

Case No. D50/08

Penalty tax – understatement by omission – abuse of the process – appeal out of time – sections 68, 68(9), 82A and 82B of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Cissy King Sze Lam and Lee Fen Brenda.

Date of hearing: 5 December 2008.

Date of decision: 20 January 2009.

As a result of the appellant's understatement of his income he was issued with a refund cheque of \$1,157,304. Had the appellant reported the correct amount of tax in the Return, he would have been refunded \$19,717. The Deputy Commissioner made an assessment to additional tax by way of penalty in the amount of \$12,000 which was equivalent to 0.9% of the amount of tax which would have been undercharged.

The appellant appealed. However, the Notice was not accompanied by all the documents required by section 82B(1) of the IRO until the appeal was out of time. The departure and arrival records of the appellant showed that there were only 5 days when the appellant was in HKSAR for the whole day.

The grounds of appeal of the appellant was that his tax reporting was handled by a tax accountant and that he had never had any intention what so ever to under report his income.

Held:

1. The Board was bound by Chow Kwong Fai to adopt 'a less stringent test than the word "prevent"'. The Board was satisfied that it was more probable than not that the appellant's frequent absence in the circumstances of this case was the cause of his inability (in the words of Woo VP) or failure (in the words of Cheung JA) to comply with the statutory requirements. In the exercise of the Board's discretion, it extended time for the appellant to appeal.
2. The Revenue suffered an *actual* cash loss in the amount of \$1,137,587 for a period of 5 months and 12 days. Interest alone would have exceeded 0.9%. It was preposterous for the appellant to ask for zero penalty in such circumstances. In the Board's decision, the penalty imposed by the Deputy Commissioner seems to be

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ridiculously low. Moreover, the appellant was in top management with a total income of \$12,039,314. Plainly he had the knowledge and means of reporting the correct amounts of his aggregate employment income if he had intended or taken the trouble to. The Board was reminded to increase the Assessment to 15% of the tax which would have been undercharged had the Return been accepted as correct. However, in view of the 0.9% level of penalty adopted by the Deputy Commissioner, the Board decided to increase the Assessment from \$12,000 to \$65,000, which was equivalent to about 5% of the tax which would have been undercharged had the Return been accepted as correct.

3. This is plainly a case of abuse of the process of appeal to the Board. 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.

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

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454
Chow Kwong Fai (Edward) v CIR [2005] 4 HKLRD 687
D35/08, (2008-09) IRBRD, vol 23, 683

Taxpayer in person.

Lai Au Che Chun and Lau Pui Yee for the Commissioner of Inland Revenue.

Decision:

Introduction

1. By an assessment ('the Assessment') dated 16 July 2008, the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner'), assessed the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') in the following sum for understating his income:

<u>Year of assessment</u>	<u>Additional tax</u>	<u>Charge no</u>
2006/07	\$12,000	X-XXXXXXXX-XX-X

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2. On 24 July 2008, the Clerk to the Board of Review ('the Clerk') received the appellant's notice of appeal against the Assessment. However, the notice was not accompanied by all the documents required by section 82B (1) of the Ordinance ('the specified accompanying documents').

3. By letter dated 25 July 2008, the Clerk drew the appellant's attention to his non-compliance and asked him to 'forthwith ensure due compliance with each of the requirements'. It was not until more than 1 month later that the Clerk received all the specified accompanying documents.

4. In the 2006/07 year of assessment, the appellant had employment income from 3 employers totalling \$12,039,314 but reported only the income of US\$500,000 from 1 employer, omitting bonus from such employer and income from the other 2 employers totalling \$8,139,314. The amount of tax which would have been undercharged if his understated return had been accepted as correct was \$1,302,291.

5. The Assessment in the sum of \$12,000 was equivalent to 0.9 % of the amount of tax which would have been undercharged if his return had been accepted as correct. He asked the Board to 'waive any penalty'.

