Case No. D35/08

Penalty tax – additional tax assessment – incorrect return – reasonable excuse – assessment excessive or incorrect - onus wholly on the appellant – sections 64(1), 66(2) & (3), 68(4), 8(a) & (9), 70, 82A(1) and 82B of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), D'Almada Remedios Ng, Lisa Wei Min and Lee Fen Brenda.

Date of hearing: 6 October 2008.
Date of decision: 28 October 2008.

For the year of assessment 2006/07, the appellant understated his income by $1,418,479 contrary to the income as reported by his former employer and employer.

Under section 82A, the Deputy Commissioner assessed the appellant to additional tax in the sum of $22,600 which is 9.96% of the amount of tax which would have been undercharged.

The appellant contended that he had reasonable excuse and that the amount of additional tax was excessive.

Held:

1. The appellant has no objection against the salaries tax assessment based on the income as reported by his former employer and employer. By reason of section 70, the salaries tax assessment shall be final and conclusive.

2. Having understated income by $1,418,479, the appellant is liable to be assessed to additional tax subject to the question of 'reasonable excuse' under section 82A.

3. The appeal is wholly unmeritorious. There was no reasonable excuse for the appellant to have understated his income. He was in reckless disregard of whether his reported income from the former employer was correct or not.

4. The appellant insisted no fault on his part and adopted a finger pointing exercise, evidencing a complete absence of any remorse and a clear refusal to see to it no further breach of his statutory reporting duties.

5. The 9.96% penalty is manifestly inadequate which should be increased from $22,600 to $34,000, a minimum of around 15%.

Appeal dismissed and costs order in the amount of $5,000 imposed.

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454
D37/07, (2007-08) IRBRD, vol 22, 839

Taxpayer in person
Chan Sin Yue and Ho Man Li for the Commissioner of Inland Revenue.

Decision:

Introduction

1. In the 2006/07 year of assessment, the appellant was employed:

(a) initially by his former employer as a director with a total income of $1,680,516; and

(b) then by his employer as the managing director with a total income of $17,245,595.

2. In his tax return – individuals for that year of assessment, he reported income of:

(a) $262,037 from his former employer; and

(b) $17,245,595 from his employer.

3. Thus, the appellant understated his income by $1,418,479. The amount of tax which would have been undercharged had his return been accepted as correct was $226,956.

4. By an assessment ('the Assessment') dated 11 July 2008, the Deputy Commissioner assessed the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, in the following sum:

Year of assessment	Additional tax	Charge no

2006/07	$22,600	X-XXXXXXX-XX-X

5. The additional tax in the sum of $22,600 is equivalent to 9.96% of the tax which would have been undercharged had his return been accepted as correct.

6. The appellant appealed against the additional tax assessment, contending that he had reasonable excuse and that the amount of additional tax was excessive.

The agreed facts

7. The appellant agreed the following facts in the 'Statement of Facts' prepared by the assessor and we find them as facts.

8. The appellant appeals against the Assessment, an additional tax under section 82A for the year of assessment 2006/07.

9. The appellant commenced his employment with the former employer in 2002.

10. By a notification dated 3 May 2006 the former employer reported that:

(a) the appellant [would cease] employment on 11 May 2006; and

(b) the following income was accrued to the appellant during the period from 1 April 2006 to 11 May 2006:

Salary	$139,130
Leave pay	41,719
Other rewards, allowances or perquisites	81,188
Total	$262,037

11. On 24 May 2006 the former employer filed a revised notification in respect of the appellant for the period from 1 April 2006 to 11 May 2006. The amount of 'Other Rewards, Allowances or Perquisites' accrued to the appellant was revised to $300,657 whereas the total income was revised to $481,506 as follows:

Salary	$139,130
Leave pay	41,719
Other rewards, allowances or perquisites	300,657
Total	$481,506

12. By an additional notification dated 12 June 2006 the former employer reported that 'Shares' in the amount of $1,199,010 were accrued to the appellant during the period from 1 April 2006 to 11 May 2006.

13. On 2 May 2007 a Tax Return-Individuals ('the Return') together with a booklet 'Guide to Tax Return-Individuals' ('the Guide Book') was issued to the appellant. The Guide Book stated, inter alia, at page 2, the first bullet point under paragraph 4.1 'Income Accrued to Me During the Year', the following:

> ' Income includes all income and perquisites from the employer or others. Award of shares and share option gains are chargeable income.'

