Case No. D65/00

Penalty tax – failure to furnish duly completed tax returns for five years – estimated assessments made and paid without objection – no mitigating factor – additional assessments made upon investigation – no reasonable excuse for omission – additional assessments found to be manifestly inadequate – the Board increased the assessments to 100% - sections 68(8)(a) and 82B(3) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Berry Hsu Fong Chung and Vincent Mak Yee Chuen.

Date of hearing: 14 August 2000.
Date of decision: 13 October 2000.

The taxpayer failed to furnish profits tax returns for five years of assessment 1993/94 to 1997/98 in respect of the business carried out in the name of Company X within the time allowed. The amount of assessable profits for the five years in question was more than $9,000,000.

Upon investigation, the Commissioner imposed additional tax by way of penalty in the amount of $1,000,000. The additional assessments ranged from 63% to 85% of the amount of tax undercharged. The taxpayer appealed under section 82B of the IRO against these additional or penalty tax assessments on the ground that they were excessive.

Held:

1. On the evidence, the taxpayer was in reckless disregard of his duty to comply with the requirements of notices given to him under section 51(1) of the IRO. His failures to comply with the notices were inexcusable.

2. It was the duty of a person on whom a notice under section 51(1) was given to comply with the notice within the time allowed. IRD had no duty to inform such a person of his previous non-compliance. The fact that IRD had not informed such a person of his previous non-compliance was no licence and no excuse for non-compliance by such person of the current or future notices.

3. The additional assessment of $1,000,000 was the amount suggested by the taxpayer according to a document which was signed by him.

4. It was clear from the same document that the taxpayer agreed the amounts of assessable profits. Once the amount of assessable profits had been ascertained and the amount of tax payable governed by the IRO had been agreed, it could not be the subject matter of any negotiation between the taxpayer and the Revenue. In any event, $1,000,000 was clearly said to be a fine or penalty, not tax.

5. The maximum amount for which the taxpayer was liable was three times the amount of tax undercharged or which would have been undercharged.

6. The payment of the estimated assessments was not a mitigating factor. The only mitigating factor was that the Board was told that the taxpayer has now instructed a Certified Public Accountant to his office every week to see that all was in good order.

7. This was a case where compliance was extracted upon investigation by IRD. The additional assessments were not excessive, they were manifestly inadequate in all the circumstances of the case. Pursuant to sections 68(8)(a) and 82B(3) of the IRO, the Board increased the assessments to 100%, which was the absolute minimum in all the circumstances of this case.

Appeal dismissed.

Case referred to:

D41/89, IRBRD, vol 4, 472

Leung Man Keung for the Commissioner of Inland Revenue.
Barbara Wong Sze Wing instructed by Messrs Benson Li & Co, Solicitors for the taxpayer.

Decision:

1. This is an appeal against the following assessments (' the Assessments') all dated 8 March 2000 by the Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the IRO, chapter 112, in the following sums:

Year of assessment	Additional tax $	Charge no
1993/94	70,000	3-2927561-94-4
1994/95	174,000	3-2867661-95-6

1995/96	282,000	3-4073101-96-4
1996/97	342,000	3-2418806-97-3
1997/98	132,000	3-3796350-98-9
Total	1,000,000	

2. The relevant provision is section 82A(1)(d) of the IRO for failing to comply with the requirements of notices given to him under section 51(1) to furnish the tax returns for the years of assessment 1993/94 to 1997/98 within the time allowed.

Statement of facts

3. Under cover of a standard form letter dated 19 July 2000, Mr Wong Wing-cheung, assessor, sent a draft statement of facts to the Taxpayer and requested the Taxpayer to signify his agreement or any suggested amendments.

4. As stated in the standard form letter, the purpose of a statement of facts is to facilitate the hearing of the appeal. Unless there is absolutely no common ground, an agreed statement of facts sets out the facts which are agreed by the parties to the appeal so that the Board of Review and the parties may concentrate on the facts in issue. By way of example, the parties agreed that the Taxpayer met the assessors on 13 September 1999 but disputed what happened at that meeting. The fact of a meeting on that date should be in the statement of fact. What happened at that meeting is an issue to be resolved by the Board of Review.

