

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D95/03

Penalty Tax – submission of incorrect tax return without reasonable excuse – attempt to claim dependent parent allowance and additional parent allowance – contradicted by facts – the claim was disallowed – imposition of additional tax assessments – claimed no intention to evade tax – merely forgot the passing away of his mother and habitually applied for dependent parent allowance – no reasonable excuse – the Revenue suffers no loss – no reasonable excuse but mitigating factor – but the mistake is just mere negligence – unlike those openly flout the rules and submit incorrect tax returns – the standard practice of imposing penalty equivalent to 100% of the tax underpaid as a starting point should not be applied – section 82A of the Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Panel: Anthony Ho Yiu Wah (chairman), Ng Ching Wo and Jason Yeung Chi Wai.

Date of hearing: 21 November 2003.

Date of decision: 5 February 2004.

This was an appeal against an assessment dated 15 August 2003 whereby the Commissioner levied additional tax in accordance with section 82A of the IRO in the sum of \$5,000 against Mr A ('the appellant') in respect of his submission of incorrect tax return for the year of assessment 2001/02. The sum so levied amounts to 49% of the tax undercharged.

The appellant submitted incorrect tax return for the year of assessment 2001/02. Even though his mother (Madam B) had passed away, the appellant still claimed for the dependent parent allowance and additional parent allowance in that year of assessment.

According to the information collected by the Revenue, the dependent parent (Madam B) in fact had passed away on 18 December 2000 (that is, in the year of assessment 2000/01). The Revenue therefore informed the appellant that such claim for the dependent parent allowance and additional parent allowance would not be granted. The appellant did not object to the relevant salaries tax assessment.

By notice dated 15 August 2003, the Commissioner levied additional tax under section 82A of the IRO in the sum of \$5,000 against the Appellant in respect of his submission of incorrect tax return for the year of assessment 2001/02, whereby he wrongly represented that the amount of dependent parent allowance and additional parent allowance was \$60,000. The sum so levied amounts to 49% of the tax underpaid.

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Mr A appealed against such assessment to the Board of Review. The grounds of appeal were as follows:

- (a) For the past 20 odd years, the appellant never ceased to claim for the dependent parent allowance. He was mistaken that his mother was still alive when he submitted the tax return for the year of assessment 2001/02. He therefore continuously applied for such dependent allowance.
- (b) The appellant never had any intention to defraud the Revenue because he was fully aware that the Births and Deaths Registry would keep track of the death of his mother. No fraud could ever be perpetuated.
- (c) The Revenue suffered no loss even though the appellant mistakenly claimed for the dependent parent allowance. This was because his mistake had been corrected in the year of assessment 2001/02.

The facts appear sufficiently in the judgment.

Held:

1. The appellant claimed that he had no intention to evade tax. He just forgot that his mother had passed away when he submitted the tax return. He just habitually claimed for such dependent parent allowance. The Board held that this was not a reasonable excuse: see D9/98, IRBRD, vol 13, 103 which said:

‘The fact that the Taxpayer had no intention to evade tax is only one of the many factors we have to consider whether the Taxpayer is liable to pay the additional tax The burden of proof shifts to the Taxpayer to show that she had “reasonable excuse” and that she should be exonerated from liability under that section.’

2. The appellant asserted that his mistake did not cause the Revenue to incur any loss because the assessment concerned had not included the dependent parent allowance. The Board held that this was not a reasonable excuse. This Board had considered this factor before in D9/98:

‘That the Revenue suffers no loss has never been regarded as a reasonable excuse. If an offence is committed, whether the victim suffers any loss does not affect the offender’s liability but it may be a mitigating factor.’

