

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D43/01**

**Penalty tax** – understatement – bad case – obstructive – whether 210% of the tax undercharged excessive – compound interest.

Panel: Kenneth Kwok Hing Wai SC (chairman), Winnie Kong Lai Wan and Horace Wong Ho Ming.

Date of hearing: 2 May 2001.

Date of decision: 12 June 2001.

The taxpayer, a medical practitioner, had been by all means obstructive to the investigation of his understatement of profits. He even altered the charge codes of his patient cards.

The Commissioner imposed additional tax of 210% of the tax undercharged with 7% compound interest per annum.

**Held:**

The Board found it a bad case of understatement. The additional tax imposed, though heavy, is not excessive. It was also not unreasonable for the Commissioner to include 7% compound interest per annum.

**Appeal dismissed.**

Cases referred to:

D45/90, IRBRD, vol 5, 332

D68/95, IRBRD, vol 11, 93

D112/95, IRBRD, vol 11, 237

D81/97, IRBRD, vol 12, 475

D36/00, IRBRD, vol 15, 356

Wong Ning Investment Co Ltd v Commissioner of Inland Revenue [2000] 3

HKLRD I19

Chan Min Ching v CIR [1999] 2 HKLRD 586

D42/88, IRBRD, vol 3, 395

D42/89, IRBRD, vol 4, 479

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D4/90, IRBRD, vol 5, 82

D22/90, IRBRD, vol 5, 167

D71/91, IRBRD, vol 7, 1

D53/92, IRBRD, vol 7, 446

D7/95, IRBRD, vol 10, 79

D29/96, IRBRD, vol 11, 490

D154/98, IRBRD, vol 14, 17

Caffoor v Commissioner of Income Tax, Colombo [1961] AC 584 PC

Re ICS Computer Distribution Limited [1996] 3 HKC 440

D65/00, IRBRD, vol 15, 610

Herbert Li of Department of Justice for the Commissioner of Inland Revenue.  
Taxpayer in person.

### Decision:

1. This is an appeal against the following assessments (‘ the Assessments’ ) all dated 16 January 2001 by the Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance (Chapter 112) (‘ IRO’ ) in the following sums:

<b>Year of assessment</b>	<b>Additional tax</b>	<b>Charge number</b>
	\$	
1988/89	1,015,000	2-6004127-89-9
1989/90	1,005,000	2-6004210-90-7
1990/91	965,000	2-5009601-91-1
1991/92	948,000	2-5017446-92-A
1992/93	897,000	2-5024511-93-6
1993/94	393,000	3-2937467-94-0
<u>1994/95</u>	<u>348,000</u>	3-2942180-95-6
Total:	<u>5,571,000</u>	

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

### The agreed facts

2. Based on the statement of agreed facts, we make the following findings of fact.

3. The Taxpayer, a medical practitioner practising in his own name (‘ the Practice’ ), has appealed against the Assessments on the ground that all the Assessments are excessive.

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4. The Taxpayer established the Practice on 15 August 1985.

5. On divers dates, the Taxpayer filed the profits tax returns in respect of the Practice for the years of assessment 1988/89 to 1992/93 and the tax return - individuals for the year of assessment 1993/94. Profits tax assessments were raised based on the amount of returned profits for each year of assessment. Details of the assessments are shown as follows:

<b>Year of assessment</b>	<b>Returned profits</b>	<b>Date of issue of assessment</b>	<b>Tax payable</b>	<b>Due date for payment</b>
	\$		\$	
1988/89	401,571	13-10-1989	62,243	10-1-1990
1989/90	573,526	18-10-1990	86,028	9-1-1991
1990/91	825,360	9-8-1991	123,804	8-1-1992
1991/92	1,009,822	26-8-1992	151,473	8-1-1993
1992/93	1,411,176	19-1-1994	211,676	9-3-1994
1993/94	1,742,377	20-3-1995	261,356	4-5-1995

