

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D5/92

Penalty tax – quantum of penalty – failure to file profits tax return within time stipulated – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Cheung Wing In and Jack Samuel Yuen.

Date of hearing: 28 January 1992.

Date of decision: 13 April 1992.

The taxpayer failed to file a profits tax return within the period stipulated as extended by the Commissioner. No further application was made for an extension of time. Following the issuance of an estimated assessment which exceeded the amount of the assessable profits the taxpayer lodged an objection and at the same time file its profits tax return. The Commissioner imposed a penalty under section 82A of the Inland Revenue Ordinance upon the taxpayer of an amount equal to approximately one-third of the tax involved. The taxpayer appeal to the Board of Review.

The taxpayer argued that it did not intend to evade or delay payment of tax and the professional representative of the taxpayer said that on previous occasions handled by her firm similar situations had arisen without such a large penalty being imposed.

Held:

The onus of proof is upon the taxpayer. A penalty of one-third of the tax involved is high for a case of this nature but on the facts before it the Board could not hold that it was excessive.

Appeal dismissed.

[Editor's note: This decision can be usefully read with D2/92.]

Case referred to:

D61/90, IRBRD, vol 5, 449

Woo Sai Hong for the Commissioner of Inland Revenue.  
Ho Shuk Chun of Messrs Yeung, Ho & Co for the taxpayer.

Decision:

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This appeal is by a taxpayer against a penalty tax assessment imposed upon it for failure to file its profits tax return within the period stipulated as extended by the Commissioner. The facts of the case are as follows:

1. A profits tax return for the year of assessment 1989/90 was issued to the Taxpayer on 2 April 1990.
2. A request for extension to lodge the return was made by the tax representative through a block extension applied for by the tax representative and the block extension was granted to 15 November 1990. No further request for extension to lodge the return was made either by the Taxpayer or its tax representative.
3. On 29 January 1991, an estimated assessment was raised for the year of assessment 1989/90 in the amount of \$2,500,000.
4. By letter dated 27 February 1991, an objection was lodged objecting to the above assessment together with the profits tax return for the year of assessment 1989/90 showing assessable profits in the amount of \$2,173,571.
5. The Commissioner accepted the objection agreeing to a revised profit of \$2,173,571 and tax in respect of that amount has been fully paid.
6. By notice dated 5 June 1991 under the terms of section 82A(4), the Commissioner of Inland Revenue informed the Taxpayer that he proposed to assess it to additional tax in respect of the year of assessment 1989/90 and it had the right to submit written representation to him.
7. On 8 July 1991 the Taxpayer through its tax representative did respond to the section 82A(4) notice and submit to the Commissioner representations.
8. On 20 August 1991, the Commissioner, having considered and taken into account the Taxpayer's representations, issued notice of assessment to additional tax under section 82A for the year of assessment 1989/90 in the amount of \$120,000.
9. By letter dated 17 September 1991 the tax representative gave notice of appeal to the Board against the said assessment to additional tax.

At the hearing of the appeal, the tax representative for the Taxpayer appeared and submitted that the penalty imposed under section 82A of the Inland Revenue Ordinance was excessive. She explained to the Board that an extension of time had been applied for and granted up to 15 November 1990. No further extension had been requested but it was not the intention of the Taxpayer to evade or delay payment of tax. Immediately after the estimated assessment had been made, the Taxpayer had filed its profits tax return with

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accompanying accounts which had been accepted by the Commissioner. She said that in many previous cases handled by her firm, similar situations had arisen without such a large penalty being imposed. She submitted that in all of the circumstances the quantum of the penalty was excessive.

The representative for the Commissioner pointed out that it was the duty of every person carrying on business in Hong Kong to file a profits tax return within the stipulated time and to pay tax. In this case the Taxpayer had failed to file its profits tax return within the extended period of time and had not done so until after an estimated assessment had been made which was greater than the taxable profits of the business of the Taxpayer. It was only after this estimated assessment had been made that the Taxpayer filed his profits tax return with his accounts.

The representative for the Commissioner said that the Taxpayer had previously submitted to the Commissioner that it had been unable to file its tax return in time because of shortage of staff and difficulty in recruiting staff. The representative for the Commissioner pointed out that previous Boards of Review had not accepted this as an excuse and drew the attention of the Board to D61/90, IRBRD, vol 5, 444 at page 449 where the Board had made the following statement:

‘The excuse that accounting staff were difficult to obtain in 1989 has been put to the Board on many occasions. The Board has consistently stated that it is the duty of a taxpayer to ensure that its accounting records are maintained up-to-date and that the returns required to be made by taxpayers under the Ordinance are made within the time limits specified in the Ordinance. Difficulties in recruiting staff do not excuse taxpayers from fulfilling their statutory obligations.’

In answer to a question from the Board, the representative for the Commissioner said that the penalty imposed was only 11% of the maximum penalty and 33% of the tax involved.

The onus of proof in any tax appeal is upon the taxpayer. In the present case, we have very little on which to base our decision. The representative for the Taxpayer has submitted that the penalty is unfair because the Taxpayer has done no more than follow previous conduct. Bearing in mind that many similar cases have come before Boards of Review in recent years and knowing that the Commissioner has drawn the attention of the accounting profession to the substantial penalties which can be imposed in case of this nature, it is difficult to have sympathy with a submission that because a taxpayer previously failed to fulfil his statutory obligations he should not now be penalised.

The facts which we have before us are very sparse. It is claimed that the Taxpayer had inadequate staff but no explanation was given regarding the somewhat cavalier treatment which the Taxpayer and its advisors gave to the Commissioner by not bothering to apply for a further extension of time. The only fact which we have before us is that when the Taxpayer received an estimated assessment which exceeded the actual profits

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which it had made, it was able to file a tax return and its accounts promptly. This simple fact obviously raises many unanswered questions.

It appears to us that a penalty of 11% of the maximum or 33% of the tax involved is high for a case of this nature but we cannot say that it is excessive in the circumstances which are known to us. As the onus of proof is upon the Taxpayer, we find in favour of the Commissioner, confirm the penalty tax assessment against which the Taxpayer has appealed, and dismiss this appeal.