5. Instead of trying to agree a statement of facts, the Taxpayer prepared a 'defence' dated 31 July 2000 with reference to the statement of facts and sent it together with other documents to the Respondent under cover of his solicitors' letter dated 31 July 2000.

6. A statement of fact is not intended to be a statement of the Respondent's case. It is intended to be a statement of agreed facts. Moreover, as the onus of proof is on an Taxpayer in an appeal to the Board of Review [sections 82B(3) and 68(4) of the IRO], a 'defence' is inappropriate.

7. It would appear from his letter dated 2 August 2000 to the Taxpayer that Mr Leung Man-keung, senior assessor, seemed to have forgotten the reason why a draft statement of fact was prepared in the first place. Mr Leung enclosed an amended statement of facts and forwarded both the 'original' and 'amended' versions to the Board of Review. We have two 'statement of facts'. It is not apparent on the face of the documents themselves which is the 'original' and which is the 'amended' version. The 'amended' version sets out the Respondent's case on the disputed facts in greater length and detail.

The admitted facts

8. Based on the facts stated in the 'original' statement of facts and admitted by the Taxpayer, we make the following findings of fact.

9. The Taxpayer is the sole proprietor of his 'Business'. The Business was previously a partnership business until 1991 when the other two partners retired from the partnership and the Taxpayer became the sole proprietor. At all relevant times, the Business was a wholesaler of construction materials. The Business closed its accounts on 31 March in each year.

10. On several dates, the Inland Revenue Department ('IRD') issued tax returns – individuals (BIR 60) for the years of assessment 1993/94 to 1997/98 ('the Tax Returns') under section 51(1) of the IRO, requiring the Taxpayer to complete and return to the Department within one month as follows:

Year of assessment	**Date of issue of return**	**Final date for submission of return**
1993/94	2 May 1994	31 May 1994
1994/95	1 May 1995	31 May 1995
1995/96	1 May 1996	31 May 1996
1996/97	1 May 1997	31 May 1997
1997/98	1 May 1998	31 May 1998

11. In the absence of duly completed tax returns, the assessor on several dates raised on the Taxpayer the following estimated assessments ('the Estimated Assessments') in respect of the Business:

Year of assessment	**Date of issue of assessment**	**Estimated assessable profits**	**Tax payable thereon**
		$	$
1993/94	23 December 1994	168,000	25,200
1994/95	25 January 1996	201,600	30,240
1995/96	28 January 1997	500,000	75,000
1997/98	2 December 1998	300,000	45,000

[Note : see paragraphs 18 and 19 below in respect of the year of assessment 1996/97]

12. The Taxpayer did not object to the Estimated Assessments and paid all the tax as

demanded.

13. In May 1999, the assessor commenced an investigation into the tax affairs of the Taxpayer. The Taxpayer appointed a certified public accountant ('CPA') as his tax representative.

14. On 2 June 1999, the assessors visited the office of the Business and held an interview with the Taxpayer. During the interview, duplicate tax returns for the years of assessment 1993/94 to 1997/98 were issued to the Taxpayer for completion ('the Duplicate Tax Returns'). The Taxpayer also supplied the books and records in respect of the Business for the year of assessment 1997/98 to the assessors for tax audit purposes.

15. On 12 August 1999, the Taxpayer submitted the Duplicate Tax Returns for the years of assessment 1993/94 to 1997/98 in respect of the Business, which showed the following particulars:

Year of assessment	**Assessable profits per return**	**Number of days late**
	$	
1993/94	353,189	5 years 73 days
1994/95	1,160,537	4 years 73 days
1995/96	1,587,473	3 years 73 days
1996/97	2,651,923	2 years 73 days
1997/98	282,934	1 year 73 days

16. Having examined the Duplicate Tax Returns submitted, the assessor made further enquiries. Upon request by the assessor, the Taxpayer supplied the ledgers and bank statements in respect of the Business covering the years of assessment 1993/94 to 1996/97.

