

Case No. D9/23

Property Tax – understatement of rental income – incorrect tax return – whether there was a reasonable excuse for the understatement – whether additional tax imposed was excessive – section 82A of the Inland Revenue Ordinance.

Panel: Hau Pak Sun (chairman), Kwok Yuk Sim Betty and Leung Sze Ning.

Date of hearing: 28 July 2022.

Date of decision: 28 July 2023.

The Appellant, Ms A, appealed against an assessment of additional tax in the amount of HK\$4,700 imposed under section 82A of the Inland Revenue Ordinance (IRO) for making an incorrect Property Tax Return for the year of assessment 2019/20. The Appellant understated the property's rental income by HK\$388,000, representing 92.38% of the total income.

The Appellant argued that the understatement was a mistake due to an oversight and requested a waiver of the penalty. The Appellant claimed she mistakenly reported one month's rent instead of the annual rental income and attributed the error to stress caused by COVID-19 and work-related pressures. She further stated that the 2019/20 Return was confusing and misunderstood the instructions regarding the reporting of annual rental income.

Held:

1. The Board held that the Appellant failed to demonstrate a reasonable excuse for the understatement. The Appellant, being a highly educated individual with a professional background in business and finance, should have understood the tax reporting requirements. The instructions on the 2019/20 Return were clear, and the Appellant had prior experience in filing property tax returns. There was no evidence to suggest that the Appellant was unable to manage her tax affairs due to stress. Carelessness or recklessness in completing the return does not constitute a reasonable excuse under section 82A(1) of the IRO.
2. The additional tax imposed, equivalent to 10.09% of the undercharged tax (HK\$46,560), was consistent with the Department's policy of imposing a

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penalty of 10% for first-time, inadvertent errors. The Board noted that the Appellant understated her income by more than 90% and did not take timely steps to rectify the error even after receiving the original tax demand. The Board concluded that the penalty was not excessive and was in line with the principles established in prior cases.

3. The Board emphasized that the purpose of additional tax under section 82A is to deter taxpayers from filing incorrect returns, protect the integrity of the tax system, and ensure fairness to compliant taxpayers. The penalty in this case was proportionate and served its intended purpose.
4. The Board dismissed the appeal and imposed a costs order of HK\$2,500, noting that government resources were expended in hearing the case, which lacked merit.

Appeal dismissed and costs order in the amount of \$2,500 imposed.

Cases referred to:

Koo Ming Kown and Another v. The Commissioner of Inland Revenue [2018]
HKCFI 2593
D17/08, (2008-09) IRBRD, vol 23, 301
D35/08, (2008-09) IRBRD, vol 23, 683
D16/07, (2007-08) IRBRD, vol 22, 454
D8/96, IRBRD, vol 11, 400
D94/98, IRBRD, vol 13, 479
D4/19, (2020-21) IRBRD, vol 35, 65

Appellant in person.

Chan Chi Yin and Hui Kam To, for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by Ms A (**‘the Appellant’**) against the assessment of additional tax in the amount of HK\$4,700 imposed under section 82A of the Inland Revenue Ordinance (Chapter 112) (**‘the Ordinance’**) for making incorrect Property Tax Return for the year of assessment 2019/20 (**‘the 2019/20 Return’**) by understating the rental income of a property. The Appellant asked for a waiver of penalty.
2. The issues for the determination by this Board are whether (a) the Appellant has reasonable excuse for making the understatement; and (b) whether the amount of additional tax imposed is excessive.

The Agreed Facts

3. The Appellant has agreed to the following facts in this section.
4. Mr B and the Appellant (**‘Mr B’** for the former, and **‘the Owners’** collectively) are husband and wife. At all relevant times, they were the joint owners of a property located at Address C (**‘the Property’**).
5. On 1 April 2020, the 2019/20 Return together with the Notes and Instructions - Form BIR57 (4/2019 version) (**‘the Notes’**) were issued to the Owners.

- (1) On the front page of the return, it was stated, in bold print, that:-

‘Please read and follow the enclosed Notes carefully in completing the return.’

- (2) Note 2 of the Notes specified that the income to be declared in the return should be the income from the Property for the full year that runs from 1 April to 31 March of the following year. Note 3(a) thereof further provided guidance on what to include as ‘Rental Income’.

- (3) At the bottom of the front page of the 2019/20 Return, it was printed in bold that:-

‘Heavy penalties may be incurred for ... making an incorrect return ... - See Note 6’

It was stated in Note 6 of the Notes that heavy penalties under the Ordinance would be imposed for any person who, *inter alia*, made an incorrect return without reasonable excuse.

