HONG KONG

A Review of Recent Board of Review Decisions

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This article reviews the cases published in Volume 33 of the Inland Revenue Board of Review Decisions and its First Supplement. There are five cases on salaries tax and personal assessment, four cases concerning profits tax, and three penalty tax cases. All the appeals were dismissed by the Board, which ordered costs in six cases. All section references below refer to the Inland Revenue Ordinance.

Salaries Tax

D3/17 – Taxability of Allowances

The Taxpayer was employed by Company C in a Grade E position and was responsible for the engineering work on board the company's ships. Company C provided him with food and travelling allowances ("Hong Kong Food/Travelling Allowances") for the years of assessment 2012/13 and 2013/14, and he also received a gratuity ("Gratuity") upon retirement in the latter year. The assessor regarded these payments as taxable income.

The Taxpayer lodged an appealed against his 2012/13 and 2013/14 salaries tax assessments. He argued that as per the Merchant Shipping (Seafarers) (Provisions and Water) Regulation, Company C should be responsible for paying for his food and travelling expenses. Regarding the Gratuity, he claimed that no tax was imposed on his colleagues of the same grade for these amounts and therefore he had not been treated fairly.

The Hong Kong Travelling Allowance was provided to the Taxpayer to cover his travelling expenses to and from his place of work. The Board found that, as an employee, the Taxpayer was responsible for getting himself to his place of work, and he had not performed any employment duties while travelling. Similarly, the Board found that Company C had no duty to provide food to the Taxpayer. The Hong Kong Food Allowance was given to him as a fringe benefit in his capacity as an employee. Both amounts were received by the Taxpayer under his employment contract, forming part of his income derived from Company C. It was concluded that the Hong Kong Food and Travelling Allowances were regarded as taxable income under section 9(1)(a) and should be chargeable to salaries tax under section 8(1)(a). As the food and travelling expenses incurred by the Taxpayer were private in nature, they failed to meet the deduction requirements of section 12(1)(a) that "all outgoings and expenses should be wholly, exclusively, and necessarily incurred in the production of assessable income", and as a result, they were not deductible for salaries tax purposes (*CIR v. Humphrey* [1970] followed).

According to Company C's policy, the Gratuity was paid to the Taxpayer upon retirement in recognition of past services rendered. The Board was of the view that the amount represented income from employment and was therefore chargeable to salaries tax under section 8(1)(a) and section 9(1)(a) (*Fuchs v. CIR* [2011] followed). Regarding the Taxpayer's argument that similar gratuities received by his colleagues were not subject to salaries tax, the Board concluded that such a tax treatment may not necessarily be correct. The onus of proof was on the Taxpayer. However, there was a lack of detailed information to substantiate his argument. The appeal was dismissed.

D5/17 – Single Parent Allowance

The Taxpayer was never married to Ms. F ("the Mother"), but she had given birth to their son ("the Son"). The Mother was not a Hong Kong resident and never stayed in Hong Kong. She resided with the Son in the Mainland at all times during the year of assessment 2013/14. The Mother had a full-time job in the Mainland and only had one day off each week, which might not fall on a Saturday or Sunday. The Son was studying at a boarding school and only stayed at home at the weekends and during holidays. The Taxpayer worked in Hong Kong, but he claimed that whenever the Son was allowed to stay at home, he would leave Hong Kong to take care of him in the Mainland. The duty of caring for the Son therefore fell principally on the Taxpayer. The Taxpayer appealed against his 2013/14 salaries tax assessment, claiming that he had sole and predominant care of the Son and should be granted single parent allowance.

According to section 32, a taxpayer must have sole and predominant care of a child in order to claim single parent allowance. "Sole and predominant care" relates to the custodial responsibility for a child. It refers to the actual care, guidance, protection, supervision, and control of a child for his or her well-being on a day-to-day basis. Section 32(2)(b) specifically states that a taxpayer shall not be entitled to single parent allowance by reason that he or she made contributions to the maintenance and education of the child. Whether a parent has exercised sole and predominant care of his or her child is a question of fact to be decided on the merits of each case.

