

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D6/94

Penalty tax – previous late filing – previous section 82A penalty – whether 40% of the tax involved is excessive – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Nicholas Ian Billingham and Kenneth Ting Woo Shou.

Date of hearing: 11 March 1994.

Date of decision: 22 April 1994

The taxpayer was a limited company which repeatedly failed to file its tax returns on time. In respect of the years of assessment 1986/87 and 1987/88 the taxpayer received penalty tax assessments under section 82A of the Inland Revenue Ordinance in the sums of \$70,000 and \$100,000 respectively. In respect of the year of assessment 1991/92 the taxpayer was again late in filing its tax return. Two estimated assessments were issued, the first of which became final because the taxpayer failed to validate its objection. When the taxpayer eventually filed its tax return on 26 May 1993 it showed assessable profits of \$36,000 less than the first estimated assessment which had become final. The taxpayer argued that it had no intention to evade or avoid tax. Blame was placed upon the auditors and on a management dispute.

Held:

The penalty tax assessment was not excessive amounting to 40% of the amount of tax which would have been undercharged. The taxpayer had failed to maintain proper accounts and seeking to place blame on auditors did not merit sympathy.

Appeal dismissed.

Cases referred to:

D2/92, IRBRD, vol 7, 56

D5/92, IRBRD, vol 7, 84

D2/90, IRBRD, vol 5, 77

Dodge Knitting Co v CIR 2 HKTC 597

Ng Pak Shing for the Commissioner of Inland Revenue.

Eddy S K Pang of Messrs S K Pang & Co for the taxpayer.

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Decision:

This is an appeal by a limited company against a penalty tax assessment imposed upon it under section 82A of the Inland Revenue Ordinance in respect of the year of assessment 1991/92. The facts are as follows:

1. In respect of the years of assessment 1986/87 and 1987/88 the Taxpayer was assessed to additional tax by way of penalty under section 82A of the Inland Revenue Ordinance in the sums of \$70,000 and \$100,000 respectively. These penalty tax assessments were duly paid by the Taxpayer.
2. On 1 April 1992 a profits tax return for the year of assessment 1991/92 was issued to the Taxpayer. On 29 April 1992 the Taxpayer's then representative applied for a block extension for all of its clients' one of which was the Taxpayer. This requested an extension of time up to 15 November 1992.
3. On 27 November 1992 the assessor raised an estimated assessment on the Taxpayer in the absence of a profits tax return in the amount of \$2,300,000 with tax payable thereon of \$379,500. An objection was lodged against this assessment on 28 December 1992. By letter dated 12 January 1992 the assessor informed the Taxpayer through its then tax representative that the objection was invalid and granted a period of time for the submission of the profits tax return for the year of assessment 1991/92 to validate the objection. However no profits tax return for the year of assessment was submitted within the time specified and the tax assessed on the estimated assessment of \$379,500 was paid by the Taxpayer.
4. On 22 March 1993 the assessor raised an additional estimated assessment on the Taxpayer in the amount of \$700,000 for the year of assessment 1991/92. An objection against this additional assessment was lodged on 20 April 1993.
5. On 29 April 1993 the assessor wrote to the Taxpayer's present tax representative advising that the objection was invalid and granted a period of time for the submission of the profits tax return for the year of assessment 1991/92 to validate the objection.
6. The Taxpayer submitted its profits tax return and accounts for the year of assessment 1991/92 on 26 May 1993 validating the objection against the second estimated assessment. The profits tax return showed assessable profits of \$2,263,662 which was approximately \$36,000 less than the first estimated assessment. On 10 June 1993 the second estimated assessment was revised to nil.
7. On 28 June 1993 the Commissioner gave notice to the Taxpayer that he proposed to assess additional tax on the Taxpayer by way of penalty under section 82A of the Inland Revenue Ordinance in respect of the year of assessment 1991/92.

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8. On 16 July 1993 the Taxpayer through its present tax representative made representations to the Commissioner.

9. On 13 August 1993 the Commissioner having considered and taken into account the representations of the Taxpayer issued a notice of assessment to additional tax by way of penalty for the year of assessment 1991/92 in the amount of \$150,000.

10. On 9 September 1993 the Taxpayer through its present tax representative gave notice of appeal to the Board of Review against the additional tax imposed upon it by way of penalty.

At the hearing of the appeal the Taxpayer was represented by its present tax representative. The tax representative submitted that the penalty was excessive in the circumstances and cited to the Board D2/92, IRBRD, vol 7, 56 and D5/92, IRBRD, vol 7, 84.

The tax representative said that there was no intention to evade or avoid tax. He pointed out that the amount of the estimated assessment had covered the profit which the Taxpayer returned in its profits tax return. He said that in fact if his client had filed its tax return on time the Taxpayer would have paid slightly less tax that is \$373,265 as opposed to \$379,500, an overpayment of tax of \$6,235.

The tax representative sought to place the blame on the previous tax representative of the Taxpayer. He said that since his firm had taken over the accounting and tax affairs of the Taxpayer he had worked extremely hard to produce the accounts for the Taxpayer. He said that the Taxpayer had lost the accounting information and he had tried his best to write up the accounts for the relevant period using the bank statements for the Taxpayer.

He further said that the cause of the delay in filing the tax return was because one director and manager had left the Taxpayer at the year end because of a disagreement with the management.

The representative for the Commissioner submitted that the penalty was not excessive in the circumstances of the case. He pointed out that the amount of the penalty was approximately 40% of the tax undercharged namely \$373,265. He drew our attention to the prior record of the Taxpayer in failing to file tax returns on time in respect of the years of assessment 1986/87 and 1987/88. In the course of his submission he referred to D2/90, IRBRD, vol 5, 77 and Dodge Knitting Co v CIR 2 HKTC 597. He pointed out that the Dodge case had been followed in D2/92 which the representative for the Taxpayer had already cited to us.

We are unable to agree with the tax representative for the Taxpayer that the penalty imposed in this case is excessive. The Commissioner has rightly taken into account the fact that the Taxpayer has a previous record of not filing its tax returns on time. Notwithstanding that, the Taxpayer has failed to maintain proper accounts. That is the real

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cause for it not being able to file its tax return on time. Enquiries of the tax representative reviewed that the nature of the business of the Taxpayer was the collection of rental income and the operation of an active business. Over 40% of the total income of the Taxpayer arose from the business mentioned above. If a taxpayer carries on such an active business with daily receipts and expenses it is necessary for the taxpayer to maintain proper and adequate accounts. This the Taxpayer obviously did not do. Taxpayers who then attempt to place the blame upon their previous auditors and accountants merit little sympathy in such circumstances.

Taking into account all of the circumstances of this case we are not able to say that a penalty of approximately 40% of the amount of tax which would have been undercharged is excessive.

For the reasons given we dismiss this appeal and confirm the penalty tax additional assessment of \$150,000 against which the Taxpayer has appealed.