6. On 4 June 2020, the Appellant filed the 2019/20 Return electronically via her eTAX account under GovHK.

- (1) At the start of the electronic filing process, in paragraph 1.2 of ‘Step 1 - Read Important Notes’, the Appellant was reminded to refer to both the paper return and the Notes. She could also gain access to the Notes (electronic version) whilst she was completing the return through the electronic channel by clicking the hyperlinks. The Appellant was also, in paragraph 2, drawn to the attention that for the purpose of filing tax returns under the Ordinance, both digital signature and password were accepted as an alternative to hand-written signature; and a person who filed his return by using a password would be treated as having signed the return and was accountable for the accuracy of the information furnished.

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- (2) In Part 3 ‘DETAILS OF PROPERTY LET for the year (from 1 April 2019 to 31 March 2020)’ of the 2019/20 Return, the Appellant put a ‘☒’ in the box indicating that the Property was let during the year. She also reported the following in Parts 3.1 to 3.3:

Number of complete months the property was let during the year	12
Period	01-04-2019 to 31-03-2020
Rental Income	HK\$32,000
Rates paid by owner	HK\$10,016

- (3) Before the Appellant signed and submitted the 2019/20 Return electronically, the eTAX system had displayed a simulated version of the return with all filled data for the Appellant's checking and confirmation. The Appellant signed the 2019/20 Return with eTAX password to declare that the information given in the return was true, correct and complete under Part 5 ‘DECLARATION’.

7. On 24 July 2020, the Inland Revenue Department (‘**the Department**’) issued the Notice of Original Assessment for the year of assessment 2019/20 to the Owners based on the rental income reported and deduction claimed in the 2019/20 Return. Since the Owners had elected Personal Assessment, Property Tax was not demanded in respect of their shares of net assessable value in the Property.

8. On 11 February 2021, the Department issued the Notice Demanding Final Tax for the year of assessment 2019/20 to the Owners and demanded final tax payable of HK\$2,638 because it was not advantageous for the Owners to elect Personal Assessment.

9. On 1 April 2021, the Property Tax Return in respect of the Property for the year of assessment 2020/21 (‘**the 2020/21 Return**’) together with the Notes (4/2020 version) were issued to the Owners.

10. The Department received the 2020/21 Return which was signed by Mr B on 20 April 2021. In Part 4 ‘DETAILS OF PROPERTY LET for the year (from 1 April 2020 to 31 March 2021)’, Mr B put a ‘☒’ in the box indicating that the Property was let during the year. He also reported the following in Parts 4.1 to 4.3:

Number of complete months the property was let during the year	10
Period	01-04-2020 to 31-03-2021
Rental Income	HK\$330,000
Rates paid by owner	HK\$8,428

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Mr B declared in Part 2 ‘DECLARATION’ that the information given in the return was true, correct and complete.

11. By letter dated 11 June 2021, the Assessor requested the Owners to provide a breakdown of the rental income of HK\$32,000 reported in the 2019/20 Return with a copy of the relevant tenancy agreement in support.

12. By reply letter dated 26 June 2021, Mr B confirmed that the Property was let throughout the period from 1 April 2019 to 31 March 2020 with a monthly rental income of HK\$35,000. He further stated that ‘(he) was sorry for the typo when (he) reported the rental income in the year 2020’.

13. On 14 September 2021, the Department raised on the Owners the following Additional Assessment Demanding Final Tax for the year of assessment 2019/20:

	Amount previously assessed	Additional amount	Total amount assessed
	\$	\$	\$
Assessable value	32,000	388,000	420,000
<u>Less:</u> Rates paid by owner	10,016	0	10,016
<u>Less:</u> 20% statutory allowance	21,984	388,000	409,984
for repairs and outgoings	4,397	77,600	81,997
Net assessable value (NAV)	17,587	310,400	327,987
Tax computed on NAV at standard rate 15%			49,128
Final tax payable			49,198
<u>Less:</u> Net tax already charged			2,638
Additional amount of tax payable			<u>46,560</u>

14. The Owners did not object to the assessment which had become final and conclusive under section 70 of the Ordinance

15. By letter dated 23 December 2021, the Assessor requested the Owners to provide a breakdown of the rental income of HK\$330,000 reported in the 2020/21 Return with supporting documents.

16. On 5 January 2022, the Deputy Commissioner of Inland Revenue (‘**the Deputy Commissioner**’) issued to the Appellant a notice of intention to assess additional tax under section 82A(4) of the Ordinance (‘**the Notice**’) notifying that:-

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- (1) he intended to impose Additional Tax in respect of the incorrect 2019/20 Return submitted by the Appellant for understating the income of the Property by HK\$388,000;
- (2) the amount of tax that would have been undercharged had the 2019/20 Return filed by the Appellant been accepted as correct was HK\$46,560; and
- (3) the Appellant had the right to submit written representations.

17. On 25 January 2022, the Department received the Appellant's undated letter responding to the Assessor's letter of 23 December 2021 and the Notice. The Appellant elaborated that the Property was let from 1 April 2020 to 31 March 2021 and rental income of HK\$406,000 was received for the year of assessment 2020/21. She also tendered apology for 'the confusion' again.