6. During the relevant periods, the Taxpayer's Practice was located at his clinic (' the Premises' ).

7. In mid-1993, the Inland Revenue Department (' IRD' ) commenced an audit on the profits tax return for the year of assessment 1991/92 submitted by the Taxpayer in respect of the Practice. On 15 September 1993, the Taxpayer attended an interview with two assessors, then in charge of his case, during which he provided certain information about the accounting/recording system of the Practice. The Taxpayer showed to the assessors a daily income sheet which recorded the patient numbers and the respective amounts paid for the morning session of 15 September 1993. He also handed to the assessors business records of the Practice for the year of assessment 1991/92, including an income book, a general ledger, bank statements and income statements from the hospital at which he was stationed. In reply to the assessors' inquiry as to the daily income sheets, the Taxpayer advised that they had not been retained.

8. On 23 November 1993, two assessors visited the Practice at the Premises by arrangement with a view to conducting a field audit.

9. On 30 November 1994, pursuant to section 51B of the IRO, authorised officers of the IRD obtained search warrants and carried out a search at the Premises and the Taxpayer's home. Books and records together with the patient cards of the Practice were among the documents seized during the search at the Premises and the Taxpayer's home (' the Search' ). The daily income sheets mentioned by the Taxpayer during the interview on 15 September 1993 (paragraph 7) for the relevant years were not found during the Search. At the request of the Taxpayer, the patient cards were sealed to enable the Taxpayer to apply for a judicial review on the matter.

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10. On 9 December 1994, the Court granted to the Taxpayer leave to apply for judicial review of the IRD's seizure of the patient cards and meanwhile, the IRD made an arrangement with the Taxpayer to allow him to make copies of the patient cards.

11. On 13 January 1995, the Taxpayer's tax representatives, a firm of certified public accountants (' the First Representatives' ), with the consent of the IRD, reviewed all the documents seized except the patient cards, in the possession of the Commissioner.

12. By virtue of a Court Order by consent dated 12 April 1995, the IRD was permitted to unseal the patient cards seized and to make copies of the patient cards on condition that certain confidential information of patients would not be copied. Entries of dates, charges and codes for charges paid by the patients and particulars of patients including names and addresses were not covered up when the copies of the patient cards were made. Having made copies of the seized patient cards in accordance with the Court Order dated 12 April 1995, the IRD returned all the patient cards to the Taxpayer on 25 November 1996.

13. On divers dates, the IRD raised on the Taxpayer the following additional profits tax assessments for the years of assessment 1988/89 to 1993/94 and profits tax assessment for the year of assessment 1994/95 in respect of the Practice:

Year of assessment	Date of issue of assessment	Assessable profits	Tax payable	Due date for payment	Number of months from original due date <i>c.f. paragraph 5</i>
		\$	\$		
1988/89	20-3-1995	3,200,000 (Additional)	496,000	4-5-1995	64
1989/90	9-8-1995	3,300,000 (Additional)	495,000	20-9-1995	56
1990/91	9-8-1995	3,300,000 (Additional)	495,000	20-9-1995	44
1991/92	9-8-1995	3,500,000 (Additional)	525,000	20-9-1995	32
1992/93	9-8-1995	3,600,000 (Additional)	540,000	20-9-1995	18
1993/94	9-8-1995	2,400,000 (Additional)	360,000	20-9-1995	4
1994/95	23-10-1995	5,500,000	825,000	23-1-1996	-

14. In reply to the Taxpayer's written inquiry on the basis of the estimated assessments for the years of assessment 1988/89 to 1993/94, the IRD claimed that they were based on information obtained mainly from patient cards.

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15. On 1 May 1995, the IRD issued to the Taxpayer a tax return - individuals for the year of assessment 1994/95.

16. On 25 September 1995, the Taxpayer wrote to the IRD saying that he could not file his tax return for the year of assessment 1994/95 because his accounting records had been seized by the IRD.

