

**Case No. D80/06**

**Penalty tax** – additional assessment for understating salary income – whether there was any reasonable excuse – whether the additional assessment was excessive – sections 68(4), 82A(1), 82B(3) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Ip Tak Keung and Susanna W Y Lee.

Date of hearing: 24 November 2006.

Date of decision: 6 February 2007.

In his 2001/02 tax return, the appellant understated his salary income. The Deputy Commissioner gave notice to the appellant of his intention to assess additional tax. After hearing the appellant's representations, the Deputy Commissioner decided not to assess additional tax and informed the appellant that the Revenue would not be so lenient again in the event of similar contraventions in the future.

In his 2004/05 tax return, the appellant again understated his salary income, in respect of which the Deputy Commissioner assessed additional tax in the sum of \$4,400, which was 19.77% of the amount of tax which would have been undercharged if the return had been accepted as correct.

The appellant appeals against the additional assessment.

**Held:**

1. The appellant's return omitted or understated his income by 29.04%. In dollar terms, he omitted or understated his income by \$111,256. The amount of tax undercharged, or would have been so undercharged if his return had been accepted as correct, was \$22,251, or 51.67% of the correct amount of tax of \$43,065.
2. Receipt and accrual of income and the total amount thereof are factual matters within the personal knowledge of the taxpayer. Knowledge of the total amount of one's own income does not depend on one being spoon-fed by one's employer. The appellant has not informed the Board whether he had checked his income by reference to his banking record (his income having been paid by autopay into his

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bank account), and if so, the reason (if any) for his understatement, and if not, why not. The appellant represented in March 2003 that he would check his income records for the purpose of reporting his income. What happened subsequently was that he understated his income again in his 2004/05 return. The appellant was in reckless disregard of his duty to report the correct amount of his income. The appellant has no excuse for understating his income.

3. The understatement is significant, both in amount and percentage.
4. Frequent change of jobs is a reason for keeping proper records of one's income. It is neither an excuse nor a mitigating factor for omitting or understating income. The appellant could and should have consulted his banking records bearing in mind his previous representation to the Revenue. It is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases. There was no remorse whatever and the expression of regret in his notice of appeal was and is hollow. (D115/01, IRBRD, vol 16, 893; D50/05, (2005-06) IRBRD, vol 20, 656; D56/06 (2006-07) IRBRD, vol 21, 1051 considered.)
5. It is the taxpayers' duty to report the correct amounts of their income. The Board should drive home the message that taxpayers must take their duty seriously. If a taxpayer does not get the message from the first penalty, a heavier penalty should, as a general rule, be imposed for subsequent contraventions. (D88/04 (2005-06) IRBRD, vol 20, 1 distinguished.)
6. The assessment is not excessive. This appeal is wholly unmeritorious. The Deputy Commissioner was quite lenient with the appellant. Pursuant to section 68(9), the appellant is to pay the sum of \$2,500 as costs of the Board, which \$2,500 shall be added to the tax charged and recovered therewith.

**Appeal dismissed and costs order in the amount of \$2,500 imposed.**

Cases referred to:

D115/01, IRBRD, vol 16, 893  
D3/02, IRBRD, vol 17, 396  
D59/05, (2005-06) IRBRD, vol 20, 821  
D56/06, (2006-07) IRBRD, vol 21, 1051  
D62/96, IRBRD, vol 11, 633  
D50/05, (2005-06) IRBRD, vol 20, 656  
D88/04, (2005-06) IRBRD, vol 20,1

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Taxpayer in person.

Lai Tat Man and Lau Lai Kuen for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal against the following additional assessment ('the Assessment') dated 25 August 2006 by the Deputy Commissioner of Inland Revenue, assessing the appellant to tax under section 82A of the Inland Revenue Ordinance, Chapter 112, in the following sum:

<b>Year of assessment</b>	<b>Additional tax</b>	<b>Charge no</b>
2004/05	\$4,400	9-1973621-05-7

***The salient facts***

2. Based on the documentary evidence before us and on the appellant's admissions, we find the following as facts.

3. By the Assessment, the Deputy Commissioner assessed the appellant to additional tax for understating his salary income in his tax return for the year of assessment 2004/05.

4. Three years ago, the appellant reported the following salary income in his 2001/02 tax return:

<u>Name of employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
Former Employer 1	Business Development Manager	June 2001 – March 2002	379,112

5. By so doing, he had omitted the following income:

<u>Name of employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
Former Employer 2	Senior System Consultant	1 April 2001 – 31 May 2002	92,829

6. By a written notice dated 14 March 2003, the Deputy Commissioner gave notice to the appellant under section 82A(4) of his intention to assess additional tax and invited the appellant to make representations.

