

**Case No. D44/09**

**Penalty tax** – salaries tax – income understated – whether additional tax imposed was appropriate – sections 68(9), 82A and 82B(3) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Susanna W Y Lee and Timothy Shen Ka Yip.

Date of hearing: 20 November 2009.

Date of decision: 11 January 2010.

The appellant understated her income for 2007/08 assessment year by \$630,460, which was 35.88% of her actual income. She omitted to report 1 of the 2 employments she had during the year. The Commissioner received notification from both employers of the appellant, and proceeded to assess salaries tax on income received by the appellant from both employments. The Commissioner considered that it was appropriate to assess additional tax under section 82A(1) of the IRO, and assessed such additional tax to be 8.02% of the tax assessable on the omitted part of the appellant's income. The appellant argued that no additional tax should be imposed because she was a first offender; it was a genuine mistake because she was rushed in filing the tax return; and she paid the tax assessed in full. She appealed against the Commissioner's decision.

**Held:**

1. It was important for taxpayers to submit true, correct and complete tax returns (D35/08, (2008-09) IRBRD, vol 23, 683 at paragraphs 51-61 and 75 applied).
2. In an application for waiver of penalty tax, where the taxpayer was in senior and middle management, earning no less than high six digit income, who by carelessness filed an incorrect tax return although he had the means and knowledge to file a correct one, and showed no or no genuine remorse to put his house in order, the starting point for the penalty tax should be 15% of the undercharged tax. The taxpayer should also expect a costs order against him (D16/07, (2007-08) IRBRD, vol 22, 454 at paragraphs 125-128; D37/07, (2007-08) IRBRD, vol 22, 839 at paragraphs 45-48 applied).
3. The appellant's contention that she was rushed in filing the tax return was rejected. By the time she did so, she was 8½ months into her second employment, and the evidence did not show her to have onerous travelling record. In any event, the appellant has the duty to manage her affairs.

4. The amount of additional tax was confirmed but not increased, because the appellant was a first offender, and she was genuinely remorseful. She also undertook to ensure compliance in the future. A costs order of \$1,000 was imposed.

**Appeal dismissed and costs order in the amount of \$1,000 imposed.**

Cases referred to:

D16/07, (2007-08) IRBRD, vol 22, 454  
D37/07, (2007-08) IRBRD, vol 22, 839  
D35/08, (2008-09) IRBRD, vol 23, 683  
Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7

Taxpayer in person.

Chan Lai Fan and Leung Shuk Fun for the Commissioner of Inland Revenue.

**Decision:**

**Introduction**

1. In the 2007/08 year of assessment, the appellant:
  - (1) was employed as an assistant director by her former employer and derived total income of \$630,460 for the period from 1 April 2007 to 28 September 2007; and
  - (2) was employed as an executive director by her employer and derived total income of \$1,126,691 for the period from 8 October 2007 to 31 March 2008.
2. In her composite return for the 2007/08 year of assessment, she reported salary income of \$1,126,691, omitting her income from the former employer, thereby understating her annual income by \$630,460, or 35.88 %.
3. The Deputy Commissioner of Inland Revenue assessed the appellant to additional tax of \$8,600 under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance'), equivalent to 8.02% of \$107,178 which was the amount of tax which would have been undercharged had her return been accepted as correct.

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4. The appellant appealed contending that the penalty tax was excessive, '[imploring] that no additional tax be imposed'.

5. After she had closed her case, we asked her to address us on our powers to increase the additional tax and to impose costs. After hearing her submissions, we did not think it was necessary to call on the Revenue and told the parties that we would give our decision in writing which we now do.

**The agreed facts**

6. The facts in the Statement of Facts, see paragraphs 7 to 21 below, were agreed as facts by the parties and we find them as facts.

7. The appellant appealed against the assessment of additional tax under section 82A of the Ordinance for the year of assessment 2007/08.

