

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D63/96

Penalty tax – late filing of profits tax return – second time offender – doubling the rate of the previous penalty – not outrageous, excessive or unacceptable – section 82A of Inland Revenue Ordinance.

Panel: Christopher Chan Cheuk (chairman), Shirley Conway and John Lee Luen Wai.

Date of hearing: 4 October 1996.

Date of decision: 8 November 1996.

The taxpayer carrying on the business of a trading company was granted extension to file the profits tax return. After expiry of the extended period the taxpayer submitted only the statement of accounts and the tax computation of the business for the year but not the profits tax return which he claimed had been lost. He finally filed it 29 days after the extended period.

The taxpayer was not a first offender and had previous record of late filing, on which occasion the taxpayer had to pay an additional assessment equivalent to 9.9% of the tax assessed.

For this time the Commissioner raised an additional assessment under section 82A in the sum of \$100,000 which is about 19.9% of the assessed tax.

The taxpayer appealed against the assessment of additional tax.

Held:

The Board noted that he was not a first offender and had two records of late filing. The last time he was assessed with an additional tax of 9.9% of the assessed tax. Doubling the rate of penalty for this time was not outrageous, excessive or unacceptable.

Appeal dismissed.

Case referred to:

D105/89, IRBRD, vol 6, 384

M O Lee for the Commissioner of Inland Revenue.
Taxpayer in person.

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Decision:

Appeal

1. This is an appeal by Mr X trading as Company Y ('the Taxpayer') against the decision of the Commissioner on the additional tax of \$100,000 assessed under section 82A, Inland Revenue Ordinance (the IRO).

Issue

2. At the hearing, the Taxpayer unequivocally admitted and agreed that he was liable to pay an additional tax because of the late return but he disputed the amount. He argued that the additional tax was outrageous, excessive and unacceptable.

Facts

3. The facts were agreed by the parties before the hearing and were set out in the Statement of Facts received by the Board of Review on 29 November 1994 together with Exhibits 1 to 13 annexed thereto.

4. The following is a brief summary of the agreed facts:-

- (a) The Taxpayer is carrying on an import and export business. It commenced business on 8 July 1980 and closed its accounts on 31 March in each year.
- (b) On 1 April 1993, the Commissioner issued a profits tax return for the year of assessment 1992/93 to the Taxpayer who was required to submit the same within one month from 1 April 1993.
- (c) On 30 April 1993, the Taxpayer applied for an extension of time to submit the profits tax return for the year of assessment 1992/93. He was then granted an extension to submit the return up to and including 15 November 1993.
- (d) On 26 November 1993, the then Tax Representative on behalf of the Taxpayer for the first time submitted the statement of accounts and tax computation of the business for the year of assessment 1992/93 and requested for a duplicate return which was issued to them on 2 December 1993. (Exhibit 8)
- (e) In the absence of a profits tax return for the year of assessment 1992/93, an estimated assessment was raised on the Taxpayer in the amount of estimated assessable profits of \$4,500,000 on 14 December 1993. (Exhibit 9)

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- (f) On 15 December 1993, through the then Tax Representative the Taxpayer lodged a profits tax return for the year of assessment 1992/93 showing an assessable profit of \$3,157,230. (Exhibit 10)
- (g) On 23 December 1993, acting on behalf of the Taxpayer the then Tax Representative lodged a notice of objection against the assessment for the year of assessment 1992/93.
- (h) The Taxpayer's objection was finally settled by agreement and on 15 March 1994, a notice of revised assessment for the year of assessment 1992/93 showing revised assessable profits in the sum of \$3,338,830 was issued to the Taxpayer. (Exhibit 11)
- (i) On 29 March 1994, the Commissioner gave a notice to the Taxpayer under section 82A(4) of the IRO that he proposed to assess him to additional tax by way of penalty for the year of assessment 1992/93 in respect of his late filing of his profits tax return.
- (j) By letter dated 6 April 1994, the then Tax Representative submitted representations to the Commissioner on behalf of the Taxpayer.
- (k) On 3 August 1994, the Commissioner having considered and taken into account the representations made issued a notice of assessment of additional tax under section 82A for the year of assessment 1992/93 in the sum of \$100,000.
- (l) By letter dated 9 August 1994, the Tax Representatives lodged on behalf of the Taxpayer an appeal to the Board of Review against the additional tax assessment.

5. The case was first heard on 13 December 1994. But, before any decision was made the chairman of the Board, Mr John GREGORY passed away. A retrial took place before us.

Evidence

6. Apart from the Agreed Facts the Taxpayer personally gave evidence. He described himself as a victim of the circumstances. He explained that he entrusted all the tax affairs to his subordinate who had let him down.

7. He did not shun responsibility and wished us to accept his pleas for reduction of the additional tax assessed.

Taxpayer's Pleas

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8. The Taxpayer requested the Board to take into the special circumstances of the case which can be briefly summarised as follows:

(A) There is no tax undercharged

The Revenue suffers no loss and the penalty tax should be lower but the Taxpayer does not go so far to say that as there is no tax undercharged no additional assessment should be made – on this point Mr LI for the Commissioner referred the Board to a case D105/89 in which another board chaired by Mr Henry LITTON, QC has made a decision.

(B) Circumstances beyond his control

The Taxpayer claimed that he entrusted all the accounting and tax affairs to his staff which consisted of a well qualified person to be his financial controller and three other staff. As he was a busy person and travelled a lot, he did not know why the accounts were not prepared in time and the return had to be filed late. He had staff problem which was due to rapid staff loss and sudden expansion of his business.

(C) Efforts to comply

He had tried every effort to comply with the extended time.

(D) Incorrect facts

The Commissioner took into consideration incorrect facts. In the original draft Statement of Facts the Commissioner failed to note that extension of time had been granted to file the return. The actual delay was only 29 days after the deadline, that is, 15 November 1993.

Decision

9. The Board fully appreciated the mitigating circumstances put forward by the Taxpayer both in writing and by his testimony at the hearing. Whether the Revenue has suffered pecuniary loss is not an important factor to consider. It is important that the law is observed and the Board has to consider whether the penalty creates a deterrent effect.

10. The Taxpayer is not a first offender and on two different occasions he had been fined. On the last occasion in respect of the year of assessment 1991/92 section 82A was invoked and he had to pay an additional tax of \$87,000. This did not create any effect for change and the Taxpayer was still late in filing the return. Mr X's explanation was that he was not aware of it and his employee did not inform him. After observing the Taxpayer's demeanour and listening to his plea the Board finds it difficult to accept his explanation.

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11. Late is late. The Taxpayer was late in meeting the Commissioner's first request and late in complying with the extended deadline. As the Taxpayer frankly admitted, he was liable to pay the additional tax.
12. The incorrect facts had been rectified before the hearing. In our deliberation we have taken notice of the corrected facts.
13. The remaining issue is what is the correct amount. The Board takes the penalty for the year of assessment 1991/92 as the basis. In that year, the additional tax of \$87,000 is equivalent to 9.9% of the tax assessed, that is, \$878,227.50.
14. Taking all the factors into consideration the Board finds it reasonable to double the rate, that is, double 9.9% to become 19.8%. The Board comes to a sum of \$99,163.15 (that is, 19.8% of the assessed tax of \$500,824). Therefore, the Board finds that the sum of \$100,000 as imposed by the Commissioner is not outrageous, excessive or unacceptable.
15. For the above reasons the Board confirms the assessed additional tax of \$100,000 and dismisses the Appeal.