18. On 8 April 2022, the Deputy Commissioner issued the Notice of Assessment and Demand for Additional Tax for the year of assessment 2019/20 ('**the s82A Assessment**') to the Appellant under section 82A of the Ordinance in the sum of HK\$4,700. The additional tax was equivalent to 10.09% of the tax that would have been undercharged had the incorrect 2019/20 Return been accepted as correct.

19. No prosecution under section 80(2) or section 82(1) of the Ordinance has been instituted in respect of the same facts.

20. By email dated 14 April 2022 to the Clerk to this Board, the Appellant appealed against the Section 82A Assessment.

The relevant statutory provisions

21. Section 82A of the Ordinance provides that:

'(1) Any person who without reasonable excuse—

(a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person; ...

shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the undercharged amount.

(9) In this section—

undercharged amount (少徵稅款) —

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(a) for additional tax assessed because of any incorrect return, statement or information or an omission from any statement or information—means the amount of tax that—

(i) has been undercharged as a result of the incorrect return, statement or information or omission; or

(ii) would have been so undercharged if the return, statement or information had been accepted as correct or the omission had not been detected;

22. Section 82A(4) of the Ordinance provides that:

‘Before making an assessment of additional tax, the specified authority must—

(a) give notice to the person that the specified authority proposes to assess additional tax and the notice must—

(i) inform the person of the following—

(A) for additional tax to be assessed under subsection (1)—the alleged incorrect return, incorrect statement or incorrect information, the alleged failure to comply with section 26M(3)(a) or 26Q(3)(a), the alleged failure to comply with a requirement of the notice given to the person under section 51(1) or (2A) or the alleged failure to comply with section 51(2); ...

(ii) include a statement that, with regard to the proposed assessment on the person of additional tax, the person has the right—

(A) to submit written representations to the specified authority; and ...

(iii) specify the date, which must not be earlier than 21 days from the date of service of the notice, by which representations and evidence that the person may wish to submit under subparagraph (ii) must be received by the specified authority; and

(b) consider and take into account any representations and evidence that the specified authority may receive under paragraph (a).’

23. Section 82B(2) of the Ordinance provides that:

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‘(2) On an appeal against assessment to additional tax, it shall be open to the appellant to argue that—

(a) he is not liable to additional tax;

(b) the amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A;

(c) the amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.’

24. Section 82B(3) of the Ordinance further provides that section 68 of the Ordinance shall, so far as applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.

25. Section 68(4) of the Ordinance places on the Appellant the burden of proof as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

26. Although not strictly relevant to this appeal, section 80(2) of the Ordinance provides that it is an offence for any person who without reasonable excuse makes, or causes or allows to be made on the person’s behalf, an incorrect, and to be liable on conviction to a fine at level 3 and a further fine of treble the undercharged amount.

The Appellant’s Grounds of Appeal and evidence

27. In her notice of appeal dated 14 April 2022, the Appellant put forth the following reason for understating the rental income in the 2019/20 Return:

‘It was an oversight on our side that when we filed the (2019/2020 Return), we stated just ONE month of the rent, where instead we should have multiplied the rent by 12 months with the updated rent amount. We apologize for the mistake.’

28. Among other things, the Appellant also stated the following for understating the rental income in the 2019/20 Return:

‘It was an oversight on our side that when we filed the (2019/2020 Return), we stated just ONE month of the rent, where instead we should have multiplied the rent by 12 months with the updated rent amount. We apologize for the mistake. Please understand that I have been working in the export business, my job is to export goods from China and Country E to Country F (for retailer Company G). When we filed the tax return, it was when Covid-19 outbreak in China, I was subjected to VERY HIGH stress

and pressure because with the Covid in China, all factories could not resume work after the Chinese New Year in 2020. All orders were impacted. There were nights which we worked until morning working with factories for solutions. Hope you can understand the very tough situation causing a major overlook on our part. Hope you can help to waive the penalty. Also, the economic situation now in Hong Kong is even worse this year. It is extremely unpredictable and harsh for us in Hong Kong. Hope you can be very kind to consider waiving this penalty.'

