

Case No. D4/19

Penalty tax – incorrect tax return – whether the appeal is late appeal – section 58(3) and 82B(1)(a) of the IRO – actual service of the notice of appeal to the Clerk – discretion to extend time – reasonable excuse under section 82A(1) of the IRO – personal duty of every taxpayer to file a true and correct tax return – receipt and accrual of income and the total amount of income in a year of assessment were factual matters within the personal knowledge of the taxpayer – norm for additional assessment of penalty tax in respect of an incorrect return due to a genuine mistake is 10% of the tax

Panel: Lo Pui Yin (chairman), Marshall H Byres and Lau Yee Cheung.

Date of hearing: 8 May 2019.

Date of decision: 26 June 2019.

The Appellant lodged an appeal against the additional tax assessed by the Commissioner of Inland Revenue. The appellant signed the tax return stating income arising from the employment of teacher by a secondary school. The additional tax was assessed on the basis that the appellant had made an incorrect tax return by omitting income from another college. The Inland Revenue Department received on 9 February 2018 a fax sent from the appellant addressed to ‘Clerk to the Board of Review’ stating his wish to appeal and attaching some documents. Thereafter the appellant gave notice of his wish to appeal against the Decision by posting the letter dated 29 March 2018 and the Office of the Clerk received the letter on 10 April 2018. The appellant lodged all the accompanying documents required by section 82B(1)(b) of the IRO on 17 December 2018.

The Board considered firstly the question of whether this appeal is late appeal and if so, whether this Board should grant extension of time to the taxpayer to lodge the appeal; and secondly the substantive questions of this appeal regarding the additional tax penalty.

Held:

1. The Board is satisfied that the relevant time period began to run on the date the notice of assessment of Additional Tax was deemed to have been served on the appellant pursuant to section 58(3) of the IRO. The Board is also satisfied that the 1 month time period under section 82B(1)(a) for appealing against the Decision expired on 1 March 2018 (D98/98, IRBRD, vol 13, 482 followed).
2. This Board operates separately and independently from the Inland Revenue Department. And the Inland Revenue Department is not the

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agent of this Board for any purpose related to an appeal to the Board of Review (D98/98, IRBRD, vol 13, 482 followed). Giving notice of appeal to the Board of Review involves actual service of the notice of appeal to the Clerk. Therefore the appellant's fax is not a notice of appeal given in writing to the Clerk (D41/05, (2005-06) IRBRD, vol 20, 590 followed).

3. Both the notice of appeal and the accompanying documents specified in section 82B(1)(b) of the IRO must be served on the Clerk within the 1 month time limit provided under section 82B(1)(a) (D16/07, (2007-08) IRBRD, vol 22, 454 followed).
4. This Board finds that the taxpayer's appeal is a late appeal. Section 82B(1A) of the IRO provides that this Board may extend time to appeal against an assessment of additional tax as penalty if it is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with section 82B(1)(a). Section 82B(3) of the IRO applies the provisions of sections 66(2) and (3), 68 and 69 of the IRO to appeals against an assessment of additional tax as penalty to the extent that they are applicable.
5. This Board determines that the discretion to extend time under section 82B(1A) of the IRO should not be exercised in favour of the taxpayer in this Appeal. The word 'prevented' under section 66(1A) of the IRO should mean 'unable to'. This Board considers that this construction applies also to the provision on the power of extension of time in section 82B(1A) of identical wording (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 followed).
6. The Board finds that the taxpayer was not prevented by absence from Hong Kong or by illness or by a reasonable cause from giving the notice of appeal and lodging the accompanying documents within the 1 month period (Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687; D4/99, IRBRD, vol 14, 141 and D24/08, (2008-09) IRBRD, vol 23, 482 followed).
7. The taxpayer's argument that he is not liable to the Additional Tax assessed under the Decision necessarily requires him to provide evidence before this Board that he has a reasonable excuse under section 82A(1) for making the incorrect return by not including or having omitted the income from the other college. Having considered the evidence and submissions of the parties, this Board is satisfied that the taxpayer did not have a reasonable excuse for his making of an incorrect return by omitting the income from the other college.
8. It is the personal duty of every taxpayer to file a true and correct tax return and so a taxpayer may not absolve his liability for failing to file a true and correct tax return or obtain a reasonable excuse from such liability by

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saying that he has entrusted a professional person to fill in and file the tax return on his behalf (D115/01, IRBRD, vol 16, 893; D15/03, IRBRD, vol 18, 396 and D16/07, (2007-08) IRBRD, vol 22, 454 followed).