Relevant authorities on time limit for appeal

6. Section 82B(1) and (1A) provides that:

'(1) Any person who has been assessed to additional tax under section 82A may within –

(a) 1 month after the notice of assessment is given to him; or

(b) such further period as the Board may allow under subsection (1A),

either himself or by his authorized representative give notice of appeal to the Board; but no such notice shall be entertained unless it is given in writing to the clerk to the Board and is accompanied by –

(i) a copy of the notice of assessment;

(ii) a statement of the grounds of appeal from the assessment;

(iii) a copy of the notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and

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(iv) *a copy of any written representations made under section 82A(4). (Replaced 12 of 2004 s. 18)*

(1A) *If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), the Board may extend for such period as it thinks fit the time within which notice of appeal may be given under subsection (1). This subsection shall apply to an appeal relating to any assessment in respect of which notice of assessment is given on or after the commencement of the Inland Revenue (Amendment) Ordinance 2004. (Added 12 of 2004 s. 18)’*

7. In D16/07, (2007-08) IRBRD, vol 22, 454, the Board (Kenneth Kwok Hing Wai, SC, Eva Chan Yee Wah, and Paul Lam Ting Kwok) held that:

- (1) The specified accompanying documents must be served on the Clerk within the 1-month time limit¹.
- (2) The Board has jurisdiction to extend time for compliance with the requirements of giving notice of appeal in accordance with section 82B(1)(a)².

8. In Chow Kwong Fai (Edward) v CIR [2005] 4 HKLRD 687, Woo VP (with whose judgment the other 2 members of the Court of Appeal agreed) said:

‘20. *In my opinion, while a liberal interpretation must be given to the word “prevented” used in s 66(1A), it should best be understood to bear the meaning of the term “未能” in the Chinese language version of the subsection (referred to in D176/98 cited above). The term means “unable to”. The choice of this meaning not only has the advantage of reconciling the versions in the two languages, if any reconciliation is needed, but also provides a less stringent test than the word “prevent”. On the other hand, “unable to” imposes a higher threshold than a mere excuse and would appear to give proper effect to the rigour of time limit imposed by a taxation statute. The rationale for the stringent time limit for raising tax objections and appeals was described in Case U175, 87 ATC 1007. Tang J had in the judgment under appeal cited quite extensively from that case. I will thus refer only to one short passage:*

¹ See paragraph 11 of D16/07.

² See paragraph 57 of D16/07.

“It seems that the need for taxation revenue to flow in predictable amounts according to projections as to cash flow have (sic) considered to be such that dispute as to the claims made by the community upon individuals for payment of tax have been treated as quite unlike any other classes of dispute within the community.” ’

9. Cheung JA (with whose observation Barma J agreed) added the following observation:

‘46. If there is a reasonable cause and because of that reason an appellant does not file the notice of appeal within time, then he has satisfied the requirement of section 66(1A). It is not necessary to put a gloss on the word “prevent” in its interpretation. If an appellant does not file the notice of appeal within time because of that reasonable cause, then it must be the reasonable cause which has “prevented” him from complying with the time requirement.’

Facts relevant to extension of time for appeal

10. The Assessment is dated 16 July 2008. It is clearly and prominently stated in the middle of page 1³ that:

‘Your attention is drawn to section 82B of the Inland Revenue Ordinance. If you wish to appeal against this assessment, you must give notice in writing to the Clerk to the Board of Review, Room 1003, Tower Two, Lippo Centre, 89 Queensway, Hong Kong, within 1 month after this notice of assessment is given to you. Your notice will not be entertained unless it is accompanied by:-

- (a) a copy of this notice of assessment;
- (b) a statement of the grounds of appeal from the assessment;
- (c) a copy of notice of intention to assess additional tax given under section 82A(4), if any such notice was given; and
- (d) a copy of any written representations made under section 82A(4).

At the same time you must serve upon me a copy of the notice of appeal and of the statement of the grounds of appeal.’

³ As in many other cases, only the first page of the 3-page additional tax (also referred to as penalty tax) assessment is copied and included in the hearing bundle. For completeness, the parties should also copy the other 2 pages and include them in the bundle.

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11. The Assessment was sent to the appellant by registered post. Information provided by Hong Kong Post showed that the registered packet was delivered on 17 July 2008.
12. The notice of appeal is dated 'June 24th 2008'. Plainly, this was a careless mistake by the appellant. He could not have given notice of appeal on 24 June 2008 for the simple reason that he had not yet been assessed to penalty tax.
13. The Clerk's Office received the notice of appeal on 24 July 2008.
14. Despite the prominent notice in the middle of page 1 of the Assessment and in non-compliance with section 82B(1), the notice of appeal was not accompanied by items (c) and (d).
15. By letter dated 25 July 2008, the Clerk drew the appellant's attention to the non-compliance and stated that the appellant 'should forthwith ensure due compliance with each of the requirements'.
16. The Clerk did not receive items (c) and (d) until 1 September 2008.
17. Information provided by the Immigration Department showed the following absence of the appellant from HKSAR during the period from 14 July 2008 and 30 August 2008:

Periods of absence

<u>Departure date</u>	<u>Departure time</u>		<u>Arrival Date</u>	<u>Arrival time</u>
14-7-2008	09:34	to	15-7-2008	18:17
16-7-2008	11:01	to	21-7-2008	13:43
23-7-2008	18:18	to	30-7-2008	15:09
1-8-2008	12:07	to	6-8-2008	10:48
7-8-2008	7:38	to	12-8-2008	15:13
14-8-2008	7:53	to	14-8-2008	20:01
16-8-2008	6:36	to	16-8-2008	12:39
17-8-2008	6:43	to	18-8-2008	1:04
19-8-2008	11:04	to	22-8-2008	12:25
24-8-2008	6:37	to	24-8-2008	11:38
25-8-2008	8:32	to	29-8-2008	17:53
30-8-2008	12:19	to	30-8-2008	17:45

Decision on application to extend time for appeal

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18. As the Assessment was delivered to the appellant's address on 17 July 2008, the 1-month limit for appeal under section 82B(1)(a) for appeal expired on 18 August 2008, 17 August 2008 being a Sunday.

19. The fact that the notice of appeal given by the appellant was filed with the Board on 24 July 2008 showed that the appellant had actual notice of the Assessment by 24 July 2008, at the latest.

20. As the Clerk did not receive copies of the specified accompanying documents until 1 September 2008, the appeal was out of time.

21. However, the departure and arrival records of the appellant showed the appellant's frequent absence from HKSAR during the period from 14 July 2008 and 30 August 2008. There were only 5 days when he was in HKSAR for the whole day, i.e. 22 July (Tuesday), 31 July (Thursday), 13 August (Wednesday), 15 August (Friday) and 23 August (Saturday).

22. Mrs Lai accepted that the appellant 'did travel frequently during the relevant period' but submitted that 'he was not absent from Hong Kong throughout the entire period' and that 'unless the appellant is able to demonstrate that there is unavoidable or excusable circumstances leading to the delay so as to satisfy the Board to exercise its discretion' she would ask the Board to dismiss the appeal.

23. We think she is putting forward too stringent a test. We are bound by Chow Kwong Fai to adopt 'a less stringent test than the word "prevent"'. We are satisfied that it was more probable than not that the appellant's frequent absence in the circumstances of this case was the cause of his inability (in the words of Woo VP) or failure (in the words of Cheung JA) to comply with the statutory requirements.

24. In the exercise of our discretion, we extend time for the appellant to appeal.

The agreed facts

25. The appellant did not respond to the assessor's request on about 10 October 2008 to agree a statement of facts. It was not until he was asked by the panel chairman at the hearing about whether there was any agreement on facts that he agreed to the assessor's draft Statement of Facts.

26. Based on such agreement, we make the following findings of fact.

27. The appellant is appealing against the imposition of additional tax by way of penalty under section 82A of the Ordinance assessed upon him for the year of assessment 2006/07.

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28. The Tax Return – Individuals for the year of assessment 2006/07 ('the Tax Return') was issued to the appellant on 2 May 2007 and was sent to the address used as the appellant's quarters ('the quarters').

29. Together with the Tax Return, a booklet 'Guide to the Tax Return – Individuals' ('the Guide') was also issued. The appellant was also asked to read and follow it carefully in completing the Tax Return. Part 4 of the Guide sets out details as to how the Tax Return should be completed.

30. Upon the appellant's request, a duplicate copy of the Tax Return was sent to him at the quarters on 9 July 2007.

31. The Tax Return was received by the Inland Revenue Department ('IRD' or 'the Revenue') on 13 September 2007. In the Tax Return, the appellant declared the following income particulars in Part 4.1:

<u>Name of employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
Employer1	MD	whole year	US\$500,000

