

**Case No. D59/09**

**Penalty tax** – income understated – honest mistake – discretion of the Board – sections 65(4), 66(1), 68, 70, 80(2), 82, 82A and 82B of the Inland Revenue Ordinance ('IRO').

**Costs** – frivolous and vexatious – sections 82B(3) and 68(9) of the IRO.

Panel: Kenneth Kwok Hing Wai SC (chairman), Julia Lau Pui G and Albert To Tak Pui.

Date of hearing: 11 February 2010.

Date of decision: 19 March 2010.

The appellant understated his income and the related quarters value by \$512,413 and \$12,180 respectively. The amount of tax which would have been undercharged if the Tax Return had been accepted as correct was \$89,180. The Deputy Commissioner made an assessment to additional tax by way of penalty in the amount of \$6,600 which was equivalent to 7.4% of the amount of tax which would have been undercharged. The grounds of appeal of the appellant were that it was a genuine mistake and that he was not intentionally avoiding any tax.

**Held:**

1. Neither recklessness nor carelessness is a licence or reasonable excuse for understatement of income. Unlike section 82, intention to evade is not a requirement for liability for additional tax and absence of such intention is irrelevant on the question of liability for additional tax. While an intention to evade tax is undoubtedly an aggravating factor, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax. The appellant has no reasonable excuse and is liable for additional tax.
2. What the appellant said evinces the absence of any genuine remorse – he sought to blame the Revenue for not writing to invite him to correct his understatement. This turns the statutory duty on its head. Once the taxpayer invokes the statutory right of appeal, he is subject to the whole of the appeal scheme provided by the Ordinance. On an appeal to the Board, the Board, not the Commissioner, is the decision maker. If there is any discretion in any matter, the discretion is that of the Board, not the Commissioner. The Board concludes that this is an appropriate case to adopt the Board's starting point of 15% and the assessment appealed against should be increased from

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\$6,600 to \$13,200 which is 14.8% of the amount of tax which would have been undercharged had the Tax Return been accepted as correct.

3. The Board considers this appeal to be frivolous and vexatious. It sees no reason why the compliant taxpayers should bear the costs of such a waste of public resources. Pursuant to sections 82B(3) and 68(9), the appellant should be ordered to pay the sum of \$5,000 as costs of the Board.

(*Per* Mr Albert To Tak Pui)

4. There was an honest mistake and a 7.4% penalty was enough. The Board should not take away the discretion of the Commissioner. The additional tax assessed by the Deputy Commissioner should be confirmed and this is not an appropriate case to order costs.

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

Cases referred to:

D48/05, (2005-06) IRBRD, vol 20, 638  
D16/07, (2007-08) IRBRD, vol 22, 454  
D37/07, (2007-08) IRBRD, vol 22, 839  
D35/08, (2008-09), IRBRD, vol 23, 683  
D50/08, (2008-09), IRBRD, vol 23, 944  
Chow Kwong Fai, Edward v CIR [2005] 4 HKLRD 687  
Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009-10)  
IRBRD, vol 24, 589  
Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7  
D17/08, (2008-09) IRBRD, vol 23, 301  
D41/89, IRBRD, vol 4, 472  
D53/92, IRBRD, vol 7, 446  
D65/00, IRBRD, vol 15, 610

Taxpayer in person.

Leung Shuk Fun and Go Shun Yuk for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. In the absence of any objection by the Revenue, the Board unanimously extended the time for giving notice of appeal in accordance with section 66(1)(a) of the Inland Revenue Ordinance, Chapter 112 ('the Ordinance').

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2. After the conclusion of the hearing, the panel members reached different conclusions.

- (1) The majority, Mr Kenneth Kwok Hing Wai SC and Ms Julia Lau Pui G, decided to increase the additional tax, also referred to as 'penalty tax', assessment appealed against and to order costs against the appellant. The reasons of the majority, are given in paragraphs 3 to 61 below. In those paragraphs, the words 'we' and 'us' do not include the dissenting member, Mr Albert To Tak Pui.
- (2) Mr Albert To Tak Pui dissented. He considered that the appeal should be dismissed; the additional tax assessment should be confirmed and there should be no order on costs. A summary of Mr To's reasons is given in paragraphs 62 to 63 below.

