Case No. D33/06

Salaries tax – whether notice of appeal given in time pursuant to section 82B(1)(a) of the Inland Revenue Ordinance (Chapter 112) ('the IRO') – adverse inference against the Revenue may be more easily drawn in the absence of evidence of service of notice of assessment on appellants – whether open for appellant to argue that employment income from foreign companies not taxable if the determination that determined it was taxable was not appealed – section 70 of the IRO – whether the appellant had any reasonable excuse for omitting or understating income – whether the amount of additional tax excessive

Panel: Kenneth Kwok Hing Wai SC (chairman), Wilson Chan Ka Shun and Mabel Lui Fung Mei Yee.

Date of hearing: 30 May 2006.
Date of decision: 30 June 2006.

The appellant received employment income from two companies incorporated in Hong Kong and the first Country A company in the years of assessment 1997/98 to 2004/05 ('the 8 years of assessment') and from the second Country A in the years of assessment 1997/98 and 1999/2000. In her composite tax returns for the 8 years of assessment, the appellant declared her income from the two Hong Kong companies but not her income from the two Country A companies.

By a determination dated 31 August 2005, the Deputy Commissioner determined that the appellant's employment income from the two Country A companies should be assessable to salaries tax ('the Determination'). The appellant did not appeal against the Determination.

The Deputy Commissioner assessed that the appellant understated 57% of her assessable income. As a percentage of total tax payable, the percentage of tax undercharged was 87%. By the penalty tax assessment, the Deputy Commissioner assessed the appellant at 63% of the tax undercharged.

The appellant appealed and argued that income from the two Country A companies were not taxable, that she was acting on professional advice and following top management's instructions and hence had a reasonable excuse for omitting or understating her income and that the assessment of additional tax is excessive.

The notices of assessment were all dated 10 January 2006 ('the notices of assessment'). By a letter dated 26 January 2006, the appellant gave notice of appeal and this letter was delivered to the Office of the Clerk to the Board ('the Clerk') on 4 February 2006. By letter dated 6 February 2006, the Clerk drew the appellant's attention to the fact that she had not included a copy of the notice of intention to assess additional tax. The appellant attached a copy of the notice of intention to assess additional tax under a cover letter dated 13 February 2006 and the same reached to Clerk's office on 14 February 2006.

Held:

1. The Board left open the question whether section 82B of the IRO requires the notice of appeal and a copy of the accompanying documents to be given to the Clerk within the one month time limit or merely the notice of appeal to be given within the one month time limit. For the purpose of this appeal, the Board assumed that the notice of appeal was only validly given on 14 February. The date when and the means by which the notices of assessment were given to or served on the appellant are matters peculiarly within the knowledge of the Revenue and therefore, other evidence permitting, in the absence of evidence from the Revenue on service of the notices of assessment on the appellant, adverse inference against the Revenue may be more easily drawn and any inference favourable to the appellant can more confidently be drawn as well. As a result, the Board drew the inference that the notices of assessments were not served until a month before 14 February and hence the appeal is within time.

2. (*Obiter*) Had the appeal been out of time, the Board would not have extended time under section 82B(1A) of the IRO because the notices of assessment stated explicitly that the notice of appeal must be accompanied by, *inter alia*, a copy of the notice of intention to assess additional tax and since the appellant was not prevented by any reasonable cause from complying with the one month time limit, she ignored the statement at her own peril.

3. As there was no appeal from the Determination, the assessments as determined on objection have become final and conclusive pursuant to section 70 of the IRO and therefore it is not open to the Appellant to argue that employment income from the two Country A companies were not taxable.

4. Since neither the appellant nor any of the alleged advisers, nor any of the 'top management' gave evidence, there is no basis to come to a view that the appellant had a reasonable excuse for her omission or understatement of her income. Moreover, on evidence available before the Board, the Board rejected the appellant's suggestion that she had acted reasonably or honestly in believing that income from the two

Country A companies were not taxable. The Board notes that the present appeal is a far cry from D18/91, IRBRD, vol 6, 36.

5. Having regard to the circumstances of this appeal, a penalty of 63% is not excessive.

Appeal dismissed.

Cases referred to:

D48/05, IRBRD, vol 20, 638
Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296
Polaroid Far East Ltd v Bel Trade Co Ltd [1992] HKLR 447
Jones v Dunkel (1958 - 1959) 101 CLR 298
D78/02, IRBRD, vol 17, 978
D18/91, IRBRD, vol 6, 36
D118/02, IRBRD, vol 18, 90

Taxpayer in absentia.
Leung Kin Wa and Ho Kwok Ying for the Commissioner of Inland Revenue.

Decision:

1. This appeal was heard under section 68(2D) of the Inland Revenue Ordinance, Chapter 112, in the absence of the appellant or her authorised representative.

