

Case No. D56/06

Penalty tax – whether or not the taxpayer had any reasonable excuse for omitting or understating his income – sections 68(4), 80(2), 82(1) and 82A of the Inland Revenue Ordinance ('IRO') – taxpayer's duty to report the correct amount of income – whether or not carelessness is an excuse for submitting an incorrect return – whether or not the assessment has exceeded the amount for which the taxpayer is liable – duty of every taxpayer to pay the correct amount of tax – whether or not lack of intention to evade tax is a mitigating factor

Panel: Kenneth Kwok Hing Wai SC (chairman), William Tsui Hing Chuen and Wong Fung Yi.

Date of hearing: 16 August 2006.

Date of decision: 14 November 2006.

The taxpayer's tax return omitted or understated his income by 34.05%. In dollar terms, the taxpayer omitted or understated his income by \$532,800. The amount of tax undercharged, or would have been so undercharged if his return had been accepted as correct, was \$105,745, or 42.91% of the correct amount of tax. The Deputy Commissioner assessed the taxpayer to additional tax in the sum of \$5,200, that is, 4.92% of \$105,745, the amount of tax which would have been undercharged had his return been accepted as correct.

The taxpayer made submissions that the taxpayer's company was acquired by another company in mid year and all staff was transferred to the new company. As such the taxpayer has forgotten to include the first half year salary in his tax return. The issue is whether the taxpayer had any reasonable excuse for omitting or understating his income.

Held:

1. There is no allegation by the taxpayer of any prosecution under section 80(2) or 82(1) having been instituted in respect of the same facts. As onus of proving that the Assessment is incorrect is on the taxpayer, the taxpayer has not proved that he is not liable for additional tax because of the institution of any prosecution.
2. What the Board concerned with under section 82A is whether there is any 'reasonable excuse' for what would otherwise be a wrongful act or omission. A taxpayer has the duty to report the correct amount of income. Receipt (and accrual) of income and the total amount thereof are factual matters within the personal

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

knowledge of the taxpayer. Knowledge of the total amount of his own income does not depend on his being spoon-fed by the employer with information on the taxpayer remembering that there was more than one employer's return. Carelessness is not an excuse for submitting an incorrect return. The taxpayer has no excuse for understating his income (D90/01, IRBRD, vol 16,757 considered).

3. The maximum amount is treble the amount of tax undercharged or which would have been undercharged had the taxpayer's return been accepted as correct. The Assessment does not exceed the amount for which the taxpayer is liable under section 82A.
4. It is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases (D115/01, IRBRD, vol 16, 893 and D50/05, (2005-06) IRBRD, vol 20, 656 followed).
5. The understatement is substantial, both in amount and percentage. 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 (D3/02, IRBRD, vol 17, 396 and D59/05, (2005-06) IRBRD, vol 20, 821 followed).
6. Lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax (D62/96, IRBRD, vol 11, 633 and D59/05, (2005-06) IRBRD, vol 20, 821 followed).
7. Additional tax imposed at 4.92% of the amount of the tax which would have been undercharged is not excessive. The taxpayer has not discharged the onus under section 68(4) of proving that the assessment appealed against is excessive or incorrect.
8. The Board are of the opinion that this appeal is wholly unmeritorious. Pursuant to section 68(9), the Board ordered the taxpayer to pay costs of the Board.

Appeal dismissed and costs order in the sum of \$2,500 imposed.

Cases referred to:

D90/01, IRBRD, vol 16, 757
D115/01, IRBRD, vol 16, 893
D50/05, (2005-06) IRBRD, vol 20, 656
D3/02, IRBRD, vol 17, 396

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

D59/05, (2005-06) IRBRD, vol 20, 821

D62/96, IRBRD, vol 11, 633

Taxpayer in person.

Chow Tai Chin Hing and Ng Wai Yee for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the assessment ('the Assessment') dated 15 May 2006 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:

<u>Year of assessment</u>	<u>Additional tax</u>	<u>Charge no</u>
2004/05	\$5,200	9-1912219-05-4

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

The salient facts

3. The parties agreed the facts in the Statement of Facts and we find them as facts.

4. The salient facts are as follows.

5. The appellant was employed throughout the year of assessment 2004/05, that is, from 1 April 2004 to 31 March 2005, by the same employer ('the employer').

6. By a Notification dated 23 June 2004, the employer reported that:

(a) the appellant ceased employment on 10 June 2004, giving 'Transfer to Member Companies' as reason for (sic) cessation; and

(b) the appellant's income during the period from 1 April 2004 to 10 June 2004 comprised salary of \$142,800 and other reward, e.g. bonus, of \$390,000, totalling \$532,800.