9. The receipt and accrual of income and the total amount of income in the 12 month period in a year of assessment were factual matters within the personal knowledge of the taxpayer and such knowledge did not depend of him being supplied with an employer's return or remembering about it (D16/07, (2007-08) IRBRD, vol 22, 454 followed).
10. The norm for additional assessment of penalty tax in respect of an incorrect return due to a genuine mistake is 10% of the tax that would have been undercharged. In fact, the Board of Review has repeatedly stated that 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 (D16/07, (2007-08) IRBRD, vol 22, 454 followed).

Appeal dismissed.

Cases referred to:

D98/98, IRBRD, vol 13, 482
D41/05, (2005-06) IRBRD, vol 20, 590
D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687
D4/99, IRBRD, vol 14, 141
D24/08, (2008-09) IRBRD, vol 23, 482
D115/01, IRBRD, vol 16, 893
D15/03, IRBRD, vol 18, 396
D16/07, (2007-08) IRBRD, vol 22, 454

Appellant in person.

Wu Ching Ping Angela and Chung Ming Yin, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant/Taxpayer, Mr A, against the Assessment of the Deputy Commissioner of Inland Revenue dated 20 December 2017 of Additional Tax by way of penalty in the sum of HK\$8,000 in respect of the Taxpayer's Salaries Tax Assessment for the year of assessment 2015/16 ('the Decision'). The Taxpayer at first also asked for the refund of a 5% surcharge in the sum of HK\$2,686

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imposed on 16 January 2018 for his not having fully paid his tax by the due date, but he informed this Board at the hearing that he no longer wished to pursue this complaint.

2. The Commissioner of Inland Revenue or a Deputy Commissioner of Inland Revenue is empowered under sections 82A(1)(a) and (3) of the Inland Revenue Ordinance (Chapter 112) ('IRO') to assess additional tax in respect of a person who without reasonable excuse, makes an incorrect return by omitting or understating anything in respect of which he is required by the IRO to make a return, either on his behalf or on behalf of another person, if no prosecution under section 80(2) or 82(1) of the IRO has been instituted in respect of the same facts and the amount of additional tax that may be assessed is not to exceed treble of the undercharged amount.

3. The Taxpayer first wrote to the Clerk to the Board of Review ('Clerk') on or about 29 March 2018 expressing his wish to appeal against the Decision. The Office of the Clerk received the Taxpayer's letter on 11 April 2018. The postage label on the envelope containing the Taxpayer's letter suggests that the date of posting to be 10 April 2018. Following communications between the Clerk and the Taxpayer in 2018, the Taxpayer lodged some supporting documents for this Appeal on 14 November 2018. After the Clerk had pointed out that not all the supporting documents for this Appeal had been lodged, the Taxpayer lodged all the requisite accompanying documents on 17 December 2018. The Clerk wrote to the Taxpayer on 18 December 2018 stating that: 'Subject to such submission as you may wish to make, your [Notice of Appeal] is prima facie invalid as it falls outside the statutory 1 month period and you may wish to consider invoking the jurisdiction of the Board to grant you an extension of time.'

4. This Board wrote to the Revenue (with copy to the Taxpayer) to clarify its position that this Appeal was a late appeal on 2 May 2019. The Revenue replied (with copy to the Taxpayer) on 3 May 2019 that it considered that the relevant time limit of 1 month started to run on 2 February 2018 and expired on 1 March 2018 and that the Taxpayer's appeal was late by 291 days.

5. This Board held the hearing of this Appeal on 8 May 2019. The Taxpayer attended the hearing in person. The Revenue was represented by two Assessors of the Inland Revenue Department and Ms Wu of the two Assessors conducted the Revenue's case at the hearing.

