Case No. D31/03

Penalty tax – incorrect return – a one-off understatement – a delay of about six years in collecting tax – no reasonable excuse – not remorseful but co-operative as investigation was concluded in about six months – liable to be assessed to additional tax – there must be an element of punishment for understating income – 72.8% was not excessive in the circumstances – assessment made on the basis of the compromise agreement reached between the Revenue and the appellant was final and conclusive – sections 68(4), 70, 82A(1)(a) and 82B(3) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Patrick Ho Pak Tai and David Li Ka Fai.

Date of hearing: 26 April 2003.
Date of decision: 11 June 2003.

The appellant appealed against the additional assessment dated 8 January 2003 by the Commissioner of Inland Revenue, assessing the appellant to tax under section 82A of the IRO for the year of assessment 1995/96 in amount of $26,000 ('the assessment').

In a gist, starting from July 1994 the appellant was employed by the Employer. As from 13 July 1995, the appellant provided services to the Employer in the name of his sole proprietorship business. As from 16 March 1996, the appellant was again employed by the Employer until the employment ceased on 31 May 1996.

The assessor commenced an investigation into the appellant's tax matters and on 28 March 2002 issued estimated assessments on salaries tax, profits tax and personal assessment, which were objected by the appellant.

At the end, on 8 October 2002, the Commissioner gave notice to the appellant under section 82A of the IRO that he proposed to assess the appellant to additional tax in respect of the year of assessment 1995/96.

The appellant made written representations on 23 October 2002 in response to the notice given by the Commissioner.

On 8 January 2003, the Commissioner, having considered the appellant's representations, issued the notice of assessment for additional tax under section 82A of the IRO for the year of assessment 1995/96 in amount of $26,000. The amount of additional tax charged was

72.8% of the amount of tax that would have been undercharged had the tax return for the year of assessment been accepted as correct.

The appellant appealed against this additional assessment dated 8 January 2003 by the Commissioner.

The facts appear sufficiently in the following judgment.

Held:

1. The relevant provision for making incorrect return by understating income was section 82A(1)(a) of the IRO.

2. According to sections 82B(3) and 68(4), the onus of proving that the assessment appealed against was excessive or incorrect was on the appellant.

3. The appellant claimed that when he notified the Business Registration section in July 1996 of the cessation of business of his sole proprietorship business, he enclosed a copy of the purported profit and loss account of his sole proprietorship business for the year of assessment 1995/96. The Board did not believe the appellant and decided against him on this question of fact on the following grounds:

    (a) There was no reason, and none had been offered by the appellant, for sending the account to the Business Registration section instead of the assessor.

    (b) He had not produced a copy of the written communication with the Business Registration section. He claimed that he did not have a copy. This is odd since he had what he alleged was an enclosure. He had not requested the Business Registration section for a copy of the written communication.

    (c) If he had meant to inform the Commissioner of the profits of his sole proprietorship business by sending a copy of the account to the Business Registration section, he should have noticed that the assessment was incorrect in that it omitted the profit of his sole proprietorship business and he should have notified the assessor. When confronted with the assessment, he chose to lie by alleging that he had not received it. This assessment was stated as a fact in the statement of facts and the assessment was one of the attachments to the statement of facts.

(d) He should have noticed that he had not received any tax demand note for the year of assessment 1995/96. He did nothing about the non-receipt of any tax demand note although he conceded that the tax demand note might have been lost in the mail.

(e) Clearly, he did not report the income for the period from 13 July 1995 to 15 March 1996 from the Employer; accepted the assessment because it was in accordance with his reported income; and expected no tax demand note.

4. The salaries tax assessment made on the basis of the compromise agreement reached between the Revenue and the appellant was final and conclusive under section 70 of the IRO. The correct amount of his salary income for the year of assessment 1995/96 was $297,788 but he reported only $73,388. His return was incorrect in that he had understated his salary income by $224,400. He had no reasonable excuse and was liable to be assessed to additional tax under section 82A(1)(a).

5. There was a delay of about six years in collecting tax from him for the year of assessment 1995/96. At 7% per annum this would be about 42% to 50%, depending on whether it was at simple or compound interest. There must be an element of punishment for understating income. The penalty in this case was 72.8%. The appellant did not seem to be remorseful. This was a one-off understatement and the appellant was co-operative in that the investigation was concluded in about six months. The Board decided that 72.8% was not excessive in the circumstances.

6. For the above reasons, the appellant had not discharged the onus of proving that the assessment was excessive or incorrect. The Board dismissed the appeal and confirmed the assessment.

Obiter:

1. The Board must record its disquiet about the conduct of the respondent's representative, Mr Chin Heh-ching, Joseph.

2. At the meeting with the assessor on 7 September 2002, Mr Chin Heh-ching, Joseph, told the appellant that agreement on the underlying tax and penalty matters were handled independently. What he did not tell the appellant was that by compromising and by not objecting to any assessment which might be issued pursuant to the compromise, the assessment would become final and conclusive under section 70 of the IRO.