8. The appellant commenced her employment with her former employer on 5 September 2005.

9. By a notification dated 17 October 2007, the former employer reported that the following income was accrued to the appellant during the period from 1 April 2007 to 28 September 2007:

Salary	\$573,502
Leave pay	56,958
Total	<u>\$630,460</u>

10. On 2 May 2008, a Tax Return-Individuals for the year of assessment 2007/08 together with a booklet 'Guide to Tax Return-Individuals' ('the Guide Book') was issued to the appellant. The Guide Book stated, inter alia, the following:

(a) Under Part 4 Salaries Tax at page 2:

'You should report income arising in or derived from Hong Kong which is received and receivable during the year. Income includes income from an office, employment (on a full-time, part-time or casual basis) or pension from a former employer.'

(b) Under (C) Guidance on General Matters at page 1:

'The term "year" refers to the year of assessment printed on the front page of the return. A year of assessment runs from 1 April to 31 March, e.g. Year of Assessment 2007/08 runs from 1 April 2007 to 31 March 2008.'

(c) Under Part 9 Declaration at page 10:

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‘Heavy penalties may be incurred for making an incorrect return or committing other offences.

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- The Inland Revenue Ordinance provides heavy penalties for any person who:

.....

- makes an incorrect return without reasonable excuse;

.....’

11. By a notification dated 30 May 2008, the employer reported that income totalling \$1,126,691 was accrued to the appellant during the period from 8 October 2007 to 31 March 2008.

12. On 16 June 2008, a duplicate Tax Return-Individuals (‘the Return’) for the year of assessment 2007/08 together with the Guide Book was issued to the appellant.

13. On 26 June 2008, the appellant filed the Return. In Part 4.1(1) of the Return, she declared the following income:

<u>Name of Employer</u>	<u>Capacity Employed</u>	<u>Period</u>	<u>Total Amount(\$)</u>
[The employer]	Executive Director	8-10-2007-31-3-2008	1,126,691
		Grand total \$	1,126,691

The appellant signed the declaration in Part 9 declaring that the information given in the Return was true, correct and complete.

14. On 4 September 2008 the assessor, based on the income reported by the former employer and the employer, raised the following 2007/08 salaries tax assessment on the appellant:

Income		\$1,757,151
<u>Less:</u> Charitable donations	1,300	
Home loan interest	<u>100,000</u>	<u>101,300</u>
Net income		<u>1,655,851</u>
Tax payable thereon		<u>228,994</u>

15. The appellant did not object against the assessment.

16. The Deputy Commissioner, on 27 February 2009, notified the appellant under section 82A(4) of the Ordinance (‘the Notice’) the following:

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- (a) He proposed to assess additional tax in respect of the appellant's omission of employment income from the former employer;
- (b) The amount of employment income omitted was \$630,460;
- (c) The amount of tax which would have been undercharged if the Return had been accepted as correct was \$107,178; and
- (d) The appellant had the right to submit written representations.

17. On 11 March 2009, the Department received the appellant's facsimile letter dated 10 March 2009 ('Representation Letter'). The appellant stated:

'I have reviewed my relevant tax return and can say that it was an honest mistake on my part and did not intend to omit my income from [the former employer] in the amount of \$630,460. I sincerely apologize for any inconvenience caused by my careless oversight.

Given that this is my first error and there was no mal intent, I would like to respectfully request that no additional tax be imposed. Please also note that I have paid the tax payable for 2007/08 for the correct amount (\$1,757,151) as well as the provisional tax for 2008/09 in full on 31 December 2008.

Thank you for allowing me this opportunity to state my reasons for the omission, and I look forward to your favorable response. For your easy reference, I have attached a copy of salaries tax payment receipts.'

18. On 8 May 2009, the Deputy Commissioner, after considering and taking into account the representations made by the appellant, raised on the appellant an assessment under section 82A of the Ordinance with an additional tax of \$8,600. That amount is 8.02% of \$107,178 which is the amount of tax which would have been undercharged had the Return been accepted as correct.

