

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D70/89

Penalty tax – failure to file tax return – estimated assessment – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Raphael Chan Cheuk Yuen and William E Mocatta.

Date of hearing: 26 September 1989.

Date of decision: 7 November 1989.

The taxpayer appealed against a penalty imposed upon him under section 82A of the Inland Revenue Ordinance. The taxpayer failed to file his tax return and an estimated assessment was issued. The estimated assessment was paid and the taxpayer subsequently filed a business profits tax return showing assessable profits substantially in excess of the estimated assessment. The taxpayer admitted the failure to file the tax return on time. It was submitted that in previous years when tax returns had been late no substantial penalty had been imposed. The quantum of the penalty imposed was less than 12% of the tax involved.

Held:

The amount of the penalty was not excessive in the circumstances.

Appeal dismissed.

Chan Wan Chun for the Commissioner of Inland Revenue.

Taxpayer represented by its director.

Decision:

This is an appeal by a taxpayer against the amount of a penalty imposed under section 82A of the Inland Revenue Ordinance. The facts are as follows:

1. The Taxpayer was incorporated in Hong Kong in November 1979 and has since then carried on a textile business. The Taxpayer closes its accounts on 31 March in each year.

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2. On 1 April 1987 a profits tax return was issued to the Taxpayer which required the Taxpayer to submit the return within one month. The certified public accountants for the Taxpayer obtained an extension of time up to 31 October 1987 within which to submit the tax return.
3. On 3 February 1988 in default of receipt of the 1986/87 tax return from the Taxpayer referred to in the preceding fact, the assessor raised an estimated profits tax assessment for the year of assessment 1986/87 under section 59(3) of the Inland Revenue Ordinance in the amount of \$17,000,000.
4. The Taxpayer did not object to the 1986/87 estimated profits tax assessment. On 7 March 1988 the tax return referred to in fact 2 above was submitted which showed assessable profits of \$24,455,949.
5. On 25 March 1988 the assessor raised an additional profits tax assessment for the year of assessment 1986/87 on the Taxpayer in accordance with the tax return which had now been filed.
6. On 13 July 1988 the assessor raised a second additional profits tax assessment for the year of assessment 1986/87 which took into account a small adjustment to the Taxpayer's claim for industrial building allowance in respect of a property.
7. The Taxpayer did not raise objection to either of the two additional profits tax assessments for the year of assessment 1986/87.
8. For a number of previous years the Taxpayer had a record of failing to submit profits tax returns within the time stipulated plus any extensions of time which might have been granted.
9. On 15 September 1988 the Commissioner gave notice to the Taxpayer under section 82A(4) of the Inland Revenue Ordinance that he proposed to assess additional tax by way of penalty for the year of assessment 1986/87 in respect of the failure by the Taxpayer to comply with the requirements of the notice given to it under section 51(1) of the Inland Revenue Ordinance.
10. After taking into account representations made by the Taxpayer, the Commissioner on 12 October 1988 assessed the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance in the sum of \$520,000 for the year of assessment 1986/87. On 9 November 1988 the Taxpayer gave notice of appeal to the Board of Review against this assessment to additional tax imposed under section 82A.

At the hearing of the appeal the Taxpayer was represented by its director who was frank and open in her submission. She admitted that the Taxpayer had failed in its obligations under the Inland Revenue Ordinance and that the tax return was filed late. She also admitted that in previous years the Taxpayer had a history of filing late tax returns.

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However she pointed out that the Taxpayer had not realised that filing late returns could lead to such a substantial penalty being imposed. She pointed out that if in previous years a warning had been issued the Taxpayer would have been more diligent in filing its tax returns and this case would never have arisen. She said that the profits made by the Taxpayer in respect of the year of assessment which is the subject matter of this appeal were the highest profits made in the history of the Taxpayer's business and substantially exceeded profits in previous years.

The representative for the Commissioner pointed out that by consistently filing its tax returns late, the Taxpayer had been obtaining advantages because it had deferred the due date for payment of tax which otherwise would have applied if the tax returns had been filed on time. He said that the fact that the Taxpayer had for a number of years filed its tax returns late was not an excuse but was rather an aggravation of the case. He said that the Commissioner had taken a lenient view because he had decided to impose a penalty in respect of one year only. He pointed out that the total amount of the tax involved amounted to \$4,528,326 and that the penalty imposed of \$520,000 represents less than 4% of the maximum penalty permitted under the Inland Revenue Ordinance and less than 12% of the amount of tax involved.

We have some sympathy for the Taxpayer in this appeal because of the frank and honest way in which the director of the Taxpayer submitted her case. Unfortunately for the Taxpayer we do not consider the penalty imposed to be excessive. The Inland Revenue Ordinance imposes a penalty which is calculated by reference to the amount of tax undercharged or which would have been undercharged that is in this case the total amount of the tax for the year of assessment 1986/87. In this case he has imposed a very small percentage, namely less than 4% of the maximum permitted penalty. This is a low percentage and recognises that he has taken a lenient view. The fact that the quantum of the penalty is so high in dollar terms is a direct consequence of the amount of the tax involved.

We have given careful consideration to the submission that the Taxpayer would have filed the tax return earlier if it had known of the likely consequences of delay in filing returns. However we do not find that this submission is sufficient to merit our saying that the penalty is excessive. The Taxpayer is a company carrying on a sophisticated business. It had the benefit of professional advice. If the professional advisers of the Taxpayer did not warn the Taxpayer of the likely consequences of failure to file tax returns on time, this is a matter for the Taxpayer to take up with its advisers and cannot affect the quantum of the penalties. Furthermore there is no obligation on the Inland Revenue Department to issue warnings in individual cases. The Inland Revenue Department draws attention to penalties when issuing tax return forms and also by means of television and newspaper advertisements. It is the duty of the Taxpayer to comply with the provisions of the Inland Revenue Ordinance. To protect the public revenue, the legislature has made provision for very heavy penalties to be imposed on those who fail in their obligations under the Inland Revenue Ordinance.

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In all of the circumstances we find the penalty imposed not to be excessive and dismiss the appeal.