

**Case No. D2/17**

**Salaries Tax** – incorrect statement in tax return – appellant claiming dependent parent allowance for parent already passed away – whether appellant liable to additional tax – whether reasonable excuse for making incorrect statement – whether additional tax excessive – sections 64, 66(3), 68, 70, 80(2), 82(1), 82A and 82B of the Inland Revenue Ordinance (Chapter 112) ('IRO')

Panel: Chui Pak Ming Norman (chairman), Lau Yat Ji Vicci and Ma Lai Yuk

Date of hearing: 17 January 2017.

Date of decision: 5 May 2017.

The appellant made incorrect statements by claiming dependent parent allowance ("DPA") in respect of his deceased mother ("Mrs A") in a financial year when Mrs A had already passed away, through a tax return filed 16 months after Mrs A's death. The appellant only made his first claim of DPA in respect of Mrs A one year prior to her death.

Upon reading the incorrect statements, the Deputy Commissioner of the Inland Revenue Department ('IRD') informed the appellant of his intention to impose additional tax (by way of penalty) and asked the appellant to show cause. Having considered the reasons raised by the appellant, the Deputy Commissioner assessed additional tax in the sum of \$5,800 (i.e. 42.65% of the tax which would have been undercharged). The appellant appealed.

In the appeal, the appellant contended, inter alia, that: (a) he negligently thought that Mrs A was still living in the relevant financial year; (b) he had no intention to defraud IRD; (c) he had been law-abiding when making tax payments in the past; (d) IRD suffered no loss from his mistake.

**Held:**

1. As a matter of general principles: (a) carelessness or recklessness was not excuse for incorrect statement; (b) while intention to evade tax was an aggravating factor, lack of intention to evade tax was not a mitigating factor; (c) payment of tax was not a relevant factor, as it was duty of every taxpayer to pay correct amount of tax; (d) the fact that IRD was vigilant to detect, or suffered no financial loss, was not a mitigating but an aggravating factor if IRD had suffered financial loss; (e) it was wholly unrealistic for a taxpayer to ask for zero penalty in cases of incorrect return, to do so was an indication that the taxpayer was still not taking his/her duty seriously; (f)

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the Board could reduce penalty assessment if the additional tax assessment was excessive; (g) where the appeal was frivolous or vexatious or an abuse of process, the Board might impose order on costs. (D16/07, (2007-08) IRBRD, vol 22, 454 considered)

2. On the agreed and undisputed facts, the appellant was liable to the additional tax assessed.
3. There was no reasonable excuse for making incorrect statements: (a) although the mistake was committed by the appellant's negligence, and the appellant was not intentional or cheating in failing to report, this was not a mitigating factor; (b) the fact that the appellant made tax payment timely was not a relevant factor; (c) the appellant had no intention to defraud IRD, but it was not a relevant factor; (d) IRD had suffered loss by incurring administrative expenses in checking and spotting the incorrect statements. In any event, the fact that IRD was vigilant enough to detect the incorrect statement was not a relevant factor. (D95/03, IRBRD, vol 18, 896 distinguished)
4. If the incorrect statement was caused by negligence of taxpayer, the penalty could be set at \$5,000 or 25% of tax undercharged (or which would have been undercharged). Where a taxpayer knowingly made untrue claim for allowances in respect of deceased parent, the penalty might be increased to 80% of tax undercharged (or which would have been undercharged). In the present case, the penalty of 42.65% on undercharged tax was not excessive in all circumstances. (D12/16, (2017-18) IRBRD, vol 32, 10, D95/03, IRBRD, vol 18, 896, D47/05, (2005-06) IRBRD, vol 20, 625, D91/00, IRBRD, vol 15, 842 considered)
5. The appeal was frivolous and vexatious. The appellant should pay a sum of \$5,000 as costs of the Board.

