

**Case No. D20/07**

**Penalty tax** – understating income by deceased taxpayer – sections 54, 64(3), 68(4), 70, 71, 80(2), 82(1), 82A and 82B of the Inland Revenue Ordinance ('IRO')

**Costs** – abuse of the process – section 68(9) of the Inland Revenue Ordinance ('IRO')

Panel: Kenneth Kwok Hing Wai SC (chairman), Kenneth Graeme Morrison and Paul David Stuart Moyes.

Date of hearing: 17 July 2007.

Date of decision: 5 September 2007.

The appellant is the administratrix of the estate of the taxpayer (deceased). Both the deceased and the appellant filed incorrect tax returns understating the income of the deceased. The assessor commenced an investigation into the tax affairs of the deceased which took more than six years. The appellant appointed her son as the authorised representative to handle the investigation. The appellant submitted a proposal for settlement proposing a total understatement of income of over \$4.5 million. In the same communication the appellant also expressed her understanding that the case would be submitted to the Commissioner or the Deputy Commissioner for consideration of penal actions under Part XIV of the IRO. The proposal was accepted by the Revenue and Revised Salaries Tax Assessments were issued. Notices of Assessment and Demand for additional tax under section 82A were also issued. The Additional Tax Assessments imposed at 25.53% of the amount of tax involved. The appellant appealed against the Additional Tax Assessments.

**Held:**

1. The amount of the assessable income has been agreed to under section 64(3) and by virtue of section 70, the Revised Salaries Tax Assessments as agreed to shall be final and conclusive for all purposes of the IRO as regards the amount of such assessable income. In any event, there was no objection against the Revised Salaries Tax Assessments and by virtue of section 70, the revised assessments as made shall be final and conclusive for all purposes of the IRO as regards the amount of such assessable income.
2. Section 82A(6) makes it clear that a person's liability for additional tax does not end with a taxpayer's death. Additional tax shall be payable out of the estate of the

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deceased taxpayer. This is a case where the deceased has totally failed in his obligation under the IRO and the failure has persisted for four years. The Commissioner has had to resort to investigations which took more than six years and the preparation of assets betterment statements. Neither the deceased nor the appellant has any reasonable excuse for understating the deceased's income. The Board takes a serious view of omission or understatement of income. On the facts of this case, a 100% penalty could have been appropriate. The Board has seriously considered whether to increase the Assessments in this case to a percentage between 25.53% and 50%. The Board has decided to defer to the Revenue's assessment of the Son's cooperativeness in this case although the Board thinks the Assessments are on the low side.

3. The Board is of the opinion that plainly this appeal has no prospects of success. It is an abuse of the process. Pursuant to section 68(9), the Board orders the appellant to pay the sum of \$5,000 as costs of the Board.

**Appeal dismissed and cost orders in the sum of HK\$5,000 imposed.**

Cases referred to:

D118/02, IRBRD, vol 18, 90  
D115/01, IRBRD, vol 16, 893  
D66/05, (2005-06) IRBRD, vol 20, 920  
D90/01, IRBRD, vol 16, 757  
D4/06, (2006-07) IRBRD, vol 21, 139

Taxpayer represented by her son.

Mei Yin and Tsa Mei Sheung for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the following assessments all dated 16 April 2007 by the Deputy Commissioner of Inland Revenue (the 'Deputy Commissioner'), assessing the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') in the following sums:

<b>Year of assessment</b>	<b>Additional tax</b>	<b>Charge no</b>
1993/94	\$68,000	9-9452738-94-8
1994/95	\$53,000	9-9452748-95-1

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1995/96	\$38,000	9-9452790-96-6
1996/97	\$24,000	9-9452771-97-A
1997/98	<u>\$11,000</u>	9-4103194-98-0
Total:	<u>\$194,000</u>	

2. The taxpayer ('the Deceased') passed away on 11 February 1998. The appellant, the surviving wife of the Deceased, is the administratrix of the estate of the Deceased. The Deceased filed incorrect tax returns understating his income in respect of the first four years of assessment under appeal. The appellant filed incorrect tax return understating the Deceased's income in respect of the fifth year of assessment. The Assessments are additional, or penalty, tax assessments imposed by the Deputy Commissioner under section 82A of the Ordinance.

