

**Case No. D78/05**

**Penalty tax** – filing of an incorrect return – imposition of additional tax under section 82A of the IRO – sections 64(3) & 70 of the Inland Revenue Ordinance ('IRO') – compromise reached between taxpayer and IRD as to quantum of assessable income – whether final and conclusive

Panel: Kenneth Kwok Hing Wai SC (chairman), Alan Ng Man Sang and William Tsui Hing Chuen.

Date of hearing: 11 February 2006.

Date of decision: 27 March 2006.

This was an appeal against an assessment of additional tax of HK\$84,000 under section 82A(1)(a) of the IRO, which provides that additional tax may be imposed where an incorrect return is made by omitting or understating income.

The appellant, who was a sales representative of a motor company, had originally reported an income of HK\$1,194,878 for the years of assessment 1993/94 to 1996/97. In 1999, the IRD conducted an investigation into the tax affairs of sales representatives of motor companies generally. Following a meeting with the appellant, the IRD assessed the appellant on salaries tax on the basis of HK\$960,000 additional income, which was objected to by the appellant.

However, by a bi-lingual document signed by the appellant, a compromise was reached between the appellant and the IRD, in which the appellant accepted that a revised assessment pursuant to the compromise would be final and conclusive under section 70 of the IRO. This document stated that this would not conclude the whole matter, and that the IRD would further consider whether to impose additional tax.

A revised assessment was issued in accordance with the compromise, which was not objected to by the appellant. But the appellant appealed against the additional tax assessments under section 82A(1)(a) on the basis that he had never received the commission income.

**Held:**

1. The revised assessments were issued under section 64(3) of the IRO, and became final and conclusive under section 70 of the IRO for all purposes of the Ordinance as regards the amount of such assessable income. Accordingly, the only ground

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raised in the appeal was untenable. The Board dismissed the appeal, and confirmed the assessment of additional tax.

**Appeal dismissed.**

Case referred to:

D31/03, IRBRD, vol 18, 477

Taxpayer in person.

Leung Wing Chau, Fu Kwok On and Ong Wai Man for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the following assessments ('the Penalty Assessments') all dated 12 September 2005 by the Deputy Commissioner of Inland Revenue, assessing the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, in the following sums:

<b>Year of Assessments</b>	<b>Additional Tax</b>	<b>Charge No</b>
1993/94	\$15,000	9-9452715-94-8
1994/95	\$22,000	9-9452661-95-3
1995/96	\$24,000	9-4222635-96-4
1996/97	<u>\$23,000</u>	9-2629924-97-5
Total	<u>\$84,000</u>	

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

3. During the relevant period, the appellant was employed as a sales representative of a motor company.

4. In his Tax Returns – Individuals, the appellant reported the following income:

<b>Year of assessment</b>	<b>Income reported (\$)</b>
1993/94	289,117
1994/95	327,850
1995/96	252,639
1996/97	325,272
Total:	<u>1,194,878</u>

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5. In 1999, the Inland Revenue Department conducted investigations into the tax affairs of sales representatives in the motor trade.

6. On 23 October 2000, the appellant met the assessor and was told about the Revenue's investigation into his tax affairs.

7. On various dates, the assessor assessed the appellant to additional salaries tax ('the Additional Salaries Tax Assessments') under section 60:

<b>Year of assessment</b>	<b>Additional income (\$)</b>
1993/94	150,000
1994/95	250,000
1995/96	260,000
1996/97	300,000
Total:	<u>960,000</u>

8. The appellant objected against the Additional Salaries Tax Assessments.

9. By a bi-lingual document in Chinese and English, entitled 'Salaries Tax' dated 28 January 2005 signed by the appellant, the appellant agreed, among others, as follows:

- ' 1. I hereby agree that my net assessable income be computed as follows and I understand that by compromising and by not objecting to the assessments to be issued pursuant to the compromise, the assessments shall become final and conclusive under section 70 of the Inland Revenue Ordinance (the Ordinance). It is established law that the Board of Review has no authority to disturb assessments which are final and conclusive:

<u>Year of Assessment</u>	<u>Net Assessable income</u>	<u>Net assessable Income already Reported/ Assessed</u>	<u>Discrepancy</u>
	\$	\$	\$
1993/94	374,897	262,690	112,207
1994/95	480,016	298,700	181,316
1995/96	423,894	231,192	192,702
1996/97	470,209	297,046	173,163"
Total:	<u>1,749,016</u>	<u>1,089,628</u>	<u>659,388</u>

- "2. I also agree to accept the following revised assessable income in settlement of the objection against the previous assessments and I understand that the

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revised assessments to be issued pursuant to the compromise shall be final and conclusive under section 70 of the Ordinance:-

<u>Year of Assessment</u>	<u>Revised Assessable Income</u>
	\$
1993/94	413,792
1994/95	529,313
1995/96	466,753
1996/97	517,676
...	

3. I understand that acceptance of the above-mentioned net assessable income 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 to be imposed, the maximum amount could be treble the amount of the tax undercharged which would be premised on the entire amount of understatement agreed.
4. I also understand that I have the right to seek independent professional advice before signing the agreement.'

10. The document dated 28 January 2005 contained clear and unequivocal warnings to the appellant about the effect of the agreement which he was considering entering into. The document in this case clearly and unequivocally addressed the concern raised by the Board of Review in D31/03, IRBRD, vol 18, 477 at paragraph 22:

'22 *At the meeting referred to in paragraph 10 above, [the assessor] did not tell the Appellant ... that by compromising and by not objecting to any assessment which might be issued pursuant to the compromise, the assessment would become final and conclusive under section 70 of the IRO. What [the assessor] said according to paragraphs 4 and 5 of the notes of interview might be misleading in that a taxpayer might be induced to think that he could still argue the salary/profit point before the Commissioner or the Board of Review.'*

11. By revised assessments all dated 11 March 2005 ('the Revised Assessments'), the assessor revised the appellant's income in accordance with paragraph 2 of the document dated 28 January 2005 and as follows:

<b>Year of assessment</b>	<b>Revised income (\$)</b>
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1993/94	413,792
1994/95	529,313
1995/96	466,753
1996/97	517,676
Total:	<u>1,927,534</u>

12. The appellant did not object against any of the Revised Assessments.
13. After considering the appellant's representations, the Deputy Commissioner issued the Penalty Assessments.
14. By letter dated 22 September 2005, the appellant gave notice of appeal against the Penalty Assessments. His only ground of appeal was that he had never received the commission because it was paid by a finance company to his wife's sole-proprietorship business.
15. 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.
16. Section 64(3) provides that:  
*'3. In the event of the Commissioner agreeing with any person assessed, who has validly objected to an assessment made upon him, as to the amount at which such person is liable to be assessed, any necessary adjustment of the assessment shall be made.'*
17. 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 ... or where the amount of the assessable income ... has been agreed to under section 64(3) ... the assessment as made or agreed to ... on objection ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income ...'*
18. The Revised Assessments were issued under section 64(3). Further, the appellant has not objected against any of the Revised Assessments. Pursuant to section 70, the Revised Assessments have become final and conclusive for all purposes of the Ordinance as regards the amount of such assessable income.
19. The only ground raised in the notice of appeal is wholly untenable and the appeal fails. We dismiss the appeal and confirm the Penalty Assessments.

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20. We take the opportunity to thank the Revenue for preparing typed transcripts of documents scribbled by the appellant. It is in the interest of a party to write clearly and legibly.

21. The Revenue might have been more helpful if the Revenue had given more thought to what was relevant and what was not in preparing the draft Statement of Facts and had been prepared to answer questions on the interpretation of section 82A(1)(i).