**Appeal dismissed and costs order in the amount of \$5,000 imposed.**

Cases referred to:

D104/96, IRBRD, vol 12, 74  
D91/00, IRBRD, vol 15, 842  
D115/01, IRBRD, vol 16, 893  
D95/03, IRBRD, vol 18, 896  
D47/05, (2005-06) IRBRD, vol 20, 625  
D16/07, (2007-08) IRBRD, vol 22, 454  
D12/16, (2017-18) IRBRD, vol 32, 10

Appellant in person.

Tang Siu Fung and Tang Mei Sze, for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. The Appellant made incorrect statements in connection with a claim for dependent parent allowance and additional dependent parent allowance in respect of late Mrs A in his Tax Return – Individuals for the year of assessment 2014/15 (‘the 2015 Tax Return’).

2. On 7 March 2016, the Deputy Commissioner of Inland Revenue (‘Deputy Commissioner’) gave a notice to the Appellant informing *inter alia* that:

- (i) if the Respondent had accepted the return as correct, tax would have been undercharged. The details are as follows:

<u>Year of Assessment</u>	<u>Amount of Allowance Claimed</u>	<u>Amount of tax</u>
	\$	\$
2014/15	80,000	13,600

- (ii) the law allows him to impose a penalty (known as ‘additional tax’) if the Appellant does not have a reasonable excuse for making the incorrect return. The penalty may be up to 3 times the amount of tax that would have been undercharged;
- (iii) the Appellant has the right to submit written representations to him, stating his reasons; and
- (iv) the Deputy Commissioner will take his reasons, if any, into account when deciding whether to impose the penalty, and if so, the amount.

3. By his letter to the Respondent dated 24 March 2016, the Appellant gave his reasons to the Deputy Commissioner for his consideration.

4. The Deputy Commissioner, having considered the reasons submitted by the Appellant, on 6 June 2016 assessed the Appellant to pay additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112 (the ‘Ordinance’) in the following sum (‘Assessment’):

<u>Year of Assessment</u>	<u>Additional tax</u>	<u>Charge No.</u>
2014/15	\$5,800	X-XXXXXXXX-XX-X

**Facts of the Case**

5. The Appellant agreed to the Statement of Facts prepared by the Respondent which was annexed in the hearing bundle. We accept the facts of the appeal which are, for easy reference, recited in paragraph 6 to paragraph 17 below.

6. The Appellant has appealed the imposition of additional tax by way of penalty assessed upon him under section 82A of the Ordinance for making incorrect statements in connection with a claim for dependent parent allowance and additional dependent parent allowance in respect of late Mrs A in the 2015 Tax Return.

7. On 4 May 2015, a notice in relation to filing of the 2015 Tax Return was sent to the Appellant's eTAX Account with a hyperlink to a 'Guide to Tax Return – Individuals'. Before a taxpayer signs and submits his tax return electronically, the eTAX system will display a simulated version of the tax return with filled data for his checking and confirmation. An important note that heavy penalties might be incurred for making an incorrect return or committing other offences is also stated.

8. On 6 July 2015, the Appellant filed the completed and signed 2015 Tax Return through the Internet under his eTAX Account. In part 8.4 of the 2015 Tax Return, he made a claim for dependent parent allowance and additional dependent parent allowance as follows:

	Dependent 1
Name	Mrs A
Hong Kong Identity Card Number	XXXXXXXX(X)
Date of Birth	1933
Relationship with me/my spouse	Parent
Claim for Dependent Parent/Grandparent Allowance:	
(i) The dependent was ordinarily resident in Hong Kong during the year.	Yes
(ii) The dependent resided with me continuously during the year without paying full costs. OR I/my spouse contributed not less than \$12,000 in money towards the dependent's maintenance during the year.	Yes, For Full Year  Yes

9. The Appellant signed the 2015 Tax Return with eTAX password to declare that the information given in such return was true, correct and complete.