14. The appellant filed the Return on 28 May 2007. In Part 4.1 of the Return, he declared the following income particulars:

Name of employer	Capacity employed	Period	Total amount ($)
[The former employer]	Director	1/4/06 – 11/5/06	262,037
[The employer]	MD	17/5/06 – 31/3/07	17,245,595
		Grand total $	17,507,632

The appellant signed the declaration section in Part 9 declaring that information given in the Return was true, correct and complete.

15. By a notification dated 30 May 2007 the employer reported that income totalling $17,245,595 was accrued to the appellant during the period from 17 May 2006 to 31 March 2007.

16. On 28 August 2007 the assessor, based on the income reported by the former employer and the employer, raised the following 2006/07 salaries tax assessment on the appellant:

Income			$18,926,111
Less:	Charitable donations	8,900	
	Home loan interest	100,000	
	Mandatory contributions to recognised retirement scheme	12,000	120,900
Net income			$18,805,211
Tax payable thereon			$2,993,833

17. On 14 September 2007 the appellant faxed a request for the breakdown of the calculation of the income of $18,926,111 as shown on the notice of assessment.

18. The appellant did not object to the assessment[1].

19. The Deputy Commissioner, on 11 March 2008, notified the appellant under section 82A(4) the following:

(a) He proposed to assess additional tax in respect of the appellant's understatement of employment income from the former employer;

(b) The amount of employment income understated was $1,418,479;

(c) The amount of tax which would have been undercharged if the Return had been accepted as correct was $226,956; and

(d) The appellant had the right to submit written representations.

20. By letter dated 14 March 2008 ('the First Representation Letter') the appellant stated:

> ' The income amount filed in my tax return for 2006/07 was based on the two tax filing guides provided by my then two employers (please see the two guides attached). As a matter of fact, after receiving from the IRD the tax calculation dated 28 Aug 2007, I had sent the IRD a fax enquiring about the discrepancy (please see copy of fax attached). To date, I still have not heard back from the IRD. Please could you kindly clarify your tax calculation at your earliest convenience.'

21. In response to the First Representation Letter, the assessor provided the appellant a breakdown on 10 April 2008. Copies of the notifications from the former employer were also supplied.

22. By letter dated 14 April 2008 the appellant stated:

> ' It seems that your computation is based on a piece of [the former employer] income information different from what I have. As explained in my previous letter dated 14 Mar 2008, my tax filing was based on the former employer income information given to me by the firm. I hereby attach again the information for your reference.
>
> Following my enquiry letter dated 14 Sep 2007 (copy attached), I had received no reply calls or letters from the IRD. Notwithstanding receiving no explanations or responses from the IRD, I followed IRD's higher tax computation and paid

[1] The salaries tax assessment referred to in paragraph 16 above.

> accordingly in order to avoid disputes. I shall be grateful if the IRD could explain to me why my letter dated 14 Sep 2007 was not replied.'

23. On 18 April 2008 the assessor telephoned the appellant to explain that a telephone reply to his enquiry about the income discrepancy was given on 18 September 2007 and that two notifications filed by the former employer were also sent to him. The appellant told the assessor that he had not received any notifications from the Department.

24. On 22 May 2008 the assessor wrote to the appellant and invited him to submit additional information regarding the understatement of income in the appellant's Return.

25. By letter dated 26 May 2008 the appellant stated:

> ' As stated in my previous letter dated 14 Apr 2008, I had received no reply calls or letters from the IRD following my enquiry letter dated 14 Sep 2007. I have no recollection about the telephone call with your Mr Chow stated in your letter.
>
> The only addition information I would like to add is the timing of my departure from my then employer [the former employer] in April 2006. Apparently the employer's returns were revised thereafter but the revised copies only reached the IRD but not to me.
>
> From my perspective, I have done whatever I could have done in this case. I filed the returns based on the information supplied by my employer. I enquired with the IRD immediately after I discovered the discrepancy in the IRD's tax computation. Notwithstanding receiving no responses from the IRD, I paid the tax fully and duly in accordance with the IRD's computation.
>
> As a taxpayer for the last 20 years, I have always filed my tax returns based upon the information supplied by my employer and have always paid tax fully and duly.'

26. The Deputy Commissioner, after considering and taking into account the representations made by the appellant, raised on the appellant an assessment under section 82A with an additional tax of $22,600. That amount is 9.96% of $226,956 which is the amount of tax which would have been undercharged had the Return been accepted as correct.

