Case No. D3/18

Penalty tax – appellant objecting to additional assessment and applying for stay of proceedings – appellant being absent on appeal and not withdrawing appeal – whether stay should be granted – whether Board should dismiss appeal with no power to vary assessment – whether aggravating or mitigating factors – whether costs be imposed – section 19 of Interpretation and General Clauses Ordinance (Chapter 1) – sections 4, 51(4)(a), 58(2), 66, 68, 70, 71(2), 75, 82A, 82B(3) of the Inland Revenue Ordinance (Chapter 112) ('IRO')]

Panel: Albert T da Rosa, Jr. (chairman), Hau Pak Sun and Jen Julienne.

Dates of hearing: 29 June and 25 September 2017.
Date of decision: 24 April 2018.

The Appellant was a solicitor trading as a firm. The Commissioner of Inland Revenue ('CIR') subjected the appellant to Additional Tax Assessment under 4 notices ('Notices'), which, together with other subsequent correspondences, were addressed to the Appellant. The Appellant did not respond to any of the Notices, and later applied for time extension to give reply in respect of documents requested in 2 of the Notices. Notwithstanding time extension was granted, nothing was forthcoming from the Appellant.

In his appeal, the Appellant filed grounds of appeal in response to the Notices without giving any other address for service. The Appellant further applied for stay of proceedings pending the outcome of his claim filed with District Court against CIR, to which the Board directed, *inter alia*: (a) to hear the stay application in a hearing; (b) to set deadlines for filing of bundles for the hearing. The said directions were sent to the Appellant through registered post. However, the Appellant did not file any bundles or documents, nor turn up at the hearing before the Board. The Board dismissed the application for stay but directed a separate hearing for the substantive appeal.

At the substantive appeal hearing, the Appellant did not appear nor file any documents. On behalf of the CIR, Ms Chow filed witness statement and gave evidence to the Board on oath.

Held:

Stay application

1. The statutory regime for challenging the assessment and enforcement proceedings in the District Court were intended to run in tandem. The

process of recovery by a taxpayer was a separate process from assessment. (Tak Wing Investments Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 266 and Commissioner of Inland Revenue v Gennon Enterprises Limited DCTC 733/2015 considered; Southgate Investments Funds v Deputy Commissioner of Taxation (2013) 211 FCR 274 distinguished)

Substantive appeal

2. The Board did not agree with CIR that where the Appellant failed to attend the hearing, the only option was to dismiss the appeal, with no power to vary the decision made by CIR. The provisions of IRO did not take away the Board's duty and power to hear tax appeal where no application was made by the Appellant for hearing in his absence. One could easily perceive the injustice where such power was lacking, and it would not be consistent with the scheme for the Board under IRO. (D11/11, (2011-12) IRBRD, vol 26, 217, D26/09, (2009-10) IRBRD, vol 24, 546, D58/93, IRBRD, vol 8, 402 and D83/01, IRBRD, vol 16, 692 not followed; D6/13, (2013-14) IRBRD, vol 28, 226 considered)

3. Where the Board was not exercising the power to dismiss an appeal in the absence of the Appellant without hearing, the Board was duty bound to assess the evidence at the hearing and come to a decision. It lied ill in the mouth of the Appellant to bemoan that a more onerous result befell him in his absence as he chose to absent himself and not to withdraw the appeal. After the exercise of the Board's power to hear a case and if the Board did not reduce or annual the assessment, then the Board might order the Appellant to pay costs of the Board.

4. The Board accepted the evidence of Ms Chow and adopted 110% as starting off point in fixing the amount of additional tax. The Board further: (a) imposed an addition of 5% as aggravating factor as the Appellant was not '*illiterate or having a low standard of education*' but sophisticated by comparison with the normal taxpayer in filling up properly his tax return or complying with the Notices; (b) gave a 5% discount for the first year of assessment (but not for the remaining 3 years), as the Appellant's business was a new business and had limited number of professional staff. The assessor's self-doubt as to whether her assessment also included non-business receipt should not be a mitigating factor.

5. The Appellant initiated the appeal and applied for adjournment but did not turn up. His appeal and application were baseless, but he did not withdraw his case. It was an abuse of process. The Board awarded cost against the Appellant.

Appeal dismissed and costs order in the amount of $15,000 imposed.

Cases referred to:

Tak Wing Investments Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 266
Commissioner of Inland Revenue v Gennon Enterprises Limited DCTC 733/2015
Southgate Investments Funds v Deputy Commissioner of Taxation (2013) 211 FCR 274
D11/11, (2011-12) IRBRD, vol 26, 217
D26/09, (2009-10) IRBRD, vol 24, 546
D58/93, IRBRD, vol 8, 402
D83/01, IRBRD, vol 16, 692
D6/13, (2013-14) IRBRD, vol 28, 226

Appellant in absentia.
Suen Sze Yick, Senior Government Counsel of Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A trading as Company B (the 'Appellant') objected to the Additional Tax Assessment raised on him for the years of assessment 2005/06 to 2008/09 by the Inland Revenue Department.