32. The appellant also declared in Part 4.2 of the Tax Return, the following place of residence provided:

<u>Address</u>	<u>Nature (e.g. house, flat, service apartment, no. of rooms in hotel, etc.)</u>	<u>Period provided</u>	<u>Name of my EMPLOYER or ASSOCIATED CORPORATION providing residence</u>	
The quarters	flat	whole year	Employer1	
<u>Rent paid by EMPLOYER or ASSOCIATED CORPORATION to landlord (\$)</u>	<u>Rent paid by ME to landlord (\$)</u>	<u>Rent refunded to ME by my EMPLOYER or ASSOCIATED CORPORATION (\$)</u>	<u>Rent paid by ME to my EMPLOYER or ASSOCIATED CORPORATION (\$)</u>	<u>Rateable value, if elected (\$)</u>

HK\$1,440,000

33. The appellant signed the declaration section in Part 9 declaring that information given in the Tax Return was true, correct and complete. At the bottom of that part, the words 'Heavy penalties may be incurred for making an incorrect return or committing other offences' are printed.

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34. Employer1 filed an Employer's Return of Remuneration and Pensions ('Employer's Return') in respect of the appellant for the year of assessment 2006/07. Particulars of income accrued and place of residence provided for the year ended 31 March 2007 are as follows:

<u>Particulars of Income</u>	<u>Period</u>	<u>Amount (HK\$)</u>
Salary / Wages	1 April 2006 to 31 March 2007	3,900,000
Bonus	1 April 2006 to 31 March 2007	929,400
	Total :	<u>4,829,400</u>

Particulars of Place of Residence provided

Address : the quarters

Nature : Director Quarters Period provided : 1 August 2006 to 31 March 2007

Rent paid to landlord by employee : HK\$928,840

Rent refunded to employee : HK\$928,840

35. Employer2 also filed an Employer's Return in respect of the appellant for the year of assessment 2006/07. Particulars of income accrued for the year ended 31 March 2007 is as follows:

<u>Particulars of Income</u>	<u>Period</u>	<u>Amount (HK\$)</u>
Director's fee	1 April 2006 to 31 March 2007	100,000

36. On 27 November 2007, the assessor raised a salaries tax assessment for the year of assessment 2006/07 with the following income:

Year of Assessment	<u>2006/07</u>
	Amount (HK\$)
Income	4,929,400
Value of residence provided	<u>321,518</u>
	5,250,918
Tax at standard rate	
\$5,250,918 @ 16%	840,146
Less: Tax reduction, capped at	<u>15,000</u>
Tax payable	825,146

The following assessor's Notes were also printed in the notice of assessment:

- (a) The tax relief announced in 2007-08 Budget has been effected in this assessment. Please see the attached sheet for details.

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- (b) Tax assessed at standard rate on the net income without allowances, i.e. total assessable income less deduction for expenses only.
- (c) Income assessed includes the value of the place of residence provided to you, calculated under the Inland Revenue Ordinance. For details please see the Guide accompanying the Tax Return.
- (d) We have assessed your income based on information supplied by your employer(s).

The appellant had paid provisional salaries tax charged for 2006/07 of amount \$2,822,596. After setting off the tax payable for year of assessment 2006/07 and provisional tax charged for year of assessment 2007/08, the excess amount of \$1,157,304 was refunded to him.

37. The appellant did not object to the assessment.

38. The appellant's ex-employer, Employer3, filed a Notification ('Cessation Notice') in respect of the appellant for the year of assessment 2006/07. Details of income accrued is as follows:

<u>Particulars of income</u>	<u>Period</u>	<u>Amount (HK\$)</u>
Other rewards, allowances or perquisites	(see attachment)	7,109,914

Particulars set out in the attachment are as follows:

Shares released:

- (1) Date of award : 28 February 2005
Date of release : 5 March 2007
Number of shares released with dividend : 30,898
Number of days from the date of award to expire date of the restricted period : 736
Release price : HK\$133
Reportable value of the restricted shares : HK\$4,109,434
- (2) Date of award : 8 March 2004
Date of release : 5 March 2007
Number of shares released with dividend : 22,560
Number of days from the date of award to expire date of the restricted period : 1093
Release price : HK\$133
Reportable value of the restricted shares : HK\$3,000,480

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Total reportable value of the restricted shares : HK\$7,109,914

39. On 29 April 2008, the assessor raised an additional salaries tax assessment for the year of assessment 2006/07 on the appellant with the following income:

	Amount (HK\$)
Income	12,039,314
Value of residence provided	<u>321,518</u>
	12,360,832
Tax at standard rate	
\$12,360,832 @ 16%	1,977,733
Less: Tax reduction, capped at	<u>15,000</u>
Tax payable	1,962,733
Less: Tax already assessed	<u>825,146</u>
Additional amount of tax payable	\$1,137,587

40. The appellant sent in a letter by fax on 5 May 2008 and asked for the source of income for which the additional assessment was raised. In response to the appellant's enquiry, the assessor issued a reply to the appellant on 9 May 2008 and advised him that the additional assessment was raised in accordance with the income reported by Employer3.