29. The Appellant testified at the hearing. A summary of her testimonial is as follows:

- (1) The Appellant obtained a bachelor in fashion and clothing technology from a university in United States in 1996. After graduation, the Appellant pursued studies for a Master of Business Administration by way of distance course from the Columbia Southern University in United States, and obtained the master degree in about 2000;
- (2) The Appellant admitted that from her education background, she is knowledgeable in the field of business, finance and accounting;
- (3) The Appellant had been working in the field of merchandising in her career. At the material time of filing the 2019/20 Return, the Appellant was a senior category manager of an Country F merchandising multi-national company;
- (4) Apart from the matters stated in her email dated 14 April 2022 about the Covid-19 situation and factories closing in the the Mainland which caused her a lot of stress in her work, the Appellant also mentioned the lockdown in Country D and Country E in March 2020 causing shortage of supplies in her company's business which caused her additional stress. The Appellant also had to work overnight to deal with the workload and different issues coming from works. Due to all these stress, she was not in a right state of mind and made a mistake in filling in the 2019/20 Return;
- (5) The Appellant tried to explain the mistake by suggesting that the 2019/20 Return was confusing and she thought the input amount would be monthly rental instead of annual rental. The Appellant also thought the monthly rental was HK\$32,000 instead of the correct amount of HK\$35,000. The Appellant also said Mr B was the person who was more familiar with the Property and tax reporting. However, the Appellant also admitted that in filling the 2019/20 Return she did not consult Mr B nor did she contact the Department for clarification;

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- (6) The Appellant also admitted that the Property was owned for some time and the 2019/20 Return was not the first time she filled in the property tax return concerning the Property;
- (7) The Appellant acknowledged that the rental amount was indeed understated. She apologized for the mistake and she asked for a lessor penalty (or it to be waived); and
- (8) The Appellant acknowledged that she had no difficulty in paying the additional tax of HK\$4,700.

30. After the Appellant has testified, the Appellant decided not to call Mr B as witness (who was initially listed by the Appellant as a witness although no prior witness statement had been produced).

Analysis

31. There is no dispute from the Appellant in this case:

- (1) The Appellant admitted to have made an incorrect tax return in the 2019/20 Return by understating rental income of HK\$388,000, representing 92.38% of the total income;
- (2) The amount of tax which would have been undercharged if the tax return was accepted as correct, was HK\$46,560 or 94.64% of the correct amount of tax of HK\$49,198;
- (3) The Appellant is liable under section 82A of the Ordinance to additional tax by way of penalty not exceeding treble the undercharged amount unless the incorrect return was made with reasonable excuse;
- (4) The amount of additional tax imposed was HK\$4,700, equivalent to 10.09% of the tax that would have been undercharged;
- (5) The additional tax imposed (if the Appellant is liable) therefore does not exceed the amount for which the Appellant would be liable under Section 82A of the Ordinance.

32. The issues in this appeal are therefore:

- (1) Whether the circumstances of the Appellant in making the incorrect return constitute 'reasonable excuse' within the meaning of Section 82A(1) of the Ordinance; and

- (2) If the answer to issue (1) is negative, then whether, having regard to the circumstances, the amount of additional tax is excessive under Section 82B(2)(c) of the Ordinance.

Issue 1 – Reasonable excuse

33. The concept of ‘reasonable excuse’ within the meaning of Section 82A(1) of the Ordinance has been considered by Mr Justice Lam (as he then was) in Koo Ming Kown and Another v. The Commissioner of Inland Revenue [2018] HKCFI 2593, at paragraphs 100 to 103:

‘100. Each of the questions raised ... concerns the concept of ‘reasonable excuse’ within the meaning of s 82A (1). This is a familiar expression in the law, used in various statutes to create a defence exonerating a person who would otherwise be subject to civil or criminal liability.

101. In HKSAR v Ho Loy (2016) 19 HKCFAR 110, which concerned the offence under regulation 61(2) of contravening without reasonable excuse any relevant provision of the Road Traffic (Traffic Control) Regulations (Cap 374G), Fok PJ stated (footnotes omitted):

‘ 36. The expression ‘without reasonable excuse’ occurs in various statutory contexts. A consideration of the defence involves looking to three matters. First, self-evidently, the matters said to constitute reasonable excuse must be identified. Secondly, the court will then examine whether the excuse is genuine, since the reason asserted for departing from a relevant prescription must be the real reason for doing so. Thirdly, the court must make an assessment of whether that excuse is reasonable, which the court will do on an objective standard depending on the particular facts of the case.

37. In determining whether an excuse is reasonable or not, it will be relevant to have regard to the context in which the defence of reasonable excuse arises, since that context may suggest either a narrow or wide range of circumstances that might constitute a reasonable excuse. For example, the range of circumstances in which there is a reasonable excuse for failing to provide a sample of blood or urine in the context of the laws against driving under the influence of drink has been held to be narrow, since the circumstances giving rise to the offence are always essentially similar so that what might be a reasonable excuse for committing it can be envisaged. In other contexts, the defence may be construed more widely and the question of whether or not an excuse is reasonable will be determined in the light of the particular facts and circumstances of the individual case.’

102. In a similar vein to what Fok PJ said in §37 of Ho Loy, the majority of the High Court of Country F in Taikato v The Queen (1996) 186 CLR 454 stated (at p 464) that ‘what is a reasonable excuse depends not only on the circumstances of the individual case but also on the purpose of the provision to which the defence of ‘reasonable excuse’ is an exception’. This statement was adopted by Tang PJ in Secretary for Justice v Chan Chi Wan Stephen (2017) 20 HKCFAR 98 at §96, albeit his Lordship was the only member of the court who considered that the question of ‘reasonable excuse’ was engaged in that case.

