

INLAND REVENUE BOARD OF REVIEW DECISIONS

**Case No. D105/96**

**Penalty tax** - section 82A - use of new form and ill health not reasonable excuses - penalty rate change after mistake committed.

Panel: Christopher Chan Cheuk (chairman), Chiu Chun Bong and Ma Ching Yuk.

Date of hearing: 24 January 1997.

Date of decision: 24 March 1997.

The taxpayer was principal of a school and also operated a firm as a sole proprietor. He failed to report the salaries in tax return and pleaded ill health and ignorance of new form. Before the Commissioner determined the additional tax under section 82A of the Ordinance, the Commissioner raised the tariff rate for similar mistakes from 10% to 25% of the tax undercharged. The Commissioner fixed the penalty at the new rate.

Held:

The change of tax form and ill health of the taxpayer are not reasonable excuses for the failure. However, it is unfair to impose the new rate.

**Appeal partly allowed.**

Case referred to:

Waddington v Miah [1974] 2 All ER

Yip Sham Yin Har for the Commissioner of Inland Revenue.  
Taxpayer represented by his sister.

**Decision:**

1. This is an appeal by Mr A ('Taxpayer') against the assessment made by the Commissioner for additional tax under section 82A of the Inland Revenue Ordinance (the IRO) for the year of assessment 1993/94 in the amount of \$15,000.
2. The Taxpayer appealed against both liability and the amount.

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3. The Taxpayer did not appear but duly authorised his sister Madam B to appear on his behalf and the Board accepted such representation without reservation. She agreed to the facts of the case and also agreed to the documents of 58 pages which were deposited with the Board before hearing.

4. Mrs Yip Sham Yin-har representing the Revenue rightly reminded the Board that she only agreed to the production of documents without proof but reserved the right to challenge the contents thereof, if necessary.

### FACTS OF THE CASE

5. (A) In the tax return for individuals for the year of assessment 1993/94, the Taxpayer declared 'Nil' income in Part D - Salaries Tax.
- (B) Examination of the employer's return by the assessor revealed that the Taxpayer had income from School C for the subject year in the sum of \$401,785.
- (C) On 3 February 1995, the assessor raised the salaries tax assessment on the Taxpayer for the subject year for his self income in the sum of \$401,785.
- (D) No objection was made against the assessment.
- (E) The Commissioner duly complied with the notification procedure in accordance with the law and the Taxpayer made written representation.
- (F) The Commissioner made an assessment for additional tax under section 82A of the IRO for the year of assessment 1993/94 in the sum of \$15,000.
- (G) The Taxpayer appealed against the assessment.

### GROUND OF APPEAL

6. The Taxpayer gave several grounds of appeal which can be summarised as follows:

- (a) He was the principal of the School and was the person who instructed the School clerk to file income tax returns for all staff. There was no reason for him to evade tax.

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- (b) At the time when he received the tax return the firm 'Company D' which he owned ceased operation. He thought that the tax return was for the firm only and as he drew no salary from the firm he completed Part D - Salaries Tax with the word 'Nil'.
- (c) The omission was due to carelessness and misinterpretation of the tax return.
- (d) Since then, he had a stroke and lost the power of speech and suffered from urinary cancer and serious diabetes.

### EVIDENCE

7. Madam B on behalf of the Taxpayer decided not to give evidence but made submission relying on the agreed facts and the agreed documents. Neither did she call any witness to testify. What she did was to relate the whole incident again in chronological order. She emphasized that the omission was an oversight and that her brother at the time of filing was not in good health. This might have been the cause for the oversight.

8. Similarly, Mrs Yip for the Revenue did not call any witness. Nor did she submit any new evidence. She gave a well written submission which was explained to Madam B. The Board has carefully considered the submissions by both sides and has come to the following findings.

### FINDINGS

9. The Taxpayer was the principal of a school and was also a business man. It is difficult for the Board to believe that he was not aware of the change in tax return form and that he misunderstood the contents thereof. As a headmaster there is no reason for him to treat the legal document without proper care and to examine it diligently.

10. We do not believe that his ill health affected him in completing the form. At that time he still carried on the duty as the principal of a school. It was only logical for the Board to assume that he was still of sound mind and with good reasoning power; the mistake was not caused by failing mental faculty.

11. The Board accepted the Revenue's argument that it was the duty of a taxpayer to read the tax return and the accompanying notes with care. The fact that he suffered from illness which we do not think had affected his mental faculty was not a good reason for him to omit such material information from the return.

12. Neither does the Board think that the illness is a good mitigating factor. The Board finds no other mitigation factor which makes it different from any other normal case.

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13. Upon enquiry Mrs Yip informed the Board that the normal rate of penalty at the time of omission when the Taxpayer filed the return, that is, 13 May 1994 was only 10% of the tax undercharged. The same rate applied at the time when the Taxpayer paid the first instalment and when the time for objection to the assessment expired. The Board was told that the rate had been increased to 25% since July 1995. The Board finds it wrong in principle that the new rate should have retrospective effect.

14. The Board makes reference to Article 11(2) of the Declaration of Human Rights which was quoted by Lord Reid in Waddington v Miah [1974] 2 All ER page 379:-

*'No one shall be held guilty of any penal offence on account of any act or omission which did not constitute a penal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the penal offence was committed.'*

15. In this case the Commissioner made the determination after the new rate of 25% had come into practice and so he determined that the Taxpayer should fall within the new tariff and should pay an additional tax of \$15,000 equivalent to about 25% of the tax undercharged.

16. The Board thinks it is wrong to do so. For the purpose of illustration if another person made the same omission on the same day as the Taxpayer did but his case came before the Commissioner in June instead of July 1995, at that time the former rate of 10% still applied so the penalty would be about \$6,600 which was equivalent to about 10% of the tax undercharged. Then, there would be a great disparity in penalty between the two who committed the same offence at the same time but because of the difference in determination dates the punishment is different. This is obviously unfair and should not be allowed.

### DECISION

17. For the above reasons the Board dismisses the appeal against liability but finds that the amount of additional tax is excessive.

18. The Board orders that the additional tax be reduced from \$15,000 to \$6,600.