2. By eight notices of assessment all dated 10 January 2006, the Deputy Commissioner gave notice to the appellant that he had assessed the appellant to additional tax ('the penalty tax assessments'):

Year of assessment	Charge No	Amount ($)
1997/98	9-4102071-98-2	49,000
1998/99	9-2332665-99-8	25,000
1999/2000	9-2307104-00-7	46,000
2000/01	9-2351070-01-5	32,000
2001/02	9-3602742-02-8	42,000
2002/03	9-2189975-03-8	38,000
2003/04	9-2041106-04-6	40,000
2004/05	9-1769172-05-3	41,000
	Total:	313,000

3. The relevant provision is section 82A(1)(a) of the Ordinance for making an incorrect return by omitting or understating income.

Whether appeal is out of time

4. Section 82B(1) provides that:

> *'(1) Any person who has been assessed to additional tax under section 82A may within-*
>
> *(a) 1 month after the notice of assessment is given to him; or*
>
> *(b) such further period as the Board may allow under subsection (1A),*
>
> *either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by-*
>
> *(i) a copy of the notice of assessment;*
>
> *(ii) a statement of the grounds of appeal from the assessment;*
>
> *(iii) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and*
>
> *(iv) a copy of any written representations made under section 82A(4).'*

5. All eight notices of assessment contain the following statement:

> ' Your attention is drawn to section 82B of the Inland Revenue Ordinance. **If you wish to appeal against this assessment, you must give notice in writing to the Clerk to the Board of Review**, Room 1003, Tower Two, Lippo Centre, 89 Queensway, Hong Kong, **within 1 month after the notice of assessment is given to you**. Your notice must be accompanied by:-
>
> (a) a copy of this notice of assessment;
>
> (b) a statement of the grounds of appeal from the assessment;
>
> (c) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and

(d) a copy of any written representations made under section 82A(4).

At the same time you must serve upon me a copy of the notice of appeal and of the statement of the grounds of appeal.'

6. By letter dated 26 January 2006, the appellant gave notice of appeal. The appellant's letter was delivered to the Office of the Clerk to the Board of Review on 4 February 2006.

7. However, the appellant's notice of appeal was not accompanied by a copy of the notice of intention to assess additional tax given under section 82A(4).

8. By letter dated 6 February 2006, the Clerk drew the appellant's attention to the omission.

9. Under cover of a letter dated 13 February 2006, the appellant attached a copy of the notice of intention to assess additional tax. This letter was delivered to the Clerk's Office on 14 February 2006.

10. The first question is whether section 82B requires:

(a) the notice of appeal and a copy of the accompanying documents to be given to the Clerk within the one month time limit; or

(b) merely the notice of appeal to be given within the one month time limit.

11. If (a) is the correct interpretation, then the appeal may be out of time. If (b) is the correct interpretation, then the appeal is clearly within time.

12. D48/05, (2005-06) IRBRD, vol 20, 638 is the decision of a panel chaired by Mr Jat Sew Tong SC. The Board held that a valid notice must be accompanied by all the requisite documents and that the notice of appeal was not validly given until when all the requisite documents were delivered to the Board.

13. Section 82B(1) and section 66(1) are not easy to construe. With all respect to the Board in D48/05, the question in paragraph 10 above is one which we will leave open because there is no need to decide the question in this case and because we did not have the benefit of hearing proper arguments from the Revenue or from the appellant.

14. For the purpose of this appeal, we assume, without deciding, that notice of appeal was only validly given on 14 February 2006.

15. The one month time limit does not begin to run from the date of the notice of assessment. It begins to run after the date when 'the notice of assessment is given to' the appellant.

16. The date when and the means by which the notices of assessment were given to or served on the appellant are matters peculiarly within the knowledge of the respondent. If the appellant was out of time by 14 February 2006, the respondent could easily have proved it. We hasten to add that section 68(4) does not apply to the issue on when time for appeal begins to run.

17. Mr Leung Kin-wa contended that the appeal was out of time and opposed the appellant's application to extend time. However, he made no attempt to prove service of the notices of assessment on the appellant.

18. The time gap between the date of the notices of assessment (10 January 2006) and the date when the notice of appeal and all the requisite documents were delivered to the Clerk's Office (14 February 2006) is one month and four days.

19. Section 58(1) provides that:

> '*Any notice sent by post shall be deemed, unless the contrary is shown, to have been served on the day succeeding the day on which it would have been received in the ordinary course by post.*'

20. In the absence of any evidence on service of the notices of assessment on the appellant, adverse inferences may be more easily drawn against the respondent and correspondingly, any inferences favourable to the appellant can more confidently be drawn as well. This is of course providing that the rest of the evidence allows such inferences to be drawn and that such evidence is credible in the first place. See Kao Lee & Yip v Koo Hoi Yan and others [2003] 3 HKLRD 296 at paragraph 34, Polaroid Far East Ltd v Bel Trade Co Ltd [1992] HKLR 447 at 454; and Jones v Dunkel (1958-1959) 101 CLR 298.