6. The Taxpayer testified under affirmation before this Board and was cross-examined by the Revenue. The Taxpayer also called Ms B to testify; she gave evidence under oath before this Board and was cross-examined by the Revenue.

7. The Revenue did not call any oral evidence. The Revenue referred to the documents submitted before this Board.

8. This Board considers in this Decision firstly the question of whether this Appeal is a late appeal and if so, whether this Board should grant extension of time to the Taxpayer to lodge the Appeal; and secondly the substantive questions of this Appeal regarding the Additional Tax penalty of HK\$8,000.

The Factual Background

9. The Taxpayer and Revenue have not reached agreement on a set of Agreed Facts for submission to this Board.

10. The Taxpayer has placed before this Board a set of documents relating to this Appeal. Some of them in fact came from the Inland Revenue Department following a request by the Taxpayer for disclosure of his tax documents. The Taxpayer has confirmed the contents of the documents as he went through them at the prompting of this Board in the course of his testimony. This Board find the following facts as established from this set of documents:

- (1) The Taxpayer and his spouse, Ms B, signed the Tax Return for the year of assessment 2015/16 stating under income a total amount of HK\$657,961 arising from the employment of teacher by Secondary School C between 16 August 2015 and 31 March 2016. The Tax Return stated a new residential address in District D. The Tax Return was dated 1 September 2016. The signatures were under Part 9 of the Tax Return, declaring that the information given in the return was true, correct and complete.
- (2) The Revenue gave notice of intention to assess additional tax to the Taxpayer on 3 August 2017 on the basis that according to information, the Taxpayer had made an incorrect tax return for the year of assessment 2015/16 by omitting income in the amount of HK\$556,864 from College E. The notice was posted by registered post to the Taxpayer's address in District D.
- (3) The Revenue re-directed the notice of intention to assess additional tax to the Taxpayer on 15 September 2017 by registered mail to the Taxpayer's address in District D since the notice of intention referred to in (2) above was undelivered and returned to the Revenue.
- (4) The Taxpayer wrote a letter dated 16 October 2017 addressed to the Revenue. This letter was sent by fax on 20 October 2017 to the Revenue. In this letter, the Taxpayer provided his new address in District F (which was supported by an electricity bill) and his email address. The Taxpayer stated in this letter that he understood that his 'tax form was filled in incorrectly. I relied on the school accountant to help me fill in my tax form and apparently it was wrong'. The Taxpayer also stated in this letter that he had dyslexia and this meant that he 'mix up numbers, dates, names and misspell words'. The Taxpayer then apologized for 'this oversight' and stated that he 'was confident at the time that the school accountant could help me with such a simple task. I still do not have a clear idea of how provisional

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tax and regular tax works. If you tell me what to do to rectify this situation I will be happy to do it.’

- (5) The Revenue wrote to the Taxpayer on 7 November 2017 asking him to provide documents certified by doctors in support of his claimed medical condition stated in his letter of 16 October 2017.
 - (6) The Taxpayer sent supporting documents by fax on 27 November 2017. They consist of three pages suggesting that from a test score that the person taking the test shows signs consistent with mild dyslexia and that the Taxpayer expressed the view in an email that he was confident that he was dyslexic because of his difficulty learning to read and/or spell.
 - (7) The Deputy Commissioner of Inland Revenue made the Decision under File No: XXX-XXXXXXXX(X)X and issued it on 20 December 2017 by registered post to the Taxpayer’s District F address. A payment voucher formed part of the Decision, requiring the Taxpayer to pay the Additional Tax assessed as penalty in the amount of HK\$8,000 before the due date of 31 January 2018 under the Shroff Account Number X-XXXXXXXX-XX-X.
 - (8) The Revenue redirected the Decision to the Taxpayer’s District F address on 31 January 2018 by registered post.
11. This Board also finds on the basis of the information provided by the Revenue the following facts (which are not disputed by the Taxpayer):
- (9) On 26 October 2016, the Assessor of the Revenue raised on the Taxpayer Salaries Tax Assessment for the year of assessment 2015/16 according to the employer’s return received from the Incorporated Management Committee of College E and Secondary School C of income of HK\$1,214,825 (namely, HK\$556,864 + HK\$657,961), with tax payable thereon assessed at HK\$102,440.
 - (10) The Taxpayer did not object to the Salaries Tax Assessment for the year of assessment 2015/16 raised on him on 26 October 2016. The assessment has become final and conclusive under section 70 of the IRO.
 - (11) No prosecution under section 80(2) or section 82(1) of the IRO has been instituted against the Taxpayer in respect of the same facts that founded the Decision.

