Appeal against Section 82A Penalty Assessment

(1) Requirements of a valid appeal

- The appeal must be within the time limit.
- It must state the grounds of appeal.
- Case D19/01: the Board of Review held that absence from HK cannot, by itself, give automatic extension of time limit. The taxpayer must satisfy the Board that he had been prevented from notifying the Board on time. As a result of the amendment to section 82B(1), the Board has now a discretion to extend the time limit. This discretion applies to an assessment issued on or after 25 June 2004.
- Case D139/00: the notice of appeal was sent to the IRD and not to the Board within the one month period. The Board held that the mistake could not constitute a reasonable excuse for the late appeal and so, it dismissed the appeal.
- The taxpayer must carefully prepare the grounds of appeal. This is because being an appellant, he may not, at the Board hearing, put forward grounds other than those written in the statement of the grounds of appeal — vide Section 66(3). Likewise, the IRD is also very careful in drafting the statement of facts. Any facts that have not been included in the Statement Of Facts (SOF) may not be raised at the board hearing: for instance, the taxpayer's previous offences such as receipt of warning

letters and penalty assessments.

(2) Before preparation of the Statement of facts (SOF)

The Assessor checks whether the taxpayer has provided the Commissioner a copy of the letter of appeal. He also needs to find out in which language the appeal is conducted. If the letter of appeal is not supplied, he will ask the taxpayer to provide a copy. If the hearing is in Chinese, he will check, with the appellant's agreement, if the Board has no objection to the SOF and the submission to the BOR in English.

(3) IRD's usual arguments against the taxpayer

The usual grounds of appeal put forward by the taxpayer are:

(a) he has done nothing wrong and the imposition of penalty by the IRD is grossly wrong.
(b) he has no intention to evade tax.
(c) he committed a genuine error only.
(d) he paid tax on time.
(e) he relied on professional advice
(f) he heard from others that such thing is common.
(g) the penalty should only punish those who commit a deliberate act of evasion.
(h) he has not received any employer's return (salaries tax case)
(i) the additional tax is excessive
(j) the IR Form is misleading

(k) the tax return form is confusing
(l) he forgot his parent passed away (false claim of DPA)
(m) the employer made an incorrect return (salaries tax case)
(n) he thought that his income is subject to overseas tax only.

On the other hand, the IRD will rely on Board cases to rebut the taxpayer's arguments and defend its penalty assessment. The usual board cases quoted are as follows.

Case D129/02: the penalty tax of $4,400 was cancelled. The taxpayer claimed that she had mistaken that she was employed by the UK company and that her income was subject to UK tax. Her employer, Company B, was the subsidiary of the UK company. She understood that her income would be reported to IRD by company B.

Case D138/02: the taxpayer claimed that he was misled by Form IR 56F. There was no figure inserted against paragraph 13(h) for Share Option Scheme. The taxpayer was not in Hong Kong when the cheque for payment under the scheme was received. Under the circumstances, the Board regarded a reduction was justified. Penalty of $3,800 was reduced to $2,000, that is from 10% to 5.26%.

Case D126/95: 10% of the tax undercharged is held as appropriate where the taxpayer makes a careless mistake

and she has been careless on a single occasion of neglecting to report in her tax return one of his two sources of income. The taxpayer provided sworn evidence that she had no intention to evade tax and her past compliance record was good. In that case, it was held that a penalty is 10% of the tax undercharged is reasonable.

Case D104/96: the Board said: “Although carelessness is not a reasonable excuse, it equally did not justify a penalty of 25%. On the facts of the present case, and bearing in mind that consistency in tax appeals is desirable, the penalty tax was reduced to 10%.”

Case D105/02: the Board said “carelessness” was not a reasonable excuse. The Board opined that the mistake of the taxpayer had been obviously negligent.

Case D3/02: the taxpayer claimed that he had not been given a copy of the Employer’s return made by a Hong Kong company. The Board held that it was the taxpayer’s duty to report the correct amount of income and such duty did not depend on whether his employer had provided him with the information. Apart from that, the taxpayer had no other excuses for omitting income. The Board imposed the taxpayer to pay the Board’s cost of $5,000. [Author’s comments: it is unusual for the Board to impose cost in similar situations following this case. Generally, cost is imposed only when the appeal is frivolous or vexatious or

where the grounds of appeal do not have any merits at all.]