7. By an Employer's Return dated 30 April 2005, the employer reported that the appellant was employed during the period from 11 June 2004 to 31 March 2005 and that the

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

appellant's income during the period from 1 April 2004 to 31 March 2005 was \$1,032,100, consisting solely of salary.

8. In his Tax Returns – Individuals dated 17 May 2005, the appellant reported that he was employed by the employer during the period '1/4/2004 to 31/3/2005' and that his income totalled '1032100'

9. By an assessment dated 27 September 2005, the assessor assessed the appellant to salaries tax with tax payable of \$246,458, with an assessor's note stating that the computation and assessment was on the basis of income of \$1,564,900 as reported by the employer.

10. The appellant did not object against this assessment.

11. By notice in writing dated 14 March 2006 under section 82A(4) of the Ordinance, the Deputy Commissioner informed the appellant in Chinese and in English that:

- (a) the Deputy Commissioner proposed to assess additional tax in respect of the appellant's understatement of his income by \$532,800;
- (b) the amount of tax which would have been undercharged if the appellant's return had been accepted as correct was \$105,745; and
- (c) the appellant had the right to submit written representations within one month.

12. The appellant made his representations in English by letter dated 3 April 2006 printed on the employer's letter paper, stating that (written exactly as in the original):

'I apologize for the reporting incorrect tax return for the year of assessment for 2004/05.

In receiving your amended Salaries Tax on 9/25/05, I have concurred to accept the tax HK\$328,885, which had included the extra bonus (received in June 2004 from [the employer]. All the payment had been settled by end of March of this year.

The reason I missed to report on this amount is that the income summary is in a separated sheet and it was submitted to us by mid of year 2004. Thus, I only reported the latest income summary, which available by early of year 2005 and forgot to report the one in mid of year 2004.

Hope you can accept my careless mistake.'

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

13. By the Assessment, the Deputy Commissioner assessed the appellant to additional tax in the sum of \$5,200, that is, 4.92% of \$105,745, the amount of tax which would have been undercharged had his return been accepted as correct. The Notes to the Assessment read as follows:

Notes:

1. The Penalty Policy Statement can be downloaded from the Department's homepage or obtained through the Fax-A-Form service (2598 6001).
2. Penalty imposed is calculated according to the scale of "First offence" for Salaries Tax cases as stated in Part F of the Penalty Policy Statement, with adjustment for mitigating factors.'

The appellant's case on appeal

14. By letter dated 9 June 2006 written in English and printed on the employer's letter paper, the appellant gave notice of appeal in these terms (written exactly as in the original):

'Appeal for Notice under Section 82A(4) Inland Revenue Ordinance Salaries Tax

The reason I missed to report on this amount is that my company was acquired by another company in mid year and all staff was transferred to the new company. As such, I have forgotten to include the first half year salary in my tax return. The income summary is in a separated sheet and it was submitted to us by mid of year 2004. Thus, I only reported the latest income summary which available by early of year 2005 but forgot to report the one in mid of year 2004. Attached please find my Employer's Return of Remuneration and Pensions. It can prove my word is true.

Please kindly review my record that this is the first time to oversight the tax report. Appreciate your forgiveness and waive the penalty. I apologize to any inconvenience caused.'

15. At the hearing of the appeal, the appellant made submissions along the lines of his letter in Chinese printed on plain letter paper and dated 7 July 2006 to the Clerk to the Board of Review.

16. It was explained to the appellant that factual matters were not proved by making assertions in his submissions. He elected not to give evidence on oath and did not call any witness.

The Board's Decision

The relevant statutory provisions

17. 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.

18. Section 70 provides that:

'Where no valid objection ... has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income ... assessed thereby ... the assessment as made ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income.'

19. 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) ...

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 ...'

20. 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;

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

(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.'*

21. 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.

22. The Board's power under section 68(8)(a) includes the power to increase the assessment appealed against.

23. Section 68(9) provides that:

'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.

Prosecution under section 80(2) or 82(1) in respect of the same facts

24. The agreed Statement of Facts, like all other agreed statement of facts that we have seen, is silent on the question whether any prosecution under section 80(2) or 82(1) had been instituted in respect of the same facts.

25. This is unsatisfactory.

26. A person cannot be liable for additional tax under section 82A unless no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts. Whether prosecution has been instituted is a matter of record and this should be agreed or proved.

Taxpayer's contractual entitlement and prior year tax return and assessment

27. We asked Mrs Chow Tai Chin-hing whether the Revenue had made enquiries with the employer about the appellant's remuneration package and whether the Revenue had considered inclusion of the appellant's prior year tax return and assessment. She told us that she had not made such inquiries and had not included them because they were thought to be irrelevant.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

28. Whether the Commissioner wishes to take such matters into account at the penalty assessment stage is a matter for the Commissioner.

