Case No. D15/07

Penalty tax – omitting income – whether assessment excessive – whether manifestly inadequate.

Panel: Kenneth Kwok Hing Wai SC (chairman), David Kwok Sek Chi and Peter Ngai Kwok Hung.

Date of hearing: 7 June 2007.
Date of decision: 10 August 2007.

The appellant omitted his income from his former employer for 1 April 2003 to 12 August 2005 amounting to $378,838. The correct amount being $783,125.

The amount of tax undercharged was $74,840 or 93.69% of the correct amount of tax undercharged. The commissioner imposed additional tax in the amount of $60,000 that is 8% of the amount of tax undercharged. The appellant contended that the assessment was excessive.

Held:

1. The Board rejected the appellant's assertion that the omission or understatement was caused by his alleged unfamiliarity with the tax return and the reporting process. The Board found that the appellant was indeed familiar with them.

2. The Board was of the view that the understatement is significant both in amount and percentage. The Board disagreed that the additional tax imposed at 4.89% of the amount of the tax which would have been undercharged was excessive but found it manifestly inadequate. The Board increased the additional tax from $5,000 to $15,000 that is 14.69% of the amount of the tax which would have been undercharged (D50/05 followed).

Appeal dismissed.

Cases referred to:

D115/01, IRBRD, vol 16, 893
D3/02, IRBRD, vol 17, 396
D59/05, (2005-06) IRBRD, vol 20, 821

D56/06, (2006-07) IRBRD, vol 21, 1051
D80/06, (2007-08) IRBRD, vol 22, 61
D62/96, IRBRD, vol 11, 633
D50/05, (2005-06) IRBRD, vol 20, 656

Taxpayer in person.
Szeto Cheng Wai Ying and Ip Chun Chiu for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal against the assessment ('the Assessment') dated 14 February 2007 by the Deputy Commissioner of Inland Revenue, assessing the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') in the following sum:

Year of assessment	Additional tax	Charge no
2005/06	$6,000	9-1866534-06-1

2. In his tax return for 2005/06, the appellant understated his income by omitting his income from his former employer ('Former Employer') for the period from 1 April 2005 to 12 August 2005 amounting to $378,838. He merely reported his income from his employer ('Employer') for the period from 18 August 2005 to 31 March 2006 amounting to $404,287. The Deputy Commissioner assessed him to additional tax and he appealed.

'In respect of the same facts' vs 'offence'

3. Section 82A(1) provides that:

'*(1) Any person who without reasonable excuse-*

(a) 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; or

(b) makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance; or

> *(c) gives any incorrect information in relation to any matter or thing affecting his own liability to tax or the liability of any other person or of a partnership; or*
>
> *(d) fails to comply with the requirements of a notice given to him under section 51(1) or (2A); or*
>
> *(e) fails to comply with section 51(2),*
>
> *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; or*
>
> *(ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.'*

4. In D56/06, (2006-07) IRBRD, vol 21 1051, the Board (Kenneth Kwok Hing-wai, BBS, SC, William Tsui Hing-chuen, JP and Wong Fung-yi) made the point that there should be agreement or evidence on whether any prosecution under section 80(2) or 82(1) had been instituted in respect of the same facts:

> '*24. The agreed Statement of Facts, like all other agreed statement of facts that we have seen, is silent on the question whether any prosecution under section 80(2) or 82(1) had been instituted in respect of the same facts.*
>
> *25. This is unsatisfactory.*
>
> *26. A person cannot be liable for additional tax under section 82A unless no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts. Whether prosecution has been instituted is a matter of record and this should be agreed or proved.'*

5. The Board has since seen an improvement in that statements of facts prepared by the Revenue dealt with the question of institution of prosecution.

6. However, instead of using the statutory wording of institution of prosecution in respect of the same facts, the Revenue introduced the element of an 'offence' in all the statements of facts that the Board has seen.