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7. By letter dated 29 March 2003, the appellant made his representations and stated that in future he would try his best to use relevant income records to report his income even if he did not have a copy of the employer's return.

8. By letter dated 14 April 2003, the assessor wrote to the appellant to inform him that the Deputy Commissioner did not intend to assess additional tax on that occasion and that the Revenue would not be so lenient again in the event of similar contraventions in future.

9. By a return dated 23 May 2005, the appellant reported the following salary income in his 2004/05 tax return:

<u>Name of employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
Former Employer 3	Project Consultant	April 2004 – March 2005	266,030
Former Employer 4	Project Manager	March 2005	<u>5,802</u>
Total:			<u>271,832</u>

10. Correct particulars of his salary income for 2004/05 are as follows:

<u>Name of employer</u>	<u>Capacity employed</u>	<u>Period</u>	<u>Total amount (\$)</u>
Former Employer 3	C. Systems Analyst	1 April 2004 – 30 June 2004	111,256
Former Employer 3	C. Systems Analyst	2 August 2004 – 15 March 2005	266,030
Former Employer 4	Sr. Solution Consultant/ Project Manager	29 – 31 March 2005	<u>5,802</u>
Total:			<u>383,088</u>

11. The assessor issued a salaries tax assessment for 2004/05 based on salary income of \$383,088. The appellant did not object against this assessment.

12. By a written notice dated 26 May 2006, the Deputy Commissioner gave notice to the appellant under section 82A(4) of his intention to assess additional tax in respect of the appellant's understatement of his income by \$111,256 and invited the appellant to make representations.

13. By letter dated 2 July 2006, the appellant made his representations.

14. No prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts.

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15. The Deputy Commissioner made the Assessment. The additional tax in the sum of \$4,400 is 19.77% of the amount of tax which would have been undercharged if the return had been accepted as correct.

*The grounds of appeal*

16. By letter dated 2 September 2006, the appellant gave notice of appeal on the following grounds (*written exactly as in the original*):

‘I wrote my representation on 2 Aug 2006 to explain that missing notification from my old company caused the incorrect tax return submitted for Year of 2004/05. I did not have any intention to submit below amount of the tax return. I have the following grounds.

1. So far, I have only received the total income HKD266,030 notice from my old company [former employer 3] (The company was closed down.)
2. The tax amount I paid at the beginning of the year 2006 included the suspected and undercharged amount HKD22,251. This tax amount did include the mentioned mis-mentioned tax return income HKD111,256. I paid all necessary tax on time.
3. The mis-mentioned tax return income was caused by the missing notification from my old company. I did not have intention to submit below tax return. The company should be responsible to issue notification to employee correctly, not just blaming on tax-payer only.
4. I am so sorry about my careless mentioning in tax return. It was because I worked for short contracts and contracts kept changing few times by the company within the year. I have been making unstable income from the non-stable employment contracts. The penalty HKD4,400 is so heavy burden to my family and me.
5. I requested not assessing for penalty. Having talked to the Enquiry in the Inland Revenue Department, I have learned that tax-payer has to try best to chase all necessary income tax notifications for tax return reporting.

I am so sorry about the mis-understanding and my careless mentioning in tax return. I sincerely appeal to waive the heavy penalty of additional tax of HKD4,400. Thanks for your kind consideration and attention’

***The relevant statutory provisions***

17. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall lie on the appellant.

18. 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 ... the assessment as made ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income.'*

19. 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 ...'*

20. 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;*

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- (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.'*

21. 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.

22. The Board's power under section 68(8)(a) includes the power to increase the assessment appealed against.

23. Section 68(9) provides that:

*'Where under subsection (8), the Board does not reduce or annul such assessment, the Board may order the appellant to pay as costs of the Board a sum not exceeding the amount specified in Part I of Schedule 5, which shall be added to the tax charged and recovered therewith.'*

24. The amount specified in Part I of Schedule 5 is \$5,000.

***Incorrect return***

25. It is clear from the appellant's notice of appeal that he accepted that his return for 2004/05 was incorrect. In any event, the salaries tax assessment as made for 2004/05 has become final and conclusive under section 70.

26. The appellant's return omitted or understated his income by 29.04%. In dollar terms, he omitted or understated his income by \$111,256. The amount of tax undercharged, or would have been so undercharged if his return had been accepted as correct, was \$22,251, or 51.67% of the correct amount of tax of \$43,065.

***Whether liable for additional tax***

27. There is no prosecution under section 80(2) or 82(1) in respect of the same facts.

28. The next issue is whether the appellant had any reasonable excuse for omitting or understating his income.

29. As the Board has said time and again, a taxpayer has the duty to report the correct amount of income.

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30. Receipt and accrual of income and the total amount thereof are factual matters within the personal knowledge of the taxpayer. Knowledge of the total amount of one's own income does not depend on one being spoon-fed by one's employer.

