

Case No. D42/09

Penalty tax – salaries tax – sections 68(1A), 68(8)(a), 68(9) and 82B(3) of Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Albert T. DA ROSA, Jr and Christina W W Lee.

Date of hearing: 24 November 2009.
Date of decision: 18 December 2009.

The appellant was assessed to additional tax (often referred to as 'penalty tax') in the sum of \$14,000, equivalent to 28.40% of the amount of tax which would have been undercharged had his return been accepted as correct, for omitting part of or understating his income in his tax return for the 2007/08 year of assessment. This was his 5th understatement or omission in 8 consecutive years of assessment. He appealed against the penalty tax assessment.

At the hearing of the appeal, the appellant's representative said the appellant did not wish to continue his appeal. She was asked by the Board to address the questions on increasing the penalty tax and on costs. After she had finished her submissions, the Board did not call upon the Revenue.

Held:

1. Under section 68(1A) of the IRO, an appellant has the right to withdraw an appeal at any time 'before the hearing of an appeal'. The permission of the Board is not required. However, there is no such right once the hearing had begun.
2. The Board agreed with D16/07, (2007-08) IRBRD, vol 22, 454 at paragraphs 125 – 128 where the Board in the case conducted a review of cases on penalty tax and extracted a number of propositions.
3. The Board agreed with D37/07, (2007-08) IRBRD, vol 22, 839 at paragraphs 45 – 48 where the Board in that case expressed the view that a taxpayer who:
 - (a) are in middle or senior management;
 - (b) earn no less than high six digit annual income;

(2009-10) VOLUME 24 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (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;

should expect a starting point of 15% and that pursuing appeals on grounds consistently rejected by the Board in reported decisions should expect a costs order against them.

4. The Board also agreed with D35/08, (2008-09) IRBRD, vol 23, 683 at paragraphs 51 – 61 and 75 where the Board in that case explained the importance of submitting true, correct and complete tax returns on time and applied D16/07 and D37/07.
5. Since the appellant has chosen to appeal, the Board must perform its ‘ultimate function’ to ‘confirm, reduce, increase or annul the assessment’ appealed against (see Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7, per Fuad VP at page 23). The Board’s function, on hearing an appeal under section 68, is to consider the matter *de novo*, as the Court of Final Appeal said in Shui On Credit Company Limited v CIR, FACV 1 of 2009 at paragraph 30, citing CIR v Board of Review ex parte Herald International Limited [1964] HKLR 224, 237.
6. This was the appellant’s 5th contravention of his duty to submit true, correct and complete tax returns. On each occasion, he claimed that he was not familiar with salaries tax reporting duties and asserted that he would ensure full disclosure in future. The Board rejected his excuses. The truth of the matter was that he persisted in his breaches, regurgitating the same or similar excuses on each occasion, showing neither remorse nor intention to comply with his statutory reporting duties.
7. The Board was of the view that a deterrent penalty was called for. However, in view of the leniency on the part of the Deputy Commissioner, the Board’s decision was that the additional tax should be increased from \$14,000 to

(2009-10) VOLUME 24 INLAND REVENUE BOARD OF REVIEW DECISIONS

\$24,600 which was slightly less than 50% of the tax which would have been undercharged had his return been accepted as correct.

8. The Board considered the appeal to be wholly unmeritorious. The Board saw no reason why the compliant taxpayers should bear the costs of such a waste of public resources. Pursuant to sections 82B(3) and 68(9), the Board ordered the appellant to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the additional tax as increased by the Board to \$24,600 and recovered therewith.

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
D35/08, (2008-09) IRBRD, vol 23, 683
Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7
Shui On Credit Company Limited v CIR, FACV 1 of 2009
CIR v Board of Review ex parte Herald International Limited [1964] HKLR 224,
237

Taxpayer absent but represented by his representative.

Au Wai Kwan Lilian and Chau Kin Wing for the Commissioner of Inland Revenue.