10. Based on the 2015 Tax Return and information not from the Appellant regarding the death of Mrs A, the Inland Revenue Department ('the Department'), on 9 November 2015, issued to the Appellant the following Salaries Tax Assessment for the year of assessment 2014/15:

	<u>Amount (\$)</u>	<u>Amount (\$)</u>
Income	864,020	864,020
<u>Less: Deductions</u>		

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	<u>Amount (\$)</u>	<u>Amount (\$)</u>
Charitable donations	5,000	
Home loan interest	<u>8,053</u>	<u>13,053</u>
Net Income		850,967
<u>Less: Allowances</u>		
Basic / Married person's	120,000	
Child	<u>140,000</u>	<u>260,000</u>
Net chargeable income		<u>590,967</u>
Tax payable		<u><u>68,464</u></u>

Assessor's Notes

1. Any deduction(s) allowed is/are subject to review.
2. The tax measures announced in 2015-16 budget have been effected in this assessment.
3. Allowance/deduction for elderly residential care expenses claimed for the parent(s)/grandparent(s) with identity card number(s) stated below is not granted as information shows that neither you nor your spouse maintained the parent(s)/grandparent(s) in that year.

XXXXXXXX(X)

11. The Appellant did not lodge any objection against the 2014/15 Salaries Tax Assessment in paragraph 10 above.

12. The above assessment had become final and conclusive in accordance with the Ordinance.

13. On 7 March 2016, the Deputy Commissioner issued a notice of intention to assess additional tax under section 82A(4) of the Ordinance and informed the Appellant that:

- (a) Owing to the Appellant's incorrect statement in connection with a claim for dependent parent allowance and additional dependent parent allowance in respect of late Mrs A in the 2015 Tax Return, he intended to impose tax by way of penalty;
- (b) Had the incorrect 2015 Tax Return filed by the Appellant been accepted as correct, the amount of tax that would have been undercharged was \$13,600; and
- (c) The Appellant had the right to submit written representations.

14. No prosecution under section 82(1) of the Ordinance has been instituted against the Appellant in respect of the same facts.

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15. By a letter of 24 March 2016 received by the Respondent on 24 March 2016, the Appellant made written representations to the Deputy Commissioner together with a copy of the death certificate in respect of Mrs A.

16. After due consideration of the Appellant's representations referred to in paragraph 15, the Deputy Commissioner did not accept that the Appellant had reasonable excuse for making incorrect statements in connection with a claim for dependent parent allowance and additional dependent parent allowance in the 2015 Tax Return. On 6 June 2016, the Deputy Commissioner issued a Notice of Assessment and Demand for Additional Tax under section 82A of the Ordinance in the amount of \$5,800, which represented 42.65% of the tax that would have been undercharged (\$13,600) had the 2015 Tax Return been accepted as correct.

17. By a notice dated 28 June 2016, the Appellant filed an appeal to the Board of Review ('the Board') against the Assessment of Additional Tax for the year of assessment 2014/15.

**Evidence**

18. The Appellant gave oral evidence at the hearing which was summarized as below:

- (a) The date of death of his mother was 9 March 2014. When he made the 2015 Tax Return, he thought that his mother was still living in that financial year, i.e. 2014 to 2015. If his mother had passed away on 1 April 2014, he would be entitled to the dependent parent allowance for that financial year. All along he claimed for dependent parent allowance for the past years. It was his negligence in claiming the dependent parent allowance for that financial year when he prepared for the 2015 Tax Return. However, upon cross-examination, the Appellant agreed that the first time for him to claim the dependent parent allowance and additional dependent parent allowance in respect of his mother was for the financial year 2013/14. Previously, he only claimed dependent parent allowance in respect of his father or mother in law or father in law.
- (b) He knew he could not defraud the Department for incorrect return submitted by him. When the Department made the assessment, they should know when his mother passed away by logging in the computer of the Births and Deaths Registry. That means he had no intention whatsoever to defraud the Department.
- (c) For the past 30 years, he had paid tax timely. There had never been any delay on his part to pay the tax. Neither did he receive any penalty for late payment. He would regard himself being a law abiding citizen. Even though his carpark was leased out for a few months by way of

renewal, he would make the property tax return according to the law. He was fully aware that he had the duty to do so as a citizen of Hong Kong.