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

28. By letter dated 29 July 2008 the appellant gave notice of appeal to the Board of Review against the Assessment to additional tax. The appellant did not, as required in section 66(2) serve on the Commissioner a copy of the notice of appeal and the statement of grounds of appeal.

29. Upon request by the assessor, the appellant by letter dated 1 September 2008 provided the Commissioner with a copy of the notice of appeal and the statement of grounds of appeal.

30. At the request of the appellant, the appellant's letter dated 5 September 2008 was added to this Statement of Facts. In the letter, the appellant stated:

> 'In connection with this appeal, I would like to suggest to the IRD that whenever the IRD receives revised notifications from an employer, the IRD should always write to notify the employee. This helps ensure the same information is also received by the employee. This is particularly useful for employees who have already left the firm, like me. In the letter from the IRD to the employee, the IRD should also ask the employee if he wishes to amend his tax filing to reflect the notification revisions. This could be done by the IRD very easily and could help avoid a lot of disputes like the one we are having. This could also save the society a lot of human and financial resources. Would the Commissioner consider my suggestion please?'

Further findings of fact

31. Based on the contemporaneous documents produced, we make the following findings of fact.

32. In respect of the 2 years of assessment preceding the year of assessment in question[2], the former employer reported in the employer's returns the following as the appellant's income:

A. The 2004/05 year of assessment (Revised return dated 25 May 2006)

Particulars	Period	Amount (HK$)
Salary/Wages	1-4-04 to 31-3-05	1,108,333
Bonus	1-4-04 to 31-3-05	5,945,975
Any other Rewards, Allowances or Perquisites Nature Housing Allowance, Dividends & Club Subscrition (*sic*), Shares	1-4-04 to 31-3-05	1,649,795
	Total	8,704,103

B. The 2005/06 year of assessment (Return dated 2 May 2006)

Particulars	Period	Amount (HK$)

[2] That is to say, the 2006/07 year of assessment.

Salary/Wages	1-4-05 to 31-3-06	1,200,000
Bonus	1-4-05 to 31-3-06	6,009,466
Any other Rewards, Allowances or Perquisites		
Nature: Housing, Dividends, Shares, Club Su (*sic*)	1-4-05 to 31-3-06	1,924,309
	Total	9,133,775

33. In respect of the 2 years of assessment preceding the year of assessment in question[3], the appellant reported the following income in his composite returns:

A. The 2004/05 year of assessment (Return dated 25 May 2005)

Name of employer	Capacity employed	Period	Total amount ($)
[The former employer]	Director	1-4-2004 – 31-3-2005	8,694,877[4]

B. The 2005/06 year of assessment (Return dated 26 July 2006)

Name of employer	Capacity employed	Period	Total amount ($)
[The former employer]	Director	1-4-05 – 31-3-06	9,133,775

34. The second paragraph of the Assessment:

(a) drew attention to section 82B;

(b) informed the appellant that the notice of appeal and accompanying documents must be served on the Clerk to the Board of Review if the appellant wished to appeal; and

(c) continued as follows:

> ' 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.'

Assessment of the credibility and reliability of the appellant as a witness

[3] That is to say, the 2006/07 year of assessment.

[4] We attach no importance to the difference between this amount and the amount of 8,704,103 subsequently reported by the former employer in its revised return referred to in paragraph 32A above.

35. The appellant gave evidence on oath and confirmed the truth of the statements of fact in his representations and grounds of appeal.

36. The salaries tax assessment of 28 August 2007 referred to in paragraph 16 above assessed the appellant to salaries tax on the basis of an income of $18,926,111. This differed from the income as reported by the appellant of $17,507,632 by $1,418,479. The difference in the amount of tax was $226,956.

37. Under section 64(1)[5], the appellant had one month in which to object to the salaries tax assessment.

38. By his fax dated 14 September 2007 referred to in paragraph 17 above, the appellant wrote to the assessor as follows:

> ' I refer to the tax calculation in your letter dated 28 Aug 2007, please could you give me the breakdown of the calculation of the income of $18,926,111, as it seems it is different from the number that I filed.
>
> Please call me at ... if you have any questions.'