In the present case, immigration records indicated that the Taxpayer was present in Hong Kong for 275 days during the year of assessment 2013/14, including 14 Saturdays and 10 Sundays. Besides, during the Son's term break of 32 days in early 2014, the Taxpayer actually spent 23 days in Hong Kong. These facts were inconsistent with the Taxpayer's claim that he would stay with the Son every weekend and during holidays. It was beyond doubt that the Taxpayer did make financial provisions and important decisions relating to the education and welfare of the Son as well as spend time with him and teach him English. The Board was of the view that this only constituted part of the normal parental care and was insufficient to prove that the Taxpayer had sole and predominant care of the Son. One should realise that playing a predominant role in a family does not necessarily mean having sole and predominant care of a child.

The Board was not satisfied that the Taxpayer had discharged his burden of proving that he had predominant care of the Son during the year of assessment 2013/14 and thus concluded that he should not be entitled to single parent allowance. The appeal was therefore dismissed and a costs order in the amount of $10,000 was imposed.

D6/17 – Deduction of Outgoings and Expenses

The Taxpayer was employed by Company E during the year of assessment of 2013/14. He was responsible for providing valuation services, liaising with clients, and business development. According to the terms and conditions stated in his employment contract, the Taxpayer had to incur his own expenses to solicit new clients and obtain their contact information. In addition, the Taxpayer was granted the discretion to determine when he would like to incur entertainment expenses for social gatherings with clients while performing his employment duties. However, none of these expenses would be reimbursed by Company E. In his 2013/14 salaries tax assessment, no deduction was granted by the assessor in respect of fees of $450,000 paid to a "cooperation party" and social and entertainment expenses of $35,000, which included an amount of $5,578 for purchasing a replacement phone. This assessment was confirmed by the Deputy Commissioner on the grounds that the relevant expenditures were domestic or private in nature and therefore not deductible.

The Taxpayer disagreed with the determination and lodged an appeal against his 2013/14 salaries tax assessment. He argued that (1) the fees paid to the cooperation party were remunerations paid to persons providing and assisting with the compilation of client information and (2) the social and entertainment expenses were necessary to carry out his employment duties. Both expenses were incurred for business purposes and thus were not private expenses.

The Board found that the information provided by the Taxpayer was insufficient to prove that the cooperation party possessed the relevant qualifications to provide the alleged services. The Taxpayer also failed to prove that both the fees paid to the cooperation party and the social and entertainment expenses were "wholly, exclusively, and necessarily incurred in the production of assessable income" under section 12(1)(a), and as a result, they were not deductible (*CIR v. Humphrey* [1970] considered). Additionally, the expenses incurred for purchasing a replacement phone were capital expenditure and not deductible for tax purposes. The appeal was dismissed.

D9/17 – Disabled Dependant Allowance

The Taxpayer (Ms. B) made a claim for dependent parent allowance ("DPA"), elderly residential care expenses deduction ("RCE"), and disabled dependant allowance ("DDA") in respect of her mother for the year of assessment 2014/15. The assessor rejected Ms. B's claim on the grounds that her brother (Mr. E) had applied for and was granted RCE and DDA in respect of her mother for the same year of assessment. Pursuant to an objection filed by Ms. B, the assessor invited her and Mr. E to compromise on who should claim RCE and other allowances. However, no consensus could be reached. As a result, the assessor withdrew the RCE and DDA granted to Mr. E and this decision was affirmed by the Deputy Commissioner.

Ms. B appealed against the Deputy Commissioner's decision, claiming that as all of the living expenses of her mother were shared among the children, she was eligible to apply for DPA through a compromise with the other siblings. She argued that where the parties could not reach any agreement as who should claim, dismissing both parties' application was an unfair decision.

The Board found that both Ms. B and Mr. E were eligible to claim DPA under section 30. However, it was clearly stated in section 33(2) that where the Commissioner had reason to believe that two or more persons were eligible to claim DPA in respect of the same parent for the same year of assessment, he should not consider any claim until he was satisfied that the claimants had agreed which of them shall be entitled to claim in that year. The Board concluded that the decisions of the assessor and Deputy Commissioner were made in accordance with this provision, and the appeal was then dismissed.