2. By the following Notices of Assessment all dated 24 October 2016 (the 'Notices of Assessment') the Commissioner of Inland Revenue (the 'CIR'/ 'Respondent') subjected the Appellant to Additional Tax under section 82A of the Inland Revenue Ordinance (the 'Ordinance') for making incorrect tax returns:

	Year of Assessment	Charge No.	Amount of Undercharged tax ($)	Additional Tax ($)	% of Undercharged tax
2.1.	2005/06	X-XXXXXXX-XX-X	395,228	420,000	106
2.2.	2006/07	X-XXXXXXX-XX-X	277,707	280,000	101
2.3.	2007/08	X-XXXXXXX-XX-X	481,539	460,000	96
2.4.	2008/09	X-XXXXXXX-XX-X	548,757	550,000	100
		Total	1,703,231	1,710,000	

3. The Business Registration BR No. XXXXXXXX taken out by the Appellant shows that

3.1. his residential address has always been at 'Address C';

3.2. the office address of the sole proprietorship law firm (the 'Firm') carried on by him was at various addresses at various times as follows:

(a) initially from 2 December 2004 at an address at Building D;

(b) changed from 31 May 2005 at an address at Building E (the ' Building E Address');

(c) changed from 29 March 2011[1] to Address F (the 'Address F Address'); and

(d) changed from 9 April 2014 to Address G.

4. The land search records of the flat owned by the Appellant shows the unit as 'Address C'. We find that 'XXX XXX House' in the Business Registration Record and 'Block X' in the land search record refers to the same building and the difference in the two renderings of the address is immaterial such that the two renderings refer to the same address (the 'Address C').

5. The Notices of Assessment were all addressed to the Appellant at his address at Address C. They reached the Appellant and the Appellant filed the relevant statements of grounds of appeal herein ('Grounds of Appeal') in response to the Notices of Assessment without giving any other address for service:

	Year of Assessment	**Charge No.**
5.1.	2005/06	X-XXXXXXX-XX-X
5.2.	2006/07	X-XXXXXXX-XX-X
5.3.	2007/08	X-XXXXXXX-XX-X
5.4.	2008/09	X-XXXXXXX-XX-X

6. Section 58(2) of the Ordinance provides that

'*Every notice given by virtue of this ordinance may be served on a person either personally or* ***by being delivered at****, or sent by post to,* ***his last known postal address****,* ***place of abode****, business or employment ...*' [Emphasis added.]

7. We find that Address C is the last known postal address of the Appellant for the purposes of these proceedings under the Ordinance.

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[1] There was also an immaterial branch office during the period from 28 April 2008 to 1 May 2009.

8. Subsequent correspondence from the Board are all addressed to the Appellant at his Address C.

9. In his notices of appeal, the Appellant applied for stay of proceedings pending the outcome of his claim filed with District Court against the Respondent under DCCJ XX/XXXX (the 'Claim').

10. This Board issued directions (the 'First Directions'), *inter alia*,:

10.1. to hear the application for stay of the appeal on 29 June 2017;

10.2. setting deadlines for filing of bundles for the hearing; and

10.3. directing that, save as specified in any future direction of the Board, for the purposes of the hearing of the application for stay:

(a) no party may provide any document or information to the Board; and

(b) no document or information shall be admitted in evidence before the Board.

11. The First Directions were sent by the Clerk to the Appellant by registered post addressed to the Appellant to Address C by letter dated 25 April 2017.

12. The Respondent duly filed the bundles but no documents or bundle were filed on behalf of the Appellant.

The Procedural Hearing

13. At the hearing on 29 June 2017 the Appellant did not turn up.

14. The question we had to decide then was whether the Claim justifies a stay of the proceedings before this Board.

15. We find that the effect of the statement of claim in respect of the Claim made by the Appellant as follows:

15.1. '*1. The loss and damage to be assessed that the Plaintiff has suffered as pleaded in the Paragraph 19 as pleaded hereinbefore;*' ---- Paragraph 19 complained about the premature action of the Respondent in having taken action to freeze the Appellant's account before the expiration of the period allowed for payment under the Respondent's letter of demand;

15.2. '*2. The sum of HK$448,835.05 as pleaded in the Paragraph 20 as pleaded hereinbefore;*' ---- Paragraph 20 gave the sum of HK$448,835.05 as the sum frozen by the Respondent; and

15.3. '*3. An order for accounting for the basis to the estimation and assessment for the Demand Note for Tax as pleaded in the Paragraph 22 as pleaded hereinbefore;*' ---- Paragraph 22 challenged the Respondent's basis for making estimation and assessment for the tax years 2005/06 to 2013/2014.

16. Only the basis for the relief in paragraphs 15.3 herein as claimed in the Claim is related to the validity or otherwise of the assessment made by the Respondent and to be considered by this Board.

17. In Tak Wing Investments Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 266 (Court of Appeal) the Court of Appeal accepts that the statutory regime for challenging the assessment and the enforcement proceedings in the District Court are intended to run in tandem.

17.1. per Keith JA[2]

'*The two processes are intended to run in tandem. Two provisions make that clear:*

(i) Section 71(2) of the Ordinance provided that tax has to be paid "notwithstanding any notice of objection or appeal", unless the Commissioner permits the payment of tax to be deferred pending the result of any objection or appeal.

