

Case No. D47/05

Penalty tax – an appeal against the assessment for additional tax – incorrect return and untrue claims for allowances – onus of proof was on the appellant to show that the assessment appealed against was excessive or incorrect – whether there was reasonable excuse – whether the additional tax imposed was excessive – the appellant showed no genuine remorse – sections 68(4), 68(8)(a), 82A(1), 82A(4), 82B(2), 82B(3) of the Inland Revenue Ordinance ('the IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Francis T K Ip and Horace Wong Ho Ming.

Date of hearing: 10 August 2005.

Date of decision: 16 September 2005.

This was an appeal against the assessment dated 20 May 2005 whereby the Deputy Commissioner of Inland Revenue assessed the appellant to additional tax in the sum of \$4,000 (that is 35.94% of the amount of tax which would have undercharged) for the year of assessment 2003/04 under section 82A, in respect of her alleged (a) making of an incorrect return by understating income and (b) making of an incorrect statement in connection with a claim for dependent parent allowance and for disabled dependant allowance.

The appellant claimed in her 'Tax Return – Individual' for the year of assessment 2003/04 dated 26 June 2004 ('tax return') that (a) her salary income for April 2003 to March 2004 totalled \$336,000 (which was inconsistent with the salary income of \$382,794 reported by the appellant's employer in an Employer's Return dated 30 April 2004); (b) her deceased mother was residing with her continuously during the full year without paying full cost; (c) her or her spouse's contribution was not less than \$120,000 in money during the year towards the dependant parent's maintenance; and (d) her entitlement for disabled dependant allowance in respect of her deceased mother during the year.

Had the appellant's tax return been accepted as correct: (a) the total amount of deductions and allowances claimed by her exceeded her reported income; (b) no salaries tax would have been payable; and (c) the amount of tax which would have been undercharged was \$11,129.

At the hearing of appeal, the appellant contended *inter alia* that this was her first incorrect return; she mistook her mother's date of death; she had no clue about money and figures and was careless; and the errors were unintentional. She did not contend that there was any reasonable excuse. She had paid the additional tax on the last day for payment, before the date of the hearing.

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Held:

1. After carefully considering the appellant's evidence in the light of the contemporaneous documents, the objective facts and the appellant's demeanour, the Board decided that the appellant was anything but a truthful witness. The Board rejected the appellant's assertion that the breaches were unintentional.
2. The correct amount of income was \$382,794. The appellant reported income of \$336,000. She understated income by \$46,794, or 12.22% of the correct amount of income.
3. The appellant's mother passed away on 26 January 2003. The appellant's claim in her tax return for dependent parent allowance in respect of her deceased mother was an untrue claim. She aggravated matters by making a further untrue claim for disabled dependent allowance in respect of her deceased mother. The allowances totalled \$120,000, or 31.35% of the correct amount of income.
4. A claim for dependent parent allowance for a deceased parent is a flagrant and blatant breach and the culpability is high. It is likely to have been a 'try-on'. On the facts, the Board found that this was not the appellant's first understatement of income. The Board had not been able to detect any genuine remorse from the appellant who tried to lie her way through.
5. On the issue of whether there was any 'reasonable excuse' for what would otherwise be a wrongful act of omission under section 82A, the Board found that there was no excuse, and definitely no reasonable excuse on the part of the appellant, for the understatement of her income and the untrue claims for allowances in respect of her deceased mother (D90/01 considered).
6. The maximum amount of additional tax is treble the amount of tax which would have been undercharged had the appellant's tax return been accepted as correct. The amount which would have been undercharged was \$11,129 and treble that was \$33,387.
7. Section 82A is not restricted to cases where there is no dishonest intent. Each case must be decided having regard to the circumstances in each case. For a blatant breach, it should be punished by a stiff penalty. The norm of 100% of the tax undercharged under the Commissioner's penalty policy is high but may not necessarily be excessive. The board has upheld additional tax at not less than 200% of the tax undercharged (D118/02 applied).

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8. The fact that the intended victim of deception was vigilant enough to detect the deception is not a mitigating factor. The fact that the Revenue suffered no financial loss is at best not an aggravating factor and is not a mitigating factor.
9. In all the circumstances of this case, the Board found that the additional tax imposed at 35.94% of the amount of the tax which would have been undercharged was not excessive; it was manifestly inadequate (D91/00, D118/02 and D95/03 distinguished).
10. Pursuant to sections 68(8)(a) and 82B(3) of the Ordinance, the Board decided to increase the assessment from \$4,000 to \$8,900. The additional tax was increased to slightly less than 80% of the amount of tax which would have been undercharged.