Decision:

Introduction

1. The appellant was assessed to additional tax¹ in the sum of \$14,000, equivalent to 28.40% of the amount of tax which would have been undercharged had his return been accepted as correct, for omitting part of or understating his income in his tax return for the 2007/08 year of assessment.
2. This was his 5th understatement or omission in 8 consecutive years of assessment.
3. He appealed against the penalty tax assessment.

The material facts

¹ Often referred to as 'penalty tax'.

(2009-10) VOLUME 24 INLAND REVENUE BOARD OF REVIEW DECISIONS

4. We make the following findings of fact.
5. The appellant was initially employed by his former employer until 1 April 2006 when he was employed by his employer.
6. In 5 out of 8 tax returns, the appellant omitted part of or understated his income. The particulars are as follows:

<u>Year of Assessment</u>	<u>Income omitted</u>	<u>Amount omitted</u> \$	<u>Total amount omitted</u> \$	<u>Tax involved</u> ² \$	<u>Amount of penalty tax</u> \$	<u>Penalty tax/tax involved</u> %
2000/01	From overseas concern	358,714	532,062	90,450	4,500	4.98
	Salaries tax paid by employer	124,979				
	Quarters value	48,369				
2001/02	From overseas concern	425,932	519,494	88,314	4,400	4.98
	Salaries tax paid by employer	46,335				
	Quarters value	47,227				
2002/03	From overseas concern	343,868	378,255	64,303	6,400	9.95
	Quarters value	34,387				
2003/04	Salaries tax paid by employer	211,983	233,181	43,139	7,500	17.39
	Quarters value	21,198				
2007/08	Salaries tax paid by employer	290,000	290,000	49,300	14,000	28.40

² Abbreviation for tax which would have been undercharged had his return been accepted as correct.

(2009-10) VOLUME 24 INLAND REVENUE BOARD OF REVIEW DECISIONS

7. Representations were made by or on behalf of the appellant on each of the five occasions. Ms A of Company B, one of the largest accounting practices in Hong Kong, made representations on behalf of the appellant on 4 occasions.

(1) Company B's letter dated 10 March 2003 for 2000/01:

'The amount of "Salaries Tax paid by employer" was reported by ticking the "yes" box of item 4.1(5) of his form BIR60. However, our client did not realise that the actual amount of "Salaries Tax paid by employer" should also be included at item 4.1(1) of his form BIR60.'

'Following the discovery of the omission and to ensure full compliance in the future, our client will ensure that full disclosure of his employment income, including the "Salaries Tax paid by employer"... is made on his form BIR60.'

'The omission by our client was unintentional and arose as he was not fully conversant with the Salaries Tax reporting obligations...'

(2) Company B's letter dated 12 January 2004 for 2001/02:

'Following the discovery of the omission and to ensure full compliance in the future, our client will ensure that full disclosure of his employment income, including the "Salaries Tax paid by employer" ... is made on his form BIR60.'

'The omission by our client was unintentional and arose as he was not fully conversant with the Salaries Tax reporting obligations'.

(3) Company B's letter dated 18 March 2005 for 2002/03:

'Following the discovery of the omission and to ensure full compliance in the future, our client will ensure that full disclosure of his employment income, including the income derived from [an overseas concern], is made on his form BIR60.'

'The omission by our client was unintentional and arose as he was not fully conversant with the Salaries Tax reporting obligations...'

(4) Company B's letter dated 2 December 2005 for 2003/04:

'As our client's Hong Kong Salaries Tax is borne by [the former employer], he trusted [the former employer] to provide him with the details of payment. In preparing our client's 2003/04 form IR56B, [the former employer] made an unintentional omission of the "Salaries Tax paid by employer" in the amount of \$211,983. [The appellant] relied on

the assistance of the employees of [the former employer] to complete his form BIR60 for the year of assessment 2003/04. Since the payment was not included at item 11 of his form IR56B, the amount was inadvertently excluded from item 4.1(1) of his form BIR60.'

