

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D107/98

Penalty Tax – incorrect salaries tax return – failure to disclose certain income chargeable to tax – deliberate – whether a reasonable excuse existed under section 82A of the Inland Revenue Ordinance – demeanour of the taxpayer – 10.21% penalty under section 82A of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Ronald Tong Wui Tung and Lily Yew Kuin King Suk.

Date of hearing: 11 July 1998.

Date of decision: 4 November 1998.

The taxpayer was employed by both Employer A and Employer B in the year of assessment 1995/96. He omitted to include in his tax return for the year of assessment 1995/96 his entire income from Employer A, chargeable to tax, in the amount of \$1,264,700. The Commissioner held that there was no reasonable excuse for such an omission and charged additional tax of \$20,000 to the taxpayer. The taxpayer appealed to the Board.

The taxpayer argued that he should not be liable for to pay additional tax because:

- (a) at the time of filling in his tax return he had not received the exact amount of commission earned from Employer A, therefore, he only included the income from Employer B;
- (b) he did not fill in his income tax return correctly because he knew that Employer A would lodge an employer's return with the Inland Revenue ('the Revenue') and that he intended to explain the omission when questioned about it by the Revenue;
- (c) he had already paid the said tax owing on 30 January 1997.

Held:

- (1) The Board had the benefit of hearing the taxpayer's evidence and considering his demeanour. It concluded that he was not a credible witness. He had no excuse whatsoever in omitting to disclose his income from Employer A. If he was not able to ascertain all the income paid to him he should have declared such income as he was able to ascertain and explain his

INLAND REVENUE BOARD OF REVIEW DECISIONS

position to the Revenue. He should then have requested Employer A to supply him with a copy of his employer's return.

- (2) By deliberately omitting the income from Employer A from his tax return and leaving it for the Revenue to raise questions about it (if they became aware of it), the conduct on the part of the taxpayer was considered reprehensible.
- (3) The Board decided that a penalty of 10.21% of the amount of tax involved was more than fair in the circumstances. Additionally, the Board ordered cost of \$2,000 as it considered the appeal to be frivolous and vexatious.

Appeal dismissed and a cost of \$2,000 charged.

Tang Chi Keung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the assessment dated 22 April 1998 by the Commissioner of Inland Revenue, assessing the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112 ('the IRO'), in the sum of \$20,000 ('the Assessment').

2. The year of assessment is 1995/96 ('the Relevant Year of Assessment'). The relevant provision is section 82A(1)(a) of the IRO for making an incorrect return by omitting the income of \$1,264,700. The amount of tax involved is \$195,842. \$20,000 is 10.21% of \$195,842.

3. During the Relevant Year of Assessment, the Taxpayer was employed by two employers. He was employed by Employer A as 'vice president' receiving \$1,122,700 as commission/fees and \$142,000 as any other reward, allowances or perquisites, totalling \$1,264,700. He was also employed by Employer B as 'responsible director & marketing director' receiving \$320,601 as salary/wages and \$28,649 as commission/fees, totalling \$349,250. The income from the two employers added up to \$1,613,950.

4. The tax return for individuals for the Relevant Year of Assessment ('the Return') was issued on 18 July 1996. The Taxpayer declared that his employment by Employer B was his 'principal office of employment' from '1 April 1995 to 31 March 1996' as 'responsible director & marketing director', with a salary/wages of \$320,601 and a commission of \$28,649 making a sub-total of \$349,250. The Taxpayer left the item 'other office of employment' blank and left out his entire income from Employer A which made up 78.36% of his total income from the two employers.

INLAND REVENUE BOARD OF REVIEW DECISIONS

5. On 2 December 1996, the assessor raised assessable based on assessable income of \$1,613,950 for the Relevant Year of Assessment.
6. On 30 December 1996, the Taxpayer lodged objection to the assessment.
7. The assessor wrote a letter dated 22 January 1997 to the Taxpayer explaining that the provisions of section 12(1)(a) of the IRO and by his letter dated 30 January 1997, the Taxpayer withdraw his objection.
8. On 3 December 1997, the Commissioner gave notice to the Taxpayer in terms of section 82A(4) of the IRO.
9. By letter dated 8 December 1997, the Taxpayer represented that *'the understated amount mentioned in the notice was actually calculated (include) in the total taxable income for the year of assessment 1995/96, and the tax payment has already made (sic) on 30 January 1997'*.
10. By letter dated 7 January 1998, the assessor wrote inviting representation regarding the failure to report the income of \$1,264,700 from Employer A.
11. No further written representation had been received by the Revenue.
12. On 22 April 1998, the Commissioner issued the Assessment.
13. By letter dated 15 May 1998, the Taxpayer gave notice of appeal against the Assessment.
14. Section 82A(1)(a) of the IRO provides that:

'any person who without reasonable excuse – (a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return ... shall, if no prosecution under section 80(2 or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which has been undercharged in consequence of such incorrect return ... or would have been so undercharged if the return ... had been accepted as correct'.
15. The Return made by the Taxpayer was clearly incorrect in that the total income of \$1,264,700 from Employer A had been omitted and that the Taxpayer's income had been understated by \$1,264,700. The amount of tax which would have been undercharged if the Return had been accepted as correct was \$194,842. The fact that the Revenue did not accept the Return as correct and did in fact assess the Taxpayer to the correct amount of tax does not affect the liability of the Taxpayer (subject to the question of reasonable excuse) to additional tax.

INLAND REVENUE BOARD OF REVIEW DECISIONS

16. In his notice of appeal, the Taxpayer alleged that by the time when he submitted the Return, he had *'not yet received the exact amount of commission earned from [Employer A], therefore, [he] had only included the income of \$349,250 from [Employer B] ...'* (emphasis added). At the hearing of the appeal, the Taxpayer initially told us that Employer A paid him by cheque *'usually it is on the tenth working day of each month ... Usually I, well, I bank into my account with the bank ... One single account. I think it is with [a named bank] ... a current account.'*

17. In cross-examination, the Taxