

Case No. D50/05

Penalty tax – making an incorrect return by understating income – whether additional tax imposed under section 82A justified – whether reasonable excuse in making incorrect return – quantum of additional tax – Board’s power to increase additional tax imposed on taxpayer.

Panel: Kenneth Kwok Hing Wai SC (chairman), Peter Sit Kien Ping and Adrian Wong Koon Man.

Date of hearing: 2 September 2005.

Date of decision: 7 October 2005.

The appellant reported income of HK\$808,417, but the correct amount was in fact HK\$1,360,496. Accordingly, the appellant made an understatement of approximately 40.58% of his correct amount of income and his return filed with the Inland Revenue Department (‘IRD’) was manifestly incorrect.

The Deputy Commissioner then assessed the appellant to additional tax of HK\$5,000 under section 82A. The issue before the Board was whether the imposition of this additional tax was justified. The appellant did not give evidence at the hearing.

Held:

1. Under section 82A, any person who without reasonable excuse makes an incorrect return may be subject to additional tax not exceeding treble the amount of tax undercharged as a consequence of the incorrect return.
2. Section 82A is not restricted to cases where there is no dishonest intent. The absence of a dishonest intent does not automatically entitle the appellant to a low or nominal penalty under section 82A. In cases of an incorrect return, it is wholly unrealistic for a appellant to ask for a zero penalty.
3. A taxpayer has a duty to report the correct amount of income. The appellant failed to adduce any evidence as to why the incorrect return was unintentional. The Board held that there was no reasonable excuse for the understatement of income and there was apparent recklessness in this case.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

4. The additional tax of HK\$5,000 was not only not excessive, it was in fact manifestly inadequate in all the circumstances. Accordingly, the Board exercised its power conferred under sections 68(8)(a) and 82B(3) to increase the additional tax imposed against the appellant to HK\$15,000.

Appeal dismissed.

Cases referred to:

D90/01, IRBRD, vol 16, 757
D115/01, IRBRD, vol 16, 893
D118/02, IRBRD, vol 18, 90
D150/01, IRBRD, vol 17, 110
D3/02, IRBRD, vol 17, 396
D65/00, IRBRD, vol 15, 610

Taxpayer in person.

Szeto Cheng Wai Ying and Lam Yuk Han for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the assessment ('the Assessment') dated 23 June 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
2003/04	\$5,000	9-1929383-04-9

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

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.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

5. The appellant was employed throughout the year of assessment 2003/04 ('the relevant year of assessment'), that is, from 1 April 2003 to 31 March 2004, by the same employer ('the employer').
6. By a notification dated 7 October 2003, the employer reported that the appellant ceased employment as 'Operation Manager' on 8 October 2003 and that the appellant's income during the period from 1 April 2003 to 7 October 2003 totalled \$552,079.
7. By an Employer's Return dated 27 May 2004, the employer reported that the appellant was employed as 'Contract Operation Mgr' and that the appellant's income during the period from 8 October 2003 to 31 March 2004 totalled \$808,417.
8. In his Tax Returns – Individuals dated 2 June 2004, the appellant reported that he was employed by the employer as 'Operations Manager' during the period '08/10/03 to 31/03/04' and that his income totalled '808,417-'.
9. Had the appellant's return been accepted as correct, the tax payable on his reported income would have been \$100,352.
10. The appellant's salaries tax assessment dated 7 September 2004 showed assessable income of \$1,360,496 (that is, \$552,079 + \$808,417), with tax payable thereon of \$202,486.
11. The appellant's salaries tax assessment also showed that he had paid provisional tax for the relevant year of assessment in the sum of \$168,234.
12. The appellant did not object against his salaries tax assessment.
13. By notice in writing dated 9 March 2005 under section 82A(4) of the Ordinance, the Deputy Commissioner informed the appellant that:
 - (a) the Deputy Commissioner intended to assess additional tax in respect of the appellant's understatement of his income by \$552,079;
 - (b) the amount of tax which would have been undercharged if the appellant's had been accepted as correct was \$102,134; and
 - (c) the appellant had the right to make representations.
14. The appellant did not respond to the section 82A(4) notice.
15. The assessor sent the appellant a reminder dated 4 May 2005.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

16. The appellant made his representations by letter dated 7 May 2005.

17. The Deputy Commissioner assessed the appellant to additional tax in the sum of \$5,000, that is, 4.89% of \$102,134, the amount of tax which would have been undercharged had his return been accepted as correct.

The appellant's case on appeal

18. The appellant's case as stated in his notice of appeal and as presented by him at the hearing of the appeal was that:

- (a) his unintentional error was forgivable and that he should be exempted from penalty;
- (b) when he reached the age of 60, he received a document which showed that he had received \$552,079;
- (c) at the time when he copied from the employer's return dated 7 May 2004, he had no recollection of the document which he had earlier received;
- (d) he had paid his salaries tax on time;
- (e) he thought that since he had paid tax, there was no need to respond to the section 82A(4) notice;
- (f) there was no similar error in 30 years;
- (g) he did receive two notifications from the employer on two different occasions and his carelessness this time led to the error; and
- (h) he would treat his reporting duties seriously.