103. In approaching the defence of reasonable excuse in an appeal from the Board under the Ordinance, it is important to bear in mind that whether or not a reasonable excuse has been made out is a question of fact in each case, to be decided by the Board and not by the court: Frank Galliers Ltd v Customs and Excise Commissioners [1993] STC 284, 292b. In another context it has been said to be ‘par excellence a matter for the jury’: R v Unah [2012] 1 WLR 545, §6. It is well established that the scope for impugning a finding of fact such as this on an appeal confined to questions of law is very limited: see eg Kwong Mile Services Ltd (in members’ voluntary winding-up) v Commissioner of Inland Revenue (2004) 7 HKCFAR 275 at §§31-37.’

34. The gist of the history of the enactment of Sections 82A and 82B was also recited at paragraphs 22 and 23 of Koo Ming Kown and Another v. The Commissioner of Inland Revenue [2018] HKCFI 2593, as follows:

‘22. The history of ss 82A and 82B was set out in D17/08 (2008) 23 IRBRD 301, at §135 onwards. They arose from the proposals of the Commissioner and the recommendations of the Inland Revenue Ordinance Review Committee which considered those proposals and reported in 1968. Their report stated:

‘397. The Commissioner felt there was need for an alternative to Court action which would authorize him to impose penalties for most offences except those of wilful intent to evade tax. He pointed out that it would save the taxpayer’s time as well as an unpleasant appearance in Court and would also save the time spent by officials of the Inland Revenue Department, the Legal Department, and the Court on the preparation and hearing of comparatively minor cases. He agreed that he had the power to compound offences, and this worked reasonably well in routine offences such as failing to lodge returns by due date. However, he had found difficulty in convincing a person who has understated his income that he should pay a penalty in addition to the additional tax payable by assessment. Where an offender is unwilling to compound his offence, the only alternative available to the Department is to prepare a case for

prosecution in Court for an offence under either Section 80(2) or Section 82(1).

398. The Commissioner submitted that where any person has been undercharged to tax as a consequence of any incorrect return, statement or information made or given to the Department, or where he would have been undercharged if the return, etc. had been accepted, it would be reasonable to empower the Department to impose a penalty, up to the amount of the tax undercharged, according to the acceptability of the excuse offered by the offender: similar powers are to be found in the tax laws of other territories, including South Africa, Country F, Malaysia and Singapore. ...'

23. The Review Committee, being in general agreement with providing an administrative penalty as an alternative to court proceedings for at least certain offences which were punishable under Part 14, made recommendations which led to the enactment of ss 82A and 82B in 1969, with s 82A(1)(a) -(e) tracking the language of the pre-existing s 80(2)(a)-(e). The maximum amount of the administrative penalty at that time was the amount of the tax undercharged. An amendment trebled it in 1975.'

35. In 1975, amendments were made to, among others, Section 82A(1) of the Ordinance to empower the Commissioner to charge additional tax up to treble amount of the undercharged tax. The legislative discussion leading up to the 1975 amendments has been cited in D17/08 (2008) 23 IRBRD 301, at paragraphs 143 and 144:

'143. The Hansard recorded what the Financial Secretary said when he moved the second reading of the amendment bill on 2 April 1975:

'THE FINANCIAL SECRETARY moved the second reading of:—'A bill to amend the Inland Revenue Ordinance.'

He said:—Sir, during the course of my 1974 budget speech I said that the present investigation powers and penalty provisions in Parts IX and XIV of the Inland Revenue Ordinance needed strengthening. The bill at present before Council is intended to achieve just this. Honourable Members will no doubt recall that in 1969, following the recommendations of the last Inland Revenue Ordinance Review Committee, extended powers, which included the right to impose an administrative penalty in cases of tax evasion, were given to the Commissioner of Inland Revenue. These amendments, coupled with the establishment of a special Investigation Section in the Inland Revenue Department, have certainly had their effect—the total amount of tax and penalties imposed in the five years since 31st March 1969 amounted to \$35 million, which, of course, excludes the unquantifiable, but nevertheless known, effect that action of this sort has on the accuracy of current returns. Nevertheless, it is the view of the Commissioner that there is still a lot that can be done in this field but he is

hindered by the fact that first this is proving an expensive and time-consuming operation and that secondly the penalties are not sufficiently high to act as a deterrent to some would-be evaders. As recently as the year ended 31st March 1974, the average understatement of earnings and profits in the cases finalized by the Investigation Section was as high as 79 per cent. This is a frightening figure, particularly at a time when we need every cent we can lay our hands on—legitimately lay our hands on—to meet the ever increasing demands on General Revenue.