3. The appellant was employed in a senior capacity.

4. In the 2007/08 year of assessment:

- (1) the appellant's employment income was \$1,614,241; and
- (2) the value of the residence provided was \$38,350.

5. In his tax return, the appellant understated:

- (1) his income by \$512,413; and
- (2) the related quarters value by \$12,180.

6. The amount of tax which would have been undercharged had the appellant's tax return been accepted as correct was \$89,180.

7. The Deputy Commissioner of Inland Revenue assessed the appellant to additional tax, also referred to as 'penalty tax', of \$6,600 which represented 7.4% of the amount of tax which would have been undercharged had his tax return been accepted as correct.

**The agreed facts**

8. The parties agreed the facts set out in the Statement of Facts and we find them as facts, see paragraphs 9 to 23 below.

9. The appellant is appealing against the assessment of additional tax assessed on him under section 82A of the Ordinance for making an incorrect return by understating his income for the year of assessment 2007/08.

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10. The Tax Return-Individuals for the year of assessment 2007/08 ('the Tax Return') was issued to the appellant on 2 May 2008.

11. Together with the Tax Return, a booklet 'Guide to Tax Return-Individuals' ('the Guide Book') was also issued. The appellant was requested to read and follow the Guide Book carefully in completing the Tax Return.

(a) Part 4 stated how the income from an office, employment or pension should be reported. In particular, it stated in Part 4.1:

'Income includes all income and perquisites from the employer or others....'

(b) Part 9 stated the offences and penalties for making an incorrect return or committing other offences.

12. The appellant filed the Tax Return on 13 May 2008 and, among others, declared the following in Part 4.1:

<u>Name of Employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
[The Employer]	[Capacity omitted here]	1 April 2007 – 31 March 2008	1,101,828

13. In Part 4.2 of the Tax Return, the appellant declared the following place of residence:

<u>Address</u>	<u>Nature (e.g. house, flat, service apartment, no. of rooms in hotel, etc.)</u>	<u>Period provided</u>	<u>Name of my EMPLOYER or ASSOCIATED CORPORATION providing residence</u>
[Address omitted here]	House	1 Apr 2007 to 26 Jun 2007	[The Employer]

<u>Rent paid by EMPLOYER or ASSOCIATED CORPORATION to landlord (\$)</u>	<u>Rent paid by ME to landlord (\$)</u>	<u>Rent refunded to ME by my EMPLOYER or ASSOCIATED CORPORATION (\$)</u>	<u>Rent paid by ME to my EMPLOYER or ASSOCIATED CORPORATION (\$)</u>	<u>Rateable value, If elected (\$)</u>
\$124,700	--	--	--	--

He further declared in box 29 that the 'Total value of all places of residence provided' was \$124,700.

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14. In other parts of the Tax Return, the appellant claimed for the deductions of outgoings and expenses for medical of \$880, home loan interest payment of \$273,238, mortgage interest to produce rental income of \$164,601 and child allowances of his two children.

15. The appellant signed the declaration section in Part 9 declaring the information given in the Tax Return was true, correct and complete.

16. The Employer filed an Employer's Return of Remuneration and Pensions ('the Employer's Return') for the year from 1 April 2007 to 31 March 2008 on 26 April 2008 reporting the following income accruing to the appellant:

	<u>Amount (HK\$)</u>
Salary/wages	951,472
Bonus	150,356
Any other rewards, allowances or perquisites	
Nature: allowance	37,645
Nature:	474,768
Total	<u>1,614,241</u>

Particulars of Place of Residence provided

Address: [Same address as that given by the appellant in his Tax Return]

Nature : Apartment

Period provided : 2007/04/01- 2007/06/26

Rent paid to landlord by employee : \$124,700

Rent refunded to employee : \$124,700

17. On 12 December 2008, the assessor, based on the income reported by the Employer raised on the appellant the following 2007/08 salaries tax assessment:

Income		\$1,614,241
Value of the residence provided		38,350
Spouse's income		47,100
		<u>1,699,691</u>
<u>Less: Deductions</u>		
Home loan interest	\$100,000	
Mandatory contribution to recognized retirement scheme – spouse	1,470	
Outgoings and expenses	880	102,350
		<u>1,597,341</u>
<u>Less: Allowances</u>		
Married person's allowance	200,000	
Child allowances	100,000	300,000
Net chargeable income		<u>\$1,297,341</u>

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Tax payable \$185,047

18. The appellant did not object to the salaries tax assessment and the assessment has become final and conclusive under section 70 of the Ordinance.