7. By way of example, paragraph 10 of the Statement of Facts in this case reads as follows:

> ' No prosecution under section 80(2) or section 82(1) of the IRO has been instituted in respect of the offence which is the subject matter of the present appeal.'

8. Except for cases where taxpayers, with full knowledge of what the admission and agreement entails, agree that they are guilty of a section 80(2) offence or a section 82(1) offence, such drafting is inappropriate. It may be a trap for the unwary and is unfairly prejudicial against taxpayers who are contending on appeal that:

(a) they have reasonable excuse; or

(b) their acts or omissions were not intentional.

9. Section 80(2) provides that:

> '*(1) Any person who without reasonable excuse-*
>
> *(a) 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;*
>
> *(b) makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance;*
>
> *(c) gives any incorrect information in relation to any matter or thing affecting his own liability to tax or the liability of any other person or of a partnership;*
>
> *(d) fails to comply with the requirements of a notice given to him under section 51(1) or (2A); or*
>
> *(e) fails to comply with section 51(2),*
>
> *shall be guilty of an offence: Penalty a fine at level 3 and a further fine of treble the amount of 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, or which has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.'

Absence of reasonable excuse is an essential ingredient of an offence under section 80(2). By agreeing that the subject matter of the appeal constitutes an offence under section 80(2), the taxpayer cannot be heard to say that he has reasonable excuse for the omission or understatement of income.

10. Section 82(1) provides that:

'*(1) Any person who wilfully with intent to evade or to assist any other person to evade tax-*

(a) omits from a return made under this Ordinance any sum which should be included; or

(b) makes any false statement or entry in any return made under this Ordinance; or

(c) makes any false statement in connection with a claim for any deduction or allowance under this Ordinance; or

(d) signs any statement or return furnished under this Ordinance without reasonable grounds for believing the same to be true; or

(e) gives any false answer whether verbally or in writing to any question or request for information asked or made in accordance with the provisions of this Ordinance; or

(f) prepares or maintains or authorizes the preparation or maintenance of any false books of account or other records or falsifies or authorizes the falsification of any books of account or records; or

(g) makes use of any fraud, art, or contrivance, whatsoever or authorizes the use of any such fraud, art, or contrivance,

> *shall be guilty of an offence: Penalty on summary conviction a fine at level 3 and a further fine of treble the amount of tax which as been undercharged in consequence of the offence or which would have been undercharged if the offence has not been detected, and to imprisonment for 6 months, and on indictment a fine at level 5 and a further fine of treble the amount of tax so undercharged or which would have been so undercharged and to imprisonment for 3 years.'*

Wilfulness and intent to evade tax are essential ingredients of an offence under section 82(1). By agreeing that the subject matter of the appeal constitutes an offence under section 82(1), the taxpayer cannot be heard to say that the omission or understatement of income was not wilful or with intent to evade tax. As a general rule, cases of wilful omission or understatement with intent to evade tax should be dealt with by heavy penalties.

11. After we had explained the point to the parties, they agreed to amend paragraph 10 of the Statement of Facts to read as follows:

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

The agreed facts

12. The parties agreed the following facts in the Statement of Facts and we find them as facts.

13. The appellant is appealing against the additional tax imposed under section 82A assessed upon him for the year of assessment 2005/06. The additional tax is issued because the appellant made incorrect Tax Return – Individuals for the year of assessment 2005/06 by omitting income of $378,838 received from the Former Employer.

14. The appellant completed his Tax Return – Individuals for the year of assessment 2004/05 on 9 October 2005 and submitted the return to the [Inland Revenue] Department. [In this return,] the appellant declared in Part 4 (salaries tax) the following income particulars:

Name of Employer	**Capacity Employed**	**Period**	**Total Amount**
Former Employer	Assistant Fabrication Manager	1-6-2004 – 31-3-2005	$600,000

15. The appellant completed his Tax Return – Individuals for the year of assessment 2005/06 ('the Return') on 25 May 2006 and submitted the Return to the Department. In the Return, the appellant declared in Part 4 (salaries tax) the following income particulars:

Name of Employer	Capacity Employed	Period	Total Amount
Employer	Resident Chief Technical Officer	18-8-2005 – 31-3-2006	$404,287

16. In the ... Return, the appellant declared in Part 9 that the information given in the Return, its Appendix (if applicable) and any other documents attached was true, correct and complete.