***The agreed facts***

3. The parties agreed the facts stated in the Statement of Agreed Facts and we find them as facts.

4. The appellant has appealed against the Assessments for the years of assessment 1993/94 to 1997/98 raised on her by the Deputy Commissioner on 16 April 2007 under section 82A of the Ordinance. The assessments for the years of assessment 1993/94 to 1996/97 were raised on the appellant in the capacity of personal representative of the estate of the Deceased, for the making of incorrect tax returns for these years of assessment by the Deceased while the assessment for the year of assessment 1997/98 was raised on the appellant for her making of incorrect tax return for that year of assessment.

5. The appellant is the surviving spouse of the Deceased who passed away on 11 February 1998 intestate.

6. At all relevant times, the Deceased was the director and shareholder of a company incorporated in Hong Kong in 1986 ('PrivateCo'). It carried on an import and export, and general trading business.

7. On divers dates, Tax Returns-Individuals for the years of assessment 1993/94 to 1997/98 were filed, declaring the following income of the Deceased:

<b>Year of assessment</b>	<b>Income from PrivateCo</b>	<b>Rental income</b>	<b>Return signed by</b>
	\$	\$	
1993/94	72,000	456,000	Deceased
1994/95	72,000	588,000	Deceased
1995/96	72,000	688,000	Deceased

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1996/97	72,000	780,000	Deceased
1997/98	62,143	840,000	Appellant

Throughout the above years of assessment, the Deceased was provided with a rent-free quarters by PrivateCo.

8. The income from PrivateCo together with the rental value in respect of the quarters provided to the Deceased were smaller than the allowances entitled to by the Deceased. Hence no salaries tax assessment was issued. Since the Deceased had elected personal assessment, the assessable income was nevertheless assessed as part of his total income under personal assessment for the years 1993/94 to 1997/98.

9. No objection was lodged against the personal assessments.

10. In January 2000, the assessor commenced an investigation into the tax affairs of the Deceased.

11. By a letter dated 4 January 2000, the assessor invited the appellant for an interview. An employee of PrivateCo telephoned the assessor and informed her that the appellant was temporarily out of town and that the appellant could speak neither English nor Chinese. Arrangement for an interview was then withheld while the assessor proceeded to prepare written enquiries.

12. By another letter dated 4 January 2000, the assessor explained to the appellant the tax obligations of a person administering the estate of a deceased person as provided in section 54 of the Ordinance.

13. On 3 February 2000, the assessor raised on the appellant in the capacity as the personal representative of the Deceased's estate the following assessments (collectively 'the Salaries Tax Assessments'):

<b>Year of assessment</b>	<b>Income</b>	<b>Rental value</b>	<b>Assessable income</b>	<b>Tax payable</b>
	\$	\$	\$	\$
1993/94	5,000,000	500,000	5,500,000	836,880
1994/95	5,000,000	500,000	5,500,000	836,880
1995/96	5,000,000	500,000	5,500,000	836,880
1996/97	5,000,000	500,000	5,500,000	836,880
1997/98	5,000,000	500,000	5,500,000	751,728

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14. By a notice dated 9 February 2000, the appellant objected against the Salaries Tax Assessments on the ground that 'the imposition of additional incomes are not supported by any evidence and should be annulled'.

15. On 10 March 2000, the appellant appointed a firm of certified public accountants (the 'First Representative') as her tax representative.

16. By letter dated 9 June 2000 to the appellant and copied to the First Representative, the assessor enquired about the assets and liabilities of the Deceased.

17. By a letter dated 6 September 2000, the appellant through the First Representative provided the following information:

- (a) the Deceased's only business investment in Hong Kong was his shares in PrivateCo and he had no other business investment outside Hong Kong;
- (b) the Deceased had no assets outside Hong Kong;
- (c) the Deceased did not hold any funds in trust for others;
- (d) other than bank loans, the Deceased had not borrowed money from other persons;
- (e) the Deceased did not receive any inward remittance or make any remittance out of Hong Kong.

18. On 30 March 2001, the assessor sent a letter to PrivateCo asking for the accounting books and records covering the period from 1 January 1993 to 31 December 1999 for examination.

