

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D13/85

Board of Review:

William Turnbull, *Chairman*, E. J. V. Hutt and Lee Wing-kit, *Members*.

31 July 1985.

Additional Tax—Section 82A of the Inland Revenue Ordinance—omission of part of the taxable emoluments—genuine mistake—whether reasonable excuse.

The Appellant failed to report certain income from his previous employment in his Salaries Tax Return. An assessment to additional tax under S. 82A in the nature of a penalty was raised against the Appellant. On appeal against the penalty assessment, the Appellant contended that the incorrect return was caused by his oversight and change of employment which should constitute a reasonable excuse.

Held:

On the facts the Appellant made a genuine mistake and had a reasonable excuse.

Appeal allowed.

Wu Hon-keung for the Commissioner of Inland Revenue.
The Appellant in person.

Reasons:

It is convenient to set out a brief summary of the facts of this case.

The Taxpayer is a qualified medical practitioner. He commenced working in Hong Kong on 17 March 1980 when he was employed by the Tung Wah Group of Hospitals a Government subvented organization. On joining their employment he was paid at a minimum pay scale and some months later this was adjusted upwards and retrospectively with effect from the date when his employment commenced. Some year or more after commencing this employment the Taxpayer was required to complete tax returns which included a return of his emoluments for the period 17 March 1980 to 31 March 1980. The Taxpayer completed his tax return form stating the amount which he was originally paid and omitting to include the backdated salary revision which covered the period of approximately two weeks at the end of the fiscal year 1979/80. The amount of adjusted backpay which was omitted by the Taxpayer was HK\$4,645.00.

On 7 May 1982 the Taxpayer's employment with the Tung Wah Group of Hospitals ceased and on the 16 April 1982 he commenced employment as a direct employee of the Hong Kong Government working at the University of Hong Kong. His new employment at the University commenced on the 16 April 1982 before his employment with the Tung Wah

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Group of Hospitals ended because he was entitled to accumulated leave when he ceased working for the Tung Wah Group of Hospitals. (When addressing us it was apparent that the Taxpayer did not fully understand this “change of employment” as he referred to himself as being employed by the Government throughout.) When filing his tax return for the year 1982/83 the Taxpayer stated that his principal office of employment was the University of Hong Kong for the period 16 April 1982 up to 31 March 1983. He omitted to include the emoluments which he received from the Tung Wah Group of Hospitals for the period from 1 April 1982 up to 7 May 1982. Indeed he omitted to include in his tax return for the year 1982/83 any reference at all to the Tung Wah Group of Hospitals. The amount of salary omitted was HK\$23,345.00 largely comprising the leave pay to which the Taxpayer was entitled and a sum of HK\$583.00 calculated by the Inland Revenue Department to be the value of the quarters provided by the Tung Wah Group of Hospitals for the period 1 April to 16 April 1982.

Following the filing by the Taxpayer of the two tax returns for the years of assessment 1980/81 and 1982/83 with omissions mentioned above the Acting Deputy Commissioner of Inland Revenue on 25 July 1984 issued a notice under section 82A(4) of the Inland Revenue Ordinance stating that he was of the opinion that the Taxpayer had without reasonable excuse made incorrect salaries tax returns for final assessments for the years 1980/81 and 1982/83. The Taxpayer was informed by this notice that it was proposed to issue an additional assessment to tax and the Taxpayer was called upon to make any written representations which he wished.

The Taxpayer made written representations to the Commissioner of Inland Revenue. The Taxpayer did not attempt to deny that he had omitted part of his taxable emoluments but explained the reasons were mistakes on his part caused firstly by the fact that he had just commenced employment and subsequently received back-pay and secondly because he had overlooked the holiday pay which he had received.

At the hearing we were informed by the representative for the Commissioner that the Commissioner had accepted the Taxpayer’s explanation with regard to the omission of the backpay as being a reasonable excuse within the terms of section 82A but that the Commissioner had not accepted the explanation given with regard to the pay in lieu of leave. The Commissioner decided to impose a penalty assessment under section 82A in the sum of HK\$1,000 to penalize the Taxpayer for the mistake which he had made in understating his taxable emoluments for the year of assessment 1982/83. The Taxpayer duly appealed against this additional assessment.