Quaere

11. A taxpayer's financial means to pay additional tax is not irrelevant for the Board's consideration under section 82B(2)(c) (D88/03 applied).

Appeal dismissed.

Cases referred to:

D90/01, IRBRD, vol 16, 757
D91/00, IRBRD, vol 15, 842
D118/02, IRBRD, vol 18, 90
D95/03, IRBRD, vol 18, 896
D88/03, IRBRD, vol 18, 853

Taxpayer in person.

Lam Fung Shan and Lee Kit Mee May for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the assessment ('the Assessment') dated 20 May 2005 by the Deputy Commissioner of Inland Revenue, assessing the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') in the following sum:

Year of assessment	Additional tax	Charge no
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2003/04

\$4,000

9-1916016-04-2

2. The relevant provisions are section 82A(1)(a) and 82A(1)(b) of the Ordinance for:
- (a) making an incorrect return by understating income; and
 - (b) making an incorrect statement in connection with a claim for dependent parent allowance and for disabled dependant allowance in respect of a deceased parent.

The relevant facts

3. The parties agreed the facts in the agreed statement of facts and we find them as facts.
4. The relevant facts are as follows.
5. The appellant's mother passed away on 26 January 2003.
6. By an Employer's Return dated 30 April 2004, the appellant's employer reported that the appellant's salary income for the period 1 April 2003 to 31 March 2004 was \$382,794.
7. In her 'Tax Return – Individuals' for the year of assessment 2003/04 ('the relevant year of assessment') dated 26 June 2004, the appellant:
- (a) reported in Part 4.1 that her salary income for April 2003 – March 2004 totalled \$336,000;
 - (b) claimed in Part 8.4 that her deceased mother was a dependent parent by putting '1' in the box under Part 8.4(5)(i); a tick against the 'Yes' box under Part 8.4(5)(ii); and a tick against the 'Yes' box under Part 8.4(7):
 - '(5) Claim for Dependent Parent/Grandparent Allowance:
 - (i) The dependant resided with me continuously during the year without paying full cost. (Enter "1" for full year; or "2" for at least 6 months **OR**
 - (ii) I/my spouse contributed not less than \$12,000 in money during the year \$1,200 prior to year of assessment 1998/99) towards the dependant's maintenance.
- (6) ...

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- (7) I wish to claim disabled dependant allowance in respect of the dependant who was eligible to claim an allowance under the Government's Disability Allowance Scheme during the year.'

8. By a hand-written note also dated 26 June 2004, the appellant asked the Inland Revenue Department to reduce the amount of provisional tax on the ground of an alleged 3% reduction in salary.

9. By an assessment dated 28 October 2004 ('the salaries tax assessment'), the assessor assessed the appellant to salaries tax on the basis that her income was \$382,794. By Assessors' Notes printed on the back of the assessment, the assessor stated that the appellant's claim for dependent parent allowance and for disabled dependant allowance in respect of her deceased mother was disallowed on the ground that neither the appellant nor her spouse had maintained the appellant's deceased mother during the relevant year. The assessor did not deal with the appellant's claim for dependent parent allowance and for disabled dependant allowance in respect of her father.

10. By letter dated 28 October 2004 (that is, the same date as the date of the salaries tax assessment), the appellant:

- (a) objected against the salaries tax assessment on the ground that she was entitled to dependent parent allowance and to disabled dependant allowance in respect of her father; and
- (b) requested that her provisional tax be held over on the ground of an alleged large scale reduction in salary in 2003.

She did not dispute that her income was \$382,794 and she did not object against the disallowance of her claim for dependent parent allowance and for disabled dependant allowance in respect of her deceased mother.

11. By an assessment dated 6 December 2004, the assessor revised the salaries tax assessment by allowing the appellant's claim for dependent parent allowance and for disabled dependant allowance in respect of her father.

12. Had the appellant's 'Tax Return – Individuals' for the relevant year of assessment dated 26 June 2004 been accepted as correct:

- (a) the total amount of deductions and allowances claimed by her exceeded her reported income;

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- (b) no salaries tax would have been payable; and
- (c) the amount of tax which would have been undercharged was \$11,129.