19. The appellant did not give evidence on oath and did not call any witness.

Our decision

The relevant statutory provisions

20. 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.

21. Section 82A(1) provides that:

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

'(1) Any person who without reasonable excuse-

- (a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person or a partnership; or*
- (b) ...*

shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which-

- (i) has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct ...'*

22. 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.'*

23. Section 82B(3) provides that section 68 shall, so far as applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax. The Board's power under section 68(8)(a) includes the power to **increase** the assessment appealed against.

Incorrect return

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

24. The correct amount of income was \$1,360,496. The appellant reported income of \$808,417. He understated income by \$552,079, or 40.58% of the correct amount of income.

Whether reasonable excuse

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

26. 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.

27. As the Board has said time and again, a taxpayer has the duty to report the correct amount of income. Such duty does not depend on the taxpayer being spoon-fed by the taxpayer's employer with information.

28. In our decision, the appellant has no excuse for understating his income.

Maximum amount of additional tax

29. The maximum amount is treble the amount of tax which would have been undercharged had the appellant's return been accepted as correct. The amount which would have been undercharged was \$102,134 and treble that is \$306,402.

Seriousness of an incorrect claim

30. D115/01, IRBRD, vol 16, 893, is a decision of a panel chaired by Mr Patrick Fung Pak-tung, SC, sitting with two senior lawyers. The Board said this:

'14. The notes accompanying a tax return make it quite clear that the duty is on a taxpayer to complete a true and correct tax return. As is stated in the Guidelines, the effective operation of Hong Kong's simple tax system requires a high degree of compliance by taxpayers. If every taxpayer is careless or reckless in making tax returns, the task of the already over-burdened IRD will become impossible to perform. This is unfair to the community at large. A taxpayer therefore cannot be heard to complain if a penalty is imposed against him or her according to the statutory provisions.'

31. Section 82A is not restricted to cases where there is no dishonest intent. As the Board said in paragraph 45 in D118/02, IRBRD, vol 18, 90, a decision of a panel chaired by Mr

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

Ronny Wong Fook-hum, SC, sitting with Professor Andrew J Halkyard and Mr Kenneth Kwok Hing-wai, SC:

'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.'

32. The onus is on the taxpayer to satisfy the Board on a balance of probabilities that there was in fact no dishonest intent. Proof of absence of dishonest intent does not automatically entitle the taxpayer to a low or nominal penalty. As the Board said in D118/02, paragraph 50, the circumstances of each particular case must be examined bearing in mind that the maximum penalty is 300%.

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

33. 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.

D150/01

34. D150/01, IRBRD, vol 17, 110, is the decision of a panel also chaired by Mr Ronny Wong Fook-hum, SC. D150/01 is clearly distinguishable because of the finding of fact in paragraph 10 that the 'omission was an unfortunate lapse of attention tarnishing thereby her good record of compliance'.

Whether excessive having regard to the circumstances

35. The appellant understated his income by \$552,079, or 40.58% of the correct amount of income.

36. The appellant said that he had been employed by the employer since 1973. He was employed by the employer throughout the relevant year of assessment. Yet, he chose to submit a return reporting his income only for the period from '08/10/03 to 31/03/04', omitting his income for the period from 1 April 2003 to 7 October 2003, a period of more than six months. He knew that he was employed from 1 April 2003 to 7 October 2003. Knowledge of this fact did not depend on his recollection of the existence of the employer's notification. He also knew that he had received

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

salary and other income payments during the period from 1 April 2003 to 7 October 2003. Knowledge of this fact did not depend on his recollection of the existence of the employer's notification.

37. The appellant chose to offer no explanation on how he could have thought (if he did, on which there was no evidence) that his income for the relevant year of assessment was merely \$808,417.

38. There was apparent recklessness in this case. The appellant chose to adduce no evidence. He made no attempt to satisfy us that the incorrect return was unintentional.

39. He did not take the trouble to make representations when he was told that he was entitled to make representations. This is not the only indication of his cavalier attitude. He asked for zero penalty. In our decision, he is still not taking his duties seriously.

40. As the Board said in D3/02, IRBRD, vol 17, 396, at paragraph 12, 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, at all or on time, he/she will be subject to enforcement action.

41. 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.

42. We bear in mind the appellant's apparent clear record.

43. In our decision, not only is the additional tax imposed at 4.89% 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)

44. **Pursuant to sections 68(8)(a) and 82B(3) of the Ordinance, we increase the Assessment from \$5,000 to \$15,000.** The additional tax is increased by us to 14.69%, slightly less than 15%, of the amount of tax which would have been undercharged.

45. As the Board said in D3/02, IRBRD, vol 17, 396, at paragraph 17, instead of considering himself fortunate to have been treated leniently by the Deputy Commissioner, the appellant chose to waste the time and resources of the Board of Review by pursuing this wholly unmeritorious appeal. As the Board said in D65/00, IRBRD, vol 15, 610, at paragraph 59, but for the fact that this appeal has served the useful purpose of increasing the penalty to what we consider should be the absolute minimum in the circumstances of this case, we would have made an order for costs under section 68(9).