3. What Mr Chin Heh-ching, Joseph, said according to paragraphs 4 and 5 of the relevant notes of interview might be misleading in that a taxpayer might be induced to think that he could still argue the salary/profit point before the Commissioner or the Board of Review.

4. Further, the Board had the following to say in respect of the conduct of Mr Chin Heh-ching, Joseph, at the hearing before the Board.

5. In his written submission, he quoted D52/93, IRBRD, vol 8, 372:

> '*The normal measure of a penalty is 100% of the tax undercharged, assuming that there are no aggravating or mitigating facts.*'

6. Although Mr Chin Heh-ching, Joseph, was aware of D118/02, IRBRD, Vol 18, 90 decided on 23 January 2003, he did not cite or mention it. That was a decision which disapproved the 100% starting point for reasons given in paragraphs 46 to 50 therein.

7. D118/02 was clearly relevant to the submission of Mr Chin Heh-ching, Joseph.

8. Barristers are bound by their professional code to ensure that the court or tribunal is informed of any relevant decision on a point of law or any legislative provision, of which they are aware and which they believe to be immediately in point, whether it be for or against their contention.

9. Citing a relevant decision does not prevent an advocate from arguing that the decision is distinguishable or wrongly decided (unless it is binding on the court or tribunal). If the advocate does not think that the relevant decision is distinguishable or wrongly decided or if the advocate knows that the decision is binding, and if he hides the relevant decision, he may be thought to be trying to induce the court or tribunal to reach a wrong decision. Any such attempt prejudicially affects the credibility of both the party and the advocate and cannot be in the long term interests of either. Nor is it in the best interests of justice.

10. On a related but different topic, the Board asked Mr Chin Heh-ching, Joseph, whether he wished to support the assessment without relying on the penalty policy which D118/02 disapproved. It might have assisted if Mr Chin Heh-ching, Joseph, had made an attempt to do so or else conceded the appeal.

Appeal dismissed.

Cases referred to:

D52/93, IRBRD, vol 8, 372
D118/02, IRBRD, vol 18, 90

Joseph Chin Heh Ching for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the additional assessment dated 8 January 2003 by the Commissioner of Inland Revenue, assessing the Appellant to tax under section 82A of the IRO for the year of assessment 1995/96 under charge number 9-4219521-96-1 in amount of $26,000 ('the assessment').

2. The relevant provision is section 82A(1)(a) of the IRO for making incorrect return by understating income.

3. The facts in the statement of facts are not disputed by the Appellant and we find them as facts.

4. Starting from July 1994 the Appellant was employed by the Employer. As from 13 July 1995, the Appellant provided services to the Employer in the name of his sole proprietorship business. As from 16 March 1996, the Appellant was again employed by the Employer until the employment ceased on 31 May 1996.

5. In the tax return - individuals for the year of assessment 1995/96 dated 5 June 1996, the Appellant declared salary income of $73,388 for his employment by the Employer from 1 April 1995 to 12 July 1995; left the whole of the section on 'Profits Tax – Sole Proprietorship Business' blank; and did not declare any of the profit or income of his sole proprietorship business.

6. Based on the Appellant's return, the assessor issued an assessment dated 3 September 1996 showing salary income of $73,388 with tax payable of '0', with the box for sole proprietorship business profit being left blank.

7. The assessor commenced an investigation into the Appellant's tax matters and on 28 March 2002 issued estimated assessments on salaries tax, profits tax and personal assessment.

8. The Appellant objected to the estimated assessments on 8 April 2002.

9. In a meeting on 27 April 2002, the Appellant submitted what purported to be a copy of the profit and loss account of his sole proprietorship business for the year of assessment 1995/96. The purported copy account showed consultancy income from the Employer of $224,400 and net profit of $195,113.

10. On 7 September 2002, the Appellant met the assessor and agreed to treat the income from the Employer of $224,400 of his sole proprietorship business for the year of assessment 1995/96 as salary income. He reserved his position on the treatment by the Revenue of the income of his sole proprietorship business.

11. Based on the compromise agreement, the assessor cancelled the profits tax assessment for the year of assessment 1995/96 and revised the salaries tax assessment for the year of assessment 1995/96 to show income of $297,788, with tax payable of $35,697.

12. Thus, the income as reported by the Appellant before investigation was $73,388; the income after investigation was $297,788; the income understated was $224,400; and the tax undercharged was $35,697. The amount understated was 75.4% of the income after investigation.

13. On 8 October 2002, the Commissioner of Inland Revenue gave notice to the Appellant under section 82A of the IRO that he proposed to assess the Appellant to additional tax in respect of the year of assessment 1995/96.

14. The Appellant made written representations on 23 October 2002 in response to the notice given by the Commissioner.

15. On 8 January 2003, the Commissioner, having considered the Appellant's representations, issued the notice of assessment for additional tax under section 82A of the IRO for the year of assessment 1995/96 in the amount of $26,000. The amount of additional tax charged is 72.8% of the amount of tax that would have been undercharged had the tax return for the year of assessment been accepted as correct.