Whether the Taxpayer's Appeal is a late appeal and related issues

12. This Board has heard the Taxpayer and the representative for the Revenue on the questions of when the time period for lodging an appeal against the Decision began to run and when this time period expired. Section 82B(1)(a) of the IRO provides that notice of appeal against an assessment of additional tax as penalty should be given in writing to the Clerk within one month after the assessment was given to the relevant taxpayer. This Board is satisfied, in the absence of evidence to the contrary, that the relevant time period began to run on 2 February 2018, the next business day after the redirection, namely the date the notice of assessment of Additional Tax was deemed to have been served on him pursuant to section 58(3) of the IRO (i.e. the date succeeding the day on which it would have received in the ordinary course by post). This Board is also satisfied that the 1 month time period under section 82B(1)(a) for appealing against the Decision expired on 1 March 2018; see D98/98, IRBRD, vol 13, 482, paragraphs 9, 10, 17.

13. The Inland Revenue Department received on 9 February 2018 a fax of 8 pages sent from the Taxpayer on the same date addressed to 'Clerk to the Board of Review' stating his wish to appeal and attaching some documents. The Taxpayer agreed in evidence that he sent this fax. This Board operates separately and independently from the Inland Revenue Department. And the Inland Revenue Department is not the agent of this Board for any purpose related to an appeal to the Board of Review; see D98/98, IRBRD, vol 13, 482, paragraph 15. Giving notice of appeal to the Board of Review involves actual service of the notice of appeal to the Clerk; see D41/05, (2005-06) IRBRD, vol 20, 590, paragraph 11. Therefore, the Taxpayer's fax of 8 pages is not a notice of appeal given in writing to the Clerk.

14. The Inland Revenue Department wrote on 21 February 2018 pointing out to the Taxpayer that he should ensure that he has sent a notice of appeal to the Board of Review in writing within one month after the notice of the Additional Assessment was given to him and directing his attention to the contact details of the Board of Review on the notice of the Additional Assessment.

15. The Taxpayer thereafter gave notice of his wish to appeal against the Decision by posting the letter dated 29 March 2018 on 10 April 2018 and the Office of the Clerk received the letter on 11 April 2018. The Taxpayer lodged all the accompanying documents required by section 82B(1)(b) of the IRO on 17 December 2018.

16. Both the notice of appeal and the accompanying documents specified in section 82B(1)(b) of the IRO must be served on the Clerk within the 1 month time limit provided under section 82B(1)(a); see D16/07, (2007-08) IRBRD, vol 22, 454, paragraph 11.

17. This Board accordingly finds that the Taxpayer's Appeal is a late appeal.

18. Section 82B(1A) of the IRO provides that this Board may extend time to appeal against an assessment of additional tax as penalty if it is satisfied that an appellant

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was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with section 82B(1)(a).

19. Section 82B(3) of the IRO applies the provisions of sections 66(2) and (3), 68 and 69 of the IRO to appeals against an assessment of additional tax as penalty to the extent that they are applicable.

20. The Taxpayer stated in evidence that he believed that he was on holiday and not in Hong Kong around the time of the sending of the notice of the Decision of 20 December 2017. The Taxpayer accepted that he had received the redirected notice of the Decision when he was shown the letter of the Inland Revenue Department dated 9 February 2018 to him which referred to a telephone conversation between the Taxpayer and Mr Cheung of the Department on 7 February 2018. The Taxpayer also accepted that he did have the telephone conversation with Mr Cheung that was referred to in the Revenue's letter of 9 February 2018. The Taxpayer confirmed that the handwritten address on the envelope with the postal label of the date of 10 April 2018 was his handwriting and he accepted that it was possible that the date of writing the letter and the date of posting the letter were different dates and that he sent the letter through using the services of his school employer. The Taxpayer suggested that he was confused between the Inland Revenue Department and the Board of Review.

21. The Revenue's representative referred to the documents provided by the Revenue and submitted that this Board should not exercise its discretion to extend time. The Revenue's representative referred to the Revenue's letters dated 9 February 2018 and 21 February 2018 respectively, both of which had informed and reminded the Taxpayer to give notice of appeal to the Board of Review in writing within 1 month after notice of the Additional Assessment was given to him and that the contact details of the Board of Review could be found on that notice. The Revenue's representative also referred to the movement records of the Taxpayer stating that in the month of February 2018, he was absent from Hong Kong for 12 days between 12 February 2018 and 23 February 2018 (both dates inclusive).

22. This Board, after considering the Taxpayer's evidence and submission and the Revenue's documents and submission, determines that the discretion to extend time under section 82B(1A) of the IRO should not be exercised in favour of the Taxpayer in this Appeal. This Board makes this determination for the following reasons:

- (a) The Court of Appeal had held in Chow Kwong Fai v Commissioner of Inland Revenue [2005] 4 HKLRD 687 that the word 'prevented' under section 66(1A) of the IRO should mean 'unable to'. This Board considers that this construction applies also to the provision on the power of extension of time in section 82B(1A) of identical wording.
- (b) The Taxpayer was not prevented by absence from Hong Kong from giving the notice of appeal and lodging the accompanying documents within the 1 month period. There was a time period of 7

working days before his departure from Hong Kong on 12 February 2018. There was also a time period of 4 working days after his arrival in Hong Kong on 23 February 2018 and before the expiry of the 1 month time period on 1 March 2018.

- (c) The Taxpayer was not prevented by illness from giving the notice of appeal and lodging the accompanying documents within the 1 month period. Assuming that the Taxpayer has established that he suffered from a young age the medical condition of dyslexia, the fact that the Taxpayer was able to write and send two letters to the Inland Revenue Department in the month of February 2018 over his tax matters, including one purporting to give notice to appeal against the Decision, refutes, in the opinion of this Board, the suggestion that his condition, on the assumption of it being an illness, had rendered him unable to give notice of appeal and lodge the accompanying documents within the 1 month period.
- (d) The Taxpayer was not prevented by a reasonable cause from giving the notice of appeal and lodging the accompanying documents within the 1 month period. The Taxpayer most probably made a mistake in sending by fax the letter dated 9 February 2018 stating his intention to appeal to the Inland Revenue Department when it should have been sent to the Clerk. This Board considers this mistake to be a unilateral mistake on the part of the Taxpayer since the notice of the Decision itself stated in bold fonts that **'If you wish to appeal against this assessment, you must give notice in writing to the Clerk to the Board of Review (PLEASE SEE CONTACT DETAILS OVERLEAF) within 1 month after this notice of assessment is given to you.'** And the same notice has on the second page a text box stating the address, telephone number, fax number, e-mail and the website of the Office of the Clerk, i.e. the contact details of the Clerk. The Taxpayer was reminded by the Inland Revenue Department twice (in the letter dated 9 February 2018 and the letter dated 21 February 2018 respectively) that if he wishes to appeal against the Decision, he should give notice of appeal to the Board of Review in writing within 1 month after notice of the Additional Assessment was given to him and that the contact details of the Board of Review could be found on that notice. The Taxpayer should have received either or both of these letters by the time he came back to Hong Kong on 23 February 2018. He still had 4 working days after his arrival in Hong Kong on 23 February 2018 and before the expiry of the 1 month time period on 1 March 2018 to give notice of appeal and lodge the accompanying documents with the Clerk within time had he chosen to do so. The Taxpayer had not furnished this Board with any evidence on the reason, if any, why he did nothing in respect of giving notice of appeal and lodging the accompanying documents with the Clerk after 23 February 2018

and probably only began to do so on or about 29 March 2018 in respect of the writing of the letter dated 29 March 2018 before arranging to have it posted through the school he worked in, which had the letter posted apparently only on 10 April 2018. None of the above matters, taken alone or together, constitutes a reasonable cause for this Board to properly exercise its discretion to extend time; see Chow Kwong Fai (above) paragraph 45; D4/99, IRBRD, vol 14, 141, paragraph 17; D24/08, (2008-09) IRBRD, vol 23, 482, headnote.