- (d) When he received the letter from the Department advising that he might be imposed for penalty in respect of the incorrect information submitted, he called the Department enquiring what it was so. The staff of the Department advised him to send a copy of the death certificate of his mother to the Department. He misunderstood that it was a simple matter by sending the death certificate to correct the information misstated. Had he known there was penalty, he would have made more explanations rather than by sending the death certificate under cover of his letter with a few words.
- (e) As a son, he would not use the fact of his mother's death to defraud others.

19. We have carefully considered his evidence and found that they are no more than submissions on the grounds of his appeal. Overall, we are not impressed that he was a creditable and reliable witness. We therefore attach no weight to his oral evidence. However, to the extent that such evidence amounts to submission, we will consider such submission when we deliberate the appeal.

### **Grounds of Appeal**

20. By his letter dated 28 June 2016, the Appellant lodged his appeal against the Assessment to the Board. The grounds of the Appeal raised by the Appellant and set out in the said letter were as follows:

- (a) His mother passed away on 9 March 2014 which is closed to the demarcation line on the year of Assessment 2014/2015 and 2013/2014, when he submitted the tax returns, he was negligent and was not intentional or cheating in failing to report.
- (b) He has already paid the tax 2 weeks in advance of the deadline and has never been uncooperative or delayed in paying tax for the past 30 years.
- (c) He never had any intention to defraud the Department because he was fully aware that the Births and Deaths Registry would keep track of the death of his mother. No fraud could ever be perpetuated.
- (d) The Department suffered no less even though he mistakenly claimed for the dependent parent allowance. This was because his mistake had been corrected in the assessment.

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- (e) When he made an enquiry to the Department for the incorrect statement, the staff just advised him to provide a copy of the death certificate of his mother instead of providing details on the grounds of negligence in submitting wrong statement.
- (f) His mistakes were no more than mere negligence and did not belong to those categories that openly flout the rules and submitted incorrect tax returns. Although carelessness is not a reasonable excuse, it equally did not justify a penalty tax of 42.65% on the facts of similar case.

**Respondent's Bundle of Authorities**

21. The Respondent submitted a bundle of the following authorities to the Board and the Appellant in addition to the cited relevant provisions of the Ordinance: -

- (a) D104/96, IRBRD, vol 12, 74;
- (b) D91/00, IRBRD, vol 15, 842;
- (c) D115/01, IRBRD, vol 16, 893;
- (d) D95/03, IRBRD, vol 18, 896;
- (e) D47/05, (2005-06) IRBRD, vol 20, 625;
- (f) D16/07, (2007-08) IRBRD, vol 22, 454;
- (g) D12/16, (2017-18) IRBRD, vol 32, 10

**Relevant provisions of Inland Revenue Ordinance**

22. Section 66(3) provides that:

- (3) *Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'*

23. Sections 68(4), (8)(a) & (9) provide that:

- '(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*
- '(8) (a) After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit*



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*the case to the Commissioner with the opinion of the Board thereon.'*

- '(9) Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part 1 of Schedule 5, which shall be added to the tax charged and recovered therewith.'*

The amount specified in Part 1 of Schedule 5 is \$25,000.

24. Section 82A(1), so far as relevant, 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; or*
- (b) makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance; ...*

*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 amount of tax which-*

- (i) has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct ...'*

25. Section 82B, so far as relevant, provides that:

*'(1) Any person who has been assessed to additional tax under section 82A may within-*

- (a) 1 month after the notice of assessment is given to him ...*

*either himself or by his authorized representative give notice of appeal to the Board ...'*

*'(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.'*

*'(3) Sections 66(2) and (3), 68, 68AA, 68AAB, 68A, 69 and 70 shall, so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.'*

26. The Appellant submitted no authority for the Board's consideration.

**Relevant authorities on the issue of reasonable excuse for making incorrect statement**

27. The Board in D16/07<sup>1</sup> extracted a number of propositions from the previous cases to deal with the issue of reasonable excuse for making incorrect statement, namely, D3/02, D31/03, D9/05, D47/05, D50/05, D59/05, D66/05, D4/06, D33/06, D56/06, D57/06 and D80/06.<sup>2</sup>

28. For easy reference, we set out the relevant propositions<sup>3</sup> which we totally agree with as follows:

- (a) .....
- (b) .....
- (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, see also D62/96, IRBRD, vol 11, 633, at paragraph 23 (Robert Wei Wen Nam QC, John Peter Victor Challen and Benjamin Kwok Chi Bun).
- (e) .....