13. The Deputy Commissioner assessed the appellant to additional tax in the sum of \$4,000, that is, 35.94% of the amount of tax which would have been undercharged had her return been accepted as correct.

14. The appellant paid the additional tax on 4 July 2005, the last day for payment.

The appellant's case on appeal

15. The appellant asserted on oath at the hearing of the appeal that:

- (a) this was her first incorrect return;
- (b) she mistook her mother's date of death and there was a gap of three months between the real date of death and her mistaken date of death;
- (c) she did not realise that she had made a mistake until she was invited by the Deputy Commissioner to make representations;
- (d) she did not collect the employer's return which had been sent to one of the three business addresses of her employer;
- (e) she was busy and it was her husband who filled in the return for her;
- (f) she had filled in the return for the preceding year, that is, for the 2002/03 year of assessment ('the preceding year of assessment') herself, that she gave a copy of the return for the preceding year of assessment to her husband and her husband filled in the return for the relevant year of assessment on the basis of a 6% reduction of her salary as reported in the return for the preceding year of assessment;
- (g) she had no clue about money and figures and was careless, but the errors were unintentional;
- (h) she would be more careful in future; and
- (i) she had financial difficulty because she had to pay for her mother-in-law's medical treatment and for her 3-year old daughter's speech therapy training at \$600 per session.

Our decision

Assessment of the appellant's evidence

16. We have carefully considered the appellant's evidence in the light of the contemporaneous documents and the objective facts and have also carefully observed the appellant's demeanour. In our decision, she was anything but a truthful witness.

17. Her claim that her return for the relevant year of assessment was her first incorrect return was belied by her return and her employer's return for the preceding year of assessment which Ms Lam Fung-shan confronted her with. She reported income of \$396,000 despite the fact that her employer reported income of \$425,100.

18. If she had in fact mistaken her mother's date of death by three months (which we disbelieve), then she would have thought that her mother passed away about three months from 26 January 2003. On her own case, she would have known that she had not resided with her deceased mother continuously during the year from April 2003 to March 2004. On her own case, she would have known that her claim in Part 8.4(5)(i) that her deceased mother 'resided with [her] continuously during the year' was untrue.

19. Her allegation that she did not realise that she had made a mistake until she was invited by the Deputy Commissioner to make representations was belied by the fact that although she objected to the salaries tax assessment on the ground that her claim for allowances in respect of her father should have been allowed, she did not object on the ground that her claim for allowances in respect of her deceased mother should likewise have been allowed.

20. If, as she alleged, she did not take the trouble to apprise herself of the contents of the employer's return for the relevant year of assessment, she had herself to blame for choosing to turn a blind eye to information which would have helped her in discharging her obligation under the Ordinance to report timeously the correct amount of her income.

21. In her notice of appeal dated 4 June 2005 and at the hearing before us, she alleged that the return for the relevant year of assessment was filled in by her husband based on a 6% reduction of the income reported in her return for the preceding year of assessment. The appellant did not take the trouble to check her own documents before lying. Her allegations were contradicted by three of her own documents.

- (a) In her written representations to the Deputy Commissioner dated 20 April 2005, she alleged that she had not received the employer's return until after she had reported her income and that she had made a mistake in computing her monthly income. She changed her version by alleging that the return for the relevant year

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of assessment was completed by her husband instead of by her. She also changed her version by alleging that the mistake was caused by her husband reporting on the basis of a 6% reduction instead of by her in computing her income.

- (b) In her hand-written note dated 26 June 2004, she alleged a 3% reduction in salary. In contrast with her new version that she was busy, she had the time to write the note herself. She also had the presence of mind to mention a 3% reduction, in contrast with her new version of a 6% reduction.
- (c) In her return for the preceding year of assessment, she reported income of \$396,000. A 6% reduction would have meant income of \$372,240. The income reported for the relevant year of assessment was \$336,000. There the answer to Part 8.4(5)(i) was '2', but the answer to it was '1' for the return for the relevant year of assessment. She was cross-examined on the reason for the change if her husband was merely copying from the earlier return. She alleged that her husband had consulted her. When asked why the husband consulted her if she had in fact resided with her deceased mother and her husband had resided with her, she said that her deceased mother did not live with her but she often visited her deceased mother. On her own case, she did not live with her deceased mother and she made the untrue statement in the return that she had resided with her deceased mother continuously during the year, knowing the same to be untrue. We note in passing that the hand-writing in the return for the preceding year of assessment and the hand-writing in the return for the relevant year of assessment seem to us to be strikingly similar. We, however, attach no weight to this similarity in our assessment of the credibility of the appellant.