19. Upon request from PrivateCo, the time for submission of the accounting books and records was extended to 30 October 2001. However the information had never been provided.

20. By a letter dated 8 November 2002, the appellant's representative, another firm of certified public accountants (the 'Second Representative'), enquired about the basis of the Salaries Tax Assessments raised on 3 February 2000.

21. By a reply dated 5 December 2002, the assessor explained to the appellant that the assessments were raised with reference to the increase in the net assets of the Deceased during the years 1993/94 to 1997/98 and enclosed an analysis for the appellant's reference.

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22. In response to the assessor's letter of 30 September 2004, the appellant appointed her son (the 'Son'), as the authorised representative to handle the investigation. The Son attended a meeting with the assessor on 12 November 2004 in the presence of the Second Representative and a manager of PrivateCo. The following matters were discussed at the meeting:

- (a) The assessor told the Son that PrivateCo failed to submit the accounting books and records for examination. The Son said that he only joined the management of PrivateCo in July 2000 and was not sure whether the books and records for the earlier years were still available.
- (b) In the absence of accounting books and records, the assessor informed the Son that assets betterment statement (the 'ABS') would be the appropriate method to ascertain the income, if any, understated by the Deceased. A draft ABS prepared for the Deceased covering the period from 1 April 1993 to the date of death indicated a discrepancy of \$23 million odd was shown to the Son.
- (c) The assessor also showed to the Son supporting schedules of the ABS for reference. The Son was informed that the ABS only included the assets and liabilities of the Deceased in Hong Kong. After examining the schedules, the Son made the following comments:

- (i) Bank balances

- The bank balances as at the date of death were incorrect and bank confirmations would be provided later for verification;

- (ii) Money held in trust

- The Deceased held a lot of trust money for his friends and customers in a named country. The money was either placed in fixed deposits in Hong Kong and overseas as security for banking facilities obtained by the Deceased or used to purchase properties. In return, the Deceased guaranteed payment of interest to the beneficiaries. The Son also claimed that the assets reflected in the ABS did not wholly belong to the Deceased as he still owed the beneficiaries a lot of trust money as at his date of death.

- (d) The assessor requested the Son to provide supporting evidence to substantiate the above claims.

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23. On divers dates, the Second Representative provided the assessor with following documents:

- (a) Copies of bank confirmations and a letter from the Estate Duty Office showing the balance of the bank accounts maintained by the Deceased as at date of his death;
- (b) A schedule of interest income from accounts held in name of the Deceased and some companies said to be beneficially owned by him for the years of assessment 1993/94 to 1998/99. The total amount of interest income was approximately \$8 million.

24. The assessor held meetings with the Son and the Second Representative on 18 May 2006 and 14 August 2006 during which the following issues were discussed:

Bank balances

- (a) The assessor was prepared to accept the bank balances as at date of death of the Deceased in accordance with the bank confirmations provided by the Second Representative [paragraph 23(a)].

Fixed deposits interest income

- (b) In respect of the interest income shown in an appendix, the assessor was only prepared to allow the interest derived from accounts held in name of the Deceased in computing the amount of income understated.

Money held in trust

- (c) The Son produced a copy of a reply dated 15 April 1996 made by the Deceased to the Inland Revenue Department (the 'Department') regarding a questionnaire on the acquisition of properties. The Deceased stated in the reply that most of the monies for acquiring the properties were drawn from his personal deposits held with two financial institutions. The Son alleged that the monies in these bank accounts were trust money, hence those properties should not be included in the ABS. The assessor rejected the claim as no supporting evidence had been produced.
- (d) The Son claimed that the Deceased kept separate trust money account for each beneficiary. However, no formal documentation or loan agreement was available as the arrangement was made entirely on a voluntary basis between the Deceased and the beneficiary. Two of the beneficiaries were named. The

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Son said that the trust monies due to these two persons were kept in the Deceased's bank account in a second named country and overseas which had now been frozen as a result of the death of the Deceased. The Son also provided one page of the application for probate in the second named country purporting to show the overseas bank account balances as at date of death of the Deceased.