17. In a letter dated 6 October 1995 from the IRD, the Taxpayer was advised to contact the IRD for access to the documents seized.

18. On 23 October 1995, the IRD raised on the Taxpayer an estimated profits tax assessment for the year of assessment 1994/95 in respect of the Practice (paragraph 13) under section 59(3) of the IRO as the tax return for that year had not been submitted.

19. On 30 January 1996, the Taxpayer authorised his wife to go to the IRD to examine the documents seized.

20. On 1 February 1996, the IRD returned to the Taxpayer the records for the year of assessment 1994/95 which were seized during the Search on 30 November 1994 (paragraph 9).

21. On 12 March 1996, the Taxpayer filed the tax return - individuals for the year of assessment 1994/95 which showed the following particulars in respect of the Practice:

<b>Year of assessment</b>	<b>Returned profits</b>
	\$
1994/95	1,917,951

22. The Taxpayer lodged objections against the assessments for the years of assessment 1988/89 to 1993/94 (paragraph 13) on the grounds that all these assessments are excessive and not in accordance with the tax returns previously filed. The Taxpayer objected against the estimated profits tax assessment for the year of assessment 1994/95 on the ground that he could not file his tax return for the year without the invoices and documentation from April to November 1994 which the IRD seized during the search at his office and home on 30 November 1994.

23. By a letter dated 23 October 1996, the IRD informed the Taxpayer that, having analysed all the available patient cards and the numeric markings thereon, the IRD proposed to settle the objections against the assessments for the years of assessment 1988/89 to 1993/94 as follows:

<b>Year of assessment</b>	<b>Revised assessable profits</b>
	\$
1988/89	2,567,286 (Additional)

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1989/90	2,696,400 (Additional)
1990/91	2,690,943 (Additional)
1991/92	2,779,741 (Additional)
1992/93	2,689,021 (Additional)
1993/94	1,407,578 (Additional)

24. On 9 November 1996, the Taxpayer appointed a limited company ('the Second Representatives') as his tax representative.

25. By a letter dated 17 December 1996, the Second Representatives, requested the IRD to provide them with computer diskettes containing the relevant data files for reference. The IRD, on 20 December and 23 December 1996, supplied the Second Representatives with five computer diskettes containing the data files of the numeric markings extracted from the patient cards seized.

26. By a letter dated 18 March 1997, the Second Representatives informed the IRD that they had resigned as the Taxpayer's representative.

27. By a letter dated 26 March 1997, the chief assessor requested the Taxpayer to confirm a statement of facts. The Taxpayer, by a letter dated 5 May 1997, contended that the numeric codes which were marked on the patient cards denoted the total amount charged and that the actual amount charged was five times the numeric value of the codes, but might be less or waived in cases where the patients had financial difficulties.

28. By a letter dated 25 June 1997, the Taxpayer made a proposal to the IRD, on a 'without prejudice' basis, for settlement of the objections against the additional assessments for the years of assessment 1988/89 to 1993/94.

29. By a letter dated 3 July 1997, the IRD requested the Taxpayer to produce the books and records of the Practice for the year ended 31 March 1995. In reply, the Taxpayer, on 10 July 1997, submitted copies of the income book of the Practice for the year ended 31 March 1995.

30. By another letter dated 18 July 1997, the IRD requested the Taxpayer to supply further documents and information in support of the income records submitted on 10 July 1997. The Taxpayer, by a letter of 26 July 1997, contended that the income records produced on 10 July 1997 would constitute sufficient records as required by the law before the introduction of the amendment to section 51C of the IRO on 30 June 1995.

31. The IRD, by a letter dated 24 September 1997, made a proposal to the Taxpayer to settle the objection against the profits tax assessment for the year of assessment 1994/95 at a revised assessable profit which was arrived at by projecting from the recorded income for the last four months ended 31 March 1995.