(ii) Section 75(4) of the Ordinance, ... not only prevents the taxpayer from arguing in any enforcement proceedings in the District Court that the assessment is excessive or incorrect. ...' [3]

17.2. per Mayo VP[4]

'*My main reason for coming to this conclusion is that it is quite clear from the legislative scheme that it contemplates that where an objection has been lodged it is open to the Commissioner by virtue of section 71(2) of the Inland Revenue Ordinance (Cap 112) (the*

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[2] [2001] 2 HKLRD 266 at page 270

[3] Material parts of section 75(4) of the Ordinance reads '*In proceedings under this section for recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal ...*'

[4] at Page 273

> *ordinance) to require the taxpayer to pay the tax payable and then proceed to consider the objection in accordance with the provisions contained in ss.64 to 69A of the Ordinance.*'

18. In Commissioner of Inland Revenue v Gennon Enterprises Limited DCTC 733/2015 the court observed, per Ling DDJ

> '*19. I must now refer to two critical provisions of the IRO. Section 71(2) states:-*
>
> *"Tax shall be paid notwithstanding any notice of objection or appeal, unless the Commissioner orders that payment of tax or any part thereof be held over pending the result of such objection or appeal:*
>
> *Provided that where the Commissioner so orders he may do so conditionally upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the amount of tax or any part thereof the payment of which is held over either-*
>
> *(a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap 289); or*
>
> *(b) by furnishing a banker's undertaking,*
>
> *as the Commissioner may require."*
>
> *20. Next, the same Ordinance provides in s 75 that:-*
>
> *(3) In proceedings under this section for the recovery of tax the production of a certificate signed by the Commissioner stating the name and last known postal address of the defaulter and particulars of the tax due by him shall be sufficient evidence of the amount so due and sufficient authority for a District Court to give judgment for the said amount.*
>
> *(4) In proceedings under this section for the recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal, but nothing in this subsection shall be construed so as to derogate from the powers conferred by the proviso to section 51 (4B)(a) to give judgment for a less sum in the case of proceedings for the penalty specified therein.*'

19. Ling DDJ also considered the Australian regime in Southgate Investments Funds v Deputy Commissioner of Taxation (2013) 211 FCR 274 where the merits of the

proposed review or appeal would be a factor for considering a stay may be considered but come to the conclusion that such approach has no application in Hong Kong; saying

> '*47. Given that a stay of enforcement proceedings is wholly incompatible with the legislative scheme, personal hardship, however extreme, does not enter into the equation. It follows that the Southgate approach is not open to me. Harsh as this conclusion may seem, I am nonetheless bound by the decision of the Court of Appeal.*'

20. The statutory regime reserves unto the Board the mechanism to determine the assessment as a parallel process separate from the process of recovery by the CIR. *A fortiori*, the process of recovery by a taxpayer is a separate process from assessment.

21. We dismissed the Appellant's application for stay.

22. The Respondent requested that we dealt with the substantive issues at that hearing, but we refused.

Further Directions

23. At the end of the 29 June 2017 hearing, this board gave directions (the 'Further Directions')

23.1. to fix date for the substantive hearing;

23.2. setting further deadlines for filing of

(a) signed statement of witness (if any) whom the Appellant intends to call;

(b) signed statement of witness (if any) whom the Respondent intends to call;

(c) statement of agreed facts of the parties (if any);

(d) hearing bundles consisting of documents to be relied on and authorise;

(e) identifications of documents the authenticity of which would be challenged;

23.3. that save in manner specified in any direction by the hearing board,

(a) no party may provide any document or information to the Board for the purposes of the hearing; and

(b) no document or information shall be admitted in evidence before the Board for the purposes of the hearing;

23.4. that there be liberty to apply.

24. By letter dated 5 July 2017 the clerk's office sent the Further Directions to the Appellant at his Address C.

25. The Respondent has also sent various letters to the Appellant at his Address C as reminders for compliance with the Further Directions.

26. The Appellant filed nothing pursuant to the said directions and did not take advantage of the liberty to apply and did not appear at the date set for substantive hearing of his appeal.

Jurisdiction In Absence Of The Appellant

27. As the Appellant is absent, counsel for the Respondent helpfully draws our attention to the possible argument that under Section 68 (2B), which deals with the situations where the appellant fails to attend the hearing, the only option which may be open to the Board (unless section 68(2D) is applicable) is to dismiss the appeal and in such circumstances there is no express power upon such dismissal for the Board to vary the decision made by the Inland Revenue Department.

28. We do not agree.

29. In D11/11, (2011-12) IRBRD, vol 26, 217, the Board based on D26/09 has ruled that there is no jurisdiction of the Board to continue hear the appeal or to make cost order in the absence of the appellant. The relevant extracts of the Decision in D11/11 reads as follows:

'*5. The Board noted that neither the Taxpayer nor its representative had made any attempt to respond (and, indeed, had not responded) to the Inland Revenue Department in respect of two letters dated 30 August 2007 and 11 September 2008.*

6. The Board was minded to consider awarding costs of the appeal against the Taxpayer in the sum of HK$5,000 given the lack of merits in the appeal and having regard to the way in which the Taxpayer had conducted themselves seemingly indicating a lack of co-operation as evidenced by paragraph 5 above.