D10/17 – Personal Assessment

The Taxpayer was an employee of Company H. He also had a sole proprietorship business named Company G and worked as Lecturer for Company K as a self-employed individual. The Taxpayer and his wife elected for personal assessment for the year of assessment 2009/10, and he lodged an objection to the assessment raised on him for the said year. The preliminary issue before the Board was whether the Taxpayer's appeal was out of time and any extension would be granted in this case.

The determination of the Deputy Commissioner dated 30 April 2015 ("the Determination") confirming the personal assessment for the year of assessment 2009/10 raised on the Taxpayer was sent to his last known postal address in Macau. The Taxpayer claimed that he came to Hong Kong in May 2015 but had not updated his postal address until December 2016. The Determination was redirected to the taxpayer's updated Shatin address on 24 January 2017. The Taxpayer then filed his notice of appeal on 22 February 2017. He argued that he had been prevented from lodging an appeal within the statutory period of one month under section 66(1) because he did not receive the Determination within a month from 30 April 2015 and the notice should have been sent to his place of business, which remained in Hong Kong for the relevant period.

The Inland Revenue Department (IRD) had duly served the notice of Determination by sending it to the Taxpayer's last known address on 30 April 2015. There was no legal requirement to send the Determination to all the addresses of the taxpayer because he was allowed to choose which address he wished the Determination from the IRD to be sent to him by informing the Commissioner of his change of address in accordance with section 51(8) (*Chan Chun Chuen v. CIR* [2012] followed). The Taxpayer had not been prevented from lodging an appeal within one month from 30 April 2015 for any reasonable excuse under section 66(1A). The Board found that the appeal was out of time and no extension for lodging the appeal would be granted to the Taxpayer.

Although it was concluded that the appeal was lodged late, the Board decided to continue with the analysis of the substantive issue of this appeal. The Taxpayer complained that the portion of business expenses allowed by the IRD for the said year was too small and that the basis of apportionment was different from the assessments for previous years.

The Board was of the view that previous assessments did not constitute any form of representation binding on the IRD's future conduct. For an outgoing or expense to be deductible under section 16(1), it must be incurred in the production of chargeable profits and not excluded by section 17. Regarding the connection between the expenses and the production of chargeable profits, it must satisfy the tests of being *"really incidental to the trade itself"* or having been incurred *"for the purpose of earning the profits"* (*Interasia Bag Manufacturers Ltd v. CIR* [2004] and *CIR v. Chu Fung Chee* [2006] followed). The Taxpayer chose not to provide evidence to substantiate the linkage between the outgoings and expenses incurred by him and the production of the chargeable profits of his business during the said year. He failed to satisfy the burden of proof under section 68(4) that the portion of business expenses allowed was too little. Therefore, even if an extension of time was granted by the Board for lodging the appeal in this case, the personal assessment for the year of assessment 2009/10 would be confirmed.

The appeal was dismissed. The Board considered that the appeal was obviously frivolous, and a costs order in the amount of $25,000 was imposed.

Profits Tax

D4/17 – Application of Section 70A

The Taxpayer did not file a return sent by the IRD for the year of assessment 2006/07. On 10 February 2010, the assessor raised a profits tax assessment with estimated assessable profits of $1,376 million in the absence of a return pursuant to section 59(3). The Taxpayer did not lodge an objection against the assessment within the stipulated one-month period under section 64(1). His request for extending the time to raise an objection against the assessment out of time was rejected by the Court of Appeal. The Taxpayer then sought to argue that when the IRD sent a letter to Company C in December 2009, it claimed to have information concerning the payment of money to Company C. The money was treated as the Taxpayer's income in the profits tax assessment. The Taxpayer argued that the IRD had inadvertently or mistakenly made an error under the first limb of section 70A(1) in issuing the assessment to the Taxpayer or, alternatively, an arithmetical error under the second limb of section 70A(1). The IRD refused to correct the 2006/07 profits tax assessment. The Taxpayer then appealed to the Board against the IRD's refusal.