39. The Revenue's case is that in response to the appellant's fax, the assessor explained to the appellant by telephone on 18 September 2007 that the assessable income of $18,926,111 comprised the following components:

(a) $481,506 reported by the former employer in the revised notification dated 24 May 2006 (see paragraph 11 above);

(b) $1,199,010 reported by the former employer in the additional notification dated 12 June 2006 (see paragraph 12 above); and

(c) $17,245,595 reported by the employer in the notification dated 30 May 2007 (see paragraph 15 above);

and the assessor also sent the appellant a copy of the notifications described on the same day.

40. The appellant insisted that he received no phone call and no copy notification and persisted in his complaint of the absence of any response by the Revenue to his fax of 14 September 2007.

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[5] See paragraph 45 below.

41. It is clear from the appellant's correspondence and his conduct of the appeal that he was not the type of persons to have allowed the Revenue not to respond to his inquiry without so much as a wink. The difference in the amount of tax was $226,956, more than 10 times the penalty tax of $22,600. He was quick to appeal against the penalty tax assessment. In our decision, it is inherently improbable that, in the absence of any response from the Revenue, he:

(a) would have allowed his fax to go unanswered;

(b) would have paid the full amount of tax as assessed by the assessor; and

(c) would not have objected to the salaries tax assessment.

42. The appellant was adamant that the Revenue did not respond to his fax of 14 September 2007 and that he had not received the former employer's memorandum to him dated 2 June 2006[6] or any of the former employer's notifications except the one referred to in paragraph 10 above. Otherwise, the appellant was evasive in his evidence. He gave us the clear impression that his approach was one of saying what he thought was helpful to his appeal.

43. We have carefully considered his evidence. We are unable to say that he impressed us as a credible or reliable witness. We attach no weight to his evidence.

The amended grounds of appeal

44. The appellant wished to rely on the following grounds of appeal in place of the ones contained in his notice of appeal dated 29 July 2008. Ms Chan Sin Yue had no objection and we gave our consent under section 66(3) for the appellant to rely on the following grounds of appeal:

'1. I refer to the letter dated 11 Jul 2008 from the Inland Revenue Department ['IRD'] ordering an additional tax of $22,600. I would like to file a strong appeal to the Board of Review ['Board'].

2. According to the IRD, the assessment of the additional tax was based upon the understatement of my filed income for 2006/07. I would like to explain to the Board that it was totally unintentional and out of my control.

3. The income filed by me was in strict adherence to the written notification dated 3 May 2006 given to me by my then employer, [the former employer]. The notification clearly stated that my income was $262,037 and the exact same income amount was filed to the IRD.

[6] See paragraph 65(c) below.

4. In May 2006, I resigned from [the former employer] to pursue another employment. Apparently, the income amount of $262,037 previously notified to me was miscalculated by [the former employer] and was subsequently revised twice after my departure from the company. However, the revisions were not communicated to me.

5. In Sep 2007, I received the tax calculation from the IRD and found a discrepancy from my own calculation. On 14 Sep 2007, I sent the IRD a fax trying to clarify the discrepancy. However, the fax was not replied by the IRD.

6. From Mar to May 2008, there were a number of correspondences from me to the IRD explaining why the understated income amount filed was totally unintentional and that I was misled by [the former employer's] miscalculations …

7. I do not know why the revised notifications from [the former employer] did not reach me but it could be due to mishandling of the notifications by the staff of [the former employer]. As I had already left the firm at the time, the delivery of the notifications would rely on proper handling of the revised notifications by the staff of [the former employer's] the Accounting Department, the Human Resources Department, secretaries and messengers etc. Error made by any of the staff involved could have caused non-delivery of the revised notifications.

8. In order to better understand [the former employer's] notification postage process, I sent [the former employer] a letter on 9 Sep 2008. I also followed up with a telephone call on 10 Sep 2008. In the telephone call, I was told that the postage of the notifications was not made by registered mails. I was also told that it was [the former employer's] [overseas office] responsible for sending out the notifications. Clearly the cross-border mailing through regular mails had further increased the probability of postage error. To date, I have not received a written reply from [the former employer] yet.

9. The other factor I would like the Board to consider is that the revised income was all paid in shares (not in cash). This meant that I would not have been able to tell the increased income amount from my bank account balance.

10. As a good taxpayer for 19 years, I have always accurately filed my fax returns and have always paid tax timely and duly. For the Board's reference, I had requested the IRD to produce a track record of my tax filing history. This is to show that I have no prior record of income understatement.