Further background facts

17. Based on the copy documents placed before us, we make the following further findings of fact.

18. By several assessments all dated 26 October 1999 ('the October 1999 Assessments'), the Commissioner issued the following profits tax assessments in respect of the Business for the years of assessment 1993/94 to 1997/98:

Year of	**Assessable**	**Tax**	**Net provisional**	**Net tax already**	**Balance of total tax**

assessment	profits	thereon	tax	charged	payable
	$	$	$	$	$
1993/94	547,072	82,060	(21,000)	(4,200)	56,860
1994/95	1,394,281	209,142	(25,200)	(5,040)	178,902
1995/96	2,345,436	351,815	(30,240)	(44,760)	276,815
1996/97	3,211,646	481,746	(75,000)	-	406,746
1997/98	1,559,458	210,526	-	(40,500)	170,026

19. The assessment dated 26 October 1999 in respect of the year of assessment 1996/97 was an original assessment, not an additional assessment, which suggests and we infer that no estimated assessment had been issued in respect of that year. The other four assessments dated 26 October 1999 were all additional assessments.

20. By letter dated 14 January 2000, the Commissioner gave the Taxpayer notice under section 82A(4) of the IRO of her intention to assess additional tax in respect of the Taxpayer' s failure to comply with the requirements of the notices given to him under section 51(1) of the Ordinance to furnish the tax returns for the years of assessment 1993/94 to 1997/98 within the time allowed.

21. By a letter dated 14 February 2000, the Taxpayer submitted written representations to the Commissioner.

22. On 8 March 2000 the Commissioner issued the Assessments.

23. By a letter dated 7 April 2000, the Taxpayer through his solicitors gave notice of appeal against the Assessments, the grounds of appeal being prepared by Mrs A, counsel, on the instructions of the Taxpayer' s solicitors.

The appeal hearing

24. At the hearing of the appeal, the Taxpayer was represented by Miss Barbara Wong Sze-wing, counsel, instructed by the Taxpayer' s solicitors. Miss Wong applied for leave to replace the original grounds of appeal by the amended grounds of appeal dated 31 July 2000. Mr Leung Man-keung, senior assessor who represented the Respondent, had no objection and we granted the Taxpayer leave to rely on the amended grounds of appeal in place of the original grounds of appeal.

25. There is substantial dispute on the facts, including what happened at the meeting on 13 September 1999 and it was the Taxpayer' s case that the assessors ' deliberated refrained' from warning the Taxpayer of the possibility of penalty tax. In these circumstances we did not consider

it appropriate to adopt witness statements as evidence in chief. All the witnesses gave their evidence in chief in the conventional way.

26. The Taxpayer and his younger sister gave evidence.

27. In preparation for the Taxpayer' s case that the assessors ' deliberated refrained' from warning the Taxpayer of the possibility of penalty tax, the Respondent put in witness statements of a whole team of assessors from a field audit team. Towards the end of the Taxpayer' s evidence in chief, Miss Wong informed us that it was no longer the Taxpayer' s case that the assessors ' deliberated refrained' from warning the Taxpayer of the possibility of penalty tax. Mr Wong Wing-cheung was the only witness called by the Respondent.

Our Decision

Whether reasonable excuse

28. The Taxpayer contended that he had reasonable excuse because he ' acted as a reasonable law-abiding citizen and exercised reasonable skill and care in handling his tax affairs such as one would expect from an average person' and that ' IRD is partly to blame for contributing to the problem' by not notifying the Taxpayer of the problem at ' the earliest available opportunity so as to prevent the problem from worsening' .

29. According to the Taxpayer' s testimony, he had secondary school middle five education. When he joined the Business, one of the partners and a part time accountant ran the clerical system and they would look after filling returns. Subsequently, the partner responsible for running the clerical system also retired and the former partner proposed that the Taxpayer should ask the Taxpayer' s younger sister to help out. From 1991 to 1993 he had paid tax. In 1993, he entrusted accounts to his younger sister. In 1993, there should be nobody helping his younger sister. He told her she should seek help from the former part time accountant. In 1993, they entrusted the job of tax return to a person referred to them by the former partner. He had never seen that person. He had no idea whether that person was a gentleman or lady. In respect of 1993 tax return, it was not his duty so he had no idea. He just paid tax demands right away.