19. On 24 April 2009, the Deputy Commissioner gave a notice to the appellant under section 82A(4) of the Ordinance ('Notice of Mindedness') notifying the following:

- (a) He intended to assess additional tax in respect of the incorrect Tax Return submitted by the appellant by understating the employment income from the Employer;
- (b) The amount of employment income and related quarters value understated was \$512,413 and \$12,180;
- (c) The amount of tax which would have been undercharged if the Tax Return had been accepted as correct was \$89,180; and
- (d) The appellant had the right to submit written representations.

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

21. On 4 May 2009, the appellant sent in his written representations to the Notice of Mindedness.

22. Having considered the representations submitted by the appellant, the Deputy Commissioner on 5 June 2009, assessed the appellant to additional tax of \$6,600 under section 82A of the Ordinance. The amount represents 7.4% of \$89,180, the amount of tax which would have been undercharged had the Tax Return been accepted as correct.

23. By a letter dated 18 June 2009, the appellant gave Notice of Appeal to the Board of Review against the assessment of additional tax.

**The grounds of appeal**

24. The appellant's notice of appeal reads as follows:

'I am writing to appeal the tax penalty issued on the 5<sup>th</sup> June 2009.

Although I was in the fault in completing my tax return, it was a genuine mistake. I have always paid all my taxes in Hong Kong and in no way was I intentionally avoiding any tax. I believe this is a fair tax system in Hong Kong and I am quite happy to pay my tax each year.

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I appeal to you to waive the tax penalty, as this year has been quite a financial struggle for me. Not only was my 13<sup>th</sup> month salary halved, but there was also no profit share and this year my company has requested me to take 4 weeks unpaid leave. With all my prior commitments this year I am finding it very hard to meet these financially.

Please can you give consideration to this as I will need to save all, if any spare cash this year to be able to pay my tax bill next year.'

**The Revenue's bundle of authorities**

25. On about 2 February 2010, the Revenue sent the Board, and copied to the appellant, a bundle of the following authorities:

- (1) Sections 58, 66, 68, 82A, 82B and Part I of Schedule 5 of the Ordinance.
- (2) D48/05, (2005-06) IRBRD, vol 20, 638.
- (3) D16/07, (2007-08) IRBRD, vol 22, 454.
- (4) D37/07, (2007-08) IRBRD, vol 22, 839.
- (5) D35/08, (2008-09) IRBRD, vol 23, 683.
- (6) D50/08, (2008-09) IRBRD, vol 23, 944.
- (7) Chow Kwong Fai, Edward v CIR [2005] 4 HKLRD 687.

**The relevant statutory provisions**

26. Section 68(4) provides that:

*'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

27. Section 68(8)(a) provides that:

*'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.'*

28. Section 68(9) provides that:

*'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*

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*sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.'*

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

29. Section 82(1)(a) provides that:

*'Any person who wilfully with intent to evade or to assist any other person to evade tax omits from a return made under this Ordinance any sum which should be included ... commits an offence.'*

Sub-section (1A) provides that on conviction, the taxpayer is liable to a fine, a further fine of treble the amount of tax undercharged or would have been undercharged and to imprisonment.

30. Section 82A(1)(a) provides that:

*'Any person who without reasonable excuse ... makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person or a partnership ... shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which ... (i) has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct.'*

31. Section 82B(2) and section 82B(3) provide that:

*'(2) On an appeal against assessment to additional tax, it shall be open to the appellant to argue that-*

*(a) he is not liable to additional tax;*

*(b) the amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A;*

*(c) the amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.'*

*'(3) Sections 66(2) and (3), 68, 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.'*



### **The Board's function in a tax appeal**

32. Whether to assess a taxpayer to additional tax and, if the answer is in the affirmative, the amount of additional tax to be assessed, are matters for the Commissioner. It is entirely up to the Commissioner to decide whether to impose a severe or lenient penalty. If the taxpayer accepts the penalty and pays up, that is the end of the matter and the Board does not come in at all.

