

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D75/01

**Penalty tax** – submission of incorrect tax returns for four years of assessment without reasonable excuse – standard practice to use as a starting point penalty equivalent to 100% of the tax underpaid – section 82A of the Inland Revenue Ordinance (‘IRO’).

Panel: Patrick Fung Pak Tung SC (chairman), Ho Chung Ping and Wong Chi Ming.

Date of hearing: 12 July 2001.

Date of decision: 7 September 2001.

The taxpayer, a car salesman employed by Company A, made tax returns reporting his income sourced from Company A and Company B. He paid income tax on the same.

However, upon investigation, it was revealed that the taxpayer understated assessable income sourced from another two companies, Company C and Company D, for four years of assessment from 1994/95 to 1997/98. The total amount of income understated was \$1,008,292.

Additional tax in the sum of \$159,487, which was equivalent to 73.98% (on average) of the tax originally underpaid, was imposed under section 82A of the IRO. Accordingly, the taxpayer appealed against the additional tax so imposed.

#### **Held:**

1. Though the Board had much sympathy for the taxpayer’s financial difficulty, it did not think that the fact that the taxpayer had been told by others in effect that he did not need to report the earning of his commissions from Company C and Company D to the Inland Revenue Department (‘IRD’) constituted any reasonable excuse to underpay tax. The law on this aspect was quite clear: D179/98 and D71/91.
2. It was also clear from the authorities, for example, D52/93, that the standard practice was to use as a starting point penalty equivalent to 100% of the tax underpaid in cases of this nature. Here, the taxpayer had only been given a penalty of 73.98% which was below the normal 100%.

#### **Obiter:**

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In view of the obvious difficulty which the taxpayer was in and his co-operative attitude throughout, the Board did hope that the Commissioner would feel able to work out some arrangement with the taxpayer whereby his financial burden could perhaps be lessened by having more time to pay the additional tax.

### **Appeal dismissed.**

Cases referred to:

D179/98, IRBRD, vol 14, 68  
D71/91, IRBRD, vol 7, 1  
D52/93, IRBRD, vol 8, 372

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

### **Decision:**

1. This is an appeal by (' the Taxpayer' ) against an assessment for additional tax under section 82A of the IRO by the Commissioner.
2. The additional tax assessed and demanded are contained in four notices of assessment and demand all dated 12 April 2001 and are in relation to the following years of assessment:

	\$
(i) 1994/95	70,000
(ii) 1995/96	26,000
(iii) 1996/97	19,000
(iv) 1997/98	<u>3,000</u>
	<u>118,000</u>

3. At the hearing of the appeal, the Taxpayer chose to give evidence without taking an oath and made his submission at the same time.

### **The facts**

4. The Taxpayer was a car salesman employed by Company A. For the years of assessment 1994/95 to 1997/98, he made tax returns reporting his income sourced from Company A and a company by the name of ' Company B' and paid income tax on the same.

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5. In December 2000, the IRD notified him that they wished to investigate into his tax affairs for the years of assessment 1994/95 to 1998/99. He was subsequently interviewed and it was agreed that, during the years of assessment 1994/95 to 1997/98, he had received commissions from two car dealers by the name of Company C and Company D for referring business to them which commissions he had not reported to the Commissioner. Consequently, it was agreed that he had understated his income chargeable to tax to the extent of \$1,008,292 as follows:

Year of assessment	Income from Company C	Income from Company D	Income already reported	Income chargeable to tax \$	Income on which tax has not been paid \$
1994/95	\$ 522,076	\$ 105,861	\$ 690,087	1,318,024	627,937
1995/96	177,996	-	408,494	586,490	177,996
1996/97	160,857	6,000	801,950	968,807	166,857
1997/98	<u>35,502</u>	<u>-</u>	<u>1,266,908</u>	<u>1,302,410</u>	<u>35,502</u>
	<u>896,461</u>	<u>111,861</u>	<u>3,167,439</u>	<u>4,175,731</u>	<u>1,008,292</u>

6. On 2 February 2001, the Commissioner issued four notices of additional assessment and demand for tax to the Taxpayer demanding additional tax in the total sum \$159,487 to be paid on the said income of \$1,008,292 which had been understated.

7. Subsequently, the Commissioner agreed to allow the Taxpayer to settle the said sum of \$159,487 by 11 monthly instalments.

8. By a notice issued on 15 March 2001 under section 82A(4) of the IRO, the Commissioner notified the Taxpayer that he intended to assess him for additional tax under section 82A of the IRO for his having without reasonable excuse made incorrect tax returns by understating income chargeable to tax.

9. On 12 April 2001, the Commissioner issued the four notices pursuant to section 82A of the IRO referred to in paragraph 2 above.

10. The additional tax assessed by those four notices is equivalent to 73.98% (on average) of the said sum of \$159,487 being the tax originally underpaid.

11. In his submission to the Board at the hearing of the appeal, the Taxpayer said that he had been misled by other people including the people working in Company C and Company D that his commissions derived from those companies had already been declared and tax paid thereon before the same were paid to him. He further asked the Board to take into consideration the financial difficulty that he was in, including the fact that he was being pursued by a property developer for a sum of over \$700,000 because he had failed to complete the purchase of a property.

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### Conclusion

12. We have no doubt that the Taxpayer is in serious financial difficulty. We are impressed by the open and frank manner in which the Taxpayer made his submission to us. We have also been informed by Ms Mei, the representative of the Commissioner, that the Taxpayer has been extremely co-operative with the IRD.

13. Much sympathy though we may have for the Taxpayer, we do not think that the fact that he had been told by other people in effect that he did not need to report the earning of his commissions from Company C and Company D to the IRD constitutes any 'reasonable excuse'. The law on this aspect is quite clear. See, for example, the Board of Review decisions D179/98, IRBRD, vol 14, 68 and D71/91, IRBRD, vol 7, 1.

14. It is also clear from the authorities, for example, the Board of Review decision D52/93, IRBRD, vol 8, 372, that the standard practice is to use as a starting point penalty equivalent to 100% of the tax underpaid in cases of this nature. Here, the Taxpayer has only been given a penalty of 73.98% which is below the normal 100%.

15. In the circumstances, we have no basis or justification for allowing the Taxpayer's appeal which must be dismissed.

16. In view of the obvious difficulty which the Taxpayer is in and his co-operative attitude throughout, however, we do hope that the Commissioner will feel able to work out some arrangement with the Taxpayer whereby his financial burden can perhaps be lessened by having more time to pay the additional tax. What we say in this paragraph, of course, has no binding effect on the Commissioner in law.