

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D127/02

Penalty tax – assets betterment statement – agreement on tax undercharged – sections 80(5) and 82A(4) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Christopher Chan Wai Hong and Winnie Lun Pong Hing.

Date of hearing: 21 January 2003.

Date of decision: 11 March 2003.

In January 1999, the Revenue commenced investigation into the affairs of the appellant and the companies under his control. In February 2002, the Revenue proposed to consider the appellant's position by reference to an assets betterment statement. In July 2002, in the company of his friend and his tax representative, the appellant reached agreement with the Revenue. He accepted that he failed to report earnings totalling \$19,213,440 to the Revenue. The Revenue sent out additional assessments on the basis of the agreed figures. The appellant did not voice any objection in relation to those assessments.

In the company of his friend and his tax representative, the appellant reached an agreement with the Commissioner on the penalties to be paid for the purpose of compounding under section 80(5) of the IRO such offence as he may have committed in relation to his short returns except the amount of penalty to be levied in relation to the amount of salary short returned by him.

The appellant's case was that (i) he had only two years of education and he could hardly read or write; (ii) he engaged an ordinary clerk to look after the accounts of his company; (iii) he entrusted his tax affairs to a firm of accountant and he did not read the returns prior to their submissions as he was illiterate; and (iv) he had been paying tax for years and that was his first transgression.

Held:

1. Illiteracy and lack of knowledge is no excuse. This case involves persistent failure to report very sizeable earnings. Given the turnover of his business, the appellant could easily afford a competent accountant to handle his affairs. The Board is of the view that the appellant is clearly liable for additional tax.

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2. This case involves lengthy investigation by the Revenue. In relation to his other defaults, the appellant voluntarily accepted penalties in excess of 100%. The Board sees no basis to distinguish his salaries tax positions from the position of his two companies.

Appeal dismissed.

Cases referred to:

D52/93, IRBRD, vol 8, 382
D53/88, IRBRD, vol 3, 133

Leung Chung Kan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The facts as found by this Board

1. On 9 April 1985, the Appellant commenced business as sole proprietor in the name of Company A.
2. Company B is a corporation incorporated in Hong Kong on 16 January 1990. At all material times, the Appellant and his wife held a controlling interest in Company B.
3. By a return dated 15 November 1994, the Appellant reported to the Revenue that the assessable profit of Company A for the year of assessment 1993/94 was \$702,126 and he received \$192,000 from Company B as its director.
4. In January 1999, the Revenue commenced investigation into the affairs of the Appellant and companies under his control. On 27 April 1999, the Revenue asked the Appellant to supply documents in relation to Company A. The Appellant complied with this request on 20 August 1999 but the materials supplied were incomplete.
5. On 19 February 2002, the Revenue proposed to consider the Appellant's position by reference to an assets betterment statement. Discussions were held with the Appellant on the statement prepared by the Revenue on 22 May 2002 and 14 June 2002.

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6. On 22 July 2002, in the company of his friend and his tax representative, the Appellant reached agreement with the Revenue. He accepted that he failed to report earnings totalling \$19,213,440 to the Revenue for the years of assessment 1992/93 to 1997/98. It was further agreed between the Appellant and the Revenue that the tax position of himself and his companies be revised as follows:

(a) Salaries tax on the Appellant

Year of assessment	Income after investigation	Income before investigation	Amount of income short returned	Amount of tax undercharged
	\$	\$	\$	\$
1992/93	315,000	0	315,000	39,000
1993/94	<u>208,000</u>	<u>192,000</u>	<u>16,000</u>	<u>2,400</u>
	<u>523,000</u>	<u>192,000</u>	<u>331,000</u>	<u>42,000</u>

(b) Property tax on the Appellant

Year of assessment	Assessable value before investigation	Assessable value after investigation	Amount short returned	Amount of tax undercharged
	\$	\$	\$	\$
1996/97	35,640	0	35,640	4,276
1997/98	48,000	43,200	4,800	0

