

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D94/97

Additional tax – failure to complete and return profits tax return within time limit – whether return received by taxpayer – whether requirements of the notice in the Return ‘given’ within the meaning of section 82A(1)(e) – non receipt – reasonable excuse.

Panel: Kenneth Kwok Hing Wai SC (chairman), Kenneth Chow Charn Ki and Lily Yew Kuin King Suk.

Date of hearing: 15 August 1997.

Date of decision: 9 January 1998.

The taxpayer failed to complete and return its profits tax return (‘the Return’) within the 1 month time limit and was assessed by the Commissioner to additional tax under section 82A of the Inland Revenue Ordinance in the sum of \$20,000.

The taxpayer was one of over 10 companies under the same parent company. The reception would take care of all incoming mail and then distribute to the relevant subject officer or company. Mail about tax would usually go to the financial controller or his secretary. The taxpayer’s financial controller had received all the tax returns for all the other companies but had not received the Return. The result of the financial controller checking through the taxpayer company and asking everybody in his company was that the taxpayer had not received the Return.

Held:

The Board was satisfied that the taxpayer had not received the Return and so the requirements of the notice in the Return had not been ‘given’ to the taxpayer within the meaning of section 82A(1)(e) and the taxpayer was therefore not liable to additional tax. If, contrary to the Board’s finding, the notice in the Return had been ‘given’ to the taxpayer within the meaning of section 82A(1)(e), the Board was satisfied that the non-receipt of the Return amounted to reasonable excuse. The assessment seeks to penalise the taxpayer for failure to comply with the notice in the Return, not for failure to notify under section 51(2) that it was chargeable to tax.

Appeal allowed.

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Joseph Chin for the Commissioner of Inland Revenue.
Taxpayer represented by its financial controller.

Decision:

1. This is an appeal from the assessment dated 15 November 1996, by Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112 ('the IRO'), in the sum of \$20,000 ('the Assessment').
2. On 1 April, 1996, the Commissioner issued a profits tax return for the year of assessment 1995/96 under section 51(1) of the IRO ('the Return'), requiring the Taxpayer to complete and return it within 1 month. The Commissioner took the view that the Taxpayer has without reasonable excuse failed to comply with the requirements of the notice in the Return. The case of the Taxpayer is that the Taxpayer has not received the Return.
3. The Taxpayer closes its account on 30 June in each year.
4. On 13 June 1996, the assessor, not having received the profits tax return for the year of assessment 1995/96, raised an estimated assessment in the amount of \$1,290,000 for that year under section 59(3) of the IRO.
5. On 24 June 1996 the Taxpayer requested and received a duplicate return. On 26 June 1996, the Taxpayer lodged an objection against the estimated assessment and submitted the duplicate return showing assessable profits of \$1,251,106.
6. The duplicate return was accepted by the assessor as correct and on 11 July 1996, the assessor revised the assessment accordingly.
7. On 4 October 1996, the Commissioner gave notice to the Taxpayer that the Commissioner was of the opinion that the Taxpayer had 'without reasonable excuse, failed to comply with the requirements of the notice given to [the Taxpayer] under section 51(1) of the IRO to furnish the profits tax return for the year of assessment [1995/96] within the time allowed' and informed the Taxpayer of its right to make representations.
8. Representations were made by the letter dated 15 October 1996 from the then current auditors of the Taxpayer to the Commissioner, stating that the Taxpayer 'has not received the Form BIR 51 for the year of assessment 1995/96 before receiving the notice of assessment dated 13 June 1996 which is based on an estimated assessment. [The Taxpayer] tried to locate the tax return by inquiring the former auditors ... and all the staffs (sic) in the Accounting Department whether they had received the tax return or not. The reply is not. [The Taxpayer] then take immediate action by requesting your department to issue a duplicate tax return on 24 June 1996 and they requested us, as their new auditors, to raise a formal objection to the estimated assessable profits for the year of assessment 1995/96

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which was submitted to your department on 26 June 1996 together with audited accounts and tax computations.’

9. At the hearing of the appeal, the financial controller of the Taxpayer told us that the Taxpayer was one of over 10 companies under the same parent company; that the reception would take care of all incoming mail and then distribute to the relevant subject officer or company; that mail about tax would usually go to him or his secretary; that although he had received the tax returns for all the other companies he had not received the Return; that the result of his checking through the Taxpayer company and asking everybody in his company was that the Taxpayer had not received the Return.

10. We have carefully considered the materials placed before us, and what the financial controller told us, including his answers to questions by the Representative for the Respondent, and find as a fact that the Taxpayer had not received the Return.

11. As the Taxpayer had not received the Return, the requirements of the notice in the Return has not been ‘given’ to the Taxpayer within the meaning of section 82A(1)(e) of the IRO and the Taxpayer has therefore made out its case under section 82B(2)(a) that it is not liable to additional tax.

12. If, contrary to our decision, the notice in the Return had been ‘given’ to the Taxpayer within the meaning of section 82A(1)(e), despite the non-receipt by the Taxpayer of the Return, we are satisfied that the non-receipt of the Return amounted to reasonable excuse. The assessment seeks to penalise the Taxpayer for failure to comply with the notice in the Return, not for failure to notify under section 51(2) that it was chargeable to tax.

13. Having decided that the Taxpayer was not liable to additional tax, it is not necessary for us to decide whether the amount of additional tax was excessive having regard to the circumstances.

14. For the reasons we have given, we allow the appeal and annul the assessment.