At the hearing before the Board, the Taxpayer sought to argue that the IRD omitted to take into consideration a letter from Company C's tax representative to the IRD dated 9 March 2010 in which the tax representative stated that the documents concerning the income were seized by the Commercial Crime Bureau and could not be submitted to the IRD. Alternatively, the Taxpayer argued that the failure of the IRD to consider the unavailable documents referred to by Company C's tax representatives constituted an omission under the second limb of section 70A(1).

The Board noted that the Taxpayer's argument in relation to the first limb of section 70A(1) at the hearing was different from that contained in the notice of appeal. Pursuant to section 66(3), the Board shall only consider the ground put forward in the notice of appeal. In the absence of any evidence put before the Board, it would not accept any allegation made by the Taxpayer in letters to the IRD as evidence unless such allegation was supported by undisputed documents or was not disputed by the IRD. Thus, the Taxpayer failed to show that the IRD knew as a fact that it was Company C, rather than the Taxpayer, which had received the money.

The Board opined that a taxpayer who wished to invoke section 70A must first prove the correct amount of profits and the correct amount of tax in order to establish that the tax charged was excessive. There must then be strong and clear evidence to show the "omission" to be in the "statement" that was submitted and the "omission" to be "in respect of" the assessment that correction was sought (*Extramoney Ltd v. CIR* [1997] referred to). It followed that the Taxpayer had failed to satisfy the first limb of section 70A(1).

In any event, the letter by Company C's tax representative was only sent to the IRD after the profits tax assessment was raised. As a matter of logic, "statements" in relation to the first limb of section 70A(1) could not have been something written and received after the raising of an assessment. Furthermore, "statement" in the first limb of section 70A(1) refers to statements submitted in respect of a return. The statement should accompany the return (*Moulin Global Eyecare Trading Ltd v. CIR* [2014] considered).

The Board also considered *Sun Yau Investment Co Ltd v. CIR* [1984] and *Moulin Global Eyecare Trading Ltd v. CIR* [2014] and concluded that the omission must have been contained in the return and the statement in respect thereof. The aim of such a restricted view is to strike a balance between the promptness and finality of an assessment and the avoidance of hardship and injustice. Otherwise, an assessment can always be reopened on the basis of any information or omission to transmit information or supply documents that bore a relation to the taxpayer, even if it resulted from a deliberate and conscious decision of the taxpayer. This could not have been the objective of section 70A. Hence, the Taxpayer's argument on the first limb of section 70A(1) failed.

The Board also held that the Taxpayer has failed to prove the second limb of section 70A(1). Any error or omission can only relate to the calculation of the amount of the assessable profits assessed, or in the amount of the tax charged (*Mok Tsze Fung v. CIR* [1962] and *Sun Yau Investment Co Ltd v. CIR* [1984] followed). Since the Taxpayer did not file any return before the profits tax assessment was raised, there could not be an error or omission in the calculation of the assessable profits. There was no complaint in respect of the subsequent calculation of the tax charged.

The Board considered that the Taxpayer's appeal was thoroughly unmeritorious. Costs in the amount of $5,000 were imposed pursuant to section 68(9).

D7/17 – *Ex Gratia* Payment for Services Rendered

The Appellant registered an insurance agency business and had two contracts with Company C. Under the Agency General Manager's Contract, he was appointed as a manager to recruit, train, and supervise agents for Company C. He was also appointed as an agent under the Agent's Contract for selling long-term insurance business. At the material time, the Appellant had about 30 per cent of Company D's agents under his supervision, which was one of the largest agencies in Company D. Company C was an indirect wholly owned subsidiary of Company D. Company A held a substantial shareholding in Company D.

On 15 May 2007, Company A completed the sale of its entire shareholding in Company D and made a significant gain of approximately $2,596 million. The issue in this appeal was whether the Sum of $30 million paid by Company A to the Appellant on 26 July 2007 in recognition of his loyalty and successful role as an agency leader leading to the success and hence high valuation of Company D was part of the assessable profits arising in or derived from the Appellant's business.

