,000 costs, which amount is to be added to the tax charged and recovered therewith.