17. Examination of records of the ... Department ... revealed that the appellant had two employments in Hong Kong during the year from 1 April 2005 to 31 March 2006. Details of the employments are as follows:

	Name of Employer	Period	Amount
(i)	Former Employer	1-4-2005 – 12-8-2005	$378,838
(ii)	Employer	18-8-2005 – 31-3-2006	$404,287
		TOTAL	$783,125

18. On 8 August 2006, the assessor raised a salaries tax assessment on the appellant for the year of assessment 2005/06 based on total assessable income of $783,125 as detailed in paragraph 17 above.

19. The appellant did not file any objection to the assessment.

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 22 November 2006, the Deputy Commissioner ... gave notice to the appellant under the provision of section 82A of the Ordinance that he proposed to assess the appellant to additional tax under section 82A of the Ordinance in respect of the incorrect Return submitted by him for the year of assessment 2005/06.

22. On 1 December 2006, the appellant filed a letter to the Commissioner ... stating that he had completed the ... Return sub-consciously based on the salaries details on the latest employer' s advice, forgetting he actually changed employment in the middle of the financial year of 2005-06 and that the omission was totally un-intentional.

23. On 14 February 2007, the Deputy Commissioner ... after considering the representations made by the appellant for the incorrect ... Return submitted for the year of assessment 2005/06, issued a Notice of Assessment for Additional Tax under section 82A of the Ordinance for the year of assessment 2005/06 to impose additional tax in the amount of $6,000.

This represented 8% of $74,840 which is the amount of tax which would have been undercharged if the Return had been accepted as correct.

24. On 12 March 2007, the appellant gave Notice of Appeal to the Board of Review against the Notice of Assessment and Demand for Additional Tax for year of assessment 2005/06.

Grounds of appeal

25. By letter dated 12 March 2007, the appellant gave notice of appeal on the following grounds:

> ' As stated in my representation, I still maintain that the omission of the income in the tax return was purely a mistake and totally un-intentional. The mistake was made mainly due to myself being un-familiar with completing tax returns as a result of my lack of employment experience in Hong Kong over a long length of time.
>
> The tax return in question was only the second return I completed within the last seven years, the first one being the 2004/05 return. I almost made a mistake too when I filled in that return (please refer to completed 2004/05 tax return attached). Between 1989 and May 2006 I have two working spells in Hong Kong adding up to around four and a half years. Five tax returns have been completed over that period. In filling the 2005/06 return focus was on the income received from my then current employer – [the Employer] and figures from the corresponding tax advice was transferred on the tax return without much thought given to the income received from the previous employer, [Former Employer]. Sub-consciously, I had the impression that this part of the income had already been taken care of in the previous return. The Notification issued by [Former Employer] (please refer to attached) was received in early September, 2005, an eight months time lapse between the receipt of the advice and the moment I completed the 2005/06 return. Admittedly the information was simply carelessly forgotten.
>
> Besides, during the relatively short employment history in Hong Kong I have not the experience of having to change employers in the middle of a fiscal year. Therefore, putting two employers' names on the same tax return was strange to me.
>
> Explanation given above is meant to be an elaboration of the reasons presented in my original representation. I hope it will help you appreciate better the circumstances under which the mistake was committed. In assessing my appeal, please kindly take into consideration the following factors:

1. I have a clean record regarding tax payments. Never in the past I have made mistakes of any kind. I have always been punctual with submissions of tax return and payments.

2. Mistakes are undesirable but unfortunately inevitable. For ordinary citizens/tax payers who do not always enjoy specialist legal and financial advice assistance mistakes of no intent could be excusable, in my own opinion.