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32. For the purpose of reaching a compromise settlement, the IRD, by another letter dated 24 September 1997, made a proposal to the Taxpayer to settle the objections against the additional profits tax assessment for the years of assessment 1988/89 to 1993/94, which was in essence in line with the proposal made by the Taxpayer on 25 June 1997 (paragraph 28) except for the proposed penalty.

33. By a fax of 8 October 1997, the Taxpayer contended that the tax return he filed for the year of assessment 1994/95 was 'true, valid and in accordance with the legal requirements of the time'.

34. By another fax message of 8 October 1997, the Taxpayer forwarded to the IRD copies of some of the bank statements of his bank accounts with two banks.

35. The Commissioner of Inland Revenue by his determination dated 27 December 1997:

- (i) reduced the assessable profits in the additional profits tax assessments for the years of assessment 1988/89 to 1993/94 to the respective revised amounts as shown in paragraph 23 above;
- (ii) reduced the assessable profits in the profits tax assessment for the year of assessment 1994/95 to \$3,022,165 (paragraph 31).

36. On 23 January 1998, the Taxpayer lodged an appeal to the Inland Revenue Board of Review against the Commissioner's determination in respect of the additional profits tax assessment for the years of assessment 1988/89 to 1993/94 and the profits tax assessment for the year of assessment 1994/95.

37. The appeal case (B/R 217/97) was heard before a differently constituted Board on 10 November 1998, 16 December 1998, 3, 4 March 1999, 2 June 1999 and 21 to 24 February 2000.

38. On 14 August 2000, the Board, chaired by Mr Terence Tai Chun-to, handed down a written decision (D50/00). By way of a letter of 9 November 2000, a revised version of the decision was sent to the Taxpayer's solicitors and the Commissioner of Inland Revenue respectively to correct certain typographical and arithmetical errors in the original decision. Having regard to all the circumstances of the case, the Board was not satisfied that the Taxpayer had discharged his onus of proving that the additional profits tax assessments for the years of assessment 1988/89, 1989/90 and 1990/91 and the profits tax assessment for the year of assessment 1994/95 as determined by the Commissioner were excessive or incorrect. As a result of certain casting errors conceded by the IRD for the years of assessment 1991/92 to 1993/94, the Board reduced the additional profits tax assessments for those years to such a limited extent. The Board dismissed the Taxpayer's appeals relating to the years of assessments 1988/89 to 1990/91 and 1994/95 and confirmed the additional profits tax assessments and profits tax assessment respectively save and

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except that for the year of assessment 1989/90 the additional assessable profits were increased to \$2,696,405.

Year of assessment	Assessable profits determined by the Commissioner \$	Assessable profits decided by the Board of Review \$	
1988/89	2,567,286 (Additional)	2,567,286	<i>Confirmed</i>
1989/90	2,696,400 (Additional)	2,696,405	<i>Increased</i>
1990/91	2,690,943 (Additional)	2,690,943	<i>Confirmed</i>
1991/92	2,779,741 (Additional)	2,743,621	<i>Reduced</i>
1992/93	2,689,021 (Additional)	2,689,016	<i>Reduced</i>
1993/94	1,407,578 (Additional)	1,233,909.5	<i>Reduced</i>
1994/95	3,022,165	3,022,165	<i>Confirmed</i>

39. The Taxpayer did not appeal against the decision (D50/00) of the Board within the stipulated time under the IRO.

40. By a notice under section 82A(4) of the IRO dated 5 December 2000, the Commissioner of Inland Revenue informed the Taxpayer that he proposed to assess additional tax under Section 82A in respect of the incorrect profits tax returns for the years of assessment 1988/89 to 1994/95. The total amount of profits understated in consequence of the incorrect returns is \$15,725,394 (paragraph 41 *infra*) and the total amount of tax undercharged is \$2,371,644 (paragraph 43 *infra*). The Taxpayer was invited to submit written representations with regard to the proposed assessment of additional tax.