- (e) Copies of hand written notes claimed to be statements of account maintained with one of the named beneficiaries were produced. The Son claimed that the trust monies due to that beneficiary should be deducted from the ABS discrepancy. The assessor pointed out that the trust monies were kept in the Deceased's overseas accounts, the overseas bank accounts had to be included in the ABS if the trust monies were to be excluded.

25. On 27 September 2006, the Son sent in a proposed basis of settlement (the 'First Proposal') showing a total understatement of \$2,151,786 by the Deceased for years of assessment 1993/94 to 1997/98.

26. On 2 November 2006, the assessor held a meeting with the Son and the Second Representative. The assessor referred to the First Proposal, which did not include other overseas assets, apart from Deceased's bank accounts in the second named country and the living expenses of the Deceased. The assessor also told the Son that the cost of the Hong Kong properties as at 1 April 1993 had been overstated.

27. On 16 November 2006, the Son sent in another proposed basis of settlement (the 'Second Proposal') showing a total understatement of \$5.01 million odd by the Deceased for years of assessment 1993/94 to 1997/98. In the proposal, the Son explained the operation of trust money accounts and said that the Deceased prepared fixed deposits account and normal account for each beneficiary manually. The trust money kept in fixed deposits account would roll over with interest and when the fixed deposits account was closed, the principal and interest would be transferred to the normal account. Fixed deposits and normal accounts for the two named beneficiaries prepared by the Deceased were attached to the Second Proposal.

28. During a meeting held on 20 November 2006, the Son provided a copy of the Grant of Letters of Administration in a third named country and bank confirmations showing the bank balances as at the date of death of the Deceased for the assessor's consideration on the trust monies from the other named beneficiary. The assessor also clarified and agreed with the Son on following adjustments:

- (a) Interest income of \$6.2 million odd would be allowed, restricted to those derived from the bank accounts held in name of the Deceased both in Hong Kong and overseas.

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- (b) The amount of trust money due to the two named beneficiaries as at date of death of the Deceased would be \$8.7 million and \$6 million respectively.
- (c) The amount of overseas bank deposits held in the second and third named countries as at date death of the Deceased would be \$2.6 million and \$2 million respectively.
- (d) The amount of estimated living expenses and legal expenses incurred by the Deceased would be reduced by \$0.5 million and \$0.3 million respectively.

The Son said he would seek the appellant's approval before sending in the final proposed basis of settlement.

29. By a letter dated 22 November 2006, the appellant submitted a proposal (the 'Final Proposal') proposing a total understatement of income of \$4,589,763 by the Deceased for the years of assessment 1993/94 to 1997/98. In the same letter, the appellant also expressed her understanding that the case would be submitted to the Commissioner or the Deputy Commissioner for consideration of penal actions under Part XIV of the Ordinance.

30. On 20 December 2006, Revised Salaries Tax Assessments for the years of assessment 1993/94 to 1997/98 were issued to the appellant in accordance with the Final Proposal.

31. The Deceased's assessable income before and after investigation and the amount of tax undercharged in consequence of the Deceased's and the appellant's submission of incorrect Tax Returns – Individuals are as follows:

<b>Year of assessment</b>	<b>Assessable income before investigation</b>	<b>Assessable income after investigation</b>	<b>Income understated</b>	<b>Tax undercharged</b>
	\$	\$	\$	\$
1993/94	79,200	997,150	917,950	157,763
1994/95	79,200	997,150	917,950	159,412
1995/96	79,200	997,150	917,950	156,070
1996/97	79,200	997,150	917,950	152,390
1997/98	<u>68,357</u>	<u>986,320</u>	<u>917,963</u>	<u>134,109</u>
	<u>385,157</u>	<u>4,974,920</u>	<u>4,589,763</u>	<u>759,744</u>

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The percentage of income understated to the total income assessed after investigation is 92.25%.

32. By a notice under section 82A(4) of the Ordinance dated 24 January 2007, the Deputy Commissioner informed the appellant of his intention to assess additional tax in respect of the incorrect returns filed by the Deceased for years of assessment 1993/94 to 1996/97 and the incorrect return filed by the appellant for the year of assessment 1997/98. The appellant was also informed that she had the right to submit written representations with regard to the proposed assessment of additional tax.

33. By a letter dated 19 February 2007, the Son on behalf of the appellant filed representations to the Deputy Commissioner. No prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts. On 16 April 2007, having considered and taken into account the appellant's representations, the Deputy Commissioner issued the following Notices of Assessment and Demand for additional tax under section 82A of the Ordinance:

<b>Year of assessment</b>	<b>Tax undercharged</b> \$	<b>Section 82A additional tax</b> \$	<b>Additional tax as percentage of tax undercharged</b>
1993/94	157,763	68,000	43.10%
1994/95	159,412	53,000	33.25%
1995/96	156,070	38,000	24.35%
1996/97	152,390	24,000	15.75%
1997/98	<u>134,109</u>	<u>11,000</u>	8.20%
Total:	<u>759,744</u>	<u>194,000</u>	25.53%

34. By a notice dated 12 May 2007, the Son on behalf of the appellant appealed to the Board of Review against the additional tax assessments for the years of assessment 1993/94 to 1997/98.

***The appeal hearing***

35. By letter dated 9 May 2007, the appellant gave notice of appeal on the following grounds:

‘With reference to your (*sic*) penalty demands recd by us for the case of my father [the Deceased], I would like to request you to waive the penalty and relieve the deceased family from financial pressure.

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This amount is a huge burden on our already very bad financial condition with many private liabilities and bank liabilities due.

I have already explained my case to you that my father passed away all of a sudden. He was handling a multi-million dollar company with many complicated transactions which were only in his knowledge. I had never been in business and so could not furnish all the details and went with a compromise settlement with the revenue department. Even after looking in the facts of situation we have been further burdened with a penalty of around HKD 200,000. Out of great difficulty, we are paying the installment for the tax due for 10000 HKD every month. Our company has accumulated losses of more than 20 Million HKD, and I am working very hard to recover these losses.

Please understand the difficult situation my mother and my family is going through. For all the hard work my father had put by working in Hong Kong and keeping 35 people employed who earned a good living from his company, if this is what his family has to go through then how will somebody like us survive.

Please have mercy on us and our family and waive the penalty. I personally beg you for your kindness on behalf of my full family.

We would be very grateful for your kindness. This has been a very special case so please consider. If you wish, I can come to meet you in person to explain my situation.'

36. The appellant was represented by the Son and the respondent by Ms Mei Yin. Neither side called any witness.

***THE BOARD'S DECISION***

***The relevant statutory provisions***

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

38. Section 64(3) provides that:

*'(3) In the event of the Commissioner agreeing with any person assessed, who has validly objected to an assessment made upon him, as to the amount at which such person is liable to be assessed, any necessary adjustment of the assessment shall be made.'*

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39. Section 70, so far as relevant, provides that:

*'Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income ... assessed thereby ... or where the amount of the assessable income ... has been agreed to under section 64(3) ... the assessment as made or agreed to ... as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income ...*

*Provided that nothing in this Part shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year.'*

40. 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) ...*

*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 ...'*

41. Section 82A(6) provides that:

*'(6) Where a person who is liable to be assessed to additional tax has died, an assessment to additional tax may be made on his executor, and the additional tax shall be recovered as a debt due from and payable out of the deceased person's estate.'*

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42. Section 82B(2) provides that:

'(2) *On an appeal against assessment to additional tax, it shall 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.'*

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

***Incorrect returns***

44. The appellant objected to the Salaries Tax Assessments raised on 3 February 2000.

45. By letter dated 22 November 2006, the appellant submitted the following proposal, that is, the Final Proposal, to settle the objection:

'I hereby agree that my assessable income be computed as follows and I understand that by compromising and by not objecting to the assessments to be issued pursuant to the compromise, the assessments shall become final and conclusive under section 70 of the Inland Revenue Ordinance (the Ordinance). It is established law that the Board of Review has no authority to disturb assessments which are final and conclusive:

<b>Year of assessment</b>	<b>Assessable income</b>	<b>Income already reported/assessed</b>	<b>Additional assessable income</b>
	\$	\$	\$
1993/94	997,150	79,200	917,950
1994/95	997,150	79,200	917,950
1995/96	997,150	79,200	917,950

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1996/97	997,150	79,200	917,950
1997/98	986,320	68,357	917,963
Total	4,974,920	385,157	4,589,763

I also agree to accept the following revised assessable/additional assessable income in settlement of the objections against the previous assessments and I understand that the revised assessments to be issued pursuant to the compromise shall be final and conclusive under section 70 of the Ordinance:

<b>Year of assessment</b>	<b>Revised assessable income</b>	<b>Revised additional assessable income</b>
	\$	\$
1993/94		917,950
1994/95		917,950
1995/96		917,950
1996/97		917,950
1997/98		917,963
Total		4,589,763

I also understand that acceptance of the above-mentioned assessable income does not conclude the whole matter and that the case will be put up to the Commissioner or Deputy Commissioner for consideration of penal actions under Part XIV of the Inland Revenue Ordinance, which include prosecution, compounding or imposition of Additional Tax. If Additional Tax is to be imposed, the maximum amount could be treble the amount of the tax undercharged which would be premised on the entire amount of understatement agreed.

I also understand that I have the right to seek independent professional advice and I have sought professional advice before signing the agreement.'

46. The Final Proposal was accepted by the Revenue and Revised Salaries Tax Assessments were issued on 20 December 2006 to the appellant in accordance with the Final Proposal, see paragraph 30 above.

47. Thus the amount of the assessable income has been agreed to under section 64(3) and by virtue of section 70, the Revised Salaries Tax Assessments as agreed to shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income.

48. In any event, there was no objection against the revised Salaries Tax assessments issued on 20 December 2006 and by virtue of section 70, the revised assessments as made shall be

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final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income.

49. By her letter dated 22 November 2006, the appellant acknowledged her understanding that:

- (a) by compromising and by not objecting to the assessments to be issued pursuant to the compromise, the assessments shall become final and conclusive under section 70;
- (b) it is established law that the Board of Review has no authority to disturb assessments which are final and conclusive; and
- (c) the matter was not concluded and the case would be referred to the Commissioner or her deputies for consideration of penal actions.

50. The Deceased or the appellant, as the case may be, submitted returns reporting the following as the Deceased' s salary income:

<b>Year of assessment</b>	<b>Income from PrivateCo</b>
	\$
1993/94	72,000
1994/95	72,000
1995/96	72,000
1996/97	72,000
1997/98	62,143

51. The correct amounts of income are as follows:

<b>Year of assessment</b>	<b>Correct amount of income</b>	<b>Income understated</b>
	\$	\$
1993/94	997,150	917,950
1994/95	997,150	917,950
1995/96	997,150	917,950
1996/97	997,150	917,950
1997/98	997,150	917,950

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52. The Deceased and the appellant, as the case may be, made incorrect returns by grossly understating the Deceased's income. As the appellant well knew, it is not open to her to argue that the Deceased and she had not understated the Deceased's income. Nor is open to her to dispute the amounts of understatement as stated in paragraph 51 above.

***Whether liable for additional tax***

53. The Deceased understated his income in his returns.

54. Section 82A(6) makes it clear that a person's liability for additional tax does not end with his death. Additional tax shall be payable out of the estate of the deceased taxpayer. The beneficiaries of a deceased's estate are not allowed to benefit at the expense of the Revenue, the Government and the public from a deceased taxpayer's understatement of income and from his death.

55. We do not accept that the appellant and the Son have any insuperable difficulty in dealing with the Deceased's tax matters. As Ms Mei Yin pointed out, he managed to reduce the amount of discrepancy from the initial sum of \$23 million odd to the final agreed amount of \$4.5 million odd.

56. If the appellant had any real difficulty, it was a difficulty created by the Deceased himself by not reporting the correct amounts of income and not keeping proper records of his income. Additional tax was raised in respect of the Deceased's gross understatement of his income. The Deceased and the administratrix of his estate cannot rely on the Deceased's own failures to report the correct amounts of income and to keep proper records.

57. The Son relied on the raising of 'query on the property' sometime in 1996 and claimed that had further query been raised, 'they would have easily been answered by [the Deceased]'. Whether or not the Deceased could easily have answered any further query is a matter on which there is no evidence and is a matter of conjecture. The 'query' relied are standard form Questionnaires issued in 1996 for property tax purposes. In any event, there is no allegation of any trust holding, whether of the properties or of any account with any financial institution, in the Deceased's reply. The Revenue was not then investigating the Deceased's tax affairs. There was no reason why the Revenue should have raised any further query then.

58. Neither the Deceased nor the appellant has any reasonable excuse for understating the Deceased's income.

***Maximum amount of additional tax***

59. The maximum amount is treble the amount of tax undercharged or which would have been undercharged had the deceased's returns been accepted as correct. The amount

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undercharged or which would have been undercharged was \$759,744 and treble that is \$2,279,232.

60. The maximum amount of additional tax depends on the size of the tax undercharged. If the tax undercharged is large, the maximum amount is three times as large.

***Whether excessive having regard to the circumstances***

61. The Board takes a serious view of omission or understatement of income. On the facts of this case, a 100% penalty could have been appropriate, see D118/02, IRBRD, vol 18, 90, a leading authority on penalty tax. All that the Assessments did was to compensate the Revenue for being kept out of the monies which should have been paid as salaries tax. There was no penal element at all. On any reckoning, the Assessments are not excessive.

62. 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] stressed the importance of true and complete reporting by taxpayers:

*'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.'*

63. This is a case where:

- (a) the Deceased has totally failed in his obligations under the Ordinance; and
- (b) the Commissioner has had to resort to investigations which took more than six years and the preparation of assets betterment statements in assessing the tax; and
- (c) the failure by the Deceased to fulfil his obligations under the Ordinance has persisted for four years.

64. D118/02, IRBRD, vol 18, 90, is a decision of a panel chaired by the then chairman of the Board, Mr Ronny Wong Fook-Hum, SC, sitting with two deputy chairmen, Professor Andrew J Halkyard and Mr Kenneth Kwok Hing Wai, SC. At paragraphs 48 and 50, the Board said that:

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‘48. *One of the earliest statement in relation to assessment at 100% of the tax involved is to be found in D53/88, IRBRD, vol 4, 10. The Board there 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.*

49. ...

50. *The circumstances of each particular case must be examined bearing in mind that the maximum penalty is 300%. Depending on the circumstances of each individual case, the Board has approved additional tax at 200% of the tax involved in D22/90, IRBRD, vol 5, 167 and in D53/92, IRBRD, vol 7, 446 and at 210% of the tax involved plus 7% compound interest per annum in D43/01, IRBRD, vol 16, 391.’*

65. Applying D118/02, but substituting ‘and’ for ‘or’ in paragraph 48(a) and (b) in that decision, this is a case where a 100% starting point would have been appropriate.

66. The Deceased and the appellant, as the case may be, submitted incorrect returns in all five years of assessment. Income was understated by 92.25% or \$4,589,763.

67. Because of the understatement, the Deceased did not have to pay any tax for the five years of assessment. Tax undercharged totalled \$759,744.

68. With the appellant’s co-operation, the investigation into the Deceased’s tax affairs took more than six years. If the appellant had incurred professional fees, that was a price which the estate had to pay for the Deceased’s gross understatement of his income. Public resources and funds were used to investigate the Deceased’s incorrect tax returns and this is clearly an aggravating, not mitigating, factor.

69. The Son argued that he had difficulty furnishing information. We have dealt with that argument in paragraph 55 above. If there was any difficulty, it was caused by the Deceased.

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70. There was actual loss to the Revenue. The average prime rate over the relevant period was more than 7% per annum. The Assessments represented no more than interest on the lost revenue at 7% per annum compound, rounded down from \$197,165 to \$194,000. We emphasize that there is no penal element at all in the Assessments.

71. The Son pleaded for a waiver. That is wholly unrealistic.

72. The Son alleged financial difficulty. The Assessments are to be paid out of the estate. There is no evidence that the estate cannot afford to pay the Assessments. The Provisional Schedule of the property of the Deceased dated 17 October 2005 shows that the net provisional principal value of estate was \$21,567,858.18.

73. The audited financial statements of PrivateCo for the year ended 31 December 2005 showed that PrivateCo:

- (a) had a turnover of \$95,626,972.40;
- (b) made charitable donations amounting to \$16,200;
- (c) had a positive cash flow of about \$1.6 million;
- (d) made a profit of \$780,972.64 for the year; and
- (e) had a net asset value of \$3,951,940.77.

74. There is no evidence of the estate's inability to pay penalty tax up to 100% of the tax undercharged of \$759,744 and we reject the allegation of inability or financial difficulty.

75. The Son claimed that around \$120,000 had been paid to the Revenue sometime in 2004, 2005 or 2006 showing their sincere approach to settling the case. The allegation is vague and lacking in details. The tax payable under the Salaries Tax Assessments referred to in paragraph 13 above totalled \$4,099,248. Unless such tax was held over, it had to be paid sometime in 2000, see section 71 which provides as follows:

- (1) *Tax charged under the provisions of this Ordinance shall be paid in the manner directed in the notice of assessment on or before a date specified in such notice. Any tax not so paid shall be deemed to be in default, and the person by whom such tax is payable, or where any tax is payable by more than one person or by a partnership then each of such persons or each partner in the partnership, shall be deemed to be a defaulter for the purposes of this Ordinance.*
- (2) *Tax shall be paid notwithstanding any notice of objection or appeal, unless the Commissioner orders that payment of tax or any part thereof be held over pending the result of such objection or appeal:*

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*Provided that where the Commissioner so orders he may do so conditionally upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the amount of tax or any part thereof the payment of which is held over either-*

*(a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap 289); or*

*(b) by furnishing a banker's undertaking,*

*as the Commissioner may require.'*

The burden of proving a payment on account of tax or a payment in excess of any tax due and payable and not held over lies on the Son. The Son made no allegation of any holding over. Ms Mei Yin said there was a partial holding over, leaving a total of \$3 million as tax payable. Paying around \$120,000 did not show any sincerity. It shows default in paying salaries tax as and when it fell due.

76. If, as we were told by Ms Mei Yin, there was no holding over and no payment of the Assessments, there is further and continuing default in paying tax. Plainly, these are not mitigating factors.

77. We accept that the appellant was co-operative and that explains why the Deputy Commissioner gave a very substantial discount from the 100% starting point.

78. In our decision, the Assessments imposed at 25.53% of the amount of tax involved are not excessive on any reckoning.

79. D66/05, (2005-06) IRBRD, vol 20, 920, is a case where the personal representative of a deceased taxpayer was assessed to additional tax at 24.4%. The deceased reported no or low salary income for the years of assessment 1993/94–1996/97, understating income by \$5,730,000 (95.26% of his income). The investigation by the Revenue took 5 years 9 months and the Revenue had to resort to the use of assets betterment statements. The appellant in that case was co-operative up to the stage of the compromise of the discrepancy and then tried his very best to destroy mitigating factors and create aggravating factors. The Board (Kenneth Kwok Hing Wai, SC, Paul Chan Mo Po and William Tsui Hing Chuen) increased the assessments to \$473,500, about 50% of the tax undercharged.

80. We have seriously considered whether to increase the Assessments in this case to a percentage between 25.53% and 50%.

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81. There is a material distinction between this case and D66/05. The appellant has been co-operative throughout.

82. 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, see:

- (a) D90/01, IRBRD, vol 16, 757 at paragraph 47 (Kenneth Kwok Hing Wai SC, Edward Chow Kam Wah and Jason Yuen King Yuk); and
- (b) D4/06, (2006 – 07) IRBRD, vol 21, 139 at paragraph 36 (Kenneth Kwok Hing Wai SC, David Li Ka Fai and Horace Wong Ho Ming).

83. The assessors who have been dealing with the Son during the investigation must have been truly impressed by his cooperativeness. Ms Mei Yin who defended the Assessments with vigour and was at the same time scrupulously fair to the appellant, stressed the Son's cooperativeness. After careful consideration, we have decided to defer to the Revenue's assessment of cooperativeness in this case as they have been dealing with the investigation for more than six years and not to increase the Assessments although we think they are on the low side.

***Disposition and Costs Order***

84. We dismiss the appeal and confirm the Assessments.

85. We are of the opinion that plainly this appeal has no prospects of success. It is an abuse of the process. Pursuant to section 68(9), we order the appellant to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the tax charged and recovered therewith.