The Board found that there was no contract between the Appellant and Company A. Yet the Sum was paid for services rendered out of the Appellant's role as an insurance agent and an agency leader managing the agency force of the Company D group before the completion of the sale, thereby enabling Company A to complete the sale and make the substantial profit. Without the services of the Appellant, the sale of the Company D group would not have been completed, and the Sum was paid as reward for these services.

The Appellant failed to prove, and there was no evidence, that the Sum was "wholly unexpected". Therefore, the Sum was held to be assessable profits arising in or derived from the Appellant's business within the meaning of section 14. The Board dismissed the appeal and ordered costs in the amount of $5,000.

D11/17 and D12/17 – Gains from the Disposal of Properties and Appeal Out of Time

In **D11/17**, the Appellant was chargeable to profits tax on the gains from the disposal of three properties. The preliminary issue was the failure of the Appellant to lodge an appeal within one month after the transmission to him of the Commissioner's written determination under section 66(1).

Section 58(3) provides that any notice sent by post shall be deemed to have been served on the day succeeding the day on which it would have been received in the ordinary course by post unless the contrary is shown. Taking into account the normal postal time of two working days, the determination was deemed to have been served on 24 September 2016. While the notice of appeal was marked with the date of 21 November 2016, it was only received by the Board on 1 March 2017. The Appellant contended that she was out of town between 21 September 2016 and 20 December 2016 and that the delay was also due to insufficient postage.

The Board opined that absence from Hong Kong, by itself, was not a reason for granting a time extension for appeal under section 66(1A). The Board found that the Appellant's Representative was able to communicate with her through e-mail and prepared the notice of appeal while she was away from Hong Kong. The Appellant failed to establish that she was prevented from giving the notice of appeal in time because of her absence from Hong Kong.

For the substantive issue, the undisputed facts were that the Appellant had acquired three properties between 23 November 2009 and 8 February 2010 and sold these properties between 24 December 2010 and 4 April 2011. With reference to the dates of the two assignments in each case, the Appellant held the properties from 12 to 17 months. All the purchases were financed by bank loans.

In determining whether a property was acquired as a capital asset or a trading asset, the Board followed *Lionel Simmons Properties Ltd (in liquidation) v. CIR* [1980] to consider the intention of the taxpayer at the time of acquisition and the badges of trade. For the first property, the Appellant contended that it was purchased for her son, who left Hong Kong to study at the end of 2009, and she had to sell the property to repay the bank loan. However, the Board found that the Appellant's son arrived in the United Kingdom on 3 October 2009, which was before the purchase of the property on 23 November 2009.

The Appellant further claimed that the second property was purchased for the Representative but was sold as she left Hong Kong for work in 2010. The Board found that at the time the Appellant signed the sale and purchase agreement on 14 December 2009, the Representative had already left Hong Kong to work in Singapore for almost 2 years. Furthermore, the property was acquired subject to a then existing tenancy for the term until 4 June 2010.

The Board was also not convinced by the Appellant's claim that the third property was sold to finance the tuition fees of her son, who was already studying in the United Kingdom at the time this property was acquired. The Appellant must have known the amount of tuition fees required when she acquired the property.

When these findings were put to the Representative at cross-examination, she changed the reasons for acquiring and selling the properties. The Board dismissed the appeal because the Appellant's grounds of appeal were not supported by evidence and the Representative's oral testimony was not credible. The objective facts and circumstances, including the short holding period, the frequency of similar transactions, and the lack of credible reasons given by the Appellant to explain the transactions, suggested that the properties were trading assets and the profits derived therefrom were chargeable to profits tax. The appeal was dismissed.

D12/17 also concerned an appeal which was out of time. The Appellant mostly resided in mainland China. She appealed against the Deputy Commissioner's determination on the charging of profits tax on the profits made by her sale of a property. The determination was sent by registered post to the address supplied by the Appellant, and receipt was acknowledged on 3 November 2016. The Appellant claimed that the address was that of her brother's office and that her sister and the staff there were responsible for forwarding any mail to her. She explained that her sister always communicated with the IRD's staff by phone, so she thought she would be notified of the determination by phone as well. She only knew that the determination had been issued on 16 January 2017 when she returned to Hong Kong to attend a wedding ceremony. On 16 February 2017, she sent the Board an appeal letter by e-mail followed by the hard copy on 20 February 2017 without a copy of the written determination and a statement of the grounds of appeal. The documents stipulated by section 66(1) were not received by the clerk to the Board until 31 March 2017. There was a delay of more than 3 months.