3. Upon considering the grounds of appeal and the submissions of the parties, the Board

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held that:

- (a) The appellant had no reasonable excuse for submitting incorrect tax return for the year of assessment 2001/02. The appellant was therefore liable for the additional tax so imposed by the Commissioner in accordance with section 82A of the IRO.
 - (b) The appellant continuously applied for the dependent parent allowance. He habitually applied the same in the first year of assessment after the passing of his mother. His mistake was no more than mere negligence. It did not belong to those categories that openly flout the rules and submitted incorrect tax returns. Thus, the standard practice of imposing penalty equivalent to 100% of the tax underpaid as a starting point should not be applied.
4. The Board therefore decided to reduce the additional tax to \$2,500 and the appeal was allowed in part.

Appeal allowed in part.

Cases referred to:

D9/98, IRBRD, vol 13, 103

D91/00, IRBRD, vol 15, 842

Yue Wai Kin for the Commissioner of Inland Revenue.

Taxpayer in person.

案件編號 D95/03

補加稅 – 沒有合理辯解而提交填報不正確的報稅表 – 意圖申索供養父母免稅額和供養父母額外免稅額 – 與事實不符 – 有關免稅額的申索不獲批准 – 稅務局向上訴人發出補加稅評稅 – 聲稱沒有意圖逃稅 – 只是忘記其母親已去世而慣性地繼續申請供養父母免稅額 – 非合理辯解 – 稅收沒有損失 – 非合理辯解但可作為求情因素 – 所犯的錯誤只是一般疏忽 – 並不屬於明目張膽的錯報 – 不應以少徵收稅款的100%作為考慮罰款水平的起點 – 《稅務條例》第82A條

委員會：何耀華（主席）、吳正和及楊志威

聆訊日期：2003年11月21日

裁決日期：2004年2月5日

甲先生（「上訴人」）就稅務局局長於 2003 年 8 月 15 日根據《稅務條例》第 82A 條向其作出的 2001/02 課稅年度補加稅評稅（款額為 5,000 元，相等於少徵收稅款的 49%）向本委員會提出上訴。

上訴人就 2001/02 課稅年度提交填報不正確的個別人士報稅表。縱使其母（乙女士）已去世，上訴人在該課稅年度報稅表申索供養父母免稅額和供養父母額外免稅額。

根據稅務局獲得的資料，受供養的母親（乙女士）其實已於 2000 年 12 月 18 日（即 2000/01 課稅年度內）逝世。因此，稅務局通知上訴人有關免稅額的申索不獲批准。上訴人沒有就有關薪俸稅評稅提出反對。

就上訴人於其 2001/02 課稅年度個別人士報稅表內作出錯誤陳述申索供養父母免稅額（包括額外免稅額）共 60,000 元一事，稅務局局長於 2003 年 8 月 15 日根據《稅務條例》第 82A 條向上訴人發出 2001/02 課稅年度補加稅評稅，款額為 5,000 元，相等於少徵收稅款的 49%。

甲先生針對該評稅向委員會提出上訴，理由如下：

- (a) 上訴人在過去二十多年來都一直申請供養父母免稅額。在填寫 2001/02 年度的報稅表時，他誤以為母親仍未去世，因此繼續申請供養父母的免稅額。

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- (b) 上訴人絕對沒有欺詐意圖，因為他很清楚生死註冊處存有母親的死亡紀錄，所以欺詐是不會成功的。
- (c) 稅務局並沒有因為上訴人錯誤申索供養父母免稅額而少收任何稅款，因為他的錯誤已在 2001/02 課稅年度內更正過來。

本案情詳細列於下述判決書中。

裁 ：

1. 上訴人聲稱他並沒有意圖逃稅，只是在填寫報稅表時忘記了母親已去世而慣性地繼續申請供養父母免稅額。委員會認為這並不是一個合理的辯解，見個案編號 D9/98, IRBRD, vol 13, 103：

「納稅人事實上沒有意圖去逃稅，只是我們要考慮納稅人應否繳付補加稅罰款的多個因素中的其中一個。... ..納稅人仍須舉證她有合理辯解而她應該免除於該條例下的責任。」