Whilst some of the amendments are of a comparatively minor nature—some of the amendments proposed in this bill—and are adequately explained in the explanatory memorandum, there are two which do call for particular comment.

...

The other amendment or really group of amendments which merits elaboration is the increase in the penalties which the courts may impose from \$2,000 plus a fine equal to the amount of tax undercharged, to \$2,000 plus treble the amount of the tax undercharged. This is provided for in clause 6 and it should also be noted that by clause 7 the Commissioner is empowered, subject to a right of appeal by the taxpayer, to impose an administrative penalty known as 'additional tax'. These amendments also bring into the net for the first time the case where the taxpayer just sits back and quietly fails to submit a return at all.

Clearly these amendments are intended as a deterrent and also as a punishment to the guilty. It will be evident from the figures I have already given to honourable Members that the existing penalty is simply not sufficient as a deterrent. As regards punishment, it will I hope be readily appreciated that, because of high interest rates and inflation, even where the maximum penalty of 100 per cent is imposed as it is in the worst type of case, the taxpayer is often no worse off than if he had paid the tax in due time. Furthermore, it must be remembered that with a standard rate of 15 per cent, except for corporations where the rate is now happily 16½ per cent, the worst that can happen to an offender if he is caught is to pay tax at 30 or 33 per cent—to put it at its lowest level it is worth taking a sporting chance, although let me say at once that I consider there is nothing sporting about the tax evader. His action, if undetected, simply shifts the burden of the tax on to those who are honest enough to contribute according to law. He deserves no sympathy from this Council and I trust he will get none. I would also remind honourable Members that, in some neighbouring countries, the penalties when added to the tax are confiscatory in that in some cases they can exceed the amount of income on which they are levied. Even the maximum 300 per cent penalty now proposed will still not be anywhere near confiscatory in Hong Kong.

An additional motive behind the increase in the penalty is to give the Commissioner a greater degree of flexibility in fixing the amount of the penalty. At present, as I have already indicated, if one does no more than recover what one should have paid to the Exchequer in the first instance, the penalty would very often have to be close to the 100 per cent margin. There is very little therefore that the Commissioner can offer by way of inducement to a taxpayer to make a clean breast of things and submit corrected returns. Furthermore, it has been the Commissioner's experience that once having been caught out, the taxpayer often sits back and leaves it to the department to build up the necessary statements from which his true profits can be ascertained. This is a laborious, painstaking task and it is ironic that this should be done at Government's expense when the fault lies entirely with the taxpayer. There is however an insufficient range of penalties for the Commissioner to hold out some inducement to the taxpayer at this stage to pay his own accountant to do his own work at his own expense.

In this connection, I should like to place on record what the Commissioner's practice in relation to the full voluntary disclosure of tax evasion is. Where offences under the Inland Revenue Ordinance have been committed, the Commissioner may institute prosecution under Part XIV of the ordinance. He is, however, also given power to compound these offences, that is to say, to accept a monetary settlement instead of sanctioning the institution of a prosecution. Alternatively, he is given the power to impose additional tax in lieu of prosecution. Although no undertaking can be given as to whether or not the Commissioner will refrain from prosecution in the case of any particular person, it is the practice of the Commissioner to be influenced by the fact that a person has made a full confession of any offence to which he has been a party and has given full facilities for investigation and has provided corrected returns accompanied by detailed statements in support of these returns. These facts will also have a favourable bearing on the amount of the penalty or where applicable, additional tax, in settlement.'

144. *At the resumption of debate on second reading, the Financial Secretary said on 18 June 1975 that:*

'I of course welcome [honourable Members'] support of the Government's objective of reducing the incidence of tax evasion, not only to protect the revenue – and if the revenue is not protected our low and narrowly based fiscal system is put at risk – but also to re-assure honest taxpayers that they alone are not expected to carry the burden of public expenditure.'

36. From the legislative history of section 82A(1) of the Ordinance, the underlying policies of imposing additional tax can be summarized as follows:

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- (1) To deter tax evasion through filing of incorrect tax return and encourage taxpayers to file correct returns;
- (2) To discourage taxpayers from taking chances of understating income and benefiting from the late payment of the correct tax;
- (3) To reduce incidence of tax evasion to preserve the Department's limited resources from investigation when the fault lies with the taxpayer by filing incorrect return;
- (4) To empower the Commissioner the right to impose an administrative penalty in cases of tax evasion instead of commencing prosecution for minor cases to save the Government's expenses;
- (5) To provide initiatives for offender to provide full facilities for investigation;
- (6) To protect our revenue which is already a low and narrowly based fiscal system; and
- (7) To ensure fairness to taxpayers who have correctly filed returns so that they do not carry the burden of public expenditure.