41. On 12 June 2008, the Deputy Commissioner gave a notice to the appellant under section 82A(4) of the Ordinance ('the Notice') that he proposed to assess the appellant to additional tax in respect of making incorrect return for the year of assessment 2006/07.

42. In response to the Notice, the appellant sent a letter dated 15 June 2008 together with a copy of his earlier letter to the Commissioner of Inland Revenue and advised that he had already paid the additional tax of \$1,137,587.

43. On 20 June 2008, the assessor issued a letter to the appellant explaining that the Notice dated 12 June 2008 was to invite him to submit representations on the omission of income before the Deputy Commissioner decided to impose any penalty. The assessor also reminded the appellant to forward his representations, if any, within one month from the issue date of her letter.

44. The appellant's written representations dated 22 June 2008 and 24 June 2008 were received by IRD on 24 June 2008 and 26 June 2008 respectively.

45. Having considered the appellant's representations, the Deputy Commissioner made an assessment to additional tax by way of penalty in the amount of \$12,000 for the year of assessment 2006/07 on 16 July 2008. The penalty is 0.9% of the tax undercharged.

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46. On 24 July 2008, IRD received a letter from the appellant advising that he had lodged an appeal to the Board of Review ('the Board'). A copy of his letter to the Board was also enclosed.

47. On 25 July 2008, the Board notified the appellant and copied to IRD that his application was not accepted.

48. The appellant's letter with a date marked '24 June 2008' addressing to the Board was received by IRD on 4 August 2008. Copies of the following documents were also attached with the letter:

- (a) a copy of the notice of assessment
- (b) a statement of the grounds of appeal from the assessment
- (c) a copy of the notice of intention to assess additional tax given under section 82A(4)
- (d) a copy of written representation made under section 82A(4)

49. On 7 August 2008, the assessor sent a letter to the appellant informing him that the notice of appeal should be given in writing to the Clerk to the Board of Review within one month after the notice of assessment was given to the appellant and accompanied by the required documents as stipulated under section 82B of the Ordinance.

50. On 2 September 2008, the appellant rang the assessor and requested for copy of his earlier letter of 15 June 2008 and the assessor's reply dated 20 June 2008.

51. After clarification with the appellant on the mode of delivery of reply, the assessor sent out copies of documents requested by the appellant with a covering letter both by post and by fax on 3 September 2008.

52. On 3 September 2008, the Board issued a letter to the appellant advising him that the required document as stipulated under section 82B of the Ordinance were not received within the statutory 1 month period.

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

The grounds of appeal

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54. We turn now to the merits of the appeal.

55. The appellant's letter dated 'June 24th 2008' reads as follows:

'I am writing to you to appeal the additional penalty of HK\$12,000 imposed on me by your Department.

The penalty was imposed on the basis of under reporting my estimated income of fiscal year 2006/07.

My tax reporting was handled by a tax accountant. I was not familiar with some details. But, this year, I was changing the tax accountant. Thus, I may have missed some details. **Nevertheless, I have never had any intention what so ever to under report my income: all my employers have been reporting to your Department on what they have paid me.** I have been working and living in Hong Kong for 16 years and have been paying my income taxes appropriately and consistently. As soon as I was informed by your Department about the additional tax liability of HK\$1,137,587 for the fiscal year of 2006/07, I paid it immediately on May 9th, 2008.

Based on above facts, I would very much appreciate if you can waive any penalty on this matter.

Many thanks and regards,'

Relevant provisions of the Ordinance

56. Sections 68(4), (8)(a) & (9) provide that:

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

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

'(9) *Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.*'

The amount specified in Part I of Schedule 5 is \$5,000.

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57. Section 82A(1), so far as relevant, provides that:

'(1) Any person who without reasonable excuse-

(a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return ...

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 ...'

58. Sub-sections (1) and (1A) of section 82B have been quoted in paragraph 6 above. Sub-sections (2) and (3), so far as relevant, provide 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.'

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

Decision on the merits

59. The appellant requested that the Board 'waive any penalty on this matter'. The only issue here is thus the amount of the penalty.

