Case No. D5/18

Penalty tax – incorrect tax return – omission of income from employment – reasonable excuse – section 82A of the Inland Revenue Ordinance

Panel: Chow Wai Shun (chairman), Chan Chak Ming and Wu Pui Ching Teresa.

Date of hearing: 18 January 2018.
Date of decision: 11 May 2018.

The Appellant made an incorrect return for the year of assessment 2015/16.

The Deputy Commissioner did not accept that the Appellant had a reasonable excuse and issued to the Appellant a Notice of Assessment and Demand for Additional Tax under section 82A of the Ordinance.

The issue in dispute is whether the Appellant has any reasonable excuse.

Held:

1. The Appellant has not discharged the onus of proof under section 68(4) of the Ordinance.

2. The Board does not consider the additional tax imposed on the Appellant, which was 7.49% of the tax undercharged, is incorrect or excessive.

3. The Board considers this appeal to be frivolous and vexatious. The appeal was without merits and a waste of public resources. The Appellant shall pay the costs.

Appeal dismissed and costs order in the amount of $25,000 imposed.

Cases referred to:

D115/01, IRBRD, vol 16, 893
D80/06, (2007-08) IRBRD, vol 22, 61
D35/08, (2008-09) IRBRD, vol 23, 683
D28/13, (2013-14) IRBRD, vol 28, 667
D16/07, (2007-08) IRBRD, vol 22, 454
D44/09, (2009-10) IRBRD, vol 24, 864

The Appellant in person.
Tang Siu Fung and Chung Yan Fat, for the Commissioner of Inland Revenue.

Decision:

The Appeal

1. This is an appeal against the imposition of an additional tax assessed upon the Appellant under section 82A of the Inland Revenue Ordinance ('Ordinance') due to an incorrect tax return for the year of assessment 2015/16 filed by the Appellant in which he omitted his income from Company A. The additional tax imposed is $7,900, which represented 7.49% of the tax undercharged.

The Agreed Facts

2. On the basis of the statement of facts agreed by the parties, we made the following finding of facts.

a. Company A filed an IR56F dated 14 December 2015 in respect of the Appellant for the year of assessment 2015/16 with the following particulars:

Residential address	Capacity in which employed	Period of employment	Particulars of income	Amount (HK$)
Address B	Position C	01-04-2015 to 19-12-2015	Salary/Wages/Director's Fee/Pensions	638,420
			Leave Pay	61,618
			Other Rewards, Allowances or Perquisites e.g. Bonus, Education Benefits, Shares (Nature…)	8,608
			Total Income	708,646

b. On 3 May 2016, a notice in relation to filing of the 2016 Tax Return was sent to the Appellant's eTAX Account with a hyperlink to a 'Guide to Tax Return-Individuals' ('the Guidebook'). The Guidebook provided guidance on how to complete Part 4 (Salaries Tax) of the Tax Return. Part 4.1 of Section D of the Guidebook provided an example on declaration of income from two companies/employers. Before a taxpayer signs and submits his tax return electronically, the eTAX system will display a simulated version of the tax return with filled data for his checking and confirmation. An important note that heavy penalties might be

incurred for making an incorrect return or committing other offences is also stated.

c. On 4 June 2016, the Appellant filed the 2016 Tax Return through the internet under his eTAX Account. In the Tax Return, he declared the following income and particulars in Part 4.1:

Name of employer	Capacity employed	Period	Total amount ($)
Company D	Position E	21-12-2015 to 31-03-2016	270,387

d. The Appellant signed the 2016 Tax Return with eTAX password to declare that the information given in such return was true, correct and complete.

e. Company D filed an IR56B dated 1 June 2016 in respect of the Appellant for the year of assessment 2015/16 with the following particulars:

Residential address	Capacity in which employed	Period of employment	Particulars of income	Amount (HK$)
Address B	Position F	21-12-2015 to 31-03-2016	Salary/Wages Bonus Total Income	268,387 2,000 270,387

f. On 25 August 2016, the Assessor raised on the Appellant the following 2015/16 Salaries Tax assessment according to the IR56F and IR56B referred above:

	Amount $
Income (708,646+270,387)	979,033
Tax payable after tax reduction	107,235

g. The Appellant did not object to the 2015/2016 Assessment above. The assessment has become final and conclusive under section 70 of the Ordinance.

h. On 2 June 2017, the Appellant changed his correspondence address to 'Address G' through the internet under his eTAX account.