3. No actual loss has been incurred to the Government, thanks to the vigilance of the assessors. The length of time over which the "offence" was committed was short and the "offender" is ready to admit his mistakes and causes no delays in the additional payment. Nevertheless, I fully accept that there was inconvenience caused to the Department and for that I apologise with sincerity.

4. My long and constant absence from Hong Kong has made me stranger to many aspects of life in Hong Kong, including formalities related to taxation.'

The appeal hearing

26. Apart from the documents sent with his notice of appeal, the appellant did not place any documents before the Board and did not cite any authority.

27. The respondent supplied the Board with a bundle of documents and a bundle of the following authorities:

(a) Inland Revenue Ordinance, section 68[1];

(b) D112/97, IRBRD, vol 13, 31;

(c) D3/02, IRBRD, vol 17, 396;

(d) D50/05, (2005-06) IRBRD, vol 20, 656;

(e) D88/04, (2005-06) IRBRD, vol 20, 1.

28. The appellant appeared in person at the hearing of the appeal. The respondent was represented by Mrs Szeto Cheng Wai-ying.

[1] This was the only section cited in the Revenue's list of authorities. Neither section 82A nor section 82B was included in the list.

29. The appellant gave evidence on oath confirming the truth of the statements of facts in his grounds of appeal. Mrs Szeto Cheng Wai-ying asked him a few questions by way of cross-examination.

30. Mrs Szeto Cheng Wai-ying did not adduce any oral evidence.

The relevant statutory provisions

31. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall lie on the appellant.

32. Section 70 provides that:

> *'Where no valid objection ... has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income ... assessed thereby ... the assessment as made ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income'.*

33. Section 82A(1) has been quoted in paragraph 3 above.

34. Section 82B(2) provides 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.'*

35. Section 82B(3) provides that section 68 shall, so far as applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.

36. The Board's powers under section 68(8)(a) includes the power to increase the assessment appealed against.

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

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

Incorrect return

39. The appellant told us at the outset of the hearing that his only contention was that the Assessment was excessive and that he was asking for a 'downward adjustment'.

40. Thus, it is clear that he was not disputing that the Return was incorrect. In any event, the salaries tax assessment as made for 2005/06 (see paragraphs 18 and 19 above) has become final and conclusive under section 70.

41. The correct amount of income was $783,125. The income as reported by him in the Return was $404,287. The Return was incorrect in that he omitted or understated his income by 48.38%. In dollar terms, he omitted or understated his income by $378,838. The amount of tax undercharged, or would have been so undercharged if his return had been accepted as correct, was $74,840, or 93.69% of the correct amount of tax of $79,877.

Liability for additional tax & absence of reasonable excuse

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

43. The appellant made it clear to us that he was not saying that there was reasonable excuse. In any event, we do not think there was any.

Maximum amount of additional tax

44. The maximum amount is treble the amount of tax undercharged or which would have been undercharged had the Return been accepted as correct. The amount undercharged or which would have been undercharged was $74,840 and treble that is $224,520. The Assessment of $6,000 does not exceed the maximum amount for which the appellant is liable under section 82A.

Whether excessive having regard to the circumstances

45. In his return for the 2004/05 year of assessment, that is, the preceding year of assessment, he had originally put down '1/6/04-12/8/05' under 'Period' in item 4.1 and '720,000' under 'Total amount ($)' in the same item. He then struck out '12/8/05' and put '31/3/05' above the figures struck out. He also struck out '720,000' and put '600,000' above the figures struck out. He:

(a) claimed 'married person' s allowance';

(b) claimed 'child allowance and dependent brother/sister allowance';

(c) did not elect for 'personal assessment';

(d) did not claim 'deduction for interest payment'; and

(e) did not claim 'dependent parent/grandparent allowance and elderly residential care expenses'.

The return was dated '9/10/05'.

46. 12 August 2005 was the appellant' s last day of employment by the Former Employer. His amendment of his tax return for the preceding year of assessment from '12/8/05' to '31/3/05' was highly material. He offered no explanation. Mrs Szeto Cheng Wai-ying did not probe.

