

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D9/93**

Penalty tax – incorrect tax return and failure to file tax returns – conduct of taxpayer – quantum of penalties – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), David A Morris and Woo Manuel Rosas.

Date of hearing: 16 February 1993.

Date of decision: 24 May 1993.

The taxpayer filed an incorrect salaries tax return and failed to inform the Commissioner that he was carrying on business. Following enquiries and an investigation it was ascertained that the taxpayer had made substantial profits and had incorrectly stated his income assessable to salaries tax. Penalties totalling approximately 128% of the tax involved were imposed upon the taxpayer. The taxpayer appealed to the Board of Review.

Held:

In the circumstances the penalties were not excessive. The conduct of the taxpayer did not merit any reduction.

Appeal dismissed.

Cases referred to:

D10/81, IRBRD, vol 1, 404

D42/88, IRBRD, vol 3, 395

D55/88, IRBRD, vol 4, 20

Kwok Tai Yan for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against certain penalties imposed upon him under section 82A of the Inland Revenue Ordinance in respect of the years of assessment 1981/82 to 1990/91. The facts are as follows:

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1. At all relevant times, the Taxpayer and his wife (who was divorced from him in 1990) were the manager and the manageress of the Branch and the Head Office of a company. The company was a limited company owned by the Taxpayer, his wife, his parents and members of his family. The Taxpayer and his wife ceased to work in the company in 1988 and 1985 respectively and their shareholdings were transferred to the father of the Taxpayer.
2. The Taxpayer and his wife also owned another business of the same kind which was also a limited company and which was incorporated in early 1987.
3. In the salaries tax return submitted for the year of assessment 1981/82 the Taxpayer declared the income for himself and his wife as a total of \$86,116.
4. In March 1988 the Inland Revenue Department commenced making enquiries into the tax affairs of the Taxpayer. In the course of those enquiries it became apparent that the Taxpayer had carried on the business on his own account using his own private bank accounts.
5. The Inland Revenue Department requested the Taxpayer to file profits tax returns for the years of assessment 1982/83 to 1987/88 in respect of the business which he had been carrying on for his own account. The Taxpayer filed profits tax returns in respect of those years in which he stated that his profits were 'nil'.
6. In the course of the investigation the Taxpayer used the services of a tax representative to assist him but was not cooperative in answering enquiries which were made by the assessors.
7. On 6 May 1992 the tax representative on behalf of the Taxpayer submitted a formal proposal for the computation of the profits of the business carried on by the Taxpayer for his own account. According to this computation the profits made by the Taxpayer from his dealing in the years of assessment 1981/82 to 1990/91 amounted to \$3,300,106. On 17 July 1992 the Taxpayer accompanied by his tax representative called at the Inland Revenue Department and a formal agreement was signed in respect of the business carried on by the Taxpayer for his own account showing assessable profits for each year as follows:

<u>Year of Assessment</u>	<u>Assessable Profits</u>
	\$
1982/83	147,937
1983/84	286,464
1984/85	443,746
1985/86	341,000

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1986/87	436,133
1987/88	679,257
1988/89	550,638
1989/90	157,555
1990/91	<u>84,552</u>
	<u>3,127,282</u>

8. In addition the Taxpayer agreed that his income assessable to salaries tax for the year of assessment 1981/82 was \$156,149 as opposed to the sum of \$86,116 being the amount which he had previously returned as per the profits tax return which he had submitted in respect of the year of assessment 1981/82 (Fact 3 above).

9. On 28 August 1992 the Commissioner gave notice to the Taxpayer that he proposed to assess the Taxpayer to additional tax on account of the incorrect tax return submitted for the year of assessment 1981/82 and the failure to inform the Commissioner in writing that he was chargeable to profits tax for the years of assessment 1982/83 to 1990/91 within the period prescribed by the Inland Revenue Ordinance.