41. Details of the amount of profits understated as decided by the Board and the returned profits for the relevant years of assessment are shown as follows:

Year of assessment	Returned profits (paragraphs 5 and 21) (RP) \$	Profits understated (paragraph 38) (D) \$	Correct assessable profits (RP + D) \$	Percentage of understatement (D/(RP + D)) %
1988/89	401,571	2,567,286	2,968,857	86
1989/90	573,526	2,696,405	3,269,931	82
1990/91	825,360	2,690,943	3,516,303	77
1991/92	1,009,822	2,743,621	3,753,443	73



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1992/93	1,411,176	2,689,016	4,100,192	66
1993/94	1,742,377	1,233,909	2,976,286	41
1994/95	<u>1,917,951</u>	<u>1,104,214<sup>#</sup></u>	<u>3,022,165</u>	<u>37</u>
	<u><u>7,881,783</u></u>	<u><u>15,725,394</u></u>	<u><u>23,607,177</u></u>	<u><u>67</u></u>

<sup>#</sup> The amount of discrepancy for the year of assessment 1994/95 is  
 $\$3,022,165 - \$1,917,951 = \$1,104,214$

42. By a letter dated 27 December 2000, the Taxpayer responded to the section 82A(4) notice.

43. On 16 January 2001, the Commissioner of Inland Revenue issued the Assessments to the Taxpayer as follows:

Year of assessment	Amount of tax undercharged	Amount of additional tax	Percentage of additional tax over tax undercharged
	\$	\$	%
1988/89	397,929	1,015,000	255
1989/90	404,461	1,005,000	248
1990/91	403,641	965,000	239
1991/92	411,543	948,000	230
1992/93	403,352	897,000	222
1993/94	185,086	393,000	212
1994/95	<u>165,632</u>	<u>348,000</u>	<u>210</u>
	<u><u>2,371,644</u></u>	<u><u>5,571,000</u></u>	<u><u>235</u></u>

44. By a letter dated 16 February 2001, the Taxpayer lodged an appeal to this Board against the Assessments (paragraph 43).

**The appeal hearing**

45. At the hearing of the appeal, the Taxpayer appeared in person and the Respondent was represented by Mr Herbert Li.

46. The Taxpayer did not give any oral evidence and called no witness. Mr Herbert Li called Miss Ngan Sin-ling, the assessor in charge of the investigation into the Taxpayer's case since May 1994, as a witness.

47. The Taxpayer cited the following authorities:

- (a) D45/90, IRBRD, vol 5, 332;

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- (b) D68/95, IRBRD, vol 11, 93;
- (c) D112/95, IRBRD, vol 11, 237;
- (d) D81/97, IRBRD, vol 12, 475;
- (e) D36/00, IRBRD, vol 15, 356; and
- (f) Wong Ning Investment Co Ltd v Commissioner of Inland Revenue [2000] 3 HKLRD 119.

48. Mr Herbert Li cited the following authorities:

- (a) Chan Min Ching v CIR [1999] 2 HKLRD 586, also reported in [1999] 2 HKC 848;
- (b) D42/88, IRBRD, vol 3, 395;
- (c) D42/89, IRBRD, vol 4, 479;
- (d) D4/90, IRBRD, vol 5, 82;
- (e) D22/90, IRBRD, vol 5, 167;
- (f) D71/91, IRBRD, vol 7, 1;
- (g) D53/92, IRBRD, vol 7, 446;
- (h) D7/95, IRBRD, vol 10, 79; and
- (i) D29/96, IRBRD, vol 11, 490.

49. Of the three possible grounds of appeal under section 82B(2) of the IRO, the Taxpayer relied only on the ground under section 82B(2)(c) that the Assessments were excessive having regard to the circumstances. He made his submission along the lines of a written submission and contended that:

- ‘ 1 Having regard to all the facts and circumstances known to the Commissioner of Inland Revenue, the additional tax under section 82A in total amount of \$5,571,000 which is about 235% of the tax undercharged of \$2,371,644 is excessive.

