

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D74/96

**Penalty tax** – late filing of profits tax return – assessment of additional tax – considerations in arriving at the assessment of additional tax – whether absence of further warning reasonable excuse – section 82A of the inland Revenue Ordinance.

Panel: Ronny Wong Fook Hum QC (chairman), Kut Ying Hay and Larry Kwok Lam Kwong.

Date of hearing: 2 November 1996.

Date of decision: 11 December 1996.

The taxpayer is a company engaged in property investment. The Commissioner of Inland Revenue (CIR) sent a circular letter to the accountant of the taxpayer specifying 15 November 1993 for lodgment of tax returns. A return was only submitted on 3 December 1993 after the Commissioner issued a notice of estimated assessment. Additional tax of \$80,000 was levied against the taxpayer for its failure to comply with section 51(1) of the Inland Revenue Ordinance. In arriving at such additional tax, the Commissioner took into account the taxpayer's 'representations and history of lodging'. The taxpayer appealed against such assessment contending that its Managing Director was hospitalised so that it was not in a position to finalise its account. It was further contended that the absence of further warnings from the Commissioner made it impossible for the taxpayer to exert pressure on its accountant to observe the time limit.

Held:

1. The accounts should have been prepared before the deadline. The indisposition of the Managing Director is no excuse.
2. The Revenue has no duty to give repeated reminder to the taxpayers to ensure timely submission of returns.
3. The Board was inclined to the view that previous non-compliance should be dealt with in the relevant years of assessment and should not be left pending as a potential aggravating factor for subsequent non-compliance.
4. Given that the taxpayer was less than 3 weeks late, the Board reduced that additional assessment from \$80,000 to \$50,000.

**Appeal partly allowed.**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Case referred to:

D5/90, IRBRD, vol 5, 77

Tai Chou Yeuk Wai for the Commissioner of Inland Revenue.  
Taxpayer represented by its director.

### **Decision:**

### **The Facts**

1. The Taxpayer is a company incorporated on 16 November 1976 and is principally engaged in property investment, investment holding and trading.
2. The Taxpayer prepares annual accounts to 31 March. It engaged a sizeable firm of Certified Public Accountants [‘the Tax Representative’] to assist them in such preparation.
3. On 9 March 1993, the Commissioner sent his Block Extension Circular letter for lodgment of tax returns for the year of assessment 1992/93 to all Certified Public Accountants. 15 November 1993 was specified as the compliance date for cases where the accounting date was between 1 January 1993 to 31 March 1993. The Certified Public Accountants were asked to remind their clients that ‘any failure, without reasonable excuse, to file returns in a timely manner or to report chargeability may result in section 80 or 82A action being taken’.
4. On 1 April 1993, the profits tax return for the year of assessment 1992/93 was issued to the Taxpayer. The Taxpayer failed to file its return by 15 November 1993.
5. The Directors’ Report and Financial Statements of the Taxpayer for the year ended 31 March 1993 were both dated 24 November 1993. According to the Directors’ Report, its board of directors during the year was made up of 7 persons including Mr X as one of the 2 Permanent Directors and his son Mr Y. The Directors’ Report was signed by Mr Y.
6. In the absence of a properly completed return for the year of assessment 1992/93, a notice of estimated assessment was issued to the Taxpayer on 26 November 1993 under section 59(3) of the Inland Revenue Ordinance (the IRO) showing assessable profits of \$6,510,000 with balance of final tax payable thereon of \$190,600 to be paid on or before 10 January 1994.
7. On the following day (27 November 1993), Mr X was admitted into a hospital due to pneumothorax. He was not discharged until 7 December 1993.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

8. The Tax Representative lodged an objection against the estimated assessment for the year of assessment 1992/93 on 3 December 1993. On the same day, Mr Y made a return on behalf of the Taxpayer declaring \$7,615,533 as its assessable profits.

9. A notice of revised assessment was issued to the Taxpayer on 21 December 1993. The sum \$386,936 payable under this revised assessment was due by 23 February 1994.

10. By letter dated 24 March 1994, the Revenue informed the Taxpayer that it is liable to be assessed under section 82A of the IRO in view of its failure to comply with section 51(1) of that IRO. The Taxpayer was invited to submit representations by 21 April 1994.