33. Section 82B confers on the taxpayer the right to appeal to the Board. Once the taxpayer invokes the statutory right of appeal, he is subject to the whole of the appeal scheme provided by the Ordinance.

34. Hong Kong's appellate courts have held that the Board must:

- (1) consider the matter from the beginning, anew; and
- (2) perform its 'ultimate function' to 'confirm, reduce, increase or annul the assessment' appealed against.

(a) In Shui On Credit Company Limited v Commissioner of Inland Revenue, (2009-10) IRBRD, vol 24, 589, Lord Walker NPJ said in the Court of Final Appeal judgment at paragraphs 29 and 30 that the Board's function is to consider the matter *de novo* (meaning starting from the beginning; anew) and the appeal is an appeal *against* an assessment:

'29. *As the Board correctly observed, by reference to the decisions in Mok Tsze Fung v. CIR [1962] HKLR 258 and (after the amendment of s.64 of the IRO) CIR v. The Hong Kong Bottlers Ltd [1970] HKLR 581, the Commissioner's function, once objections had been made by the taxpayer, was to make a general review of the correctness of the assessment. In Mok Mills-Owens J said at pp 274-275 :*

*"His duty is to review and revise the assessment and this, in my view, requires him to perform an original and administrative, not an appellate and judicial, function of considering what the proper assessment should be. He acts de novo, putting himself in the place of the assessor, and forms, as it were, a second opinion in substitution for the opinion of the assessor."*

30. *Similarly the Board's function, on hearing an appeal under s.68, is to consider the matter de novo: CIR v. Board of Review ex parte Herald International Limited [1964] HKLR*

*224, 237. The taxpayer's appeal is from a determination (s.64(4)) but it is against an assessment (s.68(3) and (4)) ...'*

- (b) In Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7, CA, Fuad VP said at page 23 that the Board must perform its 'ultimate function' to 'confirm, reduce, increase or annul the assessment' appealed against.

35. On an appeal to the Board, the Board, not the Commissioner, is the decision maker. If there is any discretion in any matter, the discretion is that of the Board, not the Commissioner.

36. Both parties should bear firmly in mind that the Board is the fact finding body and it is bound to perform its ultimate function to confirm, reduce, increase or annul the assessment appealed against. The Revenue could have been more helpful if it had taken steps to find out and told us how the sum of \$474,768 was made up. It is wholly unsatisfactory to have gaps all over the place.

### **Submitting true, correct and complete tax returns on time**

37. In D17/08, (2008-09) IRBRD, vol 23, 301, the Board considered in some detail the reasons for the introduction of the administrative penalty, i.e. the additional tax, and the increase of the maximum penalty from the amount of the tax undercharged or would have been undercharged to treble the amount of tax undercharged or would have been undercharged and concluded that the administrative penalty satisfied the rationality test and the proportionality test.

38. The Board has repeatedly stressed the importance it attaches to the submission of true, correct and complete tax returns on time. D35/08, a case included in the Revenue's bundle of authorities, was one such case. In that case the Board stated the principles that were extracted from previous Board decisions including D17/08 and D16/07, another case included in the Revenue's bundle of authorities. The Board stated in paragraphs 51 to 60 in D35/08:

*'51. Articles 106 and 108 of the Basic Law provide that the Hong Kong Special Administrative Region shall have independent finances and practise an independent taxation system.*

*52. Articles 107 and 108 of the Basic Law provide that the HKSAR shall:*

- (a) taking the low tax policy<sup>1</sup> previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation; and*

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<sup>1</sup> Tax rates range from 10% to 17.5%, see Schedules 1 and 8 to the Ordinance.

