INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D59/94

Penalty tax – delay in filing tax return – previously habitual late filing – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: Robert Wei Wen Nam QC (chairman), Albert Ho Chun Yan and Alexander Chung Ho Woo.

Date of hearing: 6 October 1994.
Date of decision: 6 December 1994.

The taxpayer appealed against a penalty tax assessment of approximately 20% of the tax involved on the ground that it was excessive but did not give any evidence or reasons to support the appeal. The taxpayer was also late in giving notice of appeal.

Held:

The notice of appeal was out of time and accordingly the appeal failed. However as the Commissioner had not taken the point regarding late filing of the notice of appeal the Board considered the merits of the case. The Board affirmed that a penalty of 20% of the tax involved is at the top end of the range for this class of case but is not excessive. The taxpayer had habitually failed to file its profit tax return on time.

Appeal dismissed.

Cases referred to:

Wong Wing Piu & Wong Wing Piu trading as Tai Yip Glass Co v CIR 2 HKTC 134
D11/93, IRBRD, vol 8, 143

Woo Sai Hong for the Commissioner of Inland Revenue.
Taxpayer represented by his director.

Decision:

Preliminaries

1. This is an appeal by a private limited company (the Taxpayer) against the additional tax assessment raised on it for the year of assessment 1992/93 by way of penalty

under section 82A of the Inland Revenue Ordinance (the IRO) for failing without reasonable excuse to lodge its profits tax return for that year within the time allowed.

2. A profits tax return for the year of assessment 1992/93 was issued to the Taxpayer on 1 April 1993. The due date for lodging the return, which was within one month from that date, had been extended to 15 November 1993 by the Commissioner of Inland Revenue by notice dated 9 March 1993 pursuant to the block extension scheme of the Revenue.

3. The Taxpayer failed to lodge its profits tax return on or before the extended due date of 15 November 1993.

4. On 26 November 1993 an estimated assessment in the sum of $1,600,000 for the year of assessment 1992/93 was raised on the Taxpayer.

5. On 24 December 1993 the Taxpayer through its tax representative lodged an objection to the estimated assessment on the ground that the assessment was excessive. On the same date it lodged its profits tax return and audited accounts which disclosed a net assessable profit of $1,316.141.

6. On 2 February 1994 the Revenue issued a revised assessment for the year of assessment 1992/93 reducing the net assessable profit to $1,316,141.

7. On 30 March 1994 the Commissioner of Inland Revenue gave notice to the Taxpayer that he proposed to assess it to additional tax by way of penalty for having without reasonable excuse failed to lodge its profits tax return of the year of assessment 1992/93 within the time allowed.

8. On 3 May 1994 the Taxpayer submitted written representations to the Commissioner of Inland Revenue, stating that shortage of clerical staff in its auditor's firm had resulted in delay in the finalisation of accounts.

9. On 16 May 1994 the Commissioner of Inland Revenue informed the Taxpayer that having considered its representations, he had assessed the Taxpayer to additional tax in the sum of $45,000.

Delay in lodging notice of appeal

10. The Taxpayer had one month, that is, until 16 June 1994, to lodge a notice of appeal against the additional tax assessment, but did not lodge one until 7 July 1994. The notice of appeal was therefore out of time. Without an extension of time this appeal cannot be heard, but the Board has no power to grant an extension: section 66(1A), which enables the Board to do so on the ground of *'illness, absence from Hong Kong or other reasonable cause'* which prevented the lodgement of a notice of appeal in time, does not apply to appeals against assessments to additional tax (Wong Wing Piu & Wong Wing Piu trading as Tai Yip Glass Co v CIR 2 HKTC 134). That is enough to dispose of this appeal. However, as the 'time-bar' point was not taken at the hearing by the representative for the

Commissioner, and the Board considered the merits on the assumption that section 66(1A) applied, it is only appropriate to state their views below.

11. A director of the Taxpayer who represented it at the hearing confirmed the grounds set out in the notice of appeal. She stated that the Taxpayer's business commitments in Country A had obliged her to travel frequently between Hong Kong and Country A; that, when in Hong Kong, she would stay in a friend's apartment in Place B rather than in the company's apartment in Place C, as Place B was more convenient to her travelling; and that, as a result, she was not aware of the notice of additional tax assessment which was sent to the company's address in Place C until she came back from a visit to Country A on 28 June 1994. However, as she admitted at the hearing, during the relevant period she was in fact in Hong Kong most of the time, as shown from the dates in her travel document. She had ample opportunity to become aware of and deal with the additional tax assessment before 16 June 1994; she did not do so because she gave first priority to her business engagements with the result that she had no time to attend to the Taxpayer's tax affairs. She has failed to prove that she was prevented by her absence from Hong Kong or any other reasonable cause from lodging the notice of appeal in time; any application for extension of time would therefore have failed even if section 66(1A) had applied.

Delay in lodging profits tax return

12. Had the notice of appeal been lodged in time, this appeal would still have failed because it has not been shown that there was a reasonable excuse for the failure to lodge it in time or that the additional tax, that is, the penalty, was excessive. The Taxpayer representative sought to establish a reasonable excuse by blaming the auditor for his alleged delay in submitting his report. No evidence was adduced to prove the auditor's delay; all the Board had was a general, vague assertion by the Taxpayer's representative; for obvious reasons, it would have been most relevant and material to hear the auditor, but he was not called. The Taxpayer has therefore failed to prove any reasonable excuse. As for the quantum of the penalty, it was in the sum of $45,000 or 19.5% of the tax which would have been undercharged if the failure to lodge the return in time had not been detected. It has been held that 20% of the tax undercharged was not excessive, although probably the top end of the range for this class of case (D11/93, IRBRD, vol 8, 143). In the present case, the Taxpayer was habitually late in lodging its profits tax returns, as shown below:

Year of Assessment	Due Date	Extended Due Date	Date of Lodgment
1988/89	1 May 1989	31 November 1989	26 February 1990
1990/91	1 May 1991	15 November 1991	8 January 1992
1991/92	1 May 1992	15 November 1992	26 February 1993
1992/93	1 May 1993	15 November 1993	24 December 1993

Previous delays are an aggravating factor. In our view, the penalty, whether taken by itself or in conjunction with the previous delays, cannot be said to be excessive.

Decision

13. It follows that this appeal is dismissed and that the additional tax assessment in question is hereby confirmed.