11. I would like to assure to the Board that I never had any intention to understate my income. The understatement was totally unintentional and out of my control. Should there be no miscalculations made by [the former employer], this understatement would never have happened. Given the circumstances, I had already done whatever I could have done to ensure the accuracy of my tax filing.

12. I strongly feel that the assessment of additional tax by the IRD was entirely unreasonable. It is unfair for me to get penalized for something out of my own control.

13. I trust that the Board will give my appeal a fair judgment.'

Relevant provisions of Inland Revenue Ordinance

45. Section 64(1) provides that:

'*(1) Any person aggrieved by an assessment made under this Ordinance may, by notice in writing to the Commissioner, object to the assessment; but no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner within 1 month after the date of the notice of assessment ...'*

46. Sections 66(2) & (3) provide that:

'*(2) The appellant shall at the same time as he gives notice of appeal to the Board serve on the Commissioner a copy of such notice and of the statement of the grounds of appeal.*

(3) Save with the consent of the Board and on such terms as the Board may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given in accordance with subsection (1).'

47. Section 68(4), (8)(a) & (9) provide that:

'*(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'*

'*(8) (a) After hearing the appeal, the Board shall confirm, reduce, increase or annul the assessment appealed against or may remit the case to the Commissioner with the opinion of the Board thereon.'*

> '*(9) 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.*'
>
> The amount specified in Part I of Schedule 5 is $5,000.

48. In respect of a salaries tax assessment which a taxpayer has not validly objected to under section 64, section 70, so far as relevant, provides as follows:

> '*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 ...*'

49. Section 82A(1), so far as relevant, 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 ...*
>
> *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 ...*'

50. Section 82B, so far as relevant, 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 ...*

either himself or by his authorized representative give notice of appeal to the Board ...'

'*(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.'

'*(3) Sections 66(2) and (3), 68, 69 and 70 shall, so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax.'*

Submitting true correct and complete tax returns on time

51. Articles 106 and 108 of the Basic Law provide that the Hong Kong Special Administrative Region shall have independent finances and practise an independent taxation system.

52. Articles 107 and 108 of the Basic Law provide that the HKSAR shall:

(a) taking the low tax policy[7] previously pursued in Hong Kong as reference, enact laws on its own concerning types of taxes, tax rates, tax reductions, allowances and exemptions, and other matters of taxation; and

(b) follow the principle of keeping expenditure within the limits of revenues in drawing up its budget, and strive to achieve a fiscal balance, avoid deficits and keep the budget commensurate with the growth rate of its gross domestic product.

53 Direct taxation on earnings and profits is an important source of income for HKSAR.

54. While the tax rates are low and the fiscal system is narrowly based, the demands on general revenue are ever increasing.

[7] Tax rates range from 10% to 17.5%, see Schedules 1 and 8 to the Ordinance.

55. Omission or understatement of receipts in tax returns causes loss in revenue if the returns are accepted by the Revenue as correct. Failure to notify chargeability, if undetected by the Revenue, causes loss in revenue. Delay in submitting returns may delay the timely collection of revenue.

56. The Inland Revenue Department makes millions of assessments each year. A high degree of compliance by the taxpayers in submitting timely, true correct and complete tax returns and information to the Revenue is crucial for the effective operation of HKSAR's tax system.

57. The Revenue can check the accuracy of returns, conduct field audits and prosecute suspected offenders. It can also deploy resources and manpower to copy information it received to the taxpayers.

58. Put in proper perspective, we consider it a waste of the Revenue's limited resources to:

(a) conduct checks, investigations and audits which are avoidable had there been a high degree of compliance by taxpayers of their statutory reporting duties; and

(b) pamper taxpayers who turn a blind eye to their duty to submit timely, true correct and complete tax returns and information.

This is also unfair to the honest and compliant taxpayers who take great care to comply and exercise due diligence in complying with their statutory reporting duties. There is no reason for the honest and compliant taxpayers exercising due diligence in the discharge of their statutory reporting duties to foot the bill. Those in breach, not those who comply, should pay.

59. Penalty tax serves two purposes – to punish the delinquent taxpayers and to deter these and other taxpayers.

60. The Board takes a serious view of omission or understatement of income, see D16/07, IRBRD, vol 22, 454 at paragraphs 125 - 128, where the Board (Kenneth Kwok Hing Wai SC, Eva Chan Yee Wah and Paul Lam Ting Kwok) cited a number of Board decisions and extracted the following principles from those cases:

(a) 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 the taxpayer being supplied with employer's return(s) or remembering about employer's return(s).