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

20. On 8 June 2009, the appellant gave notice of appeal to the Board of Review against the assessment to additional tax.

21. Information provided by the Immigration Department showed the following absence of the appellant from Hong Kong during the period from 1 June to 31 July 2008:

<u>Periods of Absence</u>			
<u>Departure Date</u>	<u>Departure Time</u>	<u>Arrival Date</u>	<u>Arrival Time</u>
6 June 2008	12:08	to 9 June 2008	22:49
29 June 2008	22:28	to 18 July 2008	19:24

### **The grounds of appeal**

22. By letter dated 8 June 2009, the appellant appealed on the following grounds:

‘I ... have received the notice of assessment and demand for additional tax in the sum of \$8,600. I have reviewed my case again and would like to respectfully implore that no additional tax be imposed on the grounds that:

- The omission of income from [the former employer] was an honest mistake and careless oversight as I was rushed in making the filing due to travelling around the time and there were many details to track of due to change of employment to [the employer] in 2007;
- This was my first error and there was no mal intent;
- Tax payable for 2007/08 as well as the provisional tax for 2008/09 was fully paid on 31 December 2008.

I now fully understand and duly note the consequences of filing an incorrect tax return, and vow that I will be extra careful going forward.

Thank you once again for allowing me this opportunity to request an appeal, and I hope to hear a favourable response.’

### **The percentage of penalty tax**

23. In D16/07, (2007-08) IRBRD, vol 22, 454, the Board conducted a review of cases on penalty tax and extracted a number of propositions. We agree with paragraphs 125 – 128 in D16/07.

24. In D37/07, (2007-08) IRBRD, vol 22, 839 at paragraphs 45 – 48, the Board expressed the view that taxpayers who:

- (a) are in middle or senior management;
- (b) earn no less than high six digit annual income;
- (c) have the knowledge and means of reporting the correct amounts of their aggregate employment income if they have intended or taken the trouble so to do;
- (d) through carelessness, or not caring whether the returns they filed be correct or not, filed incorrect returns, understating or omitting a substantial portion of their aggregate employment income;

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- (e) show no or no genuine remorse;
- (f) take no steps to put their houses in order;
- (g) argue that it is unfair to penalise them; and
- (h) demand a waiver of penalty;

should expect a starting point of 15% and that pursuing appeals on grounds consistently rejected by the Board in reported decisions should expect a costs order against them. We respectfully agree.

25. In D35/08, (2008-09) IRBRD, vol 23, 683 at paragraphs 51 – 61 and 75, the Board explained the importance of submitting true, correct and complete tax returns on time and applied D16/07 and D37/07. We agree with paragraphs 51 – 61 and 75.

26. The appellant's tax return was dated 26 June 2008. Apart from a short trip from 6 – 9 June 2008, she did not depart from Hong Kong until 29 June 2008. We see no correlation between the omission or understatement in income and her departures from Hong Kong. Even if there was, it was her duty to so organise her affairs so as to comply with her reporting duties.

27. By 26 June 2008, she had been working with her employer for 8 ½ months. We reject the change of employment contention.

28. Honest mistake, careless oversight, overseas travel, absence of intention to evade tax and payment of tax have consistently been held not to be mitigating circumstances in cases such as the present.

29. We do not consider the penalty to be excessive in the circumstances.

30. Since the appellant has chosen to appeal, we must perform the Board's 'ultimate function' to 'confirm, reduce, increase or annul the assessment' appealed against<sup>1</sup>.

31. We have decided not to increase the penalty in this case because:

- (1) This is the appellant's first breach.
- (2) She accepted that the fault was entirely hers.
- (3) She appeared to be genuinely sorry for her omission or understatement.
- (4) She undertook to ensure compliance in future by taking steps which included cross-checking her tax returns before filing. We take this

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<sup>1</sup> See Commissioner of Inland Revenue v Nina T H Wang [1993] 1 HKLR 7, per Fuad VP at page 23.

opportunity to impress on her that it is a basic sentencing principle that, as a general rule, higher penalties are meted out to repeat offenders.

**Disposition and costs**

32. For the reasons given above, we dismiss the appeal and confirm the additional tax assessment appealed against.

33. For reasons given above, we consider this appeal to be unmeritorious and the grounds have been repeatedly rejected by the Board in previous cases. We see no reason why the compliant taxpayers should bear the costs of such a waste of public resources. Pursuant to sections 82B(3) and 68(9), we order the appellant to pay the sum of \$1,000 as costs of the Board, which \$1,000 shall be added to the additional tax and recovered therewith.