<sup>1</sup> (2007-08) Volume 22 Inland Revenue Board of Review Decisions, page 454, one of the authorities relied on by the Respondent

<sup>2</sup> Paragraph 125 of D16/07

<sup>3</sup> Paragraph 128 of D16/07

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- (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) .....
- (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) .....
- (k) .....
- (l) .....
- (m) In cases where the Board concludes that the additional tax assessment is excessive, the Board will reduce the penalty assessment, for example, D9/05 and D4/06.
- (n) .....
- (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.

29. The propositions give guidance to each Board which deals with the appeal *inter alia* concerning additional tax imposed consequent upon the incorrect statements in connection with a claim for dependent parent allowance and additional dependent parent allowance filed with the Respondent. We will refer to such propositions whenever appropriate for us to do so.

**The Issues before the Board**

30. We agree with the Respondent that the issues before the Board for determination are:

- (a) whether the Appellant is liable to additional tax;
- (b) whether the Appellant has reasonable excuse for making the incorrect statements; and

- (c) whether the amount of additional tax imposed is excessive.

**Whether the Appellant is liable to additional tax**

31. On the agreed facts and the fact that the Appellant did not lodge any objection against the Assessment (which became final and conclusive under sections 64 and 70 of the Ordinance), the Appellant over-claimed the dependent parent allowance and additional dependent parent allowance.

32. Since no prosecution was brought on the over-claim of the dependent parent allowance and additional dependent parent allowance under section 80(2) or 82(1) of the Ordinance, the Appellant is liable to additional tax assessed by the Respondent pursuant to section 82A of the Ordinance.

**Whether the Appellant has reasonable excuse for making the incorrect statements**

33. The Appellant repeated his grounds of appeal in his submission, which in our view, are his submissions on reasonable excuse for making the incorrect statements. He asked the Board to consider the case D95/03, IRBRD, vol 18, 896 favorably towards him because the facts of that case are very similar to his situation.

34. In D95/03, the taxpayer claimed dependent parent allowance and additional dependent parent allowance in respect of his mother in his Tax Return- Individuals for the year of assessment 2001/02. The taxpayer's mother passed away on 18 December 2000 (in year of assessment 2000/01). His claim was rejected by the Respondent. Consequent upon his incorrect return, the Respondent imposed additional tax \$5,000 on him. The taxpayer appealed against the amount imposed. The Board in D95/03 considered that the taxpayer had no reasonable excuse in submitting incorrect tax return for the year of assessment 2001/02. The taxpayer had continuously applied for deduction of dependent parent allowance in respect of his mother for more than 20 years prior to her death. He habitually applied the same in the first year of assessment after the passing away of his mother. It was held by the Board that his mistake was no more than mere negligence. The Board thus allowed the appeal by reducing the additional tax from \$5,000 to \$2,500.

35. While we fully agree with the Board of D95/03 that if the incorrect statement was made due solely as a result of mere negligence, the additional tax should be reduced, we think the crucial facts in D95/03 are different to those of the present case. In D95/03, the taxpayer had continuously and habitually made claims of dependent parent allowance and additional dependent parent allowance for the past 20 odd years prior to the death of his parent. It was understandable that such habit caused the taxpayer to commit the mistake. In the present appeal, it is undisputed that the Appellant first made the claim of dependent parent allowance and additional dependent parent allowance in respect of his mother one year prior to her death. We do not feel that the Appellant had committed the mistakes due to the habit of making claim for a long and continuous period of time, hence due to mere negligence.

36. Now we turn to the grounds of appeal one by one relied on by the Appellant to see whether he has reasonable excuse in making an incorrect statement and to see if the assessment is excessive.