30. According to the testimony of the Taxpayer' s younger sister, her education level was form 5 and she had been a kindergarten teacher for two years and a clerk for one year before joining the Business as the only clerk. She had no knowledge concerning tax matters. She was ' not really involved in tax matters but general clerical duties and posting of ledgers' . In 1993, the former partner introduced a person to deal with taxation matters. She gave him all the documents. She only knew the surname of that male person but not his full name. She had had his telephone number which was lost after relocation of office. She did not know his address. She did not know whether he had any qualifications and did not know whether he had any experience in reporting tax. She did not ask for a copy of the account prepared by him or a copy of the return completed by him

because he was well acquainted with the former partner.

31. With more than $9,000,000 in assessable profits for the five years in question (see paragraph 18 above), the Taxpayer should employ or instruct a person or persons competent to handle his accounting and taxation matters. There is no allegation and no evidence of the competence of the former partner in accounting or taxation matters. We do not know if the former partner was competent to be a book-keeper. The younger sister was the only person in the Business responsible for general clerical duties and on the evidence before us, her competence as a book-keeper is questionable.

32. The Taxpayer said he had no idea about 1993 tax return because it was *not* his duty. This is the clearest indication coming from him of his reckless disregard of his duty to comply with a notice given to him under section 51(1).

33. Had he taken the trouble to go through it or any of the other four Returns, he would have known that it was a tax return for individuals, not just a profits tax return. Had he taken the trouble to go through it or any of the other four Returns, he would have realised that a person being given no more than the books of accounts of the Business would be unable to complete the tax return for individuals. The person whom the Taxpayer did not know was a male or a female would need:

(a) the Taxpayer’ s personal particulars;

(b) information about properties wholly owned by the Taxpayer that were let (if any) and about properties wholly owned that were not let (one property for the first four years of assessment and two for the year of assessment 1997/98, not including the property referred to at the meeting on 13 September 1999);

(c) information about the Taxpayer’ s salary income (if any);

(d) information in relation to advance rulings (if applicable);

(e) information about taxation in China (if applicable);

(f) information about the Taxpayer’ s partnership business (if any);

(g) information about interest payments, if any,

(h) information about the various allowances, including the allowance for dependent parent (for example, the Taxpayer’ s mother); and

(i) information about home loan interest (if applicable).

34. There is no allegation and no evidence that the person whom the Taxpayer did not know was a male or a female had been given any of the above information.

35. On the Taxpayer's own testimony and on the testimony of his younger sister, the Taxpayer was in reckless disregard of his duty to comply with the requirements of notices given to him under section 51(1) of the IRO. His failures to comply with the notices are inexcusable.

36. Further and in any event, the Taxpayer is a 'poor and untruthful' witness, to quote what is now a well-known phrase from the report of an independent investigation panel comprising Sir Noel Power, Mrs Pamela S W Chan and Mr Ronny F H Wong, SC, dated 26 August 2000. We reject the Taxpayer's testimony. We are not impressed by testimony of his younger sister and reject her testimony in relation to the male person who was to deal with taxation matters. We accept the testimony of Mr Wong Wing-cheung.

37. We turn now to the contention that IRD was partly to blame for contributing to the problem by not notifying the Taxpayer of the problem at the earliest available opportunity so as to prevent the problem from worsening. The duty is a person on whom a notice under section 51(1) is given to comply with the notice within the time allowed. IRD has no duty to inform such a person of his previous non-compliance. The fact that IRD has not informed such a person of his previous non-compliance is no licence and no excuse for non-compliance by such person of the current or future notices. No authority has been cited by Miss Wong that it may amount to a reasonable excuse within the meaning of section 82A(1) of the IRO and we find that it is not.

Whether excessive having regard to the circumstances

38. The Assessments add up to $1,000,000. The Taxpayer contended that this was excessive having regard to all the circumstances.