16. By letter dated 4 February 2003 received by the Board on 6 February 2003, the Appellant gave notice of appeal.

17. The onus of proving that the assessment appealed against is excessive or incorrect is on the Appellant, sections 82B(3) and 68(4).

18. The Appellant claimed that when he notified the Business Registration section in July 1996 of the cessation of business of his sole proprietorship business, he enclosed a copy of the purported profit and loss account of his sole proprietorship business for the year of assessment 1995/96 referred to in paragraph 9 above. We do **not** believe the Appellant and decide against him on this question of fact.

(a) There was no reason, and none had been offered by the Appellant, for sending the account to the Business Registration section instead of the assessor.

(b) He had not produced a copy of the written communication with the Business Registration section. He claimed that he did not have a copy. This is odd since he had what he alleged was an enclosure. He had not requested the Business Registration section for a copy of the written communication.

(c) If he had meant to inform the Commissioner of Inland Revenue of the profits of his sole proprietorship business by sending a copy of the account to the Business Registration section, he should have noticed that the assessment referred to in paragraph 6 above was incorrect in that it omitted the profit of his sole proprietorship business and he should have notified the assessor. When confronted with the assessment, he chose to lie by alleging that he had not received it. This assessment was stated as a fact in the statement of facts and the assessment was one of the attachments to the statement of facts.

(d) He should have noticed that he had not received any tax demand note for the year of assessment 1995/96. He did nothing about the non-receipt of any tax demand note although he conceded that the tax demand note might have been lost in the mail.

(e) Clearly, he did not report the income for the period from 13 July 1995 to 15 March 1996 from the Employer; accepted the assessment referred to in paragraph 6 above because it was in accordance with his reported income; and expected no tax demand note.

19. The salaries tax assessment referred to in paragraph 11 above is final and conclusive under section 70 of the IRO. The correct amount of his salary income for the year of assessment 1995/96 was $297,788 but he reported only $73,388. His return was incorrect in that he had understated his salary income by $224,400. He had no reasonable excuse and is liable to be assessed to additional tax under section 82A(1)(a).

20. There was a delay of about six years in collecting tax from him for the year of assessment 1995/96. At 7% per annum this would be about 42% to 50%, depending on whether it is at simple or compound interest. There must be an element of punishment for understating income. The penalty in this case was 72.8%. The Appellant does not seem to be remorseful. This was a one-off understatement and the Appellant was co-operative in that the investigation was concluded in about six months. In our decision, 72.8% was not excessive in the circumstances.

21. Before we leave this case, we must record our disquiet about the conduct of the Respondent's representative, Mr Chin Heh-ching, Joseph.

22. At the meeting referred to in paragraph 10 above, Mr Chin Heh-ching, Joseph, told the Appellant that agreement on the underlying tax and penalty matters were handled independently. What he did not tell the Appellant was that by compromising and by not objecting to any assessment which might be issued pursuant to the compromise, the assessment would become final and conclusive under section 70 of the IRO. What Mr Chin Heh-ching, Joseph, said according to paragraphs 4 and 5 of the notes of interview might be misleading in that a taxpayer might be induced to think that he could still argue the salary/profit point before the Commissioner or the Board of Review.

23. We turn now to the conduct of Mr Chin Heh-ching, Joseph, at the hearing before us.

24. In his written submission, he quoted D52/93, IRBRD, vol 8, 372:

> *'The normal measure of a penalty is 100% of the tax undercharged, assuming that there are no aggravating or mitigating facts.'*

25. Although Mr Chin Heh-ching, Joseph, was aware of D118/02, IRBRD, vol 18, 90 decided on 23 January 2003, he did not cite or mention it. That was a decision which disapproved the 100% starting point for reasons given in paragraphs 46 to 50.

26. D118/02 is clearly relevant to the submission of Mr Chin Heh-ching, Joseph, referred to in paragraph 24 above.

27. Barristers are bound by their professional code to ensure that the court or tribunal is informed of any relevant decision on a point of law or any legislative provision, of which they are aware and which they believe to be immediately in point, whether it be for or against their contention.

28. Citing a relevant decision does not prevent an advocate from arguing that the decision is distinguishable or wrongly decided (unless it is binding on the court or tribunal). If the advocate does not think that the relevant decision is distinguishable or wrongly decided or if the advocate knows that the decision is binding, and if he hides the relevant decision, he may be thought to be trying to induce the court or tribunal to reach a wrong decision. Any such attempt prejudicially affects the credibility of both the party and the advocate and cannot be in the long term interests of either. Nor is it in the best interests of justice.

29. On a related but different topic, we asked Mr Chin Heh-ching, Joseph, whether he wished to support the assessment without relying on the penalty policy which D118/02

disapproved. It might have assisted if Mr Chin Heh-ching, Joseph, had made an attempt to do so or else conceded the appeal.

30. For reasons given above, the Appellant has not discharged the onus of proving that the assessment is excessive or incorrect. We dismiss the appeal and confirm the assessment.