(b) In cases where the taxpayer was paid by autopay or deposits into the taxpayer's bank account, the taxpayer could easily have ascertained and checked the correct total amount of income by reference to the banking records.

(c) Carelessness or recklessness is not a licence to understate or omit one's income.

(d) 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.

(e) There is no duty on the part of the Revenue to warn a taxpayer before invoking section 82A.

(f) 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.

(g) 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.

(h) Financial difficulty or inability to pay the penalty must be proved by cogent evidence.

(i) In cases of an incorrect return, it is wholly unrealistic for a taxpayer to ask for zero penalty. If anything, this is an indication that the taxpayer is still not taking his/her duties seriously.

(j) 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.

(k) A second or further contravention is an aggravating factor. If a taxpayer does not get the message from the Revenue's or the Board's treatment of the first or earlier contraventions and does not take proper steps to ensure full and complete reporting of income, a heavier penalty should, as a general rule, be imposed for subsequent contraventions.

(l) A blatant breach should be punished by a stiff penalty.

(m) In cases where the Board concludes that the additional tax assessment is excessive, the Board will reduce the penalty assessment.

(n) In appropriate cases where the Board concludes that the additional tax assessment is manifestly inadequate, the Board will increase the additional tax assessment.

(o) Where the Board concludes that the appeal is frivolous and vexatious or an abuse of the process of appeal, the Board may impose an order on costs.

61. In D37/07, IRBRD, vol 22, 839 at paragraphs 45 – 48, the Board (Kenneth Kwok Hing Wai SC, Lawrence Lai Wai Chung and Peter Malanczuk) stated that:

'45. From time to time, taxpayers like the appellant who:

(a) are in middle or senior management;

(b) earn no less than high six digit annual income;

(c) have the knowledge and means of reporting the correct amounts of their aggregate employment income if they have intended or taken the trouble so to do;

(d) through carelessness, or not caring whether the returns they filed be correct or not, filed incorrect returns, understating or omitting a substantial portion of their aggregate employment income;

(e) show no or no genuine remorse;

(f) take no steps to put their houses in order;

(g) argue that it is unfair to penalise them; and

(h) demand a waiver of penalty.

46. It is difficult to see how such taxpayers could hope to win the sympathy of the Board in cases of additional tax of 15% or below.

47. The matters put forward by the appellant in this appeal have been consistently rejected by the Board in published decisions, some of which were included in the assessor's bundle of authorities.

48. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the Ordinance, we order the appellant to pay the sum of $2,500 as costs of the Board, which $2,500 shall be added to the tax charged and recovered therewith.'

Whether liable for additional tax

62. The appellant has not objected against the salaries tax assessment referred to in paragraph 16 above. By reason of section 70, the amount of his assessable income as assessed by the salaries tax assessment, i.e. $18,926,111, shall be final and conclusive for all purposes of the Ordinance. It is not open to the appellant to contend that the correct amount of assessable income is not $18,926,111.

63. By reporting income of only $17,507,632, the appellant made an incorrect return by understating his income by $1,418,479. Subject to the question of 'reasonable excuse', he is liable under section 82A to be assessed to additional tax.

64. What the appellant was required to report was:

(a) his 'INCOME accrued to [him] during the year';

(b) not the amount of income as reported in an employer's return; and

(c) not the amount of income as reported in only such employer's return as he claimed to have received.

65. Since we have rejected the testimony given by the appellant, there is no factual basis for any assertion that he:

(a) had only received the former employer's notification referred to in paragraph 10 above; and

(b) had not received the former employer's notifications referred to in paragraphs 11 and 12 above; and

(c) had not received the former employer's Memorandum to him dated 2 June 2006 advising him that shares had been delivered to his account, that the value of the shares totalled $1,199,009, and that the former employer had been

advised to the effect that the delivery of shares should be reported for salaries tax purposes.

Even if he had not received (b) and (c) above, the appellant had the means of ascertaining, had he so wished, the full amount of income before he filed his 2006/07 composite return. Not exercising due diligence is not a reasonable excuse. In any event, we do not for one moment believe his assertion that he had not checked if he had received all his entitlements under his remuneration package for the year of assessment during which he left the former employer's employ.

66. The appellant was in top management in the financial services sector. He knew that his remuneration package during his employ by the former employer comprised more than just his basic salary. He knew that his annual remuneration package for each of the two preceding years of assessment exceeded $8,600,000.