21. In the absence of any evidence on the means or date of service, we infer that the notices of assessment were not served until within a month before 14 February 2006. The appeal is thus within time.

22. Had the appeal been out of time, we would not have extended time under section 82B(1A). The notices of assessment stated explicitly that the notice of appeal must be accompanied by, among other documents, a copy of the notice of intention to assess additional tax. She ignored the statement at her own peril. She was not prevented by any reasonable cause from complying with the one month time limit.

The salient facts

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

24. The salient facts are as follows.

25. The appellant received employment income from two companies incorporated in Hong Kong in the years of assessment 1997/98 to 2004/05, from the first Country A company in all eight years of assessment and from the second Country A company in the years of assessment 1997/98, 1998/99 and 1999/2000.

26. In her composite tax returns for these eight years of assessment, the appellant declared her income from the two local companies but not her income from the two Country A companies.

27. The assessor started to investigate the appellant' s tax affairs in 2003 and noticed that she had also entered into employment contracts with the two Country A companies.

28. On 31 March 2004, the Assistant Commissioner raised on the appellant additional salaries tax assessment for the year of assessment 1997/98 under 61A of the Ordinance to assess her income from the first Country A company.

29. The appellant' s composite tax return for the year of assessment 2003/04 is dated 14 May 2004. She did not declare her income from the first Country A company.

30. On 27 October 2004, the assessor met the appellant and her tax representatives from a certified public accountant firm. During the meeting, the assessor told the appellant that the appellant' s salary income from the two Country A companies should be subject to salaries tax.

31. On 14 January 2005, the Assistant Commissioner raised on the appellant salaries tax or additional salaries tax assessments from the years of assessment 1998/99 to 2002/03 to assess her income from the two Country A companies.

32. The appellant' s composite tax return for the year of assessment 2004/05 is dated 25 May 2005. She did not declare her employment income from the first Country A company.

33. On 25 August 2005, the Assistant Commissioner raised on the appellant additional salaries tax assessment for the year of assessment 2003/04 and salaries tax assessment for the year of assessment 2004/05 to assess her income from the first Country A company.

34. The appellant objected against all the assessments assessing her income from the Country A companies.

35. By a Determination dated 31 August 2005, the Deputy Commissioner determined that the appellant's employment income from the two Country A companies should be assessable to salaries tax.

36. The appellant did not appeal against the Determination.

37. The appellant understated 57% of her assessable income:

Year of assessment	**Total assessable income**	**Income already reported**	**Income understated**	**Percentage of income understated to total assessable income**
	$	$	$	%
1997/98	653,028	288,838	364,190	56
1998/99	528,556	223,270	305,286	58
1999/2000	748,326	316,186	432,140	58
2000/01	663,326	266,556	396,770	60
2001/02	645,822	255,432	390,390	60
2002/03	689,797	291,907	397,890	58
2003/04	718,640	308,750	409,890	57
2004/05	774,890	365,000	409,890	53
	5,422,385	2,315,939	3,106,446	57

38. As a percentage of total tax payable, the percentage of tax undercharged was 87%:

Year of assessment	**Total tax payable**	**Tax already assessed**	**Tax undercharged**	**Percentage of tax undercharged to total tax payable**
	$	$	$	%
1997/98	71,447	6,068	65,379	92
1998/99	33,114	-	33,114	100
1999/2000	61,782	-	61,782	100
2000/01	44,863	-	44,863	100
2001/02	69,507	3,496	66,011	95
2002/03	81,265	13,624	67,641	83
2003/04	94,843	19,013	75,830	80
2004/05	115,578	33,600	81,978	71
	572,399	75,801	496,598	87

39. By the penalty tax assessments, the Deputy Commissioner assessed the appellant at 63% of the tax undercharged.

Year of assessment	**Tax undercharged**	**Additional tax**	**Additional tax/tax undercharged**
	$	$	%
1997/98	65,379	49,000	75
1998/99	33,114	25,000	75
1999/00	61,782	46,000	74
2000/01	44,863	32,000	71
2001/02	66,011	42,000	64
2002/03	67,641	38,000	56
2003/04	75,830	40,000	53
2004/05	81,978	41,000	50
	496,598	313,000	63

THE BOARD' S DECISION

The relevant statutory provisions

40. 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.