11. The Tax Representative in their letter of 20 April 1994 put forward 2 reasons against imposition of any additional penalty:

- a. Mr X, the Managing Director, was hospitalised and ‘all other directors who held non-executive office were either present (sic) in Hong Kong or not authorised to deal with the tax affairs of the company.’
- b. The Taxpayer ‘had always submitted returns and settled all taxes before deadline without delay and for the year of assessment 1992/93, the case was not deliberately committed.’

12. In the 5 years immediately preceding the year of assessment 1992/93, the lodgement history of the Taxpayer is as follows:

<b>Year of Assessment</b>	<b>Profits Tax Return Issued</b>	<b>Block Extension Granted</b>	<b>Specific Extension Granted</b>	<b>Section 59(3) Assessment</b>	<b>Profits Tax Return Lodged</b>
1987/88	6-4-1988	31-10-1988	N/A	No	2-12-1988
1988/89	3-4-1989	31-10-1989	N/A	22-11-1989	21-12-1989
1989/90	2-4-1990	15-11-1990	N/A	30-11-1990	29-12-1990
1990/91	2-4-1991	15-11-1991	N/A	29-11-1991	4-12-1991
1991/92	1-4-1992	15-11-1992	N/A	No	10-12-1992

13. By notice dated 18 May 1994, the Revenue informed the Taxpayer that a sum of \$80,000 was assessed by way of additional tax under section 82A of the IRO. According to the Agreed Facts, in arriving at this sum, the Commissioner considered and took into account ‘the [Taxpayer’s] representations and history in lodging’.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

14. The Taxpayer appeals against the sum of \$80,000 so assessed.

### **The Relevant Statutory Provisions**

15. Section 82A of the IRO provides:

*‘(1) Any person who without reasonable excuse –*

*(a) ...*

*(b) ...*

*(c) ...*

*(d) fails to comply with the requirements of a notice given to him under section 51(1)...*

*(e) ...*

*shall ... be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which –*

*(i) ...*

*(ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) ..., or which would have been undercharged if such failure had not been detected.’*

### **Evidence on behalf of the Taxpayer**

16. Mr Y gave evidence on behalf of the Taxpayer.

17. According to Mr Y:

- a. Mr X (who had since passed away) founded the Taxpayer. The respect due to Mr X as founder called for his blessings of the Taxpayer’s account before submission.
- b. The Taxpayer duly prepared its accounts for submission by the Tax Representative. The Taxpayer assumed that the Tax Representative would ensure due compliance.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

- c. No further warning was given to the Taxpayer. Had such warning been given, the Taxpayer would have exerted on the Tax Representative to ensure due observance of the time limit.

### **Our Decision**

18. The deadline for compliance was 15 November 1993. The financial statements were finalised on 24 November 1993. Mr X was admitted into hospital 3 days later. The accounts should have been prepared well before 15 November 1993. The indisposition of Mr X therefore does not constitute any reasonable excuse for the failure to meet the 15 November 1993 deadline.

19. It is not for the Revenue to send repeated reminders to the taxpayers or their tax representatives to ensure timely submission of returns. The circular of 9 March 1993 gave ample warning to the Tax Representative of its duty to ensure due compliance with the time limit. It is the duty of professional advisers to protect the interests of their clients by timely submission to the Revenue. Extension of time for proper cause can always be sought from the Revenue. In this connection, we would like to echo what was stated in D2/90, IRBRD, vol 5, 77:

*'The Board accepts that it is the responsibility of each Taxpayer to comply with the requirement of the Inland Revenue Ordinance and that responsibility is not excused if a Taxpayer elects to place his tax affairs in the hands of a tax representative. Accordingly, the action or lack of action on the part of a Taxpayer's tax representative is irrelevant to the disposal of appeals of this nature.'*

20. For these reasons, we reject the grounds put forward by the Taxpayer in support of this appeal.

21. There is one aspect in this appeal which causes us concern. The Commissioner took 2 matters into consideration in arriving at the additional assessment of \$80,000. First, the Commissioner had regard to the Taxpayer's representations. Secondly, the Commissioner took into account the Taxpayer's history of lodgement. We have serious reservations whether this latter factor is a legitimate matter to be taken into account in assessing the additional assessment. We are inclined to the view that previous non-compliance should be dealt with in the relevant years of assessment and should not be left pending as a potential aggravating factor for subsequent non-compliance.

22. The deadline was 15 November 1993. The Taxpayer was less than 3 weeks late in its submission. Given these basic facts, we are of the view that an additional assessment of \$80,000 is unduly harsh. We would reduce the sum to \$50,000.