

**Case No. D59/05**

**Penalty tax** – filing of an incorrect return – imposition of additional tax under section 82A of the Inland Revenue Ordinance ('IRO') – whether reasonable excuse for incorrect return – whether mitigating factors present – whether additional tax excessive.

Panel: Kenneth Kwok Hing Wai SC (chairman), David Ho Chi Shing and David Wu Chung Shing.

Date of hearing: 7 October 2005.

Date of decision: 23 November 2005.

This was an appeal against the Deputy Commissioner's assessment of the appellant to additional tax of HK\$4,600 for the year of assessment 2003/04 under section 82A of the IRO. The appellant reported income of HK\$54,700 while in the employer's return the total income was stated as HK\$559,000.

The appellant was then assessed to salaries tax on the basis of the income recorded in the employer's return, and not his own. No objection was raised against this assessment. Subsequently, the appellant was assessed additional tax of HK\$4,600 on the basis that he had filed an incorrect return. This amounted to 7.86% of the amount of tax which was undercharged had the income in the return been correctly stated (i.e. HK\$58,514).

The issue before the Board was whether the assessment of additional tax was excessive.

**Held:**

1. The issue under section 82A is whether there was any reasonable excuse for what would otherwise be a wrongful act or omission. A taxpayer has a duty to report the correct amount of tax and carelessness is not an excuse to submit an incorrect return.
2. It is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases. Moreover, the eventual payment of understated tax is an irrelevant factor since it is the duty of every taxpayer to pay the correct amount of tax. Further, a lack of intention to evade tax is not a mitigating factor since no taxpayer should harbour such intention. In addition, neither the eventual detection of the understatement, nor the fact that the Revenue had suffered no loss were mitigating factors.

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3. In the present case, the Board held that the additional tax imposed at 7.86% of the tax that would have been undercharged was not excessive.

**Appeal dismissed.**

Cases referred to:

D23/00, IRBRD, vol 15, 316  
D90/01, IRBRD, vol 16, 757  
D115/01, IRBRD, vol 16, 893  
D3/02, IRBRD, vol 17, 396  
D62/96, IRBRD, vol 11, 633

Taxpayer in person.

Yue Wai Kin and Tse Yuen Ling for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the assessment ('the Assessment') dated 27 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:

<b>Year of assessment</b>	<b>Additional tax</b>	<b>Charge no</b>
2003/04	\$4,600	9-1918018-04-2

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. During the year of assessment 2003/04, the appellant was employed as a research manager by his employer.

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6. By an employer's return dated 30 April 2004, the appellant's employer reported that during the period from 1 April 2003 to 31 March 2004 the appellant's salary was \$516,000 and bonus was \$43,000, making a total of \$559,000.
7. In his Tax Returns – Individuals dated 18 May 2004, the appellant reported that he was employed by the employer as 'Research Manager' during the period '1.4.03 – 31.3.04' and that his income totalled '54,700'.
8. By an assessment dated 19 July 2004, the assessor assessed the appellant to salaries tax with tax payable of \$58,514, with an assessor's note stating that the assessment was on the basis of income of \$559,000 as reported by the employer.
9. The appellant did not object against the assessment.
10. By notice in writing dated 7 February 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 \$504,300;
  - (b) the amount of tax which would have been undercharged if the appellant's return had been accepted as correct was \$58,514; and
  - (c) the appellant had the right to submit written representations within a month.
11. The appellant did not respond to the section 82A(4) notice.
12. The assessor sent the appellant a reminder dated 1 April 2005.
13. The appellant made his representations by letter dated 5 April 2005, stating that he:
  - (a) was busy and forgot to respond to the Revenue's enquiry;
  - (b) merely got the decimal point wrong by one digit to the left;
  - (c) had no intention to hide his income;
  - (d) had always paid tax early or on time; and
  - (e) hoped the Revenue would take no further action on his unintentional error.

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14. The Deputy Commissioner assessed the appellant to additional tax in the sum of \$4,600, that is 7.86% of \$58,514, the amount of tax which would have been undercharged had his return been accepted as correct.

15. On 1 June 2005, the appellant telephoned the assessor and expressed his dissatisfaction with the Assessment, reiterated his case, and stated that:

- (a) the Revenue had suffered no loss;
- (b) queried whether the Revenue was robbing him;
- (c) indicated that he would complain against the oppressive law and maladministration;
- (d) considered that the Revenue was in dereliction of duties in not informing him of his error; and
- (e) requested a more senior officer to telephone him.

16. On the same day, that is 1 June 2005, the senior assessor telephoned the appellant and the appellant stated that:

- (a) the Revenue was guilty of maladministration in not enquiring with him about the discrepancy between his reported income and the income as reported by his employer;
- (b) he would consider complaining to the Ombudsman;
- (c) he was aware that there were numerous careless persons who fell into the trap of infringing the law; and
- (d) he would seek justice for the careless persons.

***The appellant's case on appeal***

17. The appellant put forward arguments similar to those made by him in his written representations and his telephone conversations. He contended that his case was less serious than D23/00, IRBRD, vol 15, 316.

18. The appellant did not give evidence and did not call any witness.

***Our decision***

***The relevant statutory provisions***

19. 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.

20. 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 ...'*

21. 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.'*

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22. 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***

23. The correct amount of income was \$559,000. The appellant reported income of \$54,700. He understated income by \$504,300, or 90.21% of the correct amount of income.

***Whether reasonable excuse***

24. 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.

25. As the Board has said time and again, a taxpayer has the duty to report the correct amount of income. No taxpayer has the right to understate his income. Carelessness is not an excuse to submit an incorrect return.

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

***Maximum amount of additional tax***

27. 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 \$58,514 and treble that is \$175,542.

***Seriousness of an incorrect claim***

28. 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.'*

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29. It is clear from D115/01 and subsequent Board decisions that it is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases.

***Whether excessive having regard to the circumstances***

30. The appellant understated his income by \$504,300, or 90.21% of the correct amount of income. The understatement is substantial, both in amount and percentage.

31. 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.

32. As the Board said in D62/96, IRBRD, vol 11, 633, at paragraph 23, 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.

33. 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.

34. Carelessness is not a licence to understate income. If the appellant had produced a research paper for his employer in which he carelessly gave a figure of \$54,700 instead of the correct figure of \$559,000, he could hardly be heard to complain if his employer should take a serious view of his carelessness even if his employer had suffered no loss. Motorists are punished for careless driving in cases where there is no actual loss or damage.

35. We are unable to detect any remorse of his breach of his duties under the Ordinance. We take a dim view of his conduct and what he said to the assessor and the senior assessor on 1 June 2005.

36. In D23/00, the Board accepted that the starting point was 10%. The Board then asked if there were extenuating circumstances and on the facts in that case, the Board found that there were and reduced the penalty tax from 10% to 6%. In contrast, this is a case with aggravating circumstances instead of extenuating circumstances.

37. In our decision, the additional tax imposed at 7.86% 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***

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38. 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*

39. We are of the opinion that this appeal is frivolous and vexatious. Pursuant to section 68(9) of the Ordinance, we order the appellant to pay the sum of \$5,000 as costs of the Board, which \$5,000 shall be added to the tax charged and recovered therewith.