***Ground 1 – the date of death was close to the demarcation line on the year of Assessment 2014/15 and 2013/14 – he was negligent and was not intentional or cheating in failing to report (paragraph 20(a) above).***

37. As discussed in paragraph 35 above, we do not find that it is a mere negligence case on the part of the Appellant. When the Appellant submitted the 2015 Tax Return in July 2015, there had already been a lapse of about 16 months after the death of his mother (in March 2014). We could see some point in this argument if his mother passed away in March 2014 and he completed and filed the Return in July 2014.

38. In normal cases, the longer the period of time between the date of death and the date of making the return, the lesser the chance of confusion and the making of a mistake. We could not see how it could mix up the Appellant's mind on his entitlement of such allowances when he made claims in respect of his mother some 16 months after her death.

39. We accept that the Appellant was not intentional or cheating in failing to report, for otherwise he would have been prosecuted under other sections of the Ordinance. The Board has repeatedly in previous decisions stressed that 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 an intention to evade tax.<sup>4</sup>

***Ground 2 – He has already paid the tax 2 weeks in advance of the deadline and has never been uncooperative or delayed in paying tax for the past 30 years. (paragraph 20(b) above)***

40. Though the Appellant made payment of tax timely or in advance of the deadline, it is not a relevant factor when considering the issue of a reasonable excuse for making an incorrect statement. It is the duty of every taxpayer to pay the correct amount of tax on time. If he is late in payment, he will be subject to surcharge or to enforcement proceedings.<sup>5</sup>

***Ground 3 – He never had any intention to defraud the Department because he was fully aware that the Births and Deaths Registry would keep track of the death of his mother. No fraud could ever be perpetuated. (paragraph 20(c) above)***

41. We accept that no fraud could ever be perpetuated by the Appellant, for otherwise, he would have been prosecuted under other sections of the Ordinance. Again,

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<sup>4</sup> Paragraph 128(d) of D16/07

<sup>5</sup> Paragraph 128(f) of D16/07

taxpayers should not perpetuate any fraud and defraud the Department. It is a serious crime to commit fraud by making fraudulent tax return to the Department.

42. However, the absence of fraud should not be a relevant factor to be taken into account when we consider the issue of reasonable excuse for making incorrect return.

***Ground 4 – The Department suffered no loss even though he mistakenly claimed for the dependent parent allowance. This was because his mistake had been corrected in the Assessment. (paragraph 20(d) above)***

43. We do not agree that the Department suffered no loss in the present case. While it can be said that as a result of the Respondent's internal checking system, the Department recovered all the tax which the Appellant ought to pay, we could not say that the Department does not suffer any loss as submitted by the Appellant.

44. Common sense dictates that the Respondent had to incur a lot of administrative expenses in checking and spotting the incorrect statements. If each taxpayer made correct tax return, such administrative costs and expenses could be avoided.

45. The fact that the Respondent was vigilant enough to detect the incorrect statement returned by the Appellant is, in our view, not a relevant factor to be taken into account when we consider the issue of reasonable excuse for making incorrect statement. Neither does it amount to a mitigating factor. The fact that the Respondent suffers no financial loss (in term of tax) is not a mitigating factor. It will be an aggravating factor if the Department has suffered financial loss.<sup>6</sup>

***Ground 5 – When he made an enquiry to the Department for the incorrect statement, the staff just advised him to provide a copy of the death certificate of his mother instead of providing details on the grounds of negligence in submitting wrong statement. (paragraph 20(e) above)***

46. We are not sure how true this statement is. Common sense dictates that a civil servant will not give advice to the taxpayer on the adequacy of documents to be submitted in response to the request of the Respondent for grounds of not imposing additional tax.

47. However, whether it is the case or not, it does not matter because by taking this appeal to the Board, we step into the shoes of the Commissioner to consider the matter again. We will consider afresh all grounds relied on by the Appellant and consider all the evidences and documents submitted by the Appellant in deciding the Appeal. This is exactly what we are doing.

48. Ground 5 alone could not be a ground of an appeal in considering reasonable excuse of making incorrect statement to the Respondent because now the

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<sup>6</sup> Paragraph 128(g) of D16/07

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Appellant has the benefit of presenting his grounds of appeal, as well as all evidence in support of the appeal, again.