47. In the Return, that is, for the 2005/06 year of assessment, he put down '18/08/05-31/03/06' under 'Period' in item 4.1 and '404,287' under 'Total amount ($)' in the same item. He:

(a) elected for personal assessment;

(b) claimed $29,868 under 'deduction for interest payments';

(c) claimed 'married person' s allowance';

(d) claimed 'child allowance and dependent brother/sister allowance'; and

(d) claimed 'dependent parent/grandparent allowance and elderly residential care expenses'.

The Return was dated '25/05/06'.

48. In response to questions by the Board, the appellant stated that:

(a) he had a contract with the Former Employer and a contract with the Employer[2];

(b) his monthly salary under his employment by the Former Employer was $60,000;

(c) his monthly salary under his employment by the Employer was $54,255; and

(d) both the Former Employer and the Employer paid his wages by autopay into his bank account.

49. In D115/01, IRBRD, vol 16, 893 at paragraph 14, the Board (Patrick Fung Pak Tung SC, Michael Robert Daniel Bunting and Susan Beatrice Johnson) said this:

> '*The notes accompanying a tax return make it quite clear that the duty is on a taxpayer to complete a true and correct tax return. As is stated in the Guidelines, the effective operation of Hong Kong's simple tax system requires a high degree of compliance by taxpayers. If every taxpayer is careless or reckless in making tax returns, the task of the already over-burdened IRD will become impossible to perform. This is unfair to the community at large. A taxpayer therefore cannot be heard to complain if a penalty is imposed against him or her according to the statutory provisions.*'

50. As the Board has said time and again, a taxpayer has the duty to report the correct amount of income.

51. 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 one being spoon-fed by one's employer or remembering about employer's return(s).

52. Knowledge of the total amount of one's annual income and reporting it accurately and in full has nothing to do with familiarity with the tax return or the reporting process. We reject the appellant's assertion that the omission or understatement was caused by his alleged unfamiliarity with the tax return or the reporting process. When it suited his purposes, he had no difficulty familiarising himself with the tax return and the reporting process to elect for and claim, as he did:

(a) personal assessment;

(b) $29,868 under 'deduction for interest payments';

[2] Neither contract was in evidence.

(c) 'married person' s allowance';

(d) 'child allowance and dependent brother/sister allowance'; and

(e) 'dependent parent/grandparent allowance and elderly residential care expenses'.

53. If the appellant had taken the trouble, he could have added up his salary income from his banking records to ascertain and check the correct amount of his income. The appellant has not produced his banking records. He has not told us whether he had checked his income by reference to his banking records, and if so, the reason (if any) for his understatement, and if not, why not. He took the trouble to check the amount of bank interest when it suited his purpose.

54. He knew that he was employed for practically the whole of the 12-month period from April 2005 to March 2006, that his monthly income was not less than $54,000 and that his annual income was not less than $648,000. He knew or ought to have known that his annual income could not be as low as $404,287 and that 18 August 2005 to 31 March 2006 was not the only period during which he was employed in the 12-month period from April 2005 to March 2006.

55. We are not satisfied on a balance of probabilities that the appellant was a credible witness and attach no weight to his evidence.

56. In our decision, the appellant was in reckless disregard of his duty to report the correct amount of his income.

57. Mistakes are undesirable. Many mistakes are avoidable. Carelessness or recklessness is not a licence to understate or omit one' s income. There is no duty on the part of the Revenue to warn a taxpayer before invoking section 82A, see e.g. D115/01, *op. cit*.

58. The appellant held senior positions, as an assistant fabrication manager and as resident chief technical officer. This is an aggravating factor. He could have and should have done better.

59. The understatement is significant, both in amount and percentage.

60. As the Board has said time and again, see for example:

(a) D3/02, IRBRD, vol 17, 396, at paragraph 12 (Kenneth Kwok Hing Wai SC, Winnie Lun Pong Hing and Daniel Wan Yim Keung);

(b) D59/05, (2005-06) IRBRD, vol 20, 821 at paragraph 31 (Kenneth Kwok Hing Wai SC, David Ho Chi Shing and David Wu Chung Shing);

(c) D56/06, (2006-07) IRBRD, vol 21, 1051 at paragraph 46, *op. cit*., and

(d) D80/06 at paragraph 38, (2007-08) IRBRD, vol 22, 61 (Kenneth Kwok Hing Wai, BBS, SC, Ip Tak Keung and Susanna W Y Lee);

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.

61. As the Board has said time and again, see for example:

(a) D62/96, IRBRD, vol 11, 633, at paragraph 23 (Robert Wei Wen Nam QC, John Peter Victor Challen and Benjamin Kwok Chi Bun);

(b) D59/05 at paragraph 32 *op. cit*.;

(c) D56/06 at paragraph 47, *op. cit*.; and

(d) D80/06 at paragraph 40, *op. cit*.;

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.

62. 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. See D50/05, (2005-06) IRBRD, vol 20, 656 at paragraph 41 *op. cit.* (Kenneth Kwok Hing-wai, SC, Peter Sit Kien-ping and Adrian Wong Koon-man) and D59/05 at paragraph 33 *op. cit*.

63. The appellant is a first offender and this is a mitigating factor.

64. The appellant argued that additional tax should be a fixed sum and not by reference to percentage. He cited the sum payable under a fixed penalty ticket for a traffic contravention in support of his argument.

65. We disagree.

66. The amount for a fixed penalty is fixed by statute as the exact sum payable.

67. Section 82A does not fix any amount as the penalty.

68. What it does is to provide for the maximum amount by reference to '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; or (ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected'.

69. For incorrect return cases, the maximum amount varies, depending on the amount of 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'.

70. This is precisely the reason why there are numerous Board decisions making it clear that the correct approach in additional tax cases is to look at the additional tax as a percentage of the amount of tax involved.

D50/05

71. In D50/05, *op. cit.,* the taxpayer was employed by the same employer from 1 April 2003 to 7 October 2003 as operation manager and from 8 October 2003 to 31 March 2004 as 'Contract Operation Mgr'. He reported his income for the latter period but omitted his income for the earlier period. The correct amount of income was $1,360,496 but the taxpayer reported income of $808,417, understating his income by $552,079, or 40.58% of the correct amount of income. He was assessed to additional tax in the sum of $5,000, that is, 4.89% of $102,134, the amount of tax which would have been undercharged had his return been accepted as correct. He appealed on the grounds that:

(a) his unintentional error was forgivable and that he should be exempted from penalty;

(b) when he reached the age of 60, he received a document which showed that he had received $552,079;

(c) at the time when he copied from the employer' s return dated 7 May 2004, he had no recollection of the document which he had earlier received;

(d) he had paid his salaries tax on time;

(e) he thought that since he had paid tax, there was no need to respond to the section 82A(4) notice;

(f) there was no similar error in 30 years;

(g) he did receive two notifications from the employer on two different occasions and his carelessness this time led to the error; and

(h) he would treat his reporting duties seriously.

72. The Board concluded that not only was the additional tax imposed at 4.89% of the amount of the tax which would have been undercharged not excessive, it was manifestly inadequate in all the circumstances of that case and increased the additional tax from $5,000 to $15,000, that is, 14.69%, slightly less than 15%, of the amount of tax which would have been undercharged.

73. In our view, there is no material difference between this case and D50/05.

Conclusion and disposition

74. For the reasons given above, the Assessment is not incorrect and not excessive having regard to the circumstances. It is manifestly inadequate.

75. **Pursuant to sections 68(8)(a) and 82B(3) of the Ordinance, we increase the Assessment from $6,000 to $11,000.** The additional tax is increased by us to 14.7%, slightly less than 15%, of the amount of tax which would have been undercharged.