39. $1,000,000 was the amount suggested by the Taxpayer according to a document dated 13 September 1999 ('the September 1999 Document') and signed by the Taxpayer. The Taxpayer tried to explain this document away by contending that he thought $1,000,000 was the amount of tax which he had to pay.

40. This contention is untenable on the Taxpayer's own testimony (emphasis added) that his 'understanding was that it was a **penalty** imposed upon [him] because [he] submitted the returns late, late in a sense, and also in compensation to the government'. He also testified that the CPA 'was advising [him] that the $1,000,000 was close to it, so I signed it'.

41. The September 1999 Document is in Chinese and English. The caption is 'profits tax re [the Business]'. It states that:

' I hereby agree that the assessable profits of the above trade/professional/business should be as follows:

Year of assessment	Profits already reported/assessed	Agreed assessable profits	Understated assessable profits
	$	$	$
1993/94	0	547,072	547,072
1994/95	0	1,394,281	1,394,281
1995/96	0	2,345,436	2,345,436
1996/97	0	3,211,646	3,211,646
1997/98	0	1,559,458	1,559,458
Total	0	9,057,893	9,057,893

I also understand that acceptance of the above – mentioned assessable profits does not conclude the whole matter and that the case will be put up to the Commissioner or Deputy Commissioner for consideration of penal actions under Part XIV of the Inland Revenue Ordinance, which include prosecution, compounding or imposition of additional tax. If additional tax is imposed, the maximum amount could be treble the amount of tax undercharged.'

42. The September 1999 Document was signed by the Taxpayer and witnessed by the CPA and dated 13 September 1999.

43. The only part in the September 1999 Document which is not bilingual is the Chinese characters written by the CPA above his signature as the witness. They read as follows:

'現建議上述5年共罰款$1,000,000以代替其他罰則'

to the effect that the Taxpayer proposed a total penalty or fine of $1,000,000 in place of other penal actions.

44. It is clear from the September 1999 Document that the Taxpayer agreed the amounts of assessable profits. Once the amounts of assessable profits had been ascertained and agreed the amounts of tax payable were governed by the IRO and could not be the subject matter of any negotiation between the taxpayer and the Revenue. In any event, $1,000,000 was clearly said to be a fine or penalty '罰款', not tax.

45. The Taxpayer complained that the September 1999 Document did not set out the

amount of tax payable. He did so by choosing to ignore the fact prior to the September 1999 Document being signed, the assessors had shown him and the CPA IRD' s table of computation, a copy of which had been faxed to the CPA before the meeting. Mr Wong told us, and as stated above, we accept his evidence, that the assessors found that the bank deposits exceeded the amounts of sales reported in the Duplicate Tax Returns and Mr Wong discussed it with the CPA who was unable to explain the difference. The computation used the amount of net bank deposit, the opening balance and the closing balance to arrive at the amount of estimated sales. It then used the gross profit percentage as per account to arrive at an estimated gross profit. The expenses per account were then deducted and adjustments were made to arrive at the amount of assessable profits for each of the five years. The assessable profits, tax thereon and tax payable for each of the five years were set out in the computation. The 13 September 1999 document was signed after the amounts of assessable profits as shown in the computation had been agreed by the Taxpayer and the CPA. The total amount of tax payable as shown on the computation is $1,164,352.

46. It is clear from his acknowledgement in the September 1999 Document that acceptance of the above-mentioned assessable profits does not conclude the whole matter that his earlier accusation that the assessors ' deliberated refrained' from warning the Taxpayer of the possibility of penalty tax is a wholly irresponsible accusation which should never have been made. How could one possibly deliberately refrain from warning when an express warning in writing was in fact given?