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- 2 Having regard to the recent Board of Review decisions on additional tax under section 82A, the additional tax imposed seldom exceeded 150% of the tax undercharged. The Commissioner of Inland Revenue departed from the guidelines established under those decisions.
- 3 During the course of the tax investigation, I had been co-operative in complying with the assessors' requests as far as I could. I do not think that my case is one that justified the penalty as high as 235% of the tax undercharged.
- 4 It was mainly due to the long lapse of time and the lack of sufficient documentary evidence that I could not discharge my onus of proof of the excessiveness of the additional profits tax assessments as raised by the assessors of the Investigation Unit of the Inland Revenue Department. I believe that in a substantial number of tax investigation and field audit cases, it was common that the taxpayers could not produce all the accounting records or information of bank accounts and personal assets for the investigation period (usually six years). As I am much aggrieved by the excessive additional profits tax charged by the IRD and determined by the Board of Review, the 235% on the excessive tax undercharged is such a great financial burden that I could hardly bear. I sincerely request the members of the Board of Review to reduce the additional tax under section 82A.
- 5 Due to the poor economy and the keen competition in medical practices, I suffer great financial difficulties in paying the additional profits tax and the penalty.'

50. Mr Herbert Li submitted along the lines of his written submission and referred to the Commissioner's penalty policy 'Penalties under Section 82A of the Inland Revenue Ordinance' published and uploaded on the IRD's homepage on 14 December 2000. The Commissioner classified this case as one under 'Group (a)' of 'Disclosure Denied' and added commercial restitution where applicable. Mr Herbert Li submitted that the Assessments were not excessive.

### **Our decision**

51. The onus of proving that the Assessments are excessive or incorrect is on the appellant, sections 68(4) and 82B(3) of the IRO.

52. The Taxpayer argued his first three grounds together under the sub-headings of 'Level of co-operation', 'Magnitude of understatement', 'Time spent in the investigation process' and 'Authorities'.

53. In the course of his argument, the Taxpayer abandoned his fourth ground that the additional profits tax as determined by the Board of Review in D50/00 was 'excessive'.

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54. The Taxpayer also contended he was ‘ unable to settle the long overdue back duties of over \$2,000,000 for the years of assessment 1989/90 to 1994/95 in the foreseeable future, let alone the penalty of \$5,571,000’ .

### **Level of co-operation**

55. Had the Taxpayer complied with his statutory duty to report the correct amounts of profits, there would have been no need for the IRD to deploy its publicly funded resources to investigate the correct amount of profits. If the Taxpayer had been co-operative, he mitigated the damage caused by his breaches and if the Taxpayer had been obstructive, he aggravated the damage.

56. The Taxpayer contended that he had been ‘ co-operative with the IRD since the commencement of the tax investigation as far as [he] could’ .

57. In our decision, if being ‘ co-operative ... as far as [he] could’ meant being obstructive, we agree.

58. This case arose from the Taxpayer understating profits in his profits tax returns.

59. He failed or refused to keep, or make available to the IRD, the daily income sheets. The unavailability of the daily income sheets created substantial difficulties in ascertaining whether the Taxpayer had reported the correct amounts of tax.

60. The Taxpayer knew he had recorded charges or codes of charges on the patient cards.

61. The first thing he did when the patient cards were seized on 30 November 1994 was to request that they be sealed so as to enable him to apply for a judicial review. It was not until 12 April 1995 that the Taxpayer and the IRD resolved their differences by the consent Court Order dated 12 April 1995.

62. More significantly, we accept Miss Ngan Sin-ling’s evidence and find as a fact that more than 90% of the patient cards contained alterations to the charge codes by the insertion of ‘ +’ . For example, ‘ 22’ was altered to ‘ 2+2’ . The ‘ +’ mark was in new ink, compared with the pale ink of the figures. We draw the inference which in our decision is compelling and irresistible that the ‘ +’ marks were added in an attempt to mislead the IRD, or at least impede the IRD’s investigation, in the event of the IRD getting hold of the patient cards.