i. On 23 June 2017, the Deputy Commissioner issued a notice to the Appellant under section 82A(4) of the Ordinance notifying that:

i. He intended to impose Additional Tax in respect of the incorrect 2016 Tax Return submitted by the Appellant for omitting the employment income of $708,646 from Company A.

ii. The amount of tax that would have been undercharged had the 2016 Tax Return filed by the Appellant been accepted as correct was $105,424.

iii. The Appellant had the right to submit written representations.

j. The Appellant filed written representations dated 24 June 2017, which was received by the IRD on 28 June 2017.

k. By a letter dated 31 July 2017, the Assessor requested the Appellant to submit further written representations for his omission of income from Company A in the 2016 Tax Return.

l. The Appellant filed further written representations dated 3 August 2017 which was received by the IRD on 7 August 2017.

m. Having considered the Appellant's representations, the Deputy Commissioner did not accept that the Appellant had a reasonable excuse for filing an incorrect return. On 20 September 2017, the Deputy Commissioner issued to the Appellant a Notice of Assessment and Demand for Additional Tax under section 82A of the Ordinance, which forms the subject matter of this appeal. The notes at the end of such Notice indicated that the penalty imposed had already been adjusted for mitigating factors.

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

o. By a notice dated 27 September 2017, the Appellant filed an appeal to this Board against the assessment of additional tax above.

Grounds of appeal

3. The Appellant's grounds of appeal as stated in his notice of appeal on 27 September 2017 can be summarised as follows:

(1) The Appellant left Company A in December 2015 and joined Company D in the same month. This had confused him with which employment to put down in his tax return.

(2) The Appellant moved from his previous address to his last address in October 2015, resulting in loss of some of his record of income. Furthermore, his previous tax returns were filled in and filed by his wife while he filed the relevant return himself for the year of assessment 2015/16.

(3) He has been diagnosed with depression and anxiety disorders since October 2015 and some of the medication prescribed caused side effects including confusion, drowsiness and memory loss.

The relevant provisions of the Ordinance

4. Under section 82A(1) of the Ordinance, any person who without reasonable excuse makes an incorrect return by omitting or understating anything in respect of which he is required by the Ordinance to make a return, either on his behalf or on behalf of another person, shall be liable to be assessed to additional tax of an amount not exceeding treble the amount of the tax which has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct.

5. The excepted situation was where prosecution under section 80(2) or 82(1) of the Ordinance has been instituted in respect of the same facts. There was no such prosecution instituted against the Appellant. This case does not fall within the exception.

6. Section 82B(3) provides, *inter alia*, that section 68 so far as it is applicable has effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.

7. Pursuant to section 68(4) of the Ordinance, the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

8. Sections 68(8)(a) and 68(9) of the Ordinance provide that:

'*(8)(a) 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.*'

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

9. The amount specified in Part I of Schedule 5 is $25,000.

Decision

10. It is not in dispute that the Appellant made an incorrect return by omitting his income from Company A in respect of which he was required by the Ordinance to make a return. The issue in dispute is whether the Appellant has any reasonable excuse for the omission.

11. The importance of timely, complete, true and correct reporting by taxpayers has been repeatedly stressed by this Board: see, for examples, D115/01, IRBRD, vol 16, 893, D80/06, (2007-08) IRBRD, vol 22, 61, D35/08, (2008-2009) IRBRD, vol 23, 683 and D28/13, (2013-14) IRBRD, vol 28, 667. Does any of the grounds of appeal put forward by the Appellant constitute a reasonable excuse for such omission?

12. First, the Appellant submitted that his move from Company A to Company D in the same month confused him with which employment to be reported in his tax return. Second, the Appellant submitted that the omission of income from Company A was due to the loss of some of his income record when he moved out from his previous residence towards the end of 2015. At the hearing, he gave oral evidence to the effect that he had to move to a new residence because he had had a hard time with his wife. He also added that he had recently been informed to be served a petition for divorce by his wife. Before the marital relationship turned sour, it was indeed his wife who prepared and filed his previous tax returns electronically for him.

13. While we do not cast doubt on the oral evidence given by the Appellant, we do not consider any of these amounts to a reasonable excuse under section 82A of the Ordinance. First, it has been repeatedly held by this Board that receipt and accrual of income and the total amount thereof are factual matters within the personal knowledge of a taxpayer: see, for examples, D80/06, (2007-08) IRBRD, vol 22, 61 (paragraph 30) and D16/07, (2007-08) IRBRD, vol 22, 454 (paragraph 128(a)).