2. 上訴人申述其錯誤並沒有導致稅務局少收稅款，原因是稅務局所作出的評稅經已沒有將任何供養父母免稅額計算在內。委員會認為這並不是一個合理的辯解。委員會曾在個案編號 D9/98 考慮過此因素：

「至於稅收沒有損失從來未有被認為是一個合理的辯解。假如觸犯了法例，無論受害人有沒有損失也不會影響觸犯法例者的責任，但可以作為求情的因素。」

3. 在考慮過上訴人提出的上訴理由及雙方的申述後，委員會認為：
 - (a) 上訴人沒有合理辯解就 2001/02 課稅年度提交填報不正確的報稅表。因此，根據《稅務條例》第 82A 條，上訴人有法律責任被評定補加稅。
 - (b) 上訴人連續二十多年申請供養父母免稅額，在母親去世後的第一個課稅年度慣性地繼續申索。他所犯的錯誤只是一般疏忽，並不屬於明目張膽的錯報，因此不應以少徵收稅款的 100% 作為考慮罰款水平的起點。
4. 委員會因此裁定上訴人的上訴部分得直，並把有關的補加稅評稅調低至 2,500 元。

上訴部分得直。

參考案例：

D91/98, IRBRD, vol 13, 103

D91/00, IRBRD, vol 15, 842

余偉堅代表稅務局局長出席聆訊。
納稅人親自出席聆訊。

裁決書：

背景

1. 甲先生(以下簡稱「上訴人」)就稅務局根據《稅務條例》(第112章)(以下簡稱「稅例」)第82A條向他徵收的2001/02課稅年度補加稅罰款提出上訴。稅務局作出上述評稅是因為上訴人就2001/02課稅年度提交填報不正確的個別人士報稅表。
2. 在上訴聆訊上，上訴人選擇在宣誓後作供，並接受稅務局代表的盤問。

案情事實

3. 稅務局於2002年5月2日向上訴人發出2001/02課稅年度的個別人士報稅表(BIR表格第60號)。
4. 稅務局於2002年6月6日收到上訴人填妥的2001/02課稅年度個別人士報稅表(BIR表格第60號)。上訴人在該報稅表第8.4部就申索供養父母免稅額和供養父母額外免稅額提供資料如下：

(甲) 父/母姓名 : 乙女士
 香港身份證號碼 : BXXXXXX(X)
 出生日期 : 1913年4月
 與上訴人或上訴人
 配偶的關係 : 父母

(乙) (一) 受養人在本年度內連續與上訴人全年同住而並無付出十足費用；

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(二) 上訴人就受養人的供養詳情在以下問題中提供了「是」的回答：

- (a) 上訴人或上訴人配偶在本年度內給予受養人不少於\$12,000的金錢作生活費；
- (b) 受養人在本年度內有資格申請政府傷殘津貼。

上訴人聲明在該報稅表內所填報的資料均屬真確，並無遺漏，並於該表上簽署作實，日期為2002年5月30日。

5. 根據稅務局獲得的資料，受供養的母親乙女士其實已於2000年12月18日（即2000/01課稅年度內）逝世。

6. 評稅主任於2002年9月10日向上訴人發出2001/02課稅年度薪俸稅評稅，其中並無批准上訴人申索供養父母免稅額和供養父母額外免稅額。此外，評稅主任在評稅通知書內通知上訴人有關免稅額的申索不獲批准，理由是據稅務局取得的資料，上訴人和他的配偶都沒有在有關的課稅年度內供養父母/祖父母。

7. 上訴人並沒有就2002年9月10日稅務局發出的薪俸稅評稅提出反對。

8. 就上訴人於其2001/02課稅年度個別人士報稅表內作出錯誤陳述申索乙女士的供養父母免稅額(包括額外免稅額)共60,000元一事，稅務局局長於2003年8月15日根據稅例第82A條向上訴人發出2001/02課稅年度補加稅評稅及繳稅通知書，款額為5,000元，相等於少徵收稅款的49%。

