

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D72/94

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

Panel: William Turnbull (chairman), Victor Hui Chun Fui and Jao Yu Ching.

Date of hearing: 17 January 1995.

Date of decision: 8 March 1995

The taxpayer was a private limited company which was late in filing its profits tax return. The Commissioner imposed a penalty of 4.7% of the tax involved. The taxpayer appealed to the Board of Review to reduce the quantum of the penalty. Employees of the taxpayer appeared before the Board and said that they might be required to pay the penalty.

Held:

The penalty was not excessive. The Board had sympathy for the individuals appearing before it but this did not affect the quantum of the penalty.

Appeal dismissed

Cases referred to:

D53/88, IRBRD, vol 4, 10

D70/89, IRBRD, vol 5, 69

D2/90, IRBRD, vol 5, 77

D65/90, IRBRD, vol 5, 455

D2/92, IRBRD, vol 7, 56

D11/93, IRBRD, vol 8, 143

D42/93, IRBRD, vol 8, 318

Dodge Knitting Co Ltd and Dodge Trading Ltd v CIR 2 HKTC 597

Tam Lee May for the Commissioner of Inland Revenue.

Taxpayer represented by his accountant.

Decision:

This is an appeal by a private limited company against a penalty tax assessment raised under section 82A of the Inland Revenue Ordinance (the IRO) in respect of the late filing of a profits tax return. The facts are as follows:

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1. The Taxpayer was incorporated in June 1974 and commenced business in March 1975. The business of the Taxpayer comprised property investment and trading in goods.
2. The Taxpayer closed its account on 31 March in each year. On 1 April 1993 a profits tax return for the year of assessment 1992/93 was issued to the Taxpayer requiring its completion and return within one month. The tax representative of the Taxpayer obtained an automatic extension for the submission of this tax return up to 15 November 1993.
3. On 26 November 1993 the assessor not having received the 1992/93 profits tax return from the Taxpayer raised on the Taxpayer an estimated profits tax assessment in the amount of \$3,600,000 with tax charged thereon of \$630,000.
4. By letter dated 23 December 1993 the tax representative for the Taxpayer lodged an objection against this estimated assessment. The profits tax return for the year of assessment 1992/93 was submitted to the Revenue on the same date and showed assessable profits of only \$3,037,181.
5. The profits tax return was accepted by the assessor and a revised assessment to profits tax of \$3,037,181 with tax chargeable thereon of \$531,506 was issued.
6. The Taxpayer had a record of failing to submit its profits tax returns within the time stipulated as follows:

Year of Assessment	Date of Issue	Deadline of Submission	Date of Submission
1988/89	3-4-1989	31-10-1989	25-11-1989
1989/90	2-4-1990	15-11-1990	23-11-1990
1990/91	2-4-1991	15-11-1991	31-1-1992
1991/92	1-4-1992	15-11-1992	20-1-1993

7. On 19 May 1994 the Commissioner of Inland Revenue gave notice to the Taxpayer under section 82A of the IRO of his intention to assess additional tax by way of penalty in respect of the late filing by the Taxpayer of its profits tax return.
8. By letter dated 17 June 1994 the tax representative made representations to the Commissioner on behalf of the Taxpayer.
9. On 18 July 1994 the Commissioner of Inland Revenue having taken into account the representations of the Taxpayer issued a notice of assessment for

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additional tax under section 82A for the year of assessment 1992/93 in the amount of \$25,000.

10. By a letter dated 16 August 1994 the Taxpayer gave notice of appeal to the Board of Review against the assessment to additional tax by way of penalty.

At the hearing of the appeal the Taxpayer was represented by its accountant and assistant accountant. They explained to the Board that the penalty of \$25,000 was very substantial and had come as a great shock to them. The assistant accountant indicated to the Board that her employer would require her to pay the amount personally and clearly the matter was of considerable distress to both her and the accountant of the Taxpayer. She explained that she had only been employed in August 1993 and that the accounts had been delivered to the auditors in September 1993. The auditors had not finished the audit and the tax return was not filed by them until 23 December 1993. The return should have been filed on or before 15 November 1993 being the expiry of the extended period granted by the Revenue for the filing of profits tax returns for companies whose financial year ended on 31 March.

The two representatives for the Taxpayer went on to explain to the Board that in previous years the Taxpayer had followed a course of conduct under which it was regularly late in filing its tax returns. Estimated assessments were raised which were promptly paid by the Taxpayer. Where the estimated assessment was in excess of the assessable profits, the Taxpayer would pay the same and then seek a refund of the over payment after the tax return had been filed. This is what had happened in the year in question. They explained that it was their understanding that an administrative fee or penalty of a small sum would be imposed by the Commissioner and they had never envisaged that such a substantial penalty would be imposed for the late filing of a profits tax return.

The representative for the Commissioner pointed out to the Board that the quantum of the penalty which had been imposed was very modest being only 4.7% of the tax involved. The Board was referred to a number of previous decisions which established that penalties in the region of between 10% to 20% would not be unreasonable. The representative pointed out that the IRO placed an obligation upon the Taxpayer to file its tax return promptly and it was no excuse to place the blame upon either auditors or staff.

The representative for the Commissioner cited the following cases and decisions to us:

D53/88, IRBRD, vol 4, 10

D70/89, IRBRD, vol 5, 69

D2/90, IRBRD, vol 5, 77

D65/90, IRBRD, vol 5, 455

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We have considerable sympathy for both the two persons who appeared before us to represent the Taxpayer and the Taxpayer itself. The concern of the individuals was both apparent and genuine. It was also quite apparent and genuine that the imposition of a substantial penalty had come as a complete surprise to the two individuals and the Taxpayer. However in the circumstances of this case we are not able to find that the penalty imposed is in any way excessive. Clearly the Commissioner has taken into account the mitigating factor and has imposed a penalty of only 4.7% when the norm for cases of this nature would more usually be in the region of 10%.

Although we totally accepted the bona fides of the submissions made by the two individuals it is hard to understand why they and the Taxpayer were not aware that the Commissioner imposes substantial penalties on those who fail to file their tax returns within the specified time. The current practice of the Commissioner has been consistent for some years and every year the Commissioner writes circular letters to audit firms and tax representatives in Hong Kong. The matter has also been made public through the professional society of accountants. Whilst the two persons appearing before us may not have received such notifications as they are not practising accountants it is hard to understand why their auditors and tax representative would not have drawn this to their attention.

Whether or not the Taxpayer seeks to recover the amount of the penalty from its employees is not a factor which this Board can take into account. It would seem to this Board to be a little unfair that an employer should seek to pass the burden of a penalty on to a new employee who was following a previous course of conduct of the Taxpayer. However this is not something which can or should concern this Board in considering whether or not the quantum of the penalty is excessive.

For the reasons given this appeal is dismissed and the additional assessment to penalty tax in the sum of \$25,000 is confirmed.