7. However, our attention has been drawn to the Board or Review decision D26/09, (2009-10) IRBRD, vol 24, 546, where the following was said:

"4. On closer scrutiny of the provisions of section 68(2B)(b) and section 68(2D) of the [Inland Revenue] Ordinance, it appears that the power to hear an appeal in the absence of the appellant may only be[sic] exercised on the application of the appellant and where he will not be in Hong Kong on the day of the hearing of the appeal. Further, the jurisdiction to award costs may only be exercised after the hearing of an appeal – see section 68(8)(a) and (9) of the [Inland Revenue] Ordinance.

5. There was no power for this Board to hear this appeal in the absence of the Taxpayer or to make a costs order against him. Accordingly, the only decision of this Board which is of legal effect is the dismissal of this appeal under section 68(2B)(c)."

8. We agree that there is no power for this Board to hear the appeal under section 68(2B)(b) and section 68(2D) or make a costs order. We see no reason to depart from the dicta in D26/09.

9. We therefore dismiss the appeal pursuant to section 68(2B)(c) of the Inland Revenue Ordinance and make no order as to costs.'

30. D58/93, IRBRD, vol 8, 402 and D83/01, IRBRD, vol 16, 692 could also be read as having come to the same conclusion; however, no reason or analysis had been given in those two cases.

31. As pointed out by the Board in the decision in Chinese in D6/13, paragraphs 4 and 5 of the decision in D26/09 do not read as cited in D11/11 but read as follows:

'*(4) Therefore, we need to consider whether or not the Taxpayer's late appeal should be entertained.*

(5) Ms Chan Wai-yee on behalf of the Deputy Commissioner submits that the Taxpayer was in no way prevented from appealing within the relevant time limits prescribed under section66(1)(a) of the IRO. She submits that his failure to file the appeal in time was not a result of having been prevented by illness or absence from Hong Kong or other reasonable cause and therefore, urges the Board to reject the Taxpayer's application for extension of time to pursue his appeal.'

32. Since none of the decisions of other Boards are binding on us and no reasoned decision on point is found, we go on an analysis of the issue on our own.

Jurisdiction to Hear in Appellant's Absence

33. The Board is mandated under the Ordinance to hear tax appeals. Section 68(1) reads

> '*Except where*
>
> *(a)* ... [relating to transfer to the High Court and not applicable here]*; or*
>
> *(b)* ... [relating to settlement and not applicable here]*,*
>
> *every appeal under section 66* ***shall be heard by the Board*** *in accordance with this section ...* ' [Emphasis added.]

34. In relation to additional tax section 82B(3) provides

> '*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.*' [Emphasis added.]

35. The legislative scheme must be to make the procedure applicable to section 66 appeals equally applicable to additional tax appeals.

36. Section 19 of Interpretation and General Clauses Ordinance (Chapter 1) reads

> '*An Ordinance shall be deemed to be remedial and* ***shall receive such fair, large and liberal construction and interpretation as will best ensure the attainment of the object of the Ordinance*** *according to its true intent, meaning and spirit.*' [Emphasis added.]

37. Section 68(2) requires the appellant's attendance are Board hearings of his case. It reads:

> '*Subject to subsection (2B), an appellant* ***shall attend*** *at the meeting of the Board at which the appeal is heard* ***in person or by an authorised representative****.*' [Emphasis added.]

38. In a way Section 68(2B)[5] to Section 68(2D) make provisions for the Board to deal with the appeal in the absence of the appellant or his authorised representative and therefore do away with the obligation of an appellant under section 68(2) in certain cases.

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[5] Section 68(2A) has been repealed and does not concern us.

39. The question remains whether Section 68(2B) to Section 68(2D) also do away with the power and duty of the Board to hear the appeal under Section 68(1) in any way.

40. Section 68 (2B) reads

'*If, on the date fixed for the hearing of an appeal, the appellant fails to attend at the meeting of the Board either in person or by his authorized representative the Board* ***may*** *—*

(a) if satisfied that the appellant's failure to attend was due to sickness or other reasonable cause, postpone or adjourn the hearing for such period as it thinks fit;

(b) proceed to hear the appeal under subsection (2D); or

(c) dismiss the appeal.' [Emphasis added.]

41. We note the enabling word 'may'[6] rather than the restricting phrase 'shall only' being used in Section 68(2B). The powers under section 68(2B) are therefore additional powers of the Board.

42. Section 68 (2D) reads:

'*The Board* ***may****, if satisfied that an appellant will be or is outside Hong Kong on the date fixed for the hearing of the appeal and is unlikely to be in Hong Kong within such period thereafter as the Board considers reasonable* ***on the application of the appellant*** *made by notice in writing addressed to the clerk to the Board and received by him at least 7 days prior to the date fixed for the hearing of the appeal,* ***proceed to hear the appeal in the absence of the appellant or his authorized representative****.*' [Emphasis added.]

