INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D65/04

Penalty tax – whether additional tax assessment under section 82A of the Inland Revenue Ordinance ('IRO') excessive – whether appellant co-operative with Revenue in the investigation of his tax affairs – whether case distinguishable from D103/01.

Panel: Ronny Wong Fook Hum SC (chairman), Benny Kwok Kai Bun and Lo Pui Yin.

Date of hearing: 23 October 2004.
Date of decision: 9 December 2004.

At all material times, the appellant was a car salesman who earned commission from his employer, loan originating fees from finance companies, and commission from insurance companies. In his tax returns for 1993/94 to 1998/99, the appellant failed to report his receipts arising from the latter two sources of income.

After the Revenue had commenced an investigation, on 27 October 1999 the appellant confirmed the total income he received during the relevant years, including the items he had previously omitted to report. Upon further investigation, on 19 December 2003, the Revenue prepared a revised schedule of income received by the appellant, which was only HK$32,287 more than the amount originally confirmed. On the basis of the revised schedule, the appellant was additionally assessed on 11 February 2004.

By notice dated 16 April 2004, the Revenue informed the appellant of his intention to impose additional tax under section 82A(4) of the IRO. The Revenue then imposed an additional tax assessment of HK$688,456, representing a sum of 76.11% of the tax undercharged during the relevant years of assessment.

The issue before the Board was whether the additional tax assessment under section 82A of the IRO was excessive.

Held:

1. On the facts, the present case was indistinguishable from D103/01, where the Board of Review did not interfere with an additional tax assessment of 65.79% of the amount of tax undercharged.

2. As the appellant had displayed a genuine intention to assist the Revenue in their investigation, there was no justification for imposing a penalty higher than in D103/01.

3. Accordingly, adopting the approach of D103/01, the appeal was allowed to the extent that the section 82A additional tax assessment was reduced from HK$688,456 to HK$452,900.

Appeal allowed.

Case referred to:

D103/01, IRBRD, vol 16, 837

Mei Yin for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. The Appellant is a car salesman. He joined Company A in 1985. Apart from his commission from Company A on sale of Brand B Car, the Appellant had two other principal sources of income:

(a) Loan originating fee from Finance Company C for introducing purchasers of Brand B Car to Finance Company C for hire purchase finance in the acquisition of their Brand B Cars. Finance Company C and Company A were both members of the Group D.

(b) Commission from various insurance companies for introducing purchasers to take out motor insurance with those companies. The insurance companies involved included, inter alia, the following:

(i) Insurance Company E;

(ii) Insurance Company F;

(iii) Insurance Company G.

2. In his returns for the years 1993/94 to 1998/99, the Appellant did not report to the Revenue the loan originating fees and the commission which he received from Finance Company C and the various insurance companies. According to the Appellant, he and his colleagues were repeatedly assured by officers of Finance Company C and the insurance companies that they would be responsible for tax on such payments and no pink form would be given to the Appellant and his fellow salesmen covering those payments.

3. The Revenue commenced investigation in 1999 into the loan originating fees and the insurance commission received by car salesmen. At a meeting held on 28 May 1999, the Chairman of the Group D informed the Appellant and his colleagues that those payments had to be reported to the Revenue. No explanation was given to them as to why the previous assurances had not been honoured.

4. The Appellant attended an interview with the Revenue on 22 July 1999. On 27 October 1999, the Appellant confirmed the following as the total income which he received for the relevant years:

Year of assessment	**Total income**
1993/94	$1,339,781
1994/95	$2,362,072
1995/96	$1,757,596
1996/97	$1,050,997
1997/98	$1,313,647
1998/99	$488,166

The Appellant pointed out that 'There might have additional income but it is small and I cannot remember the exact amount'.

5. By letter dated 1 November 2001, the Revenue drew the Appellant's attention to various cars which had been referred by dealers to finance companies for hire purchase facilities. The transactions in question spanned between 1993 and 1999. The Appellant was asked to identify the commission which he received from such referrals. The Appellant responded on 25 November 2001 indicating that he could not provide the information sought as he had no material in hand.