63. The Taxpayer also attempted to mislead the IRD or impede the IRD’s investigation by making different assertions of what the code stood for, see paragraph 27 above. In D50/00, the

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Board of Review accepted Miss Ngan Sin-ling's approach by eliminating all the '+' signs which she judged to be squeezed in artificially and in adopting 10 as the multiple.

64. If the Taxpayer had the slightest inclination to co-operate with the IRD, he would have accepted the IRD's offer in its letter dated 24 September 1997 (see paragraph 32 above). The IRD's offer was to agree the amount of additional assessable profits for each of the years of assessment 1988/89 to 1993/94 at \$718,234 and to refer the case to the Commissioner for consideration of additional tax under section 82A. The offer was to settle at 29.47% of the correct amounts of additional profits as determined in D50/00 (see paragraph 38 above). By 24 September 1997, all the patient cards had been returned to the Taxpayer. The Taxpayer did not accept the IRD's offer and the Commissioner made his determination dated 27 December 1997.

65. The Taxpayer's waste of the IRD's resources and public funds did not end with the determination. He appealed to the Board of Review, the hearing of which took place on 10 November 1998, 16 December 1998, 3, 4 March 1999, 2 June 1999 and 21 to 24 February 2000. The length of the hearing depended materially on the number and complexity of issues raised before the Board of Review. The Taxpayer contended that his appeal should not be held against him as he only exercised the right to which he was entitled under the IRO and that the time in the appeal process should be disregarded. Apart from accepting that prior to June 1995, one was required to keep sufficient records to enable assessable profits to be readily ascertained, the Board of Review decided against the Taxpayer on all his contentions. The Board of Review reduced the assessments for the years of assessment 1991/92, 1992/93 and 1993/94 only to the limited extent conceded by the IRD. It is clear from D50/00 that the Taxpayer's appeal was unmeritorious. The Taxpayer had a statutory right to appeal, but the fact that he lodged an unmeritorious appeal is a relevant circumstance which both the Commissioner and we are bound to have regard to in considering the amounts of additional tax. It would have been wrong for us to disregard the time taken by the Board of Review to dispose of an unmeritorious appeal brought by the Taxpayer.

### **Magnitude of understatement**

66. This is a bad case of understatement, both in terms of the dollar amounts understated and the percentage of understatement. Understatement continued, albeit to lesser extents, for the year of assessment 1993/94 despite the field audits on 15 September 1993 and 23 November 1993 and also for the year of assessment 1994/95 despite the execution of the search warrant on 30 November 1994.

### **Time spent in the investigation process**

67. We have dealt with this in paragraph 65 above.

68. This is a case where ascertaining the correct amount of assessable profits commenced with the field audit on 15 September 1993 and ended with D50/00 dated 14 August 2000 or the

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revised version on 9 November 2000. Strictly speaking, the one month period for appeal to the Court of First Instance should be added.

### **Authorities**

69. We have carefully considered all the authorities cited by the parties. We do not intend to refer separately to any of them. They are decisions on the facts of those cases and a decision confirming the Commissioner's assessment(s) is not necessarily authority for the proposition that any assessment exceeding those assessment(s) is excessive.

### **Finality of D50/00**

70. Had the Taxpayer not abandoned his contention that the additional profits tax as determined by the Board of Review in D50/00 was 'excessive', we would have decided against him on this ground. He had not appealed to the Court of First Instance under the proviso to section 69(1) of the IRO. Section 69(1) provides that '*the decision of the Board shall be final*' and '*what shall be final shall be final*', D154/98, IRBRD, vol 14, 17 at page 23. Section 70 provides that '*where the amount of such assessable ... profits ... has been determined on ... appeal, the assessment as ... determined on ... appeal ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable ... profits*'. Section 82B(3) provides that sections '*69 and 70 shall, so far as they are applicable, have effect with respect to appeals under additional tax as if such appeals were assessments to tax other than additional tax*'. Caffoor v Commissioner of Income Tax, Colombo [1961] AC 584 PC does not assist the Taxpayer because the issues in D50/00 and the issues here are the amounts of the assessable profits for the years of assessment 1988/89 to 1994/95, see pages 597 to 598.