43. Section 68(2E) then enables the Board in a hearing under Section 68(2D) to consider, in the appellant's absence, the written submissions made by him. It reads:

'*(2E) The Board may, if it hears an appeal in the absence of an appellant or his authorized representative under subsection (2D), consider such written submissions as the appellant may submit to the Board.*'

44. Thus, where the appellant who is abroad has pre-applied for hearing in his absence in circumstances prescribed under section 68(2D), the section confers upon the Board power to do so by only considering those matters set out in section 68(2D) without

[6] Similarly, in the Chinese version of the Ordinance the word '可' is used.

the need of considering other facts. Section 68(2D) and (2E) shelter such hearing and the Board's reference to the appellant's written submission from subsequent challenges on grounds of the appellant's absence in such situation.

45. Sections 68(2D) and (2E) do not expressly or by any necessary implication take away the Board's duty and power to hear tax appeals under Section 68(1) where no application was made by the appellant for hearing in his absence. One could easily perceive the injustice where such power is lacking in cases for example

45.1. where a Board considers the case presented by the Commissioner in the relevant determination is fundamentally improbable but lacks any power to hear the case but to mechanically dismiss the case under such rigid interpretation of section 68(2B)(c); or

45.2. where an appellant, who abuses the process by challenging every state of the proceedings, could deprive the Commissioner of the opportunity to present subsequent adverse evidence simply by absenting himself from the hearing seconds before the start of the hearing.

46. We do not consider such effects to be consistent with the purpose of the scheme for the Board under the Ordinance.

47. The fact that the situation does not fall within Section 68(2D) does not necessarily mean that dismissal under section 68(2B)(c) without hearing automatically applies.

Power After Hearing

48. It may well be right that if the Board decides to go down the section 68(2B)(c) route to dismiss the appeal in the absence of the appellant and without any hearing, then the Board can only dismiss the case without the power to vary the assessment.

49. However, where the Board is not exercising the power under section 68(2B)(c) without any hearing, then its powers after the hearing is set out in section 68(8)(a) which reads:

> '*After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon.*'

50. The Board is duty bound to assess the evidence available at the hearing and come to a decision on the choice of results in section 68(8)(a). It lies ill in the mouth of an appellant to bemoan the fact that a more onerous result (if any) befalls him in his

absence as he chooses to absent himself and not to withdraw the appeal while he can before the hearing so as to cap his tax as assessed by the Respondent.

Power to Award Section 68(9) Costs

51. Section 68(9) further provides

> '*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.*'

52. For appeals to the Board on additional tax, Section 82B(3)[7] makes section 68(9) applicable.

53. We therefore decide that after the exercise of the Board's power to hear a case (no matter under section 66 or otherwise) and if the Board does not reduce or annul such assessment, then the Board may order the appellant to pay costs of the Board expressly conferred upon the Board under section 68(9) of the Ordinance.

Evidence

54. Ms Chow filed her witness statement on behalf of the Respondent and gave evidence to the board on oath.

55. Save for one correction (i.e. there is a typo in the last line of Note 1 in Annex 5, that the cross reference to the best lending rate ought to have been being stated at enclosed at 'Annex 6' instead of 'Annex 5' as stated), Ms Chow affirmed her witness statement.

56. We find Ms Chow to be a credible witness and accept her evidence given in paragraphs 1 to 19 of her Witness Statement.

57. Thus, according to Ms Chow and the documents presented in the hearing bundle we find as follows:

Tax Audit

57.1. It is the Revenue's usual practice to invite taxpayer to attend an initial interview for kicking off the tax audit. A year of audit will be selected. Following the initial interview, the taxpayer is required to produce his/her/its business books and records for examination

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[7] See paragraph 34 herein.

regarding the year of audit. The Revenue will usually project the discrepancies for other years based on the audit findings.

57.2. Between 09/09/2010 and 17/02/2011 various written and telephone requests were made to the Appellant inviting him to attend interview in tax audit for the year of assessment 2007/08 to no avail.

57.3. Section 51(4)(a) Notice(s) requiring furnishing of records and information were issued

(a) on 08/03/2011 to the Appellant

(i) at the Building E Address for, *inter alia*, the accounting books and records of the Firm for the year of assessment 2007/08;

(ii) at Address C for, *inter alia*, the Appellant's personal bank accounts for the period from 1 April 2005 to 31 March 2010.

(b) on 29/04/2011 to the Appellant

(i) at Address F, for, *inter alia*, the accounting books and records of the Firm for the year of assessment 2007/08.

(ii) at Address C for, *inter alia*, information regarding the Appellant's personal bank accounts for the period from 1 April 2005 to 31 March 2010.

(c) on 18/07/2011 to the Appellant

(i) at Address F for, *inter alia*, the source of the bank deposits placed into the business bank accounts of the Firm for the year of assessment 2007/08.

(ii) at Address C for, *inter alia*, the source of the bank deposits placed into the Appellant's personal bank accounts for the year of assessment 2007/08.