22. We reject the appellant's assertion that she had no clue about money and figures. She asked for reduction of the amount of provisional tax in her hand-written note dated 26 June 2004. In October 2004, she lodged an immediate objection against the assessor's failure to allow her claim for allowances in respect of her father and asked that her provisional tax be held over.

23. We reject the appellant's assertion that the breaches were unintentional. The fact that although she lodged an immediate objection in respect of the father's allowances but did not object in respect of her deceased mother's allowances suggested that she tried it on the Revenue but failed.

24. We hope that in future the appellant will treat her obligations under the Ordinance with the seriousness they deserve. If she does not, the consequences which include criminal prosecution would be grave.

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25. We reject the appellant's assertion of financial difficulty. Financial difficulty should be proved by full disclosure of assets, liabilities and cash-flows. Merely producing some invoices and some receipts made out in the names of various persons does not. The maximum amount of additional tax is \$33,387 and the appellant has already paid the \$4,000 additional tax. We note that the appellant's income for the relevant year of assessment was \$382,794 and that according to her return for that year, she:

- (a) claimed \$18,660 as interest paid in respect of a loan to acquire her residence;
- (b) claimed \$10,000 as approved charitable donations; and
- (c) made no claim for any child allowance.

There is no evidence about the appellant's husband's income or assets.

The relevant statutory provisions

26. 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.

27. 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) makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance; or

(c) ...

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

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*the return, statement or information had been accepted as correct;
or*

(ii) ...'

28. 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.'*

29. 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. Section 68(8)(a) provides that 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.

Incorrect return and untrue claims for allowances

30. The correct amount of income was \$382,794. The appellant reported income of \$336,000. She understated income by \$46,794, or 12.22% of the correct amount of income.

31. The appellant's mother passed away on 26 January 2003. The appellant's claim in her return for the relevant year of assessment for dependent parent allowance in respect of her deceased mother was an untrue claim. She aggravated matters by making a further untrue claim for disabled dependant allowance in respect of her deceased mother. The allowances totalled \$120,000, or 31.35% of the correct amount of income.

Whether reasonable excuse

32. If we have understood the appellant's case correctly, she did not contend that there was any reasonable excuse.

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33. What we are concerned with under section 82A is whether there is any 'reasonable excuse' for what would otherwise be a wrongful act or omission, see D90/01, IRBRD, vol 16, 757 at paragraph 26.

34. In our decision, there is no excuse, and definitely no reasonable excuse, for the understatement of her income and the untrue claims for allowances in respect of the appellant's deceased mother.

Maximum amount of additional tax

35. The maximum amount is treble the amount of tax which would have been undercharged had the appellant's return for the relevant year of assessment been accepted as correct. The amount which would have been undercharged was \$11,129 and treble that is \$33,387.

Culpability of a claim for dependent parent allowance for a deceased parent

36. In our Decision, a claim for dependent parent allowance for a deceased parent is a flagrant and blatant breach and the culpability is high. It is likely to have been a 'try-on'.

37. A return for individuals is normally issued in early May each year and a taxpayer has one or three months to complete the return. The deceased parent would have passed away by April in the preceding year. By the time a taxpayer filled in the return, his/her deceased parent would have passed away for at least 13 to 16 months. The more attached a taxpayer was to his/her deceased parent, the more likely it would be for the taxpayer to remember precisely when he/she lost his/her loved one and to realise at the time of the completion of the return that the deceased parent had passed away.

38. When the taxpayer filled in the return in May to July in a year, he/she must know that he/she did not reside with his/her deceased parent in March in the same year. How could a taxpayer possibly have stated under Part 8.4(5)(i) that the taxpayer resided with the deceased parent 'continuously during the year', that is, from April in the year before to March in the same year if the taxpayer did not intend to deceive the Revenue? The deceased parent had passed away by April in the year before. The Board will require a lot of convincing that the taxpayer was not making an untrue claim, knowing the same to be untrue, or (at best) reckless whether it be true or false.

39. In cases where a taxpayer stated under Part 8.4(5)(ii) that the taxpayer or his/her spouse contributed not less than \$12,000 in money during the year towards the deceased's parent's maintenance, the question is the date when and the amount in which the taxpayer or his/her spouse contributed to the deceased parent from April in the year before to March in the same year.