The Board held that the Appellant should be deemed to have received and read the determination on 3 November 2016. When the determination was sent by post to the address supplied by the Appellant in accordance with section 58(2), the Commissioner did not need to further prove that the Appellant was actually notified of the same (*Chan Chun Chuen v. CIR* [2012] applied). Under section 66(1A), the Board may grant leave to appeal out of time only if the Appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving the notice of appeal within the statutory period. The word "prevented" should be understood as meaning "unable to". While it is a less stringent test than the word "prevent", it still imposed a higher threshold than mere excuse (*Chow Kwong Fai v. CIR* [2005] referred). Although the Appellant was not in Hong Kong, she could have appointed a tax representative or a relative to handle the matters for her appeal. The evidence showed that she just ignored the rules about the time limit for lodging the appeal. The Board dismissed the appeal and ordered costs in the amount of $10,000.

Penalty Tax

D32/16 and D33/16 – Third Parties Charged for Additional Tax of the Taxpayer

These two cases concerned Mr. A ("1st Appellant") and Mr. F ("2nd Appellant"), who were directors of Company D. The 1st Appellant signed the profits tax returns of Company D for the years of assessment 1996/97 and 1999/00, while the 2nd Appellant signed the profits tax return for the year 1997/98.

In December 2002, the assessor commenced an audit on tax returns and accounts filed by Company D. The Assistant Commissioner invoked section 61A and concluded that the entering into service agreements between Company D and its parent company, Company L, and the purported payment of management fees were transactions entered into or carried out for the sole or dominant purpose of enabling the company to obtain tax benefits. Additional profits tax assessments for the years of assessment 1996/97 to 1998/99 and profits tax assessment for the year 1999/00 were raised on Company D to deny the deduction of management fees paid to Company L and legal and professional fees paid to Company L and its subsidiaries in mainland China.

In 2003, Company D ceased its trading business and disposed of its entire interest to a fellow subsidiary. In 2008, a differently constituted Board of Review upheld the determination by the Deputy Commissioner that Company D had understated its assessable profits in the years of assessment 1996/97 and 1997/98 and over-claimed its losses in 1999/00. The taxes undercharged were $6,062,567, $5,166,411, and $5,871,140 for the respective years. Company D lodged no further appeal after failing its appeal by way of case stated, failure to obtain leave to apply for judicial review, and appeal dismissed by the Court of Appeal in 2009. Despite repeated demands and enforcement actions, Company D failed to pay any of the tax. In 2011, the Commissioner petitioned for the winding up of Company D, and the Court ordered Company D to be wound up on 4 June 2012.

On 26 April 2013, assessments were issued to the Appellants for additional tax under section 82A for making incorrect profits tax returns on behalf of Company D by understating its profits and over-claiming its losses, which were the subjects of this appeal.

The Appellants contended that it was unfair to have the findings in a previous Board decision between Company D and the IRD binding on the Appellants, who were not parties to those proceedings. The Board opined that section 70 applies to any party who has not been a party to prior proceedings between the underlying taxpayer and the IRD, so long as the other requirements of the section are applicable. In any section 82A case such as the present one, the third party can always adduce evidence of his own belief at the relevant time as reasonable excuse, even though section 70 prevents him from challenging the binding effect of the determination in prior proceedings. A taxpayer will not be subject to additional tax if he can provide a reasonable excuse.

The Appellants signed the returns for and on behalf of Company D. They were required to furnish correct information and come under the terms of section 84A as someone required to furnish accurate information to the IRD. The Appellants had furnished incorrect returns. However, both Appellants failed to adduce evidence and prove that they had reasonable grounds to believe, and did believe, in the correctness of the returns when they signed them.