57.4. There was no response from the Appellant to the said Section 51(4)(a) Notice(s) until 16/08/2011 when the Appellant

(a) (using its Address F letterhead) applied for an extension of time for 28 days to give reply in respect of the documents requested in the Section 51(4)(a) Notice dated 18 July 2011;

(b) (without giving any other address) applied for an extension of time for 28 days to give reply in respect of the documents requested in the Section 51(4)(a) Notice dated 18 July 2011.

57.5. Pursuant to the application referred to in paragraph 57.4 herein, extension of time was granted up till 10 September 2011.

57.6. Despite the extension, nothing from the Appellant was forthcoming and on 08/11/2011 a Writ of Summons in case number DCTC XXXX/XXXX was issued in the District Court against the Appellant for failure to comply with the Section 51(4)(a) Notice issued by the Assessor on 29 April 2011 for obtaining accounting books and records of the Firm.

57.7. The Appellant was absent from the hearing of DCTC XXXX/XXXX. The Court then ordered him to:

(a) produce the requested information and documents within 30 days from the day of serving the order;

(b) pay the Revenue penalty of $8,000 and costs of action $3,378.

57.8. On 05/03/2012 the sealed copies of the Judgment and Order in respect of DCTC XXXX/XXXX were served to the Appellant by the Tax Inspector.

57.9. During the period between the events in paragraphs 57.8 and 57.10 herein, the Respondent followed up with chasing for the outstanding disclosure from the Appellant with no avail (but couched the reminders as 'request' and that was only remedied when the term 'required' was used in the reminder letter dated 20/03/2013).

57.10. The Appellant was convicted in Eastern Magistrates' Court in September 2012 for breaching the court order referred to in paragraph 57.7 above (Case Number ESSXXXXXX/XXXX).

Other Sources of Information

57.11. Information on the Appellant for the year of assessment 2007/08 was obtained through Section 51(4)(a) Notice(s) issued to other banks who dealt with the Appellant on

(a) 17/05/10: See Annex 8 1-16 for the notice and Annex 8 17-24, 25-36 and 37 for the information supplied;

(b) 09/09/10: See Annex 8 38-42 for the notices and Annex 8 45 and 47 for the information supplied

(c) 16/09/10: See Annex 8 43-44 for the notice and Annex 8 46 for the information supplied

Tax Assessment

57.12. Using the information from the banks the Respondent issued various Additional Tax Assessments on the Appellant (including some of which are superseded) cumulating in the following

(a) for the year of assessment 2005/06: Additional Profits Tax Assessments on the Appellant issued on 12/03/2012;

(b) for the year of assessment 2006/07: Second Additional Profits Tax Assessment and Additional Personal Assessment on the Appellant issued on 25/01/2013;

(c) for the year of assessment 2007/08: the Respondent issued the Second Additional Profits Tax Assessment and Second Additional Personal Assessment on the Appellant on 07/03/2014;

(d) for the year of assessment 2008/09: the Respondent issued the Additional Profits Tax Assessment and Additional Personal Assessment on the Appellant on 03/09/2015

57.13. Except for the Additional Tax Assessment for the year 2006/07 in paragraph 57.12(b) herein the others had become final and conclusive under section 70.

57.14. As for the Additional Tax Assessment for the year 2006/07 in paragraph 57.12(b) herein, the Appellant lodged an objection and by determination the assessment was revised such that the additional tax was revised to $277,707 and there is no appeal from the determination.

57.15. The 2006/07 Profits Tax Assessment and personal assessment were revised per determination and the revised assessment under the determination had become final and conclusive under section 70.

S82A Additional Tax

57.16. On 03/05/2016 Notice under section 82A(4) of the Ordinance was issued by the Commissioner for the 4 years under the present appeal.

57.17. On 24/10/2016 Additional Tax Assessments for the years of assessment 2005/06 to 2008/09 were issued under section 82A of the Ordinance.

58. We also accept the commercial restitution rate referred to in paragraph 23 and Annex 5 of her statement.

Quantum

Starting Off Point

59. The Respondent applied the category of Group (c) in 'Disclosure Denied' as set out in Part D under 'Section 82A Penalty Policy for cases involving Field Audit & Investigation' of the Revenue's Penalty Policy ('the Policy') in fixing the amount of additional tax of the present case. That provided for a normal loading of 100% of the tax undercharged and a maximum loading (including commercial restitution) of 150% stated in the policy for '*cases where the taxpayers fail to exercise reasonable care and omit profits/income such as lease premium, one-off commission, etc*'.

60. The low end normal loading of 100% was adopted in this case notwithstanding the fact that the Appellant not only omitted the information but ignored his statutory obligations to provide information when

60.1. specifically asked for under various Section 51(4)(a) Notice(s);[8] and

60.2. ultimately even under a court order to furnish such information which resulted in his conviction.