'Following the discovery of the omission and to ensure full compliance in the future, our client will ensure that full disclosure of his employment income, including the "Salaries Tax paid by employer" is made on his form BIR60.'

'The omission by our client was unintentional and arose as he was not fully conversant with the Salaries Tax reporting obligations'.

(5) The appellant's letter dated 12 January 2004 for 2007/08

'I regret to tell you that I forget to state my whole income. To be honest, I have no intention to hide by understating my income. The reason is that I didn't get familiar with this application. In the application, I had ticked the "Yes" box of part 4.1(5) of "My employer(s) paid Salaries Tax for me" but didn't know to fill in the amount of "Salaries tax paid by the employer" of part 4.1(1) and thus leads to misunderstanding.'

'And I promise that I won't make the same mistake in the future.'

The hearing

8. The Clerk to the Board of Review gave notice of hearing to both parties by letter dated 5 October 2009.

9. The appellant did not respond in any way, whether by himself or his representative.

10. The appellant did not attend the hearing of the appeal. An employee of the employer working in the administration department attended as his representative.

11. The representative said the appellant did not wish to continue his appeal but went on to ask for a reduction. This was a clear contradiction in terms.

12. When pressed, she said the appellant wished to give up and make no more requests.

13. We asked her to address us on the questions of increasing the penalty tax and on costs.

14. After she had finished her submissions, we told the parties that we were not calling on the Revenue and would give our decision in writing which we now do.

The Board's decision

15. Under section 68(1A) of the Inland Revenue Ordinance, Chapter 112, an appellant has the right to withdraw an appeal at any time 'before the hearing of an appeal'. The permission of the Board is not required. There is no such right once the hearing has begun.

16. In D16/07, (2007-08) IRBRD, vol 22, 454, the Board conducted a review of cases on penalty tax and extracted a number of propositions. We agree with paragraphs 125 – 128 in D16/07.

17. In D37/07, (2007-08) IRBRD, vol 22, 839 at paragraphs 45 – 48, the Board expressed the view that taxpayers 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;

should expect a starting point of 15% and that pursuing appeals on grounds consistently rejected by the Board in reported decisions should expect a costs order against them. We respectfully agree.

18. In D35/08, (2008-09) IRBRD, vol 23, 683 at paragraphs 51 – 61 and 75, the Board explained the importance of submitting true, correct and complete tax returns on time and applied D16/07 and D37/07. We agree with paragraphs 51 – 61 and 75.

19. Since the appellant has chosen to appeal, we must perform the Board's 'ultimate function' to 'confirm, reduce, increase or annul the assessment' appealed against³. As the Court of Final Appeal said in Shui On Credit Company Limited v CIR, FACV 1 of 2009 at paragraph 30, the Board's function, on hearing an appeal under section 68, is to consider the matter *de novo*, citing CIR v Board of Review ex parte Herald International Limited [1964] HKLR 224, 237.

20. This is the appellant's 5th contravention of his duty to submit true, correct and complete tax returns. On each occasion, he claimed that he was not familiar with salaries tax reporting duties and asserted that he would ensure full disclosure in future. We reject his excuses. The truth of the matter is that he persisted in his breaches, regurgitating the same or similar excuses on each occasion, showing neither remorse nor intention to comply with his statutory reporting duties.

21. A deterrent penalty is called for. However, in view of the leniency on the part of the Deputy Commissioner, our decision is that the additional tax should be increased from \$14,000 to \$24,600 which is slightly less than 50% of the tax which would have been undercharged had his return been accepted as correct.

Disposition and costs

22. **We increase the additional tax assessment appealed against** from \$14,000 **to \$24,600** under sections 82B(3) and 68(8)(a).

23. For reasons given above, we consider this appeal to be wholly unmeritorious. We see no reason why the compliant taxpayers should bear the costs of such a waste of public resources. 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 additional tax as increased by us to \$24,600 and recovered therewith.**

³ See Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7, per Fuad VP at page 23.