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(b) *follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.*

53. *Direct taxation on earnings and profits is an important source of income for HKSAR.*

54. *While the tax rates are low and the fiscal system is narrowly based, the demands on general revenue are ever increasing.*

55. *Omission or understatement of receipts in tax returns causes loss in revenue if the returns are accepted by the Revenue as correct. Failure to notify chargeability, if undetected by the Revenue, causes loss in revenue. Delay in submitting returns may delay the timely collection of revenue.*

56. *The Inland Revenue Department makes millions of assessments each year. A high degree of compliance by the taxpayers in submitting timely, true correct and complete tax returns and information to the Revenue is crucial for the effective operation of HKSAR's tax system.*

57. *The Revenue can check the accuracy of returns, conduct field audits and prosecute suspected offenders. It can also deploy resources and manpower to copy information it received to the taxpayers.*

58. *Put in proper perspective, we consider it a waste of the Revenue's limited resources to:*

(a) *conduct checks, investigations and audits which are avoidable had there been a high degree of compliance by taxpayers of their statutory reporting duties; and*

(b) *pamper taxpayers who turn a blind eye to their duty to submit timely, true correct and complete tax returns and information.*

*This is also unfair to the honest and compliant taxpayers who take great care to comply and exercise due diligence in complying with their statutory reporting duties. There is no reason for the honest and compliant taxpayers exercising due diligence in the discharge of their statutory reporting duties to foot the bill. Those in breach, not those who comply, should pay.*

59. *Penalty tax serves two purposes – to punish the delinquent taxpayers and to deter these and other taxpayers.*

60. *The Board takes a serious view of omission or understatement of income, see D16/07, IRBRD, vol 22, 454 at paragraphs 125 - 128, where the Board (Kenneth Kwok Hing Wai SC, Eva Chan Yee Wah and Paul Lam Ting Kwok) cited a number of Board decisions and extracted the following principles from those cases:*
- (a) *Receipt and accrual of income and the total amount in the 12-month period in a year of assessment are factual matters within the personal knowledge of the taxpayer. Such knowledge does not depend on the taxpayer being supplied with employer's return(s) or remembering about employer's return(s).*
  - (b) *In cases where the taxpayer was paid by autopay or deposits into the taxpayer's bank account, the taxpayer could easily have ascertained and checked the correct total amount of income by reference to the banking records.*
  - (c) *Carelessness or recklessness is not a licence to understate or omit one's income.*
  - (d) *While an intention to evade tax is undoubtedly an aggravating factor, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax.*
  - (e) *There is no duty on the part of the Revenue to warn a taxpayer before invoking section 82A<sup>2</sup>.*
  - (f) *Payment of tax is not a relevant factor. It is the duty of every taxpayer to pay the correct amount of tax. If he/she does not pay tax, on time or at all, he/she will be subject to enforcement action.*
  - (g) *The fact that the Revenue was vigilant enough to detect the understatement is not a mitigating factor. The fact that the Revenue suffered no financial loss is not a mitigating factor. It is an aggravating factor if the Revenue has suffered financial loss.*
  - (h) *Financial difficulty or inability to pay the penalty must be proved by cogent evidence.*
  - (i) *In cases of an incorrect return, it is wholly unrealistic for a taxpayer to ask for zero penalty. If anything, this is an indication that the taxpayer is still not taking his/her duties seriously.*

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<sup>2</sup> Section 82A(4) requires the service of a notice of mindedness.

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- (j) *There must be a real difference in penalty between those who mitigate their breaches by being co-operative and those who aggravate their breaches by being obstructive.*
- (k) *A second or further contravention is an aggravating factor. If a taxpayer does not get the message from the Revenue's or the Board's treatment of the first or earlier contraventions and does not take proper steps to ensure full and complete reporting of income, a heavier penalty should, as a general rule, be imposed for subsequent contraventions.*
- (l) *A blatant breach should be punished by a stiff penalty.*
- (m) *In cases where the Board concludes that the additional tax assessment is excessive, the Board will reduce the penalty assessment.*
- (n) *In appropriate cases where the Board concludes that the additional tax assessment is manifestly inadequate, the Board will increase the additional tax assessment.*
- (o) *Where the Board concludes that the appeal is frivolous and vexatious or an abuse of the process of appeal, the Board may impose an order on costs.'*