14. Further, indeed, the Guidebook which was hyper-linked to the Appellant's eTAX account provided clear guidance on how to complete the return with examples, one of which was on declaration of income from two companies/employers. Before the Appellant signed and submitted his tax return electronically, the eTAX system should have displayed a simulated version of the tax return with filled data for checking and confirmation with a reminder that making an incorrect return might lead to heavy penalties. To our knowledge and understanding, a taxpayer can print out a hard copy of the tax return submitted.

15. The Appellant might not be acquainted with e-filing his tax return but he could still have been able to report the correct amounts of his aggregate employment income if he had intended or taken the trouble so to do. He could have referred to and read the Guidebook thoroughly. He could have approached Company A for a copy of the employer's return or ascertained the correct amount of income by reference to his banking records. He could have consulted his tax advisor or retained one. He could have just sought assistance from the IRD.

16. Even if the Appellant was not in reckless disregard of his duty to report the correct amount of his income, this Board has said time and again that carelessness is not a reasonable excuse for submitting incorrect return: see, for examples, D80/06 (above, paragraph 33), D44/09, (2009-10) IRBRD, vol 24, 864 (paragraph 28) and D16/07 (above, paragraph 128(c)).

17. Could the Appellant's omission be justified by the medical ground he raised? In this regard, he submitted at the hearing a medical note from his psychiatrist dated 23 November 2017 certifying that the Appellant had gone for consultation since 24 October 2015, was diagnosed of having mild to moderate major depressive disorder and had been given antidepressant medication. The psychiatrist also stated that the Appellant's mood had remained persisting low, impairing substantially his executive function, attention, concentration and organization ability and causing difficulties in handling his daily activities for at least the initial one and a half year of treatment.

18. The Respondent did not object to the admission of this piece of document evidence which was filed late but queried, given the Appellant could still get a job with Company D and passed the probation, whether the depressive disorder suffered by the Appellant had made him unable to fulfil his tax reporting duty. We had the same question in our minds. In the absence of the benefit of hearing further and directly from the psychiatrist, we have to say that the Appellant has not discharged the onus of proof under section 68(4) of the Ordinance.

19. Under section 82A(1) of the Ordinance, the Commissioner may impose an additional tax of an amount not exceeding treble the amount of tax undercharged. In D44/09 (above), the taxpayer omitted to report her income from an ex-employer. The amount of income understated represented 35.88% of her actual income. She asked for zero penalty because the omission was an honest mistake caused by her careless oversight. In reaching its decision on the quantum of additional tax, this Board, in paragraph 24 of its decision, agreed 15% as the starting point for taxpayers who:

a. are in middle or senior management;

b. earn no less than high six digit annual income;

c. have the knowledge and means of reporting the correct amounts of their aggregate employment income if they have intended or taken the trouble so to do;

d. through carelessness, or not caring whether the returns they filed be correct or not, filed incorrect returns, understating or omitting a substantial portion of their aggregate employment income;

e. show no or no genuine remorse;

f. take no steps to put their houses in order;

g. argue that it is unfair to penalise them; and

h. demand a waiver of penalty.

The Board confirmed the additional tax which represented 8.02% of the tax that would have been undercharged had the return be accepted as correct.

20. In light of D44/09 and the facts of this appeal, we do not consider the additional tax imposed on the Appellant, which was 7.49% of the tax undercharged, is incorrect or excessive.

Disposition of the appeal and costs

21. By reason of the above, we dismiss the appeal and confirm the imposition of an additional tax against the Appellant in the sum of $7,900 for the year of assessment 2015/16.

22. According to D16/07 (above, paragraph 128(o)), where the Board concludes that the appeal is frivolous and vexatious or an abuse of the process of appeal, the Board may impose an order of costs, that is pursuant to section 68(9) of the Ordinance. Further, in accordance with D44/09 (above, paragraph 24), taxpayers pursuing appeals on grounds consistently rejected by the Board in reported decisions should expect a costs order against them.

23. We consider this appeal to be frivolous and vexatious. The appeal was without merits. He could have realised this latest by perusing the bundles submitted by the Respondent, including the previous decisions of this Board relevant to additional tax. Furthermore, the Appellant had failed to adduce the medical note from his psychiatrist until the hearing notwithstanding that clear directions on filing of evidence were given in advance. We therefore consider this appeal a waste of public resources and the Appellant shall pay the costs. Therefore, we order the Appellant to pay costs in the sum of $25,000, which sum should be added to the additional tax as increased and recovered therewith.