Case D115/01: the Board held that "The notes accompanies a tax return make it clear that the duty is on the taxpayer to complete a true and correct return. As stated in the Guideline, the effective operation of Hong Kong's simple tax system requires a high degree of compliance by taxpayers".

Case D46/01: the Board said "It is trite law that a taxpayer may not shelter behind its own ignorance or unfamiliarity with accounting matters or the fact that it entrusted professionals to discharge its duties on its behalf. See also D34/88. The fact that there was no intention on the part of the Company or its directors to evade profits tax or understate the liability deliberately does not constitute a defence."

Case D15/03: A taxpayer may not shelter behind the fact that she entrusted professionals to discharge her own legal duties on her behalf.

Case D80/96: the taxpayer did not disclose gains from share options. It was held that the penalty was reduced to 10% of the tax undercharged. This reduction was because the taxpayer was a first offender and he was ignorant of the law and the omissions were unintentional.

Case D113/99: the Board held that "neither the taxpayer's long absence from HK is a reasonable excuse for the omission or understatement of income nor it be a mitigating factor". The Board reiterated that an intention to understate income was an aggravating circumstance, but the absence of that was neither a mitigating factor because every taxpayer should not have it. The taxpayer's misconception that reliance could be placed upon his employer's return for full compliance of his obligation could neither be a reasonable ground of appeal against liability nor a mitigating factor.

Case D114/97: the taxpayer forgot his income and put down the words "Forgotten" but he was still liable to penalty. The Board said: "Even if the taxpayer had not received his pay, what he should have done was to state the amount he had received so far and the further amount due but not yet received by him. Putting down 'Forgotten' as the total amount of income was quite irresponsible."

Case D112/97: the Board found that the taxpayer's attitude was arrogant and cavalier. Penalty of $40,000 representing 21.04% of the tax undercharged was held to be not excessive. The taxpayer did not disclose his additional source of income as salaries and the share option gain. The Board disagreed with the taxpayer that the omission was an oversight only. The Board held that no intention to evade tax or ignorance of law could not

constitute a reasonable excuse.

Case D62/96: the taxpayer filed incorrect returns for 1993/94 and 1994/95 by omitting part of his income. Penalty tax of 25% of the tax undercharged was levied. The taxpayer understood that he left out his income from D Ltd, but he did not care, knowing that his employer would send in the employer's return. He also claimed that IRD had suffered no loss. The Board ruled that the chief point was the taxpayer failed to make a true, correct and complete return of his total income as he declared and promised in his tax return. That was a duty of every taxpayer upon the due performance of which the success of our taxation system depends. The penalty loading of 25% was maintained.

Case D6/03: the taxpayer has understated her income in 1996/1997. A warning letter had been issued to her but she understated her income again in 2000/2001. She sworn on oath that she had never received the warning letter. It was held that that was irrelevant whether or not the taxpayer received the 1998 warning letter; the fact that it was the second time the taxpayer submitted incorrect return. In the circumstances, the additional tax of 23% was not excessive. The Board also said accepting a misguided opinion could not constitute a reasonable excuse.

Case D101/02: the taxpayer argued that he erroneously filled in the return due to the change in the format of the

return. This argument was not accepted and the penalty of $14,000 being 10.95% of tax undercharged was confirmed.

Case D96/03: the amount omitted was $4,626,406. The taxpayer argued that she had been heavily committed to business and travelling. She had relied on the information provided by her employer and her mistake was only not to verify the figures. The Board confirmed the penalty at $180,000 representing 25.7% of tax undercharged. The Board said the taxpayer was under a duty to make a proper return of her income.

Case D15/03: the decision in D46/01 is upheld that a taxpayer cannot shelter behind the fact that she entrusted professionals to discharge her legal duties. The penalty of $3,200 being 7.4% of the tax undercharged was confirmed.

Case D95/03: the taxpayer forgot that his mother had died and he habitually claimed for DPA. The penalty of $5,000 was reduced to $2,500, that is from 49% to 24.4% of the tax undercharged. It is commented that the practice of imposing penalty at 100% of the tax underpaid as a starting point is not relevant in the circumstances of the case.