The Board held that on a *de novo* basis, the “base portion” of additional tax was 140 per cent for the 1st Appellant and 90 per cent for the 2nd Appellant. The starting-off point of 100 per cent for both Appellants was appropriate. There was an additional 50 per cent for the 1st Appellant for setting up the arrangement and the transactions carried out for the sole or dominant purpose of enabling Company D to obtain a tax benefit. On the other hand, there was a 10 per cent deduction for both Appellants, 5 per cent for the accounting records maintained which enabled identification of the issue and 5 per cent for the disclosure of the transactions with non-residents in the profits tax returns and tax computations filed. For both Appellants, there shall be added commercial interest compounded monthly on 100 per cent or 90 per cent of the tax undercharged for the relevant years of assessment from the respective dates when the tax would have been due if the original returns filed were correct to the date of the actual demand note subject to the jurisdictional limit of 300 per cent of the tax undercharged under section 82A(1). The Board remitted the cases to the Commissioner for determination of the amounts in accordance with the Board’s opinion.

The Appellants appealed against the Board’s decisions to the Court of First Instance, which delivered a judgement in favour of the Appellants on 23 November 2018 (*Koo Ming Kown & Murakami Tadao v. CIR* – HCIA/1/2017). The Commissioner has lodged an appeal to the Court of Appeal (CACV 602/2018) which will be heard on 11 October 2019.

D8/17 – Late Filing of Tax Return

The Taxpayer was a private company incorporated in Hong Kong in 1987 with an accounting year end date of 31 March. The extended due date for filing its profits tax return for the year of assessment 2014/15 was 16 November 2015, but the Taxpayer was late by 23 days in submitting the said return together with the audited financial statements. According to the records of the IRD, the Taxpayer had previously failed to furnish its profits tax returns for the years of assessment 2011/12 to 2013/14 within the time limit stipulated. Having considered the late submission of its profits tax return in 2014/15 and the filing history of the Taxpayer, the Commissioner imposed an additional tax by way of penalty under section 82A in the amount of $12,000 (“the Additional Tax”), which represented 3.04 per cent of the amount of tax that would have been undercharged.

The Taxpayer appealed against the imposition of the Additional Tax for the year of assessment 2014/15, claiming that it was excessive. He argued that (1) there was no undercharge of profits tax as the payment of provisional tax for 2014/15 exceeded the actual amount of tax payable for the year; (2) the first set of financial statements had gone astray due to being lost in the post and the second set was resent, resulting in a delay in submission; (3) there was no deferral of tax assessment by the IRD as an estimated assessment was issued in 7 December 2015 and a valid objection was lodged on 11 December 2015; and (4) there was no intention to delay tax payment as provisional tax had already been paid.

Section 82A applies not only to situations where there was an actual undercharge of tax as a result of failure to deliver a tax return in compliance with section 51(1). It also applies to cases where tax "would have undercharged" if such failure had not been detected. In the present case, the failure to file a tax return on time would result in an undercharge of tax and thus the Taxpayer may be subject to the Additional Tax under section 82A unless there is reasonable excuse.

There was no evidence before the Board showing when the alleged first set of financial statements was sent, nor any proof of those documents being lost in the post. However, the Board found that the audit work of the Taxpayer was completed on 30 November 2015, which was after the extended due date of 16 November 2015 for filing its profits tax return for the year of assessment 2014/15. As such, it was frivolous for the Taxpayer to allege that the loss of the first set of financial statements caused the late filing. Even if the Taxpayer's allegation was proved, it was not an excuse for the late filing.

The Taxpayer's argument that it did not have any intention to evade or delay tax payment as the provisional tax paid for the said year exceeded the actual tax payable was not considered by the Board to be an excuse for the delay in filing.

Having reviewed its previous decisions in cases *D118/02, D112/99, D64/94, D49/08, D36/13,* and *D3/16,* the Board concluded that the amount of Additional Tax assessed in the present case was not excessive. The appeal was then dismissed. The Board considered that the appeal was a wastage of public resources, and the taxpayer was ordered to pay costs in the amount of $5,000. T