37. Similar observations of the underlying policies have been made by the Board in D35/08, as follows:

'51. Articles 106 and 108 of the Basic Law provide that the Hong Kong Special Administrative Region shall have independent finances and practise an independent taxation system.

52. Articles 107 and 108 of the Basic Law provide that the HKSAR shall:

(a) taking the low tax policy previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation; and

(b) follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.

53 Direct taxation on earnings and profits is an important source of income for HKSAR.

54. While the tax rates are low and the fiscal system is narrowly based, the demands on general revenue are ever increasing.

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55. *Omission or understatement of receipts in tax returns causes loss in revenue if the returns are accepted by the Revenue as correct. Failure to notify chargeability, if undetected by the Revenue, causes loss in revenue. Delay in submitting returns may delay the timely collection of revenue.*

56. *The Inland Revenue Department makes millions of assessments each year. A high degree of compliance by the taxpayers in submitting timely, true correct and complete tax returns and information to the Revenue is crucial for the effective operation of HKSAR's tax system.*

57. *The Revenue can check the accuracy of returns, conduct field audits and prosecute suspected offenders. It can also deploy resources and manpower to copy information it received to the taxpayers.*

58. *Put in proper perspective, we consider it a waste of the Revenue's limited resources to:*

(a) *conduct checks, investigations and audits which are avoidable had there been a high degree of compliance by taxpayers of their statutory reporting duties; and*

(b) *pamper taxpayers who turn a blind eye to their duty to submit timely, true correct and complete tax returns and information.*

This is also unfair to the honest and compliant taxpayers who take great care to comply and exercise due diligence in complying with their statutory reporting duties. There is no reason for the honest and compliant taxpayers exercising due diligence in the discharge of their statutory reporting duties to foot the bill. Those in breach, not those who comply, should pay.

59. *Penalty tax serves two purposes – to punish the delinquent taxpayers and to deter these and other taxpayers.'*

38. Having regard to the underlying policies of imposing additional tax to taxpayers who have filed incorrect tax return, Section 82A(1) of the Ordinance does not only serve to punish or deter the taxpayer who understated his income, but also to protect the integrity of the revenue system and to ensure fairness to taxpayers who comply with their statutory reporting duties. It follows, in such context, that the range of circumstances that might constitute a reasonable excuse under Section 82A(1) of the Ordinance must be a narrower one to ensure compliance of the statutory obligations by taxpayers.

39. Indeed, the Board has consistently taken a serious view of omission and understatement of income, see D16/07, IRBRD, vol 22, 454 at paragraphs 125 - 128, where the Board cited a number of Board decisions and extracted the following principles from those cases:

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- ‘(a) Receipt and accrual of income and the total amount in the 12-month period in a year of assessment are factual matters within the personal knowledge of the taxpayer. Such knowledge does not depend on the taxpayer being supplied with employer’s return(s) or remembering about employer’s return(s).*
- (b) In cases where the taxpayer was paid by autopay or deposits into the taxpayer’s bank account, the taxpayer could easily have ascertained and checked the correct total amount of income by reference to the banking records.*
- (c) Carelessness or recklessness is not a licence to understate or omit one’s income.*
- (d) While an intention to evade tax is undoubtedly an aggravating factor, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax.*
- (e) There is no duty on the part of the Revenue to warn a taxpayer before invoking section 82A.*
- (f) Payment of tax is not a relevant factor. It is the duty of every taxpayer to pay the correct amount of tax. If he/she does not pay tax, on time or at all, he/she will be subject to enforcement action.*
- (g) The fact that the Revenue was vigilant enough to detect the understatement is not a mitigating factor. The fact that the Revenue suffered no financial loss is not a mitigating factor. It is an aggravating factor if the Revenue has suffered financial loss.*
- (h) Financial difficulty or inability to pay the penalty must be proved by cogent evidence.*
- (i) In cases of an incorrect return, it is wholly unrealistic for a taxpayer to ask for zero penalty. If anything, this is an indication that the taxpayer is still not taking his/her duties seriously.*
- (j) There must be a real difference in penalty between those who mitigate their breaches by being co-operative and those who aggravate their breaches by being obstructive.*
- (k) A second or further contravention is an aggravating factor. If a taxpayer does not get the message from the Revenue’s or the Board’s treatment of the first or earlier contraventions and does not take proper steps to ensure full and complete reporting of income, a heavier penalty should, as a general rule, be imposed for subsequent contraventions.*

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- (l) A blatant breach should be punished by a stiff penalty.*
- (m) In cases where the Board concludes that the additional tax assessment is excessive, the Board will reduce the penalty assessment.*
- (n) In appropriate cases where the Board concludes that the additional tax assessment is manifestly inadequate, the Board will increase the additional tax assessment.*
- (o) Where the Board concludes that the appeal is frivolous and vexatious or an abuse of the process of appeal, the Board may impose an order on costs.'*