31. The appellant told us that his emoluments were paid into his bank account by autopay. If the appellant had taken the trouble, he could have added up his salary income from his banking records to ascertain and check the correct amount of his income. The appellant has not produced his banking records. He has not told us whether he had checked his income by reference to his banking records, and if so, the reason (if any) for his understatement, and if not, why not. The appellant represented in March 2003 that he would check his income records for the purpose of reporting his income. What happened subsequently was that he understated his income again in his 2004/05 return.

32. In our decision, the appellant was in reckless disregard of his duty to report the correct amount of his income.

33. Even in cases where simple carelessness is established, the Board has said time and again that carelessness is not an excuse for submitting an incorrect return.

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

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

35. In D115/01, IRBRD, vol 16, 893 at paragraph 14, the Board said this:

*'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.'*

36. The appellant held senior positions.

37. The understatement is significant, both in amount and percentage.

38. As the Board has said time and again, e.g. D3/02, IRBRD, vol 17, 396, at paragraph 12; D59/05, (2005-06) IRBRD, vol 20, 821 at paragraph 31 and D56/06, (2006-07) IRBRD, vol 21, 1051 at paragraph 46, payment of tax is not a relevant factor. It is the duty of every taxpayer



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to pay the correct amount of tax. If he/she does not pay tax, on time or at all, he/she will be subject to enforcement action.

39. We interpose here to point out that paragraph 3 of the headnote for D59/05 which stated that 'the normal starting point adopted by the Board is 10%' is incorrect. The D59/05 panel did not endorse 10% as the starting point. What the D59/05 panel said in paragraph 36 of that Decision was to:

- (a) note that in D23/00, the D23/00 panel accepted that the starting point was 10%; and
- (b) distinguish D23/00 on the facts.

40. As the Board has said time and again, e.g. D62/96, IRBRD, vol 11, 633, at paragraph 23; D59/05, (2005-06) IRBRD, vol 20, 821, at paragraph 32; and D56/06 (2006-07) IRBRD, vol 21, 1051 at paragraph 47, 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.

41. Frequent change of jobs is a reason for keeping proper records of one's income. It is neither an excuse nor a mitigating factor for omitting or understating income. The appellant could and should have consulted his banking records bearing in mind his previous representation to the Revenue.

42. The appellant told us that he had paid the Assessment. There is no evidence that this was a heavy burden to him or his family.

43. It is clear from D115/01 and subsequent Board decisions, including D50/05, (2005-06) IRBRD, vol 20, 656, at paragraph 33, and D56/06 at paragraph 44 that it is wholly unrealistic for a taxpayer to ask for zero penalty in incorrect return cases.

44. The appellant kept on blaming Former Employer 3 for not sending him the employer's return on his income of \$111,256. He did that in paragraph 3 of his notice of appeal and at the hearing. His response to the Assessment was to demand to see the Deputy Commissioner. In our decision, there was no remorse whatever and the expression of regret in his notice of appeal was and is hollow.

***D88/04***

45. In D88/04 (2005-06) IRBRD, vol 20, 1, the panel allowed an appeal in part and reduced an additional assessment for a second contravention from 18.34% to 10%.

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46. In our decision, D88/04 was a decision on its own facts and for this reason does not assist the appellant.

47. If D88/04 goes beyond a decision on its own facts, we respectfully disagree and decline to follow it.

48. A second contravention is a second contravention, whatever differences there may be in carelessness. There are numerous ways of being careless. If the subsequent contravention has to be the same or practically the same as the previous contravention before the Board will regard and punish the subsequent contravention as a second contravention, this is to downgrade the seriousness of repeated contraventions. It is the taxpayers' duty to report the correct amounts of their income. The Board should drive home the message that taxpayers must take their duty seriously. If a taxpayer does not get the message from the first penalty, a heavier penalty should, as a general rule, be imposed for subsequent contraventions.

***Conclusion***

49. In our decision, the Assessment is not excessive.

50. The appeal fails.

51. We were much 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***

52. We dismiss the appeal and confirm the Assessment.

***Costs order***

53. We are of the opinion that this appeal is wholly unmeritorious. The Deputy Commissioner was quite lenient with the appellant. The appellant's arguments have been rejected time and again by the Board. Pursuant to section 68(9), we order the appellant to pay the sum of \$2,500 as costs of the Board, which \$2,500 shall be added to the tax charged and recovered therewith.

***Postscript***

54. We remind the Revenue that in preparing its bundle of authorities, it should use the loose-leaf edition of the Laws of Hong Kong and the IRBRD reports printed by the Government Printer or the Government Logistics Department. We would also appreciate some improvement in the quality of drafting of the Statement of Facts.