6. By letter dated 3 June 2003, the Appellant was asked to identify the reasons why various cheques were drawn by him. In response to that request the Appellant provided a hand written schedule dated 29 June 2003. The schedule is a document of some length. It was prepared on the basis of the Appellant's own recollection.

7. As a result of the further investigation by the Revenue, a revised schedule of the Appellant's income was prepared on 19 December 2003. As compared with the earlier schedule of 27 October 1999, the total receipts of the Appellant for the relevant years were as follows:

Year of assessment	**Total income as per schedule of 27-10-1999**	**Total income as per schedule of 19-12-2003**	**Discrepancy**
1993/94	$1,339,781	$1,339,781	
1994/95	$2,362,072	$2,362,073	+$1
1995/96	$1,757,596	$1,748,411	-$9,185
1996/97	$1,050,997	$1,052,997	+$2,000
1997/98	$1,313,647	$1,331,935	+$18,288
1998/99	$488,166	$509,349	+$21,183
		Total	+$32,287

8. On the basis of the revised schedule, the Appellant was additionally assessed on 11 February 2004.

9. By notice dated 16 April 2004, the Deputy Commissioner of Inland Revenue informed the Appellant of his intention to impose additional tax under section 82A(4) of the Inland Revenue Ordinance. After considering representations from the Appellant, the Deputy Commissioner by notices dated 15 June 2004 imposed additional tax as follows:

Year of assessment	**Net assessable income**	**Net assessable income already reported/ assessed**	**Additional net assessable income**	**Amount of tax undercharged**	**Additional tax under section 82A**	**Relationship between additional tax and tax undercharged**
1993/94	$1,205,803	$676,758	$529,045	$79,357	$65,400	82.41%
1994/95	$2,125,866	$897,778	$1,228,088	$184,213	$151,900	82.46%
1995/96	$1,573,570	$574,018	$999,552	$162,363	$132,100	81.36%
1996/97	$947,698	$394,365	$553,333	$110,666	$79,900	72.20%
1997/98	$1,198,742	$450,310	$748,432	$131,355	$83,500	63.57%
1998/99	$458,415	$332,318	$126,097	$20,502	$11,200	54.63%
	$7,510,094	$3,325,547	$4,184,547	$688,456	$524,000	76.11%

10. The Appellant appealed before us against the additional tax so imposed. The Appellant contends that the additional tax imposed should be set aside and in the alternative that the additional tax imposed is too high.

11. The facts in this case are almost identical with the facts in D103/01, IRBRD, vol 16, 837. The taxpayer in D103/01 was also a motor car sales executive who failed to declare her income from finance and insurance companies for customers introduced by her to those companies.

On 26 October 1999, she submitted to the Revenue an income schedule for the years of assessment 1993/94 to 1998/99. She omitted from this schedule a sum of $247,992.4 which she received as rebates from a company owned and controlled by her boyfriend. She eventually reached agreement with the Revenue on 22 January 2001 on the income that she omitted for the years 1994/95 to 1998/99. She omitted to report to the Revenue 51.66% of her total income in those years. The Revenue imposed additional tax on that taxpayer at an average rate of 65.79% of the amount of tax undercharged. The Board of Review on appeal did not interfere with the assessment of additional tax on the basis of that average rate.

12. Ms Mei for the Revenue sought to distinguish D103/01 on the basis that the Appellant was not as co-operative as the taxpayer in that case resulting in additional time and efforts in investigating the Appellant's affairs. We disagree. The chronology of this case is identical with the chronology in D103/01. The taxpayer in D103/01 omitted $247,992.4 from her initial schedule of 26 October 1999. That sum came through her boyfriend's company which could easily be ascertained. The discrepancy in the present case between the 1999 Schedule and the 2003 Schedule is only $32,287. Whilst the amount under reported is 55.7% of the total income, we are of the view that the Appellant had displayed a genuine wish to assist the Revenue in their investigation. We see no justification for imposing a penalty in this case higher than that in D103/01.

13. We therefore allow the Appellant's appeal and revise the additional tax assessed to 65.79% of the total amount of tax undercharged for each of the relevant years of assessment. The total amount of additional tax assessed is accordingly reduced to $452,900.