40. Having regard to the principles as stated above, it is clear that the Appellant's circumstances significantly fall short of what would have been a reasonable excuse under section 82A(1) of the Ordinance. The Board does not find the Appellant's circumstances, individually or collectively, exonerating. The reasons being:

- (1) There is no evidence suggesting that the Appellant was not able to manage her personal affairs, in particular her statutory obligations to report income to the Department, due to her (alleged) stress at work;
- (2) Stress by itself can hardly be a justification, let alone reasonable excuse, for one not to comply with one's statutory obligation. This is so having regard to the underlying objectives of section 82A(1) of the Ordinance in protecting the revenue and ensuring fairness, it would not be fair to other taxpayers who are able to duly fulfill their tax reporting obligations. The Board also agrees with the Commissioner that the Appellant's failure to file a correct return was due to the Appellant's choice not to pay due regard or attach a lower weight to her filing obligations, rather than inability due to work stress.
- (3) In relation to the Appellant's own (alleged) confusion of the 2019/20 Return, it is not a genuine justification. The Appellant is a highly-educated person who is familiar with the fields of business, finance and accounting. She has also been working in a multi-national company as a senior management. The Board finds that the 2019/20 Return is clear enough so that no reasonable person in the position and experience of the Appellant would be confused as to the information required, in particular the Appellant had had the experience in filing previous property tax return. If the Appellant were indeed confused as she claimed, she should have sought the clarification either from the Department or Mr B which she did not do so.
- (4) Despite the reporting of the so-called one-month rental income in the 2019/20 Return erroneously, the Appellant, however, was careful to

claim a deduction of rates for the full year in Part 3.3(1) thereof. The amount claimed, being HK\$10,016, was more than the quarterly rates and government rent payable totaling HK\$4,950 and far exceeded the quarterly rates of HK\$2,531 or monthly rates of HK\$844 (HK\$2,531/3). Further, even the alleged one-month rental was not the correct amount (which should have been HK\$35,000 instead of HK\$32,000). All these demonstrate the lack of care on the part of the Appellant in filling the 2019/20 Return. Carelessness or recklessness cannot be a reasonable excuse to understate or omit one's income.

41. In the circumstances, the Board does not find any reasonable excuse of the Appellant in making the incorrect 2019/20 Return. The liability of the Taxpayer to pay additional tax under Section 82A(1) of the Ordinance do stand.

Issue 2 – Whether the additional tax is excessive

42. Under Section 82A(1) of the Ordinance, it empowers the Commissioner to charge up to treble of the understated amount. The amount of additional tax imposed on the Appellant was a mere HK\$4,700, or about 10.09% of the undercharged tax.

43. In comparison to the relatively modest additional tax imposed on her, the Appellant understated her income by more than 90%.

44. The Appellant admitted that she does not have any financial difficulty to pay the HK\$4,700. After all, the Appellant's income from her employment exceeds HK\$1 million a year. The rental income from the Property also exceeded HK\$400,000 a year.

45. The Appellant should have known about her mistake in understating the rental income after the receipt of the original tax demand note, which had significantly understated the tax payable. The Appellant, however, sat back and did nothing to rectify until questions were being asked by the Department in the following financial year.

46. These circumstances demonstrate that the Appellant's plea for reduction of additional tax is by itself an unattractive one. Apart from the fact that it was the first time the Appellant filed an incorrect return and that the mistake was likely not intentional, the Board does not consider there were any other mitigating circumstances.

47. On behalf of the Commissioner, it was submitted that for simple and inadvertent omission or understatement of income in first offence case, it has long been the Department's policy to impose a penalty of 10% of the tax undercharged. This practice has been endorsed by the Board in dealing with numerous appeals against assessments of additional tax. In D8/96, D94/98 and D4/19, the Boards consistently held that the norm of 10% penalty was appropriate in cases where the taxpayer made a genuine mistake in filing an incorrect return. It was also pointed out in D4/19 that it was wholly unrealistic for a

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taxpayer to ask for zero penalty. Besides, the absence of dishonest intent does not automatically entitle the taxpayer to a low or nominal penalty under section 82A as stated in D16/07.

48. Having review the previous decisions of the Board and the circumstances of this case, the Board agrees with the Commissioner that additional tax of 10.09% of the undercharged tax cannot by any means be regarded as excessive.

Conclusion

49. This appeal is accordingly dismissed.

50. Under Section 68(9) of the Ordinance, the Board may order the Appellant to pay costs of the Board not exceeding a sum of HK\$25,000 and such sum shall be added to the tax charged and recovered therewith.

51. The Board is of the view that there are no merits in the Appellant's appeal. As the result of the appeal, government resources have been expended in order to hear the appeal. We order the Appellant to pay a sum of HK\$2,500 as costs of the Board which shall be added to the tax charged and recovered therewith.