23. The Taxpayer's Appeal is therefore dismissed.

The Taxpayer's Substantive Appeal against the Decision

24. This Board has also heard the Taxpayer and the Revenue on the merits of the substance of this Appeal.

25. Section 82B(2) provides:

'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.'*

26. The Taxpayer stated in his written communications with the Clerk that he had been 'unjustly' penalized. Having considered the Taxpayer's written communications together with his oral explanations of them during the hearing, this Board considers that the Taxpayer argues in this Appeal that he is not liable to the Additional Tax of HK\$8,000 assessed. On the other hand, it is clear that in light of the amount of tax that would be undercharged (namely HK\$94,667) and the maximum sum that could be assessed as additional tax under section 82A(1) of the IRO (namely not exceeding treble of the undercharged amount), it is not open to the Taxpayer to argue that the amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A. Although the Taxpayer's statements on his grounds of appeal or reasons for appeal given to this Board do not appear to be arguing that 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, this Board has heard relevant submissions and is to consider this matter.

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27. The Taxpayer's various written representations to the Board of Review indicate that he has raised a number of points, which can be summarized as follows:

- (a) He relied on the school accountant to help him fill in his Tax Return. The school accountant made the mistake of giving him incomplete instructions. At the time, he was confident that the school accountant could help him with such a simple task.
- (b) He has dyslexia and mixes up numbers, dates, names and misspells words. He has been diagnosed with dyslexia at a young age (a long time ago). He relied on professional advice to help him complete forms and tables. The present matter was not intentional or careless. He did not intentionally or carelessly misinform the Revenue.
- (c) He apologized for this oversight and would try more not to miss anything in the future.
- (d) He has been a civil servant (teacher) with 17 years of tax payments. He has always had enough money to cover his taxes. He was on time with submitting forms and payment.
- (e) Throughout the time he worked at Secondary School C, he never received monthly statements or any kind of documentation of his salary and so this reinforced his need to rely on the school accountant.

28. The Taxpayer's argument that he is not liable to the Additional Tax assessed under the Decision necessarily requires him to provide evidence before this Board that he has a reasonable excuse under section 82A(1) for making the incorrect return by not including or having omitted the income from College E.

29. The Taxpayer accepted that there was an omission in the Tax Return for the year of assessment 2015/16 in that his income from College E was not included. The Taxpayer stated in his oral evidence that he was from Country G and had been a teacher of English in Hong Kong for about 17 years up to now. The Taxpayer also stated that he relied on other people to tell him about numbers because of his condition of dyslexia. The Taxpayer further stated that while he received from his employer a form in Chinese about his income, he was not confident with extracting information from it because it was in Chinese. He referred to an employer's return from Secondary School C. The Taxpayer furthermore recalled that for the purpose of filling in the Tax Return of the year of assessment 2015/16, he and Ms B went to see the accountant of Secondary School C and asked him. The school accountant provided him with the 'numbers' and he had the 'numbers' confirmed and then filled in the 'numbers' on the Tax Return. He believed that the school accountant should know that he had worked with another school before joining the school. He believed that the mistake would not have been made if the employer's return sent to him were in English. He also claimed that the logo of the Inland Revenue

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Department on the employer's return must have suggested to him that it was all encompassing for the year in question and thereby misled him.

30. Ms B gave evidence recalling that both the Taxpayer and she visited Secondary School C and asked the school accountant to help them with filling in the Tax Return for the year of assessment 2015/16. The school accountant copied some figures from the computer, provided them with the amount of income in writing on a piece of paper, and taught them about filling in the Tax Return and they confirmed the figures with the school accountant several times.