61. We adopt 110% as starting off point.

62. We note that Paragraph 4 of the Part D of the Policy states

'*4 The percentage in the penalty loading table in paragraph D2 are for general guidance only. The penalty imposed may be adjusted upwards or downwards depending on the circumstances of each case. The following table contains the general aggravating and mitigating factors to be considered in determining the ultimate*

8 Para 57.3 to 57.6 herein

penalty

Factors for Consideration	*Mitigating*	*Aggravating*
1. Background of the Taxpayer and Sophistication of the Business	• *being illiterate or having a low standard of education*	• *sophisticated taxpayers*
	• *simple and unsophisticated business*	• *established and sophisticated business*
2. Attitude of the taxpayer	• *genuine concern, seriousness, responsiveness and co-operation*	• *undue delay or obstruction to the progress of audit and investigation*
	• *sincerity and willingness to compromises*	• *passiveness and unwillingness to compromises*
	• *readiness to accept the discrepancy when quantified*	• *evasiveness and belated acceptance of the discrepancy quantified*
3. Time Span	• *casual or one-off understatement*	• *multiple or repeated evasion acts over a consecutive number of years (e.g. persistent default in rendering returns and making of incorrect returns when pressed with estimated assessments)*

Aggravating Factor

63. In the Witness Statement[9] of Ms H, no aggravating factor was taken into account in this case.

64. The Appellant was absent at the trial and Counsel for the Respondent has fairly taken on the difficult role of assisting the Board to consider matters fairly even from the point of view of the Appellant. Thus when asked whether there is anything to justify why the Appellant, being a solicitor, is not considered 'sophisticated taxpayer' under the first aggravating factor, Counsel for the Respondent submitted

64.1. that one cannot say that merely because the Appellant is a solicitor or a solicitor firm, he or his firm must be a sophisticated business. Otherwise, the Inland Revenue will be discriminating against certain industries.

64.2. that the Appellant may not be as sophisticated as managing partners of international firms.

65. There is certain truth in the submission.

66. However, we are not bound by the Policy nor the classification by reference merely to the profession of a taxpayer.

67. In our view, the sophistication or otherwise of the taxpayer should fairly be a factor taken into consideration for the purposes of mitigating and aggravating factors. The sophistication is by comparison to a normal taxpayer of Hong Kong (and not by comparison to others in his same or similar profession) <u>for the purposes of complying with the task at hand</u>.

68. As a solicitor, the Appellant is certainly not '*illiterate or having a low standard of education*'. We find the Appellant to be sophisticated by comparison with the normal taxpayer in filling up properly his tax return or complying with the Notices in tax audit.

69. The Appellant has provided nothing to the contrary.

70. We impose an addition of 5% for this aggravating factor.

71. We also note that Paragraph 4 of the Part D of the Policy has '*undue delay*'[10] and '*passiveness and unwillingness to compromise*' listed in number two of the

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[9] See paragraph 21 thereof.

table of the factors for consideration. The Respondent submitted that these factors in fact had already been reflected in the classification of this case as 'Disclosure Denied' on page 3 of Policy in Annex 4 under paragraph 2. The Disclosure Denied category is already the worst scenario in Group (c). So, the passiveness or unwillingness factor has already been reflected by classifying the taxpayer in this group. Thus, there would have been double counting in a way, if we add this as a separate aggravating factor. We find no additional aggravating factor in this case.

Mitigating Factors

72. Two mitigating factors were taken into account.

72.1. a 5% discount was given for a rolled up consideration

(a) '*The Firm commenced business in January 2005. It was a new business during the years of assessment 2005/06 to 2008/09.*' ('the New Business Factor')

(b) '*The firm had limited number of professional staff. During most of this time in the aforesaid years of assessment, the Appellant was the only solicitor in the Firm accompanying by one consultant and one assistant solicitor.*' ('the Insufficient Lawyer Factor')

72.2. a 15% discount was given because '*The understatement consisted of contentious deposits or withdrawals as the additional assessable profits were ascertained based on bank analyses. Since the Appellant had not furnished any information and documents to the Revenue, it might be possible that the bank analyses had included non-business receipts as the Firm's turnover.*'

73. We have difficulties in following the logic.

New Business & Insufficient Lawyers

73.1. The Respondent tried to explain to us by reference to Annex 4 of Ms H's Statement

(a) that the 5% discount which applies to all four years is a global assessment of two factors --- the New Business Factor and the Insufficient Lawyer Factor; and

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[10] It reads '*undue delay or obstruction to the progress of audit and investigation*'. The period during which the Appellant did not respond positively to his being "invited" to tax interview could not fairly be said to be periods for which there is obstruction to the tax audit or investigation process.

(b) that while the first factor applies only to the first year of business, the second factor applies to all of them; and on the whole these two factors are given 5% of discount.

74. We find that the revenue of the Firm had been increasing quite substantially in the four years of assessment and we tack the corresponding salary expenses as follows:

	Year	***Revenue***	***Salary Expenses***	***Salary/Revenue***
74.1.	2005/06	$2.90m	$1.00m	34.48%
74.2.	2006/07	$4.30m	$1.20m	27.90%
74.3.	2007/08	$5.60m	$1.20m	21.42%
74.4.	2008/09	$9.20m	$2.69m	29.23%

75. It is true that the Firm commenced business in 2005 and was a new business then and hence, some discount has to be given to him. We do not agree that the Firm was still new in the subsequent 3 years.

76. We do not find that the low number of legally qualified staff (if that is the case) is relevant in relation to the obligations for a Firm of the Appellant to file its tax returns or comply with tax audit.