(c) Profit of Company A

Years of assessment	Profits after investigation	Profits before investigation	Amount short returned	Amount of tax undercharged
	\$	\$	\$	\$
1992/93 to 1997/98	22,744,061	3,902,061	18,789,680	2,815,218

(d) Profit of Company B

Year of assessment	Profits after investigation	Profits before investigation	Amount short returned	Amount of tax undercharged
	\$	\$	\$	\$
1997/98	2,410,226	1,600,179	810,047	120,292

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7. On 12 July 2002, the Revenue sent out additional assessments on the basis of the agreed figures set out in paragraph 6 above. The Appellant did not voice any objection in relation to those assessments.

8. On 22 July 2002, in the company of his friend and his tax representative, the Appellant reached the following agreement with the Commissioner on the penalties to be paid for the purpose of compounding under section 80(5) of the IRO such offence as he may have committed in relation to his short returns referred to in paragraph 6(b) to 6(d) above.

Nature of short return	Amount short returned	Amount of tax undercharged	Penalty agreed	Relationship between the penalty and the amount of tax undercharged
	\$	\$	\$	%
Assessable value				
Short returned	35,640	4,276	5,000	116.93
Profits of Company A	18,789,680	2,815,218	3,375,000	119.88
Profits of Company B	810,047	120,292	130,000	108.07

9. No agreement was reached between the parties on the amount of penalty to be levied in relation to the amount of salary short returned by the Appellant.

10. By notice dated 14 August 2002, the Commissioner informed the Appellant of his intention to impose additional tax under section 82A(4) of the IRO in respect of the defaults of the Appellant for the years of assessment 1992/93 and 1993/94. After considering submissions from the Appellant dated 29 August 2002, the Commissioner, by notices dated 30 September 2002, imposed the following additional tax on the Appellant:

Year of assessment	Amount of tax undercharged	Additional tax levied	Relationship between the additional tax and the amount of tax undercharged
	\$	\$	%
1992/93	39,600	47,000	118.69
1993/94	<u>2,400</u>	<u>3,000</u>	125
	<u>42,000</u>	<u>50,000</u>	119.05

Case of the Appellant

11. The Appellant gave sworn testimony before us. He told us that:

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- (a) He had only two years of education. He could hardly read or write. Various leading developers were however prepared to give him work because of his reliability.
- (b) He engaged an ordinary clerk to look after the accounts of Company A.
- (c) He entrusted his tax affairs to a firm of accountant. He did not read the returns prior to their submissions as he is illiterate.
- (d) He has been paying tax for years and this is his first transgression.

Case of the Revenue

12. The Revenue says that the Appellant is a sophisticated businessman. The turnover of Company A was substantial. The Revenue had to spend considerable time in unraveling his affairs. No attempt was made by the Appellant to work out his true fiscal position and disclose the same to the Revenue.

Our decision

13. As pointed out by this Board in D52/93, IRBRD, vol 8, 382, illiteracy and lack of knowledge is no excuse. This case involves persistent failure to report very sizeable earnings. Given the turnover of his business, the Appellant could easily afford a competent accountant to handle his affairs. We are of the view that the Appellant is clearly liable for additional tax.

14. In D53/88, IRBRD, vol 3, 133 the Board pointed out that penalty at 100% of the amount of tax undercharged is appropriate to those cases:

- (a) where there has been no criminal intent and the taxpayer has totally failed in his or its obligations under the IRO or
- (b) where the Commissioner has had to resort to investigations or the preparation of assets betterment statements or has otherwise had difficulty in assessing the tax or
- (c) where the failure by the taxpayer to fulfill his or its obligations under the IRO has persisted for a number of years.

15. This case involves lengthy investigation by the Revenue. In relation to his other defaults, the Appellant voluntarily accepted penalties in excess of 100%. We see no basis to distinguish his salaries tax positions from the position of his two companies.

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16. For these reasons, we dismiss the appeal and confirm the assessment.