31. The Revenue referred to a number of previous decisions of the Board of Review underlining the obligation of taxpayers to provide true, correct and complete information in the tax returns and indicating that a mistake on the part a taxpayer in filing an incorrect return was relevant only to the quantum of the penalty. The Revenue also made the point that in a case where the taxpayer had made a genuine mistake, an assessment of penalty tax at 10% of the undercharged amount of tax was considered to be appropriate. The Revenue further made the point that the Board of Review had regarded penalty tax to serve the two purposes of punishing the delinquent taxpayers and deterring these and other taxpayers.

32. Having considered the evidence and submissions of the parties, this Board is satisfied that the Taxpayer did not have a reasonable excuse for his making of an incorrect return by omitting the income from College E. The reasons for this Board's finding are as follows:

- (a) The Taxpayer's Tax Return for the year of assessment of 2015/16 was incorrect in that the income from the employment of College E was omitted. The Tax Return stated only the income from the employment of Secondary School C.
- (b) The Taxpayer had filed tax returns and paid tax in Hong Kong for more than a decade. His source of income had been from employment as a teacher. He must be well aware that the relevant period of income covered for taxation was from the beginning of April of the previous year to end of March of the present year. The Taxpayer accepted under cross-examination that he had read the *Guide to Tax Returns – Individual* for the year of assessment 2015/16 which stated in bold font that the year of assessment 2015/16 'runs from **1 April 2015 to 31 March 2016**'.
- (c) The Taxpayer worked for two schools between 1 April 2015 and 31 March 2016. The Taxpayer must have been well aware of this fact. This Board is unable to accept that it did not occur to the Taxpayer to be unusual, strange or erroneous the fact that the income entered in the Tax Return for the year of assessment 2015/16 was only of the income of the employer Secondary School C for the period of 16 August 2015 to 31 March 2016 in the amount of HK\$657,961.

Firstly, the entry of one employer and not of two employers was reasonably unusual. Secondly, the period of employment entered in the Tax Return did not cover the period of time between 1 April 2015 and 15 August 2015. It is difficult to accept that the Taxpayer, having worked between 1 April 2015 and 15 August 2015 and received remuneration for that work, would be oblivious to the absence of the income from work during that period in the entry on the Tax Return. Thirdly, the income from College E omitted from the Tax Return was HK\$556,864. The representative of the Revenue made a valid point in cross-examination that the Taxpayer could have obtained from his bank statements a rough idea of how much he had earned between April 2015 and March 2016. From this rough idea, it was reasonable to expect the Taxpayer to recognize that the amount entered in the grand total of the income did not match the rough idea or scale of the total amount of money he earned between April 2015 and March 2016.

- (d) The Taxpayer claimed that he relied on the school accountant of Secondary School C to help him fill in the Tax Return. Both the Taxpayer and Ms B described that the school accountant obtained some figures from the school computer and then gave them a numerical figure on a piece of paper. However, this Board is unable to accept the Taxpayer's claim that he regarded the figure given to him by the school accountant as encompassing of all the income he earned in the past year. While it is reasonable to expect the school accountant of Secondary School C to have access to and be familiar with the information comprising of the income of a teacher of that school, it is clearly not reasonable to expect this person to be familiar with the information comprising of the income of a teacher of another school or while that teacher worked for another school. The Taxpayer has not provided any evidence tending to suggest that a school accountant of one school could have access to what is essentially financial information of another school, particularly where the names of the two schools do not suggest that they were at the time managed by the same educational organization.
- (e) The Taxpayer claimed that he had to rely on another person to help him fill in the Tax Return because he was dyslexic. The Taxpayer provided the Revenue and thereafter to this Board the results of self-administered tests to substantiate the claim that he was dyslexic. This Board can attach very little weight to the results of these tests since, by reason of the nature of these tests, they were not meant to be an expert, objective and clinical diagnosis. As to the result of the first test, the score suggested that the Taxpayer was at most suffering from symptoms consistent with mild dyslexia. While the second test appears to compile a profile report, such a report still describes itself as a 'screening tool' which 'cannot provide you with

the evidence that many organizations and institutions demand, especially where there is funding at stake' and only 'provide an indication of your dyslexia traits'. Although the provider of the second test suggested that personalized guidance could be obtained from paid for profiling options, it made clear at the same time that 'none of these should be considered as full diagnostic assessments. These can only be provided by trained professionals ...'. The email from Ms H provided advice and made suggestions of a general nature and does not advance the Taxpayer's claim. This Board considers that, at most, the Taxpayer is only able to suggest that he was dyslexic and nothing further.