Submitting true, correct and complete tax returns on time

60. At the request of the Board, Mrs Lai supplied the appellant and the Board with a redacted copy of D35/08⁴.

61. We agree with what the Board (Kenneth Kwok Hing Wai, SC, Lisa D' Almada Remedios Ng Wei Min and Brenda Lee Fen) said in paragraphs 51 to 61 in D35/08.

62. The Statement of Facts prepared by the assessor runs into 7 pages with 27 paragraphs but is silent on the amount of tax which would have been undercharged had the Return been accepted as correct.

63. The Notice referred to in paragraph 41 above, so far as relevant, stated that:

‘According to our information, you have made incorrect tax return by omitting your income. If the Department had accepted the return as correct, tax would have been undercharged. The details are as follows:

<u>Year of assessment</u>	<u>Source</u>	<u>Period</u>	<u>Income Omitted</u> \$	<u>Nature</u>	<u>Amount</u> \$
2006/07	Employer3	5.3.2007	7,109,914	Share Award	1,137,587
2006/07	Employer1	1.4.2006 to 31.3.2007	929,400	Bonus	148,704
2006/07	Employer2	1.4.2006 to 31.3.2007	100,000	Director' s Fee	<u>16,000</u>
				Total:	<u>1,302,291</u>

64. Based on:

- (a) the absence of any challenge to the accuracy of the information as stated in the Notice;
- (b) the appellant' s agreement that the penalty was equivalent to 0.9% of tax (which would have been) undercharged referred to in paragraph 45 above;

we find that the amount of tax which would have been undercharged was \$1,302,291.

⁴ (2008-09) IRBRD, vol 23, 683

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65. The maximum amount of penalty tax under section 82A is $\$1,302,291 \times 3 = \$3,906,873$.

66. As a result of the appellant's understatement of his income and with the detection by the assessor of the omission of the bonus of \$929,400 from Employer1 and the omission of the director's fee of \$100,000 from Employer2 but not the omission of the share award of \$7,109,914 from Employer3, the appellant was issued with a refund cheque of \$1,157,304 on 27 November 2007, see paragraph 36 above. The appellant had the use of this sum, and the Revenue had lost this amount as from 27 November 2007.

67. After the assessor had detected the appellant's understatement by omission of the share award by Employer3, the assessor raised the additional salaries tax assessment on 29 April 2008 for an additional amount of tax payable of \$1,137,587. The appellant claimed in his notice of appeal to have paid this amount on 9 May 2008, see paragraphs 39, 42 and 55 above.

68. Had the appellant reported the correct amount of tax in the Return, he would have been refunded $\$1,157,304 - \$1,137,587 = \$19,717$, instead of the actual amount refunded to him of \$1,157,304. Thus, as a result of his understatement, he had had the use of in the sum of \$1,137,587 during the period from 27 November 2007 – 9 May 2008. The Revenue suffered an *actual* cash loss in the sum of \$1,137,587 for a period of 5 months and 12 days. Interest alone would have exceeded 0.9%.

69. It is preposterous for the appellant to ask for zero penalty in such circumstances. In our Decision, the penalty imposed by the Deputy Commissioner seems to be ridiculously low.

70. Moreover, the appellant was in top management with a total income of \$12,039,314. By reporting income in the meagre sum of US\$500,000 or HK\$3,900,000, he omitted income in the sum of \$8,139,314, or in percentage terms, 67.6%. Plainly, he had the knowledge and means of reporting the correct amounts of his aggregate employment income if he had intended or taken the trouble to.

71. We agree with paragraphs 125 to 128 in D16/07 and paragraphs 51 to 61 in D35/08. We were reminded to increase the Assessment to 15% of the tax which would have been undercharged had the Return been accepted as correct.

72. However, in view of the 0.9% level of penalty adopted by the Deputy Commissioner, we have decided to increase the Assessment from \$12,000 to \$65,000, which is equivalent to about 5% of the tax which would have been undercharged had the Return been accepted as correct.

Disposition and costs

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73. We **increase** the Assessment from \$12,000 to **\$65,000**.

74. This is plainly a case of abuse of the process of appeal to the Board, see in particular paragraph 68 above.

75. Pursuant to sections 82B(3) and 68(9), we order the appellant to pay the sum of **\$5,000** as costs of the Board, which \$5,000 shall be added to the penalty tax of \$65,000.