10. The Taxpayer made representations to the Commissioner on 22 September 1992. After considering the representations the Commissioner on 27 October 1992 assessed the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance in the following amounts:

<u>Year of Assessment</u>	<u>Tax Undercharged</u> \$	<u>Section 82A Additional Tax</u> \$
1981/82	35,178	47,500
1982/83	22,190	29,900
1983/84	42,969	58,000
1984/85	75,436	101,800
1985/86	57,970	78,300
1986/87	74,142	99,100
1987/88	112,077	140,400
1988/89	85,348	100,200
1989/90	23,633	26,000
1990/91	<u>12,682</u>	<u>13,100</u>

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541,625

694,300

11. The Taxpayer duly appealed to the Board of Review against these penalty tax assessments.

At the hearing of the appeal the Taxpayer duly appeared and represented himself. He asked the Board to cancel the penalties which had been imposed on him. He said that he had been divorced in 1990 and three years prior to that he had left home. He said that during the period when the Inland Revenue Department were investigating his affairs he did not have a job and was being divorced and that was why he did not respond to the questions from the assessors. He confirmed that he had been uncooperative and offered as an explanation the fact that he had only achieved form 3 level standard of education. He said that he had been under great mental stress and could not concentrate. He said that he thought many things were unreasonable. He said that he had to pay the salaries and profits tax which had been assessed on him by instalments and that the business which he was now running was not good. He said that he considered the tax which he was now paying by instalments was a punishment for his being uncooperative and that he should not have to pay penalties in addition.

The representative for the Commissioner pointed out to the Board that the Taxpayer himself had informed the Inland Revenue Department that he had been carrying on business on his own account and that he was now trying to seek to deny this. He said that apart from the Taxpayer's own admission that he had been carrying on business on his own account the assessors had analyzed the personal accounts of the Taxpayer and his wife which showed a substantial level of activities which were indicative of carrying on business. He pointed out that many of the personal cheques made out by the Taxpayer were payable to shops related to his business which again indicated that he was carrying on a business for his own account. The representative for the Taxpayer then drew our attention to the various relevant facts including the fact that the investigation had gone on for many years due to the lack of cooperation by the Taxpayer in furnishing information. He said that the private affairs of the Taxpayer such as his marital problems and family problems and low standard of education were not reasonable excuses.

The representative for the Commissioner submitted that the additional tax imposed by way of penalty represented 42.7% of the maximum penalty and was not excessive in the circumstances. He drew to our attention D10/81, IRBRD, vol 1, 404, D42/88, IRBRD, vol 3, 395 and D55/88, IRBRD, vol 4, 20.

Nothing which the Taxpayer said to us is in any way persuasive that the quantum of the penalties imposed are excessive. The amounts imposed are substantial sums of money but they reflect the quantum of the tax involved. Apparently it was the Taxpayer himself who informed the Inland Revenue Department after the commencement of enquiries that he had been carrying on business for his own account. There can be no doubt that he must have known that he was carrying on such a business and that he should have been paying tax on the profits which he made. Apparently he utilized the services of the

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family company of which he was the manager or alternatively his business skills for the purpose of making profits for his own account. Those who handle their affairs in such a manner have no room to complain if subsequently their activities are discovered by the Inland Revenue Department and they are called to account for what they have done.

It is not material that the Taxpayer was having marital problems and his level of education had little or no bearing on his conduct. The simple fact of this case is that he apparently under-declared his salaries income for one year of assessment and totally failed to file any tax returns or notify the Commissioner that he was carrying on a business in respect of all of the other years. For him to say to us that it was a sufficient penalty that he should now have to pay the salaries tax and profits tax which he should have long since paid is most unconvincing. All that he is doing in paying his salaries tax and profits tax is the same as everyone else must do in Hong Kong, except that through his conduct the Taxpayer has deferred the due payment of tax for many years.

For the reasons given we dismiss this appeal and confirm the penalty tax assessments against which the Taxpayer has appealed.