77. If anything the increased revenue in the relevant years ought to have enabled the Appellant to engage sufficient accounting staff to fulfil the tax related tasks.

78. We are therefore only prepared to give a [5%] discount for the year of assessment 2005/06 but give no discount for the remaining 3 years for either of the two factors.

Non-Business Receipt?

79. A 15% discount was given for the possibility that part of the Additional Tax Assessment included possible non-business receipt.

80. Counsel for the Respondent sought to justify the discount by explaining:

80.1. that the original assessment is final and conclusive but not the additional tax such that the additional tax is still the subject matter of this appeal and so there is some room for adjustment of the additional tax; and

80.2. that if one is in doubt that even in the original assessment which is after all an estimate based on the bank transactions reviewed from the bank account records and not necessarily business receipt, some discount ought to be given to be fair.

81. We have difficulty following the logic as to why the mere possibility that the bank analysis may have included non-business receipt in the Firm's turnover ought to be taken in as a mitigating factor at this stage.

82. The additional tax to be levied under section 82A is '*an amount not exceeding treble the amount of tax ... undercharged*'. In order to determine the tax undercharged, one needs to determine the tax that ought to be charged. The tax that ought to be charged is arithmetically determined from the 'assessable income' or 'assessable profit'. Section 70 makes '*conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value*'.

83. Thus, the amount assessable income or profits for the purposes of determining the additional tax is still a purpose of the Ordinance and therefore conclusively determined based on section 70.

84. The assessor either believes in her own assessment or she does not. If she has any self-doubt on whether her assessment backed by bank transactions also included non-business receipt, that ought to have been reflected at the stage of her assessment. It would be absurd if we can ignore the assessment and then have to go down the same path and redo the assessment exercise from scratch from the bank statements (with the possibility of basing on different facts if additional facts were introduced).

85. We find that the assessor's self-doubt, if any, should not be a mitigating factor and refuse to give the 15% discount otherwise granted by the Respondent.

Base Portion of Additional Tax

86. In summary, without taking into account commercial restitution or interest, the portion of the additional tax (as a percentage of the tax undercharged) to be imposed by this Board ('Base Portion of Additional Tax') on the Appellant as follows

	Year	Start Off %	+Aggravating Factor	- Mitigating Factor	Base Portion of Additional Tax
86.1.	2005/06	110%	+5%	-5%	110%
86.2.	2006/07	110%	+5%	N/A	115%
86.3.	2007/08	110%	+5%	N/A	115%
86.4.	2008/09	110%	+5%	N/A	115%

Commercial Restitution

87. We would therefore exercise our discretion to adopt the rate and period set out in Annex 5 to the Statement of Ms H compounded monthly for the purposes of calculating the amount to be imposed by reason of commercial restitution on the amount of tax undercharged as set out in Annex 4 to the Statement of Ms H from the respective

dates when the tax would have been due if the original return filed were correct, to the date of the actual demand note.

Conclusions

88. We are satisfied that the original net percentages set out in paragraph 2 herein are not excessive for the Appellant.

89. We are of the view that:

89.1. they are too low for the Appellant and substitute the rates for the Appellant in respect of the Base Portion of Additional Tax as set out in the table in paragraph 86 herein; and

89.2. there shall be added commercial interest at the rates for commercial restitution set out in paragraph 87 herein compounded monthly on 100% of the tax undercharged for each of the 4 years of tax assessment from the respective dates when the tax would have been due if the original return filed were correct to the date of the actual demand note subject to the jurisdictional limit, under Section 82A(1) of the Ordinance, of 300% of the tax undercharged.

Section 68(9) Costs

90. The Appellant initiated the appeal and applied for adjournment but did not turn up. As it turned out, his appeal and application for adjournment are both baseless. Yet he did not withdraw the case. As a solicitor, he ought to know that valuable public resources would be wasted. This is an abuse of the process under the Ordinance.

91. This Board awards cost of HK$15,000 against the Appellant pursuant to section 68(9) of the Ordinance.

Confidentiality And Professional Conduct

92. The conduct of the Appellant in dealing with his tax obligations

92.1. in District Court Case DCTC XXXX/XXXX leading to his conviction at Eastern Magistrates' Court Case Number ESSXXXXXX/XXXX;

92.2. in the Claim in District Court under DCCJ XX/XXXX; and

92.3. in the appeal before this Board

> appears to be an abuse of the processes. This is inconsistent with his professional duty as a solicitor. In normal circumstances, this would be an appropriate case where one would be making a reference to the Law Society for investigation for misconduct.

93. However, Sections 4 and 68(5) of the Ordinance impose duty of confidentiality on all involved as regards these proceedings.

94. Given the duty of confidentially we regret that we are not be in a position to refer the conduct to the relevant professional body concerned to take disciplinary proceedings on professional misconduct if any.

Disposition

95. In accordance with Section 68(8)(a) of the Ordinance as applied by Section 82B(3) of the Ordinance, we remit the case to the Commissioner with our opinion in paragraphs 89 and 91 herein for determination of the amount for the Appellant in accordance with our opinion herein.