There was no suggestion at any time by the Commissioner of Inland Revenue that the Taxpayer had ever sought to evade payment of tax or acted fraudulently. It was accepted that the Taxpayer had made a mistake but should be penalized for his mistake.

The Taxpayer when he appeared before the Board of Review did not in any way seek to deny his mistake. From the submissions which he had previously made in writing to the Commissioner and this Board and from what he said when he appeared before the Board of

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Review it was clear that he felt severely aggrieved by the imposition of the penalty which he said implied that he had done something wrong and had the intention of defrauding the Government.

This is not the first appeal of this type which has come before the Board of Review recently but one of many.

This appeal introduces two interesting points which have given the Board of Review much reason for thought in previous appeals. The first is whether or not a “simple slip of the mind” constitutes a reasonable excuse within the meaning of section 82A. The Commissioner’s representative in his submission states as follows:—

“I submit in the present Appeal that the Board is only required to consider whether or not the “simple slip of mind” in the circumstances as occurred to the Appellant can amount to a reasonable excuse. For the purpose of section 82A it is not necessary to establish that the incorrect return is made deliberately or with a willful intent. Surely, it is the duty of the Taxpayer to make a correct return and not for the Revenue to correct the mistakes.”

This submission on behalf of the Commissioner gives section 82A a meaning of imposing an absolute liability upon Taxpayers to file correct tax returns without being allowed to make what we will call “genuine mistakes”. We feel that this interpretation of section 82A goes too far. In an imperfect world individuals make genuine mistakes. We are of the opinion that in deciding whether or not a taxpayer has a reasonable excuse within the meaning of section 82A, the Commissioner should decide whether the Taxpayer has acted as one would expect a reasonable law abiding citizen to do. The Commissioner himself seems to agree with this approach in that he accepted the mistake made by the Taxpayer in the first of the two understatements as a being reasonable excuse. As stated above this was confirmed by the Commissioner’s representative at the hearing.

The question which we now have to decide is whether or not the Taxpayer had a reasonable excuse for the second mistake which he made and which is the subject matter of this appeal. As we have stated we consider that the correct test to be applied in ascertaining “reasonable excuse” is what one would expect a reasonable person to do in all of the circumstances. A reasonable person is not a perfect person, but an average person using the reasonable skill and care in handling his taxation affairs which one would expect to see from such an average person. To paraphrase English legal expressions, the word “reasonable” introduces the concept of the standard of care in handling his tax affairs which one would expect from the average man on a Hongkong tram or the M.T.R. or who takes his family out on a Sunday for lunch or to the Ocean Park. Having heard the Taxpayer and the Commissioner’s representative and having read the submissions made by the Taxpayer we find that the Taxpayer made a genuine mistake without any intention to defraud or avoid payment of tax and that he had a reasonable excuse.

Having so found it is not necessary for this Board to go further. However in case it is held by a higher court that our interpretation of section 82A is incorrect as a matter of law,

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we have also considered the second point which is whether or not the Commissioner has a discretion regarding the use of section 82A and if not whether the penalty assessment of HK\$1,000 is excessive having regard to all of the circumstances. We are of the opinion that when the whole of section 82A is read, the Commissioner is given a discretion even where there is no reasonable excuse and that he is not obliged either to take action under section 82A or to prosecute the Taxpayer in every case. If it were to be held that the genuine mistake or “simple slip of mind” made by the Taxpayer did not amount to a reasonable excuse within section 82A then we would be of the opinion that the Commissioner should have exercised his discretion in favour of the Taxpayer and not to have imposed a penalty under section 82A. However under the appellate provisions of section 82B this Board is not empowered to review the exercise of whatever discretion the Commissioner may have as to whether or not to invoke the provisions of section 82A. Having decided to invoke the provisions of section 82A this Board is only empowered to decide whether or not there is a liability to additional tax and if so whether or not the amount is ultra vires or is excessive. On the facts of this case the Board would have had to hesitation in reducing the amount of the additional assessment to the lowest nominal practical sum which would be HK\$1. However having decided that the Taxpayer had a reasonable excuse it is not necessary for this Board to go further or to make any alternative order.

On the facts and for the reasons stated above this Board, having decided that the Taxpayer’s genuine mistake or simple slip of mind amounted to a reasonable excuse, allows the Appeal in full and orders that the additional assessment in the sum of HK\$1,000 be cancelled.