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Again, the Board will require a lot of convincing that the taxpayer was not making an untrue claim, knowing the same to be untrue or (at best) reckless whether it be true or false.

40. It is an aggravating factor for the taxpayer to make a further claim for disabled dependant allowance in respect of a deceased parent.

41. A blatant breach should be punished by a stiff penalty. The norm of 100% under the Commissioner's penalty policy is high but may not necessarily be excessive.

D91/00

42. D91/00, IRBRD, vol 15, 842, was the decision of a panel chaired by Mr Ronny Wong Fook-hum, SC. In that case, the additional tax was \$10,000, or 99% of the tax which would have been undercharged had the taxpayer's claim for dependent parent allowance been accepted as correct. The Board accepted that the violation was 'unintentional' (see paragraph 8) and reduced the additional tax to \$2,500. D91/00 is clearly distinguishable because of the finding of fact that the violation was 'unintentional'.

43. It is noteworthy that in D91/00, the Revenue drew attention to a number of cases before the Magistracies in relation to false claims for dependency allowances prosecuted under section 80(2)(b) of the Ordinance. The penalty in the six cases from August 1999 to May 2000 ranged from 79.36% to 135.39% of the tax undercharged.

44. Section 82A is not restricted to cases where there is no dishonest intent. Each case must be decided having regard to the circumstances in each case. The Board has upheld additional tax at not less than 200% of the tax undercharged.

45. In D118/02, IRBRD, vol 18, 90, a decision of another panel also chaired by Mr Ronny Wong Fook-hum, SC, the Board said this in paragraph 45:

'This Board has repeatedly recognised that it has no jurisdiction to interfere with the discretion of the Commissioner as to which statutory provision the Commissioner selects to deal with any transgression. It is however a fair assumption to make that section 80(2) is reserved for more serious cases.'

46. Paragraph 45 went on to point out that the financial penalties in the Magistracies is on top of the publicity and shame of a conviction. At paragraph 50, the Board stated that:

'The circumstances of each particular case must be examined bearing in mind that the maximum penalty is 300%. Depending on the circumstances of each individual case, the Board has approved additional tax at 200% of the tax involved in D22/90, IRBRD, vol 5, 167 and in D53/92, IRBRD, vol 7, 446 and at

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210% of the tax involved plus 7% compound interest per annum in D43/01, IRBRD, vol 16, 391.'

D95/03

47. D95/03, IRBRD, vol 18, 896, was the decision of a panel chaired by Dr Anthony Ho Yiu-wah, PhD. In that case, the additional tax was \$5,000, or 49% of the tax which would have been undercharged had the taxpayer's claim for dependant parent allowance been accepted as correct. The Board accepted that it was a case of ordinary carelessness (see paragraph 13(b)) and reduced the additional tax to \$2,500. D95/03 is clearly distinguishable because of the finding of fact.

Whether excessive having regard to the circumstances

48. The appellant understated her income by \$46,794, or 12.22% of the correct amount of income.

49. This was not her first understatement of income.

50. On her own case, she made untrue claims for allowances in respect of her deceased mother, knowing the same to be untrue.

51. The allowances claimed amounted to \$120,000, or 31.35% of the correct amount of income.

52. Had her return been accepted as correct, she would not have to pay any tax.

53. We have not been able to detect any genuine remorse on her part. She tried to lie her way through.

54. The fact that the intended victim of deception was vigilant enough to detect the deception is not a mitigating factor. The fact that the Revenue suffered no financial loss is at best not an aggravating factor and is not a mitigating factor.

55. In our decision, not only is the additional tax imposed at 35.94% of the amount of the tax which would have been undercharged not excessive, it is manifestly inadequate in all the circumstances of this case.

Increasing the Assessment under sections 68(8)(a) and 82B(3)

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56. **Pursuant to sections 68(8)(a) and 82B(3) of the Ordinance, we increase the Assessment from \$4,000 to \$8,900.** The additional tax is increased by us to slightly less than 80% of the amount of tax which would have been undercharged.

Postscript

57. We thank Ms Lam Fung-shan for drawing our attention to D91/00 and D95/03.

58. We hope that, in future, the Commissioner's representative would not make any submission to the effect that a taxpayer's ability to pay additional tax is irrelevant unless the representative is prepared to submit on the points raised in paragraphs 17 and 18 in D88/03, IRBRD, vol 18, 853.