9. 上訴人就有關的補加稅評稅於2003年8月22日向本委員會提出上訴，理由如下：

- (a) 上訴人在過去二十多年來都是無間斷地申請供養母親的免稅額。在填寫2001/02年度的報稅表時，他誤以為在有關年度母親仍未去世，因此繼續申請了供養母親的免稅額。
- (b) 上訴人絕對沒有欺詐意圖，因為他很清楚生死註冊處存有母親的死亡紀錄，所以欺詐是不會成功的。
- (c) 上訴人並沒有因為他在填寫報稅表時所犯的錯誤而少交任何稅款，因為他的錯誤已在2001/02課稅年度的評稅通知書內更正過來。

案情分析

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10. 上訴人聲稱他不是意圖逃稅，只是在填寫報稅表時沒有記起母親已在上一個課稅年度去世而慣性地繼續申請了供養母親的免稅額。我們認為這並不是一個合理的辯解。稅務上訴委員會在個案編號D9/98, IRBRD, vol 13, 103中表達了以下意見：

「納稅人事實上沒有意圖去逃稅，只是我們要考慮納稅人應否繳付補加稅罰款的多個因素中的其中一個。……納稅人仍須舉證她有合理辯解而她應該免除於該條例下的責任。」

以下是所節錄的判詞的英文原文：

‘The fact that the Taxpayer had no intention to evade tax is only one of the many factors we have to consider whether the Taxpayer is liable to pay the additional tax The burden of proof shifts to the Taxpayer to show that she had “reasonable excuse” and that she should be exonerated from liability under that section.’

11. 上訴人申述他在填寫報稅表時所犯的錯誤並沒有導致少收稅款，原因是稅務局所作出的評稅經已沒有將任何供養父母免稅額計算在內。我們認為這並不是一個合理的辯解。稅務上訴委員會曾在個案編號D9/98中表達了以下意見：

「至於稅收沒有損失從來未有被認為是一個合理的辯解。假如觸犯了法例，無論受害人有沒有損失也不會影響觸犯法例者的責任，但可以作為求情的因素。」

以下是所節錄的判詞的英文原文：

‘That the Revenue suffers no loss has never been regarded as a reasonable excuse. If an offence is committed, whether the victim suffers any loss does not affect the offender’s liability but it may be a mitigating factor.’

12. 至於罰款水平方面，稅務局代表向我們提出以下觀點：

- (a) 稅務局有關薪俸稅的罰款政策特別指出申請已去世父母的供養父母免稅額屬明目張膽的個案，故一般的罰則是少徵收稅款的100%。
- (b) 稅務上訴委員會個案編號D91/00, IRBRD, vol 15, 842亦是因為納稅人申索已去世父親的供養父母免稅額而引起。在該個案中，上訴委員會認為納稅人失去至親的傷感和納稅人自己當時的健康狀況欠佳是兩個很有力的求情因素，因此將該個案的罰款減為少徵收稅款的24.8%。

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- (c) 個案編號D91/00的案情較為特殊，因此本案的補加稅罰款水平不應與該個案看齊，而本案所評定的5,000元補加稅罰款相等於少徵收稅款的49%，罰則並不過高。

案情總結及裁決

- 13. 在考慮過上訴人提出的上訴理由及雙方的申述後，我們認為：
 - (a) 上訴人就2001/02課稅年度提交填報不正確的報稅表沒有合理的辯解。因此，根據稅例第82A條，上訴人有法律責任被評定補加稅。
 - (b) 上訴人連續二十多年申請供養母親的免稅額，慣性在母親去世後的第一個課稅年度錯誤地繼續申報。他所犯的錯誤只是一般疏忽，並不屬於明目張膽的錯報，因此不應以少徵收稅款的100%作為考慮罰款水平的起步點。在此情形下，稅務局所評定相等於稅款49%的5,000元補加稅罰款實屬過高。
- 14. 我們因此裁定上訴人的上訴部分得直，並把有關的補加稅評稅調低至2,500元。