### **Inability to pay**

71. Madam Justice Yuen expressed the view, obiter, in Chan Min Ching v CIR [1999] 2 HKLRD 586 at page 589 that:

*' In my view, the reason why the taxpayer failed to keep accurate records (as referred to in paragraph 16(b) of the decision) and her ability or lack of it to pay additional tax (as stated in paragraph 16(c) of the decision) would appear to me to be matters which the Board should have taken into account as part of the "relevant circumstances" as referred to in section 82B(2)(c).'*

72. There are some previous Board of Review decisions which held that the financial position of a taxpayer is not a valid consideration to take into account when assessing the quantum of the penalties, although it may be relevant to the question whether the taxpayer should be allowed to pay by instalments.

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73. We assume, without deciding, that the financial inability of the Taxpayer to pay the Assessments is a relevant factor to be taken into consideration. The Taxpayer contended that he was unable to pay. As Rogers J (as he then was) said in Re ICS Computer Distribution Limited [1996] 3 HKC 440 at page 449A, ‘*this seems to be an attempt to raise an argument without the fundamental evidence to support it*’. The Taxpayer made selective disclosure of copy of bank statements from two accounts which he held with his wife with a bank other than the two referred to in paragraph 34 above. There is simply no evidence of the Taxpayer’s financial position, no evidence of the Taxpayer’s wealth at the time of hearing of this appeal, and no evidence on the Taxpayer’s cash flow.

### **The Commissioner’s penalty policy**

74. Miss Ngan Sin-ling did not know why or how the starting point for ‘Group (a)’ of ‘Disclosure Denied’ came to be 210%. She was also unable to assist on how 7% came to be chosen as the interest rate. In these circumstances, we express no view on the Commissioner’s penalty policy.

### **Whether excessive in the circumstances**

75. We must consider whether the Assessments which represented 210% of the tax undercharged, plus 7% compound interest per annum were excessive having regard to the circumstances.

76. The Taxpayer is well-educated, being a medical practitioner.

77. He received income from patients who visited his clinic at the Premises. The task of keeping an accurate record of the correct amount of income from his patients, and reporting the correct amount of profits, had he been so minded, would have been relatively straight forward.

78. He failed or refused to keep, or make available to the IRD, the daily income sheets.

79. The alterations of the patient cards and making different assertions of what the charge code stood for were cover-up tactics in attempts to mislead the IRD, or at least impede the IRD’s investigation.

80. The Taxpayer lodged and pursued an unmeritorious appeal (D50/00).

81. The Taxpayer was obstructive and the matter dragged on for about seven years.

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82. As stated in paragraph 66 above, this is a bad case of understatement, both in terms of the dollar amounts understated and the percentage of understatement, with understatement continuing, albeit to lesser extents, despite the 15 September 1993 and 23 November 1993 field audits and despite the execution of the search warrant on 30 November 1994. The Taxpayer substantially understated his assessable profits over a period of seven years of assessment.

83. In our decision, it was not unreasonable for the Commissioner to have included 7% compound interest per annum, see, for example, paragraphs 51 and 52 in D65/00, IRBRD, vol 15, 610 at page 621.

84. The maximum amount for which the Taxpayer is liable is 300%, not 100%, not 150%, and not 200%, of the amount of tax undercharged or which would have been undercharged.

85. We have carefully considered all the points raised by the Taxpayer orally and in writing. The penalty imposed by the Commissioner is a heavy one which befits the gravity of this case. In our decision, none of the Assessments is excessive.

### **Disposition**

86. We dismiss the appeal and confirm the Assessments.