67. Plainly there was no reasonable basis for any belief on his part that his income during his 1 1/3 months employment by the former employer prior to his resignation amounted only to $262,037. This would be equivalent to an annual remuneration package of less than $2,400,000, less than 30% of $8,600,000.

68. We find that he was in reckless disregard of whether his reported income of $262,037 from the former employer was correct or not.

69. There was no reasonable excuse for him to understate his income.

Whether excessive in the circumstances

70. The amount of tax which would have been undercharged had his return been accepted as correct was $226,956. The maximum amount of additional tax is treble that amount.

71. The appellant insisted that there was no fault on his part and adopted a finger pointing exercise, evidencing a complete absence of any remorse on his part and a clear refusal to take any steps on his part to see to it that there is no further breach of his statutory reporting duties:

(a) He blamed or criticised the former employer for filing the notifications many months before he was required to file the Return. This demonstrated the appellant's propensity to blame others. His case is one of not having received any notification or memorandum except the one referred to in paragraph 10 above, not one of having received the other notifications but forgetting about or mislaying them. Whether the former employer had filed the notifications earlier

than it should is thus irrelevant. In any event, the former employer did not file the notifications pre-maturely[8].

(b) He blamed or criticised the former employer for not having sent the notifications to him by registered mail. We have rejected his assertion about non-receipts of some of the notifications. In any event, he could have reported the correct amount of income had he not been in reckless disregard of his statutory reporting duties. If he is serious about copying notifications to employees by registered mail, he could see to it that the employer, of which he is managing director, would do so without fail.

(c) He blamed or criticised the Revenue for allegedly not responding to his fax of 14 September 2007. We have found against him on his allegation. His persistence resulted in waste of resources of the Revenue in having to respond and deal with what we have found to be an unmeritorious allegation. This is another indication of his propensity to blame others. Whether or not the Revenue had responded is irrelevant to the questions of reasonable excuse of excessiveness.

(d) He suggested that the Revenue should copy[9] all revised notifications by employers to employees and invite them to amend their tax returns if they so wish. He claimed that this could 'save the society a lot of human and financial resources'. We cannot disagree more. This is a waste of the Revenue's human and financial resources. We see no reason why the honest and compliant taxpayers should pay for pampering taxpayers like the appellant.

(e) He questioned why the Revenue had not sent him a copy of its written closing until after he had completed his submission. The Revenue would only be required to make submissions if called upon by the Board to do so at the end of a taxpayer's closing submission. This is standard practice.

(f) He blamed or criticised the Revenue for an 'entirely unreasonable' assessment of additional tax. For reasons which are apparent from this Decision, we agree with him that the Assessment is 'unreasonable' in the sense of being manifestly inadequate.

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[8] See section 52(5) which provides that 'Where any person who is an employer ceases or is about to cease to employ in Hong Kong an individual who is or is likely to be chargeable to tax under Part III, or any married person, he shall give notice thereof in writing to the Commissioner not later than 1 month before such individual ceases to be employed in Hong Kong, stating the name and address of the individual and the expected date of cessation: Provided that the Commissioner may accept such shorter notice as he may deem reasonable.'

[9] By registered post, we presume.

72. The appellant did not serve a copy of his notice of appeal and his grounds of appeal until after a written request by the assessor[10], notwithstanding the express statement in the Assessment that he must do so[11]. Nor did the appellant respond[12] to the assessor's request to agree a statement of fact. We had to deal with the question of whether there was any agreement of background facts at the hearing.

73. The grounds of appeal[13] put forward by the appellant have been rejected time and time by the Board[14].

74. This appeal is wholly unmeritorious. There is no reason why the honest and compliant taxpayers should bear the costs of the Board in dealing with such frivolous and vexatious appeal.

75. For reasons given above and in D37/07 and D16/07 and the cases there cited:

(a) a penalty of 9.96% is manifestly inadequate in the circumstances;

(b) the penalty should be increased to a minimum of around 15%; and

(c) costs should be ordered against the appellant.

Disposition

76. We **increase** the Assessment from $22,600 to **$34,000**.

77. Pursuant to sections 82B(3) and 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 penalty tax of $34,000.

[10] See paragraph 29 above.
[11] See paragraph 34(c) above.
[12] Except to request the inclusion of his letter of 5 September 2008.
[13] See paragraph 44 above.
[14] See paragraphs 60 and 61 above and the cases there cited.