39. In D37/07, another case included in the Revenue's bundle of authorities, the Board set out the criteria for adopting a 15% starting point for first offenders. Such criteria was repeated in paragraph 61 in D35/08:

'61. In D37/07 IRBRD, vol 22, 839 at paragraphs 45 – 48, the Board (Kenneth Kwok Hing Wai SC, Lawrence Lai Wai Chung and Peter Malanczuk) stated that:

"45. From time to time, taxpayers like the appellant 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.*

46. *It is difficult to see how such taxpayers could hope to win the sympathy of the Board in cases of additional tax of 15% or below.*
47. *The matters put forward by the appellant in this appeal have been consistently rejected by the Board in published decisions, some of which were included in the assessor's bundle of authorities.*
48. *We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the Ordinance, we order the appellant to pay the sum of \$2,500 as costs of the Board, which \$2,500 shall be added to the tax charged and recovered therewith.”*

### **Liability for additional tax**

40. It is an agreed fact that the appellant understated his income and the related quarters value<sup>3</sup>.

41. On the question of whether there is a reasonable excuse, the Board stated in D17/08 at paragraph 268 that:

*‘As section 68(4) puts the burden of proving that the additional tax assessment is incorrect on the taxpayer:*

- (a) the taxpayer must identify and prove an excuse; and*
- (b) the Board must be satisfied that that excuse is reasonable.’*

42. The appellant understated the following:

- (1) the allowance paid by the Employer into the appellant's bank account to pay the mortgage payments in the acquisition of a landed property after the provision of residence ceased; and

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<sup>3</sup> See paragraph 19 above.

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- (2) the education allowance which was also paid by the Employer into the appellant's bank account and that such payment had 'presumably', as he said, started since his daughter started kindergarten which was 'a couple of years' before the date of the Tax Return.

43. The appellant asserted that the understatement arose from a genuine mistake. We do not accept his assertion because:

- (1) he knew that the residence provided by the Employer had ceased as at 26 June 2007;
- (2) the Employer did not leave him homeless for the remainder of the year of assessment;
- (3) he put on the debit side a claim for interest deduction, knowing that the Employer had paid into his bank account the amount of his mortgage payments; and
- (4) he had been receiving education allowance for his daughter for 'a couple of years'.

44. In any event, even accepting his assertion at its face value, he had the means of reporting the correct amount, had he been so minded and had he exercised any due diligence in discharging his statutory reporting duties.

45. The Board has repeatedly held that neither recklessness nor carelessness is a licence or reasonable excuse for understatement of income, see paragraph 60(c) in D35/08 cited in paragraph 38 above.

46. Unlike section 82, intention to evade is not a requirement for liability for additional tax and absence of such intention is irrelevant on the question of liability for additional tax. Further, the Board has repeatedly held that while an intention to evade tax is undoubtedly an aggravating factor, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax, see paragraph 60(d) in D35/08 cited in paragraph 38 above.

47. The appellant has no reasonable excuse and is liable for additional tax.

**Maximum amount of additional tax**

48. It is an agreed fact that the amount of tax which would have been undercharged had the Tax Return been accepted as correct was \$89,180<sup>4</sup>. 3 times that is \$267,540.

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<sup>4</sup> See paragraph 22 above.

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49. The additional tax of \$6,600 did not exceed the amount for which the appellant was liable under section 82A.

**Whether excessive in the circumstances**

50. At the hearing, the appellant snapped at the assessor in response to a question by her. The appellant said:

‘Look, I don’t follow this full-time. I have a full-time job. I am a very busy person. I get letters. I reply to them. What you are saying is all quite confusing, boards and Inland Revenue Department. I just try to follow my best. I rung up the department a couple of time and said I am confused.’

51. We are pleased to note that numerous taxpayers with full-time jobs are very busy persons who do read the letters they receive and do not find them confusing at all.

52. In answer to the question on the steps, if any, he was taking to make sure that future returns will be correct and complete, he said:

‘I am now well aware of the page on our website that gives a full summary of all earnings, which makes it very easy to fill out the tax return, instead of me sitting there with a calculator, adding up pay slips.’