41. Section 70 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 such assessable income ... has been determined on objection ... the assessment as ... determined on objection ... 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.'*

42. 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 ...'*

43. 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.'*

44. 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

45. The appellant argued that income from the two Country A companies were not taxable. Mr Leung Kin-wa argued that they were. Section 70 is not on Mr Leung Kin-wa's list of authorities.

46. There was no appeal from the Determination. Thus, the assessments as determined on objection have become final and conclusive under section 70. The issue whether employment income from the two Country A companies are taxable cannot be re-opened.

47. The appellant's tax returns for eight years of assessment were incorrect in that the employment income from the two Country A companies was omitted. She omitted or understated her income by 57%. In dollar terms, she omitted or understated her income by $3,106,446. The amount of tax undercharged, or would have been so undercharged if her returns had been accepted as correct, was $496,598. Until the omission or understatement was discovered during the tax audit, the appellant had paid a mere 13% of the correct amount of tax.

Whether liable for additional tax

48. The next issue is whether the appellant had any reasonable excuse for omitting or understating her income.

49. She asserted that she was acting on professional advice and following top management's instructions.

50. Neither she, nor any of the alleged advisers, nor any of the 'top management' gave evidence. As the Board said in D78/02, IRBRD, vol 17, 978, a decision of a panel chaired by Mr Benjamin Yu, SC, at paragraph 5:

> *'Despite being advised that he had the burden of proving that the assessment was excessive, the Taxpayer elected not to call any evidence or give evidence himself. Since he has chosen not to give any evidence, there is no basis on which this Board can come to a view that he had a reasonable excuse for his omission or understatement.'*

51. Moreover, on such evidence as has been placed before us, we reject any suggestion that the appellant acted reasonably or honestly in believing that income from the Country A companies was not taxable:

(a) She prepared a Salary Tax Plan Proposal dated 17 March 1995 in which she stated that the then existing special arrangement needed to be formalised and legalised. On the then existing status, she stated that 'the remaining paid by Private Account (ie no need to report to IRD and thus following no need to pay salary tax)'. She was plainly proceeding on the basis that as long as IRD did not know about a payment because information on such payment was, by agreement between the parties, withheld from the Revenue, there would be no need to pay salaries tax.

(b) Her employment contract with the first Country A company was said to be effective from 1 May 1994 despite the fact, as at 17 March 1995, the matter had not gone beyond proposal stage. Clearly she was trying to get away with paying as little tax as possible, without any regard to the true factual position.

(c) She did not report her income from the two Country A companies at any time. This is quite different from a taxpayer who reported income and then contended that such income was not taxable.

(d) She suppressed and withheld some documents from IRD during the field audit 'in order to protect the interests of the [former employer's] Group and/or cover its liable (*sic*) responsibility under the IRO and/or allow some associates' tax cases lapse for investigation under the IRO as well'.

(e) There is no evidence that she acted strictly in accordance with any alleged advice.

52. This case is a far cry from D18/91, IRBRD, vol 6, 36, a decision of a panel chaired by Mr Denis Chang QC, on acting on professional advice as a reasonable cause.

53. The appellant had no excuse for omitting or understating her income.

Maximum amount of additional tax

54. The maximum amount is treble the amount of tax undercharged or which would have been undercharged had the appellant's returns been accepted as correct. The amount undercharged or which would have been undercharged was $496,598 and treble that is $1,489,794. The penalty tax assessments do not exceed the amount for which the appellant is liable under section 82A.

Whether excessive having regard to the circumstances

55. As stated above, we reject any suggestion that the appellant acted reasonably or honestly in believing that the income from the Country A companies was not taxable. She has totally failed in her obligations under the Ordinance to report the correct amount of income. The Revenue has had to resort to a field audit to discover the omission or understatement. The failure of the appellant to report the correct amount of income has persisted over eight years, even after she knew that the Revenue was investigating her tax affairs and that the Revenue took the view that income from the two Country A companies was taxable. Had her returns been accepted as correct, 87% of the correct amount of tax would have been undercharged. She has had the use of the money (87% of the correct amount of tax or $496,598), and the Revenue has lost the use of such money, for many months. To ask for 'waiver' of penalty tax evidences her lack of remorse for her

breach of statutory duty and is wholly unrealistic. A penalty of 63% is not excessive (compare paragraph 48 in D118/02, IRBRD, vol 18, 90, a decision of a panel chaired by Mr Ronny Wong Fook Hum SC). If the Deputy Commissioner has erred at all, he erred in being too lenient.

56. The appellant alleged in her notice of appeal that she had no job and no savings and that she had 'gambled away lots of [her] money'. If she had lost any money on gambling, she was the author of her own misfortune. More importantly, there is no evidence on her assets and liabilities, her net worth or her cashflow position.

Disposition

57. We dismiss the appeal and confirm the penalty tax assessments.