

Case No. D33/16

Penalty tax – judicial limit of 300% of the tax undercharged – sections 68(8), 82A and 82B of the Inland Revenue Ordinance (‘the Ordinance’)

Panel: Albert T da Rosa, Jr. (chairman), Maurice Joseph Chan and Ha Suk Ling Shirley.

Dates of hearing: 26-30 January and 6 March 2015.

Date of decision: 6 January 2017.

Taxpayer A and Taxpayer F put their respective signatures to the profits tax returns of Company D for the years of assessment of 1996/97 and 1999/2000; and the year of assessment of 1997/98 respectively. By Notices of Assessment, Taxpayer A was subjected to additional tax under section 82A in respect of the years of assessment 1996/97 and 1999/2000 and Taxpayer F was subjected to additional tax in respect of the year of assessment of 1997/98. Both Taxpayers appealed the additional tax assessments under section 82B. By agreement of the parties, their appeals were heard together.

Held:

1. The Board refers to the decision in D32/16 in which they set out all the circumstances, history and background and their reasons for decision. The Board adopts and relies on the reasoning, discussion, and analysis set out therein.
2. For Taxpayer F:
 - a) the Board substitutes the rate of 90% in respect of the Base Portion of Additional Tax as defined in their decision in D32/16; and
 - b) there shall be added commercial interest at the rates for commercial restitution set out in paragraph 117 of the Board’s decision in D32/16 compounded monthly on 90% of the tax undercharged from the date when the tax would have been due if the original return filed were correct, to the date of the actual demand note, subject to jurisdictional limit, under section 82A(1) of the Ordinance, of 300% of the tax undercharged.
3. In accordance with section 68(8)(a) of the Ordinance as applied by section 82B(3) of the Ordinance, the case is remitted to the Commissioner with

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

the Board's opinion in paragraph 11 herein for Taxpayer F for determination of the amount in accordance with their opinion herein.

Appeal dismissed.

Russell Coleman, Senior Counsel and Julian Lam, Counsel; instructed by Messrs Baker & McKenzie, for the Appellant.

Stewart K M Wong, Senior Counsel and Elizabeth Cheung, Counsel; instructed by Department of Justice, for the Commissioner of Inland Revenue.

Decision:

Background

1. All references to sections and subsections are, unless otherwise stated, to those of the Inland Revenue Ordinance, Chapter 112 (the 'Ordinance').
2. Mr A (the '1st Appellant') put his signatures to the profits tax returns of Company D (a company incorporated in Hong Kong with the name D1 at the relevant time and subsequently changed to D2) for the respective years of assessment of
 - 2.1. 1996/1997 dated 27 July 1997; and
 - 2.2. 1999/2000 dated 26 July 2000.
3. Mr F (the '2nd Appellant') put his signature to the profits tax return of Company D for the year of assessment 1997/1998 dated 30 July 1998.
4. The 1st Appellant and the 2nd Appellant are collectively called the Appellants.
5. Company D's profits tax liability for the relevant years was determined by the decision of a differently constituted Board of Review.
6. By Notices of Assessment dated 26 April 2013 (the 'Notices of Assessment'), the Commissioner of Inland Revenue (the 'CIR') subjected:
 - 6.1. the 1st Appellant to additional tax under section 82A in respect of the years of assessment 1996/1997 and 1999/2000; and
 - 6.2. the 2nd Appellant to additional tax in respect of the year of assessment 1997/1998.

(2018-19) VOLUME 33 INLAND REVENUE BOARD OF REVIEW DECISIONS

(the 'Additional Tax Assessments')

7. By Notice of Appeal dated 24 May 2013, the Appellants appealed the Additional Tax Assessments to the Board of Review (the 'Board') under section 82B.

8. By agreement of the parties, their appeals were heard together by this Board.

Disposition

9. We refer to our decision in D32/16 in which we set out all the circumstances, history and background and our reasons for decision.

10. We adopt and rely on the reasoning, discussion, and analysis set out in our decision in D32/16.

11. For the 2nd Appellant:

11.1. we substitute the rate of 90% in respect of the Base Portion of Additional Tax as defined in our decision in D32/16; and

11.2. there shall be added commercial interest at the rates for commercial restitution set out in paragraph 117 of our decision in D32/16 herein compounded monthly on 90% of the tax undercharged from the date when the tax would have been due if the original return filed were correct, to the date of the actual demand note, subject to jurisdictional limit, under section 82A(1) of the Ordinance, of 300% of the tax undercharged.

12. 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 paragraph 11 herein for the 2nd Appellant for determination of the amount in accordance with our opinion herein.

13. The Chairman apologises for the time taken in his deliberation and thanks the parties for their patience.