53. Earlier at the hearing, he said:

‘As you can see on that page there, there is only one box there for putting in residence provided by my employer, which I filled in. I then purchased a place, and the housing allowance that I get for that has to go into the mortgage, and that is the part I have missed out, probably because there is no other box for it to go in.

If you see over the page, I have actually listed the property there, so I wasn’t trying to avoid it. It was just a simple mistake that I have missed that part out. The whole point of the thing is if I had got a letter saying “You have made a mistake”, I would correct it, pay my correct tax, end of story. Instead, I get a letter straight away saying “fine”. That is the whole thing I appeal. If you had told me there was a mistake, correct it, and I will pay my tax. I am not trying to avoid tax, I made a simple mistake, and there is no warning and I get a fine, and that is what I am appealing.’

54. We ‘saw over the page’ and noted that the appellant claimed allowance or deduction while omitting it as an income. What the appellant said evinces the absence of any genuine remorse – he sought to blame the Revenue for not writing to invite him to correct his understatement. This turns the statutory duty on its head. It is for him to submit true, correct and complete tax returns on time, not for the Revenue to waste the compliant taxpayers’ money by writing to him to invite him to correct his understatement.



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55. There is no evidence of financial difficulty or inability to pay the penalty or a higher penalty at 15% together with \$5,000 in costs. The best way to avoid any further penalty is to take positive steps to ensure compliance.

56. The matters raised in the appellant's notice of appeal have repeatedly been rejected by the Board in reported decisions, see D35/08 cited in paragraph 38 above.

57. That the Board's function includes the reduction or increase of the assessment appealed against means that the Board should reduce or increase, as the case may be, in appropriate cases.

58. The following are early examples of the Board's increase of the penalty assessments:

- (1) In D41/89, IRBRD, vol 4, 472, the Board increased the penalty assessment from 65% to 100%.
- (2) In D53/92, IRBRD, vol 7, 446, the Board increased the penalty assessments from \$104,000 to \$348,950, i.e. 200% of the tax involved.
- (3) In D65/00, IRBRD, vol 15, 610, the Board increased the penalty assessment from 75% to 100%.

59. The appellant's total income exceeded \$1,500,000. He was employed in a senior position. He had the means of reporting the correct amount of income had he taken the trouble to do so. Putting his case at its highest, through carelessness, he filed incorrect return understating about 1/3 of his income. He showed no genuine remorse. He sought to blame the Revenue for his breach of statutory duty. He argued that it was unfair to penalise him and asked for a waiver of the penalty. He placed on the Employer the responsibility for correct reporting in future.

**Conclusion and order on costs**

60. We conclude that this is an appropriate case to adopt the Board's starting point of 15% and the assessment appealed against should be increased from \$6,600 to \$13,200 which is 14.8% of the amount of tax which would have been undercharged had the Tax Return been accepted as correct.

61. For reasons given above, we consider this appeal to be frivolous and vexatious. We see no reason why the compliant taxpayers should bear the costs of such a waste of public resources. Pursuant to sections 82B(3) and 68(9), the appellant should be ordered to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the additional tax as increased and recovered therewith.

**Summary of Mr Albert To Tak Pui's reasons**

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62. As stated in paragraph 2 above, Mr Albert To Tak Pui dissented. He considered that the appeal should be dismissed; the additional tax assessment should be confirmed and there should be no order on costs. The following is a summary of his reasons.

63. Mr To is satisfied that there was an honest mistake and a 7.4% penalty was enough. The Board should not take away the discretion of the Commissioner. Mr To does not think this is an appropriate case to order costs.

**Disposition of the appeal and costs**

64. Section 65(4)(e) provides that:

*‘For the purpose of hearing and determining an appeal ... a matter arising at a meeting of the Board is determined by a majority of votes of the members present and voting on the matter and, if there is an equality of votes, the member presiding has a casting vote in addition to his or her original vote.’*

65. Pursuant to section 65(4)(e), this appeal is determined by the majority’s decision.

66. The additional tax assessment appealed against **is increased from \$6,600 to \$13,200** under sections 82B(3) and 68(8)(a).

67. The appellant is **ordered to pay** the sum of **\$5,000 as costs** of the Board, which \$5,000 shall be added to the additional tax as increased to \$13,200 and recovered therewith.