49. The Appellant would not be prejudiced even if he had acted on the advice of the staff by just submitting a copy of the death certificate to the Respondent for consideration.

***Ground 6 – His mistakes were no more than mere negligence and did not belong to those categories that openly flout the rules and submitted incorrect tax return. Although carelessness is not a reasonable excuse, it equally did not justify a penalty tax of 42.65% on the facts of similar case. (paragraph 20(f) above)***

50. Whether an assessment is excessive or not depends on the facts of each case. It is difficult to say a certain percentage is high or not without regard to the circumstances of the case. The Board in D12/16 citing D95/03 and D47/05 stated that if the incorrect statement was caused by mere negligence of the taxpayer, the penalty could be set at \$5,000 or 25% of the tax undercharged or which would have been undercharged.<sup>7</sup> However the same Board in D12/16<sup>8</sup> and the Board in D47/05<sup>9</sup> held that a false claim for dependent parent allowance and additional dependent parent allowance is a flagrant and blatant breach and the culpability is high. In D12/16, the Board said where the taxpayer knowingly made an untrue claim for allowances in respect of the deceased parent with the hope of getting the allowance, the penalty might be increased to 80% of the tax undercharged or which would have been undercharged.<sup>10</sup>

51. Fairly Ms. Tang on behalf of the Respondent drew our attention to the facts of D91/00 and D95/03. Because of their special circumstances, the hearing panels of those two cases reduced the amount of penalty to 25% of tax undercharged or which would have been undercharged.

52. The relevant facts of D95/03 were considered in paragraphs 34 and 35 above.

53. In D91/00, the Board accepted that the taxpayer was taking her father's demise to heart and that she had suffered from prolonged vaginal bleeding. Those two facts weighed heavily in her favor in mitigating her unintentional breach of the Ordinance.

54. After hearing the analysis of the facts of D91/00 made by the Respondent, the Appellant also submitted that he was also taking his mother's demise to heart which caused him to make an incorrect return. We do not accept his assertion or submission as we do not have any evidence from the Appellant on how his feeling was attached to his mother which led him to err that his mother passed away only several months, instead of

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<sup>7</sup> Paragraph 22 of D12/16

<sup>8</sup> Paragraph 22 of D12/16

<sup>9</sup> Paragraph 36 of D47/05

<sup>10</sup> Paragraph 23 of D12/16

16 months, before when he was making the return. Further, even if he had the affection for his mother, he did not suffer from any disease which caused him to make an incorrect statement.

55. The Appellant is a manager earning over \$800,000 for the year of assessment 2014/15. We agree with the Respondent's submission that the Appellant should have the ability and means to file a true and correct return. The amount of tax that would have been undercharged, if his claim for dependent parent allowance and additional dependent parent allowance was accepted, was \$13,600.

56. Having considered each and every submission made by the Appellant, the facts of the case and having reviewed the decisions made by other hearing panels<sup>11</sup> which are submitted and relied on by the Respondent, we are of the view that there is no reasonable excuse on the part of the Appellant for making an incorrect statement and that the penalty of 42.65% on the undercharged tax is not excessive in all the circumstances.

### **Disposition**

57. With the reasons set out above, we dismiss the appeal and confirm the Assessment.

### **Cost order**

58. The Appellant, being a manager in middle or senior management, earns no less than \$800,000 annual income and has the knowledge and means of making a correct return. We reject each and every ground relied on by the Appellant because none of them is justified. The whole appeal is of no merits. We rule that this appeal is frivolous and vexatious. There is no reason why the honest and law compliant taxpayers should bear the costs of the Board in dealing with this unmeritorious appeal.

59. Pursuant to section 68(9) of the Ordinance, we order the Appellant to pay a sum of HK\$5,000 as costs of the Board, and this sum of HK\$5,000 be added to the tax charged and recovered therewith.

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<sup>11</sup> The authorities cited in paragraphs 21 and 27 in this decision