47. The Taxpayer relied on the payment of $100,000. This is a red herring calculated to confuse. It is clear from the Taxpayer' s own testimony that he knew that the $100,000 was on account of incorrect employers' returns. In relation to the $100,000, he said that ' Mrs B initially said that the $100,000 was being imposed upon me because of incorrect reporting on my employees and then said that there are late submissions of returns and the overall penalty would be $1,000,000' . At the 13 September 1999 meeting, the CPA wrote out on a separate sheet of paper a letter in Chinese to the Commissioner putting forward a request to have a penalty of $100,000 in place of other prosecution actions in respect of errors and omissions in the employers returns form 56A/B for the years of assessment 1993/94 to 1997/98. The Taxpayer signed this letter, witnessed by the CPA.

48. For the reasons given above, we find that $1,000,000 was the amount supposed by the Taxpayer.

49. There is no written objection against any of the October 1999 Assessments. They are final and conclusive for all purposes by reason of section 70 of the IRO. Thus, the amounts of tax which would have been undercharged had the failure to comply with notices given under section 51(1) not been detected are:

Year of assessment	Tax undercharged

	$	
1993/94	82,060	
1994/95	209,142	
1995/96	351,815	
1996/97	481,746	
1997/98	210,526	
	1,335,289	(see paragraph 18 above)

50. The Assessments ranged from 63% to 85% of the amount of tax undercharged:

Year of assessment	**Tax undercharged**	**Section 82A additional tax**	**Additional tax as percentage of tax undercharged**
	$	$	
1993/94	82,060	70,000	85%
1994/95	209,142	174,000	83%
1995/96	351,815	282,000	80%
1996/97	481,746	342,000	71%
1997/98	210,526	132,000	63%
	1,335,289	1,000,000	75%

51. The due date for payment of tax under the October 1999 Assessments was 7 December 1999. The due dates for payments of tax under the estimated returns were from February 1995 to April 1999. There was thus a delay of up to four-and-a-half years in the collection of the correct amount of profits tax from the Taxpayer as a result of the failures of the Taxpayer to furnish the Returns within the time allowed. During such periods, the Taxpayer had the benefit of the use of the monies which should have been paid as tax.

Year of assessment	**Estimated Assessments due dates**	**Delay period (Second Estimated Assessment due date to 7 December 1999)**	**Amount of tax payable by 7 December 1999 (see paragraph 18 above)**
			$
1993/94	10-2-1995 2-5-1995	Over 4 years 7 months (55 months)	56,860
1994/95	12-3-1996 10-5-1996	Over 3 years 6 months (42 months)	178,902

1995/96	14-3-1997 13-5-1997	Over 2 years 6 months (30 months)	276,815
1996/97	No Estimated Assessments, say 13-5-1998	Over 1 year 6 months (18 months)	406,746
1997/98	20-1-1999 14-4-1999	Over 7 months	170,026

52. At an interest rate of 1% per month, the loss of revenue, that is the sums under the fourth column in paragraph 51 above, for the periods in the third column ranged from 7% to 55%. Approaching the matter from another angle, a surcharge of 5% is routinely imposed for late payments of tax of up to six months and for a further 10% on 105% of the amount of tax for late payments beyond six months.

53. This is a case where the Duplicate Tax Returns were only furnished after a field audit team had commenced an investigation into the Taxpayer' s tax matters and had issued the Duplicate Tax Returns to the Taxpayer during the 2 June 1999 visit. Even then the Taxpayer did not report the correct amount of sales and thus the correct amount of assessable profits which were not agreed on until after IRD had gone through the bank statements as stated in paragraph 45 above.

Year of assessment	**Reported profits (paragraph 15)/profits after investigation (paragraph 18)** $	**Percentage**
1993/94	353,189 / 547,072	**64.56**
1994/95	1,160,537 / 1,394,281	**83.24**
1995/96	1,587,473 / 2,345,436	**67.68**
1996/97	2,651,923 / 3,211,646	**82.57**
1997/98	282,934 / 1,559,458	**18.14**

54. The Taxpayer contended that IRD was partly to blame for contributing to the problem by not notifying the Taxpayer of the problem at the earliest available opportunity. This presupposed that the Taxpayer did not know that he had not furnished the Returns, an assumption

which in our decision should not be made in favour of the Taxpayer in view of our finding that he was in reckless disregard of his duty and our rejecting of his testimony and our rejection of the testimony of his younger sister in relation to the male person who was to deal with tax matters (see paragraphs 35 and 36 above).