- (f) It is well established in previous decisions of the Board of Review that it is the personal duty of every taxpayer to file a true and correct tax return and so a taxpayer may not absolve his liability for failing to file a true and correct tax return or obtain a reasonable excuse from such liability by saying that he has entrusted a professional person to fill in and file the tax return on his behalf; see D115/01, IRBRD, vol 16, 893, paragraph 14; and D15/03, IRBRD, vol 18, 396, paragraph 7.
- (g) This Board finds that there is no expert medical evidence before it that supports the suggestion that the Taxpayer's dyslexic condition impaired him to such an extent that it was not reasonable to expect him to be aware of the matters raised in (c) above and/or that he should be relieved or absolved from the personal duty of a taxpayer to file a true and correct tax return. On the other hand, this Board considers the Taxpayer's correspondence in writing to the Inland Revenue Department and to the Clerk indicate that he was and is well aware of the circumstances around him and able to advance his own views.
- (h) This Board rejects the Taxpayer's claim that he has a reasonable excuse for filing the incorrect return involved in this Appeal on the ground that he had to rely on the school accountant of Secondary School C to help him fill in the return because he was dyslexic. This Board accepts the Revenue's submission that the omission the Taxpayer made in reporting the entirety of his income from his ex-employer (College E) could have been avoided had he exercised reasonable care to recall and cross-check the amount of income he had declared in the return.
- (i) This Board also agrees with the Revenue's observation that the Taxpayer had not filed the return involved in this Appeal on time.
- (j) This Board further agrees with the Revenue's observation that the Taxpayer could have approached his employers for the supply of the

employer's returns for the year of assessment 2015/16. If he had been supplied with an employer's return in Chinese, he could have asked for one done in English. And coincidentally, the employer's returns provided by College E and by Secondary School C to the Revenue were both in English. In any event, the Board of Review had indicated that the receipt and accrual of income and the total amount of income in the 12 month period in a year of assessment were factual matters within the personal knowledge of the taxpayer and such knowledge did not depend of him being supplied with an employer's return or remembering about it; see D16/07, (2007-08) IRBRD, vol 22, 454 at paragraph 128. In the Taxpayer's case, he knew he had two employers in the 12 month period of the year of assessment in question and relied on the income information provided by one of the two employers as if that information was the true, correct and complete information of his income for the whole of that period. Clearly, the Taxpayer had not complied with the personal duty required of him.

33. Given that the Taxpayer's Appeal is dismissed on the ground that it is out of time and no extension of time should be granted, it is not necessary for this Board to consider whether the amount of the penalty tax assessed of HK\$8,000, which represents 8.45% of the tax that would have been undercharged, was appropriate. This Board needs only to state that the Taxpayer had been treated with leniency by the Deputy Commissioner of Inland Revenue when he made the additional assessment, bearing in mind that the norm for addition assessment of penalty tax in respect of an incorrect return due to a genuine mistake is 10% of the tax that would have been undercharged. In fact, the Board of Review has repeatedly stated that 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' (see D16/07, (2007-08) IRBRD, vol 22, 454 at paragraph 128).

34. Accordingly, this Board would have dismissed the Taxpayer's Appeal on its merits if it had been lodged within time.

Decision

35. This Board determines that the Taxpayer's appeal is a late appeal and refuses to extend time. The Taxpayer's appeal is dismissed. In any event, this Board would dismiss the Taxpayer's appeal on its merits if it had been lodged within time. The Additional Tax Assessment for the year of assessment 2015/16 that the Deputy Commissioner of Inland Revenue, by his Decision dated 20 December 2017, assessed to be in the sum of HK\$8,000, is affirmed.

36. This Board makes no order as to costs.