

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D3/02

Penalty tax – whether a reasonable excuse for omitting income – failure to disclose income and share option from company – duty to report the correct amount of income – whether quantum of additional tax excessive – sections 68 and 82B of the Inland Revenue Ordinance (‘IRO’) – unmeritorious appeal – order to pay costs.

Panel: Kenneth Kwok Hing Wai SC (chairman), Winnie Lun Pong Hing and Daniel Wan Yim Keung.

Date of hearing: 20 February 2002.

Date of decision: 11 April 2002.

The appellant objected to the additional assessments for making incorrect returns by omitting or understating incomes. The appellant explained his omission of reporting the income from a Hong Kong company by asserting that he was employed by a United States company and that he had not received a copy of the employer’s return made by the Hong Kong company in respect of him and the Hong Kong company had been acquired by another company that he had not received any report from the Hong Kong company; and that he had relied on the information on his income supplied by the company which had taken over the Hong Kong company. In respect of the share option granted by the company which had taken over the Hong Kong company, the appellant asserted that he thought that as this was an investment in the United States it should not be taxable in Hong Kong and that was why he had not reported it.

Held:

1. The Board did not believe the assertions made by the appellant. It was his duty to report the correct amount of income. Such duty is not dependent on being supplied by the employer or employers with information on the correct amount. The appellant had no excuse for omitting income. Note 7(d)(ii) of the explanatory notes accompanying the tax return stated clearly and categorically what should be reported in respect of share options.
2. Payment of tax is not a relevant factor. It is the duty of every taxpayer to report and pay the correct amount of tax. If he does not pay tax, he will be subject to enforcement action. The Board considered that the additional tax, which was only 14.87% and 15.87% of the tax undercharged, was not excessive. Further the appellant chose to

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waste the time and resources of the Board of Review by pursuing this wholly unmeritorious appeal. Pursuant to section 68(9) of the IRO, the Board ordered the appellant to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the tax charged and recovered therewith.

Appeal dismissed and a cost of \$5,000 charged.

Wong Yuen Wan Yee for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the following additional assessments (' the Assessments'), both dated 19 October 2001, by the Commissioner of Inland Revenue, assessing the Appellant to tax under section 82A of the IRO in the following sums:

Year of assessment	Additional tax	Charge number
	\$	
1997/98	9,400	9-3957420-98-2
1999/2000	<u>5,500</u>	9-1971485-00-8
Total:	<u>14,900</u>	

2. The relevant provision is section 82A(1)(a) of the IRO for making incorrect returns by omitting or understating incomes.
3. The facts in the statement of facts are agreed by the parties and we find them as facts.
4. The onus of proving that the Assessments are excessive or incorrect is on the Appellant, sections 68(4) and 82B(3).
5. Under section 82B(2) of the IRO, there are only three possible grounds of appeal. The Appellant relied on two of them and contended that he was not liable to additional tax and that the amount of additional tax was excessive having regard to the circumstances.
6. In respect of the year of assessment 1997/98, the Appellant sought to explain his omission of reporting the income of \$405,145 from a Hong Kong company by asserting that he was employed by a United States company, not a Hong Kong company; that the United States company ' wired' him the money; and that he had not received a copy of the employer' s return made by the Hong Kong company in respect of him. We do not believe him. He has produced

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neither the alleged employment contract with the United States company nor any documentary evidence of the alleged remittance by the United States company. He had no excuse for not reporting his income from the Hong Kong company.

7. We note that he reported his income from the Hong Kong company in respect of the year of assessment 1998/99.

8. In respect of the omission of the income of \$179,705 from the Hong Kong company in the year of assessment 1999/2000, the Appellant asserted that the Hong Kong company had been acquired by another company; that he had not received any report from the Hong Kong company about his income from the Hong Kong company; and that he had relied on the information on his income supplied by the company which had taken over the Hong Kong company. We disbelieve him. In his tax return for the year of assessment 1999/2000, he reported the income from the company which had taken over the Hong Kong company and stated that it covered the period starting from '1/7/1999'. In other words, the income he reported had nothing to do with April 1999, May 1999 and June 1999.

9. In any event, it was his duty to report the correct amount of income. Such duty is not dependent on being supplied by the employer or employers with information on the correct amount. He had no excuse for omitting income.

10. In respect of the omission of the notional gain of \$24,168 arising from the exercise in the year of assessment 1999/2000 of a share option granted by the company which had taken over the Hong Kong company, the Appellant asserted that he thought that as this was an investment in the United States it should not be taxable in Hong Kong and that was why he had not reported it. Even if we had believed him (which we do not), that would not have constituted a reasonable excuse. Note 7(d)(ii) of the explanatory notes accompanying the tax return stated clearly and categorically what should be reported in respect of share options.

11. We turn now to the question whether the additional tax is excessive.

12. As the Board of Review has said time and again, payment of tax is not a relevant factor. It is the duty of every taxpayer to report and pay the correct amount of tax. If he does not pay tax, he will be subject to enforcement action.

13. In respect of the year of assessment 1997/98, the Appellant reported an income of \$100,000 while omitting the income of \$405,145. He understated his total income by 80.2%. The additional tax of \$9,400 was only 14.87% of the tax undercharged. In our view, the Commissioner erred, if at all, in being too lenient.

14. In respect of the year of assessment 1999/2000, the Appellant reported an income of \$312,812 while omitting the income of \$203,873. He understated his total income by 39.46%.

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The additional tax of \$5,500 was only 15.87% of the tax undercharged. This was not his first omission. In our view, the Commissioner erred, if at all, in being too lenient.

15. We have carefully considered all the materials before us and come to the conclusion that none of the Assessments is excessive.

16. We dismiss the appeal and confirm the Assessments.

17. Instead of considering himself fortunate to have been treated leniently by the Commissioner, the Appellant chose to waste the time and resources of the Board of Review by pursuing this wholly unmeritorious appeal. Pursuant to section 68(9) of the IRO, we order the Appellant to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the tax charged and recovered therewith.