55. We consider that it is probable that the Taxpayer would have at least a rough idea of the amounts of profits. The amounts of profits under the Estimated Assessments are significantly less than the amounts after investigation. We infer that the Taxpayer took advantage of the low Estimated Assessments. It suited his purpose. The Taxpayer relied on the payment of the Estimated Assessments. This is not a mitigating matter. If he did not pay the Estimated Assessments, he would have been subject to enforcement and recovery actions by IRD.

Year of assessment	**Estimated profits (paragraph 11)/profits after investigation (paragraph 18)** $	**Percentage**
1993/94	168,000 547,072	**30.71**
1994/95	201,600 1,394,281	**14.46**
1995/96	500,000 2,345,436	**31.32**
1996/97	No estimated assessment 3,211,646	**No Estimated Assessments**
1997/98	300,000 1,559,458	**19.24**

56. In summary, the circumstances of this case are that:

(a) The Taxpayer is a first offender in the sense that there was no complaint by IRD about the period between 1991 and March 1993. However, for the **five years** of assessment in question which followed, **no** return had been furnished. The breaches were persistent and continuing. The Duplicate Tax Returns were only furnished after IRD had given the Duplicate Tax Returns were only furnished after IRD had given the Duplicate Tax Returns to the Taxpayer during a visit by a field audit team (see paragraph 53 above).

(b) Even then, the Taxpayer did not report the correct amount of assessable profits (see paragraph 53 above). Having said that, we remind ourselves that the

Assessments were not in respect of incorrect returns, but for furnishing no return for over five years.

(c) The Taxpayer was in reckless disregard of his duty to comply with notices given the him under section 51(1) (see paragraph 35 above).

(d) The assessable profits for the five years in question exceeded $9,000,000 (see paragraph 18 above).

(e) The Revenue suffered actual loss (see paragraph 51 above) and the Taxpayer took advantage of the low Estimated Assessments (see paragraph 55 above).

(f) There is no real co-operation with IRD except under compulsion and it is questionable whether he is remorseful. The Taxpayer tried to blame IRD by firstly accusing the assessors of deliberately refraining from warning him of penalty tax, a wholly irresponsible accusation which should never have been made (see paragraph 46 above). The Taxpayer then complained about IRD not notifying him of his breaches at the earliest opportunity (see paragraphs 37 and 54 above).

(g) The total amount of penalty in the sum of $1,000,000 was suggested by the Taxpayer who then spent a lot of time before us trying to dissociate himself from his own suggestion in writing (see paragraphs 38 to 48 above).

(h) The only mitigating factor is that we were told that the Taxpayer now instructs a CPA to come to his office every week to see that all was in good order.

57. The maximum amount for which the Taxpayer is liable is three times the amount of tax undercharged or which would have been undercharged. We have carefully considered all the points raised by Miss Wong in her oral and written submissions. In our decision, not only are the Assessments not excessive, they are manifestly inadequate in all the circumstances of this case.

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

58. This is a case where compliance is extracted upon investigation by IRD. The Assessments are manifestly inadequate. Pursuant to sections 68(8)(a) and 82B(3) of the IRO, we increase the Assessments to 100% as follows, 100% being in our decision the absolute minimum in all the circumstances of this case (compare D41/89, IRBRD, vol 4, 472).

Year of assessment	**Original additional tax** $	**Charge No**	**Increased by us to** $

1993/94	70,000	3-2927561-94-4	82,060
1994/95	174,000	3-2867661-95-4	209,142
1995/96	282,000	3-4073101-96-4	351,815
1996/97	342,000	3-2418806-97-3	481,746
1997/98	132,000	3-3796350-98-9	210,526
		Total:	1,335,289

Costs under section 68(9)

59. We consider the Taxpayer' s case on appeal to be frivolous and vexatious. But for the fact that the appeal has served the useful purpose of increasing the penalties to what we consider should be the absolute minimum, we would have made an order for costs under section 68(9).