29. On appeal to the Board, it is a matter for the Board. In cases where a taxpayer claims to have forgotten about one or more employer's return(s), such matters may in some cases assist the Board in assessing the veracity of the assertion. We tried but were unable to work out the appellant's remuneration package or bonus from the employer's notification and return.

The Commissioner's Penalty Policy

30. The Assessment contains notes indicating how the penalty assessment was arrived at under the Commissioner's Penalty Policy. This is helpful to the person penalised and to the Board to the extent of making the penalty process more transparent.

31. It goes without saying that the Penalty Policy does not bind the Board. The Commissioner cannot justify her penalty by citing her own policy. Mrs Chow Tai Chin-hing said the Penalty Policy was supported by decisions of the Board. We heard what she said. If such is the case, the Commissioner should support her penalty assessment by reference to Board decisions.

Incorrect return

32. There was no appeal from the assessment referred to in paragraph 9 above. Thus, the assessment as made has become final and conclusive under section 70.

33. The appellant's return omitted or understated his income by 34.05%. In dollar terms, he omitted or understated his income by \$532,800. The amount of tax undercharged, or would have been so undercharged if his return had been accepted as correct, was \$105,745, or 42.91% of the correct amount of tax (\$246,458).

Whether liable for additional tax

34. There is no allegation by the appellant of any prosecution under section 80(2) or 82(1) having been instituted in respect of the same facts. As the onus of proving that the Assessment is incorrect is on the appellant, the appellant has not proved that he is not liable for additional tax because of the institution of any prosecution.

35. The next issue is whether the appellant had any reasonable excuse for omitting or understating his income.

36. 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.

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

37. As the Board has said time and again, a taxpayer has the duty to report the correct amount of income.

38. Receipt (and accrual) of income and the total amount thereof are factual matters within the personal knowledge of the appellant.

39. Knowledge of the total amount of his own income does not depend on his being spoon-fed by the employer with information or on the appellant remembering that there was more than one employer's return.

40. As the Board has said time and again, carelessness is not an excuse for submitting an incorrect return.

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

Maximum amount of additional tax

42. The maximum amount is treble the amount of tax undercharged or which would have been undercharged had the appellant's return been accepted as correct. The amount undercharged or which would have been undercharged was \$105,745 and treble that is \$317,235. The Assessment does not exceed the amount for which the appellant is liable under section 82A.

Seriousness of an incorrect return

43. In D115/01, IRBRD, vol 16, 893, 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.'

44. It is clear from D115/01 and subsequent Board decisions, including D50/05, (2005-06) IRBRD, vol 20, 656, at paragraph 33, that it is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases.

Whether excessive having regard to the circumstances

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

45. The understatement is substantial, both in amount and percentage.
46. As the Board has said time and again, e.g. D3/02, IRBRD, vol 17, 396, at paragraph 12, and D59/05, (2005-06) IRBRD, vol 20, 821, at paragraph 31, 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.
47. As the Board has said time and again, e.g. D62/96, IRBRD, vol 11, 633, at paragraph 23, and D59/05, (2005-06) IRBRD, vol 20, 821, at paragraph 32, lack of intention to evade tax is not a mitigating factor for the simple reason that no taxpayer should have the intention to evade tax.
48. The appellant stated in the course of his submission that he had been paid a special 'thank you' bonus, said to be about half a million dollars, in June 2004. Knowledge of the receipt of such a large and unusual bonus is unlikely to be forgotten. Yet, he offered no plausible explanation for not reporting or including this bonus in his tax return.
49. Whether the appellant's financial matters were managed by wife, as asserted by the appellant in his submission, is quite beside the point. The appellant had personal knowledge of the bonus and there is no allegation that the tax return was completed by his wife.
50. The appellant asserted that he was under stress because of possible redundancy. He chose not to give evidence to substantiate his assertion. We attach no weight to his assertion.
51. We bear in mind the appellant's clear record, a fact accepted and noted in the Assessment.
52. In our decision, the additional tax imposed at 4.92% of the amount of the tax which would have been undercharged is not excessive. The Deputy Commissioner erred (if at all) in being too lenient and we were at one stage inclined to increase the additional tax. In the end, we have decided not to increase the additional tax but to make a costs order.

Disposition

53. The appellant has not discharged the onus under section 68(4) of proving that the assessment appealed against is excessive or incorrect. We dismiss the appeal and confirm the Assessment.

Costs order

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS

54. We are of the opinion that this appeal is wholly unmeritorious. The Deputy Commissioner was quite lenient with the appellant. The appellant's arguments have been rejected time and again by the Board. Pursuant to section 68(9) of the Ordinance, we order the appellant to pay the sum of \$2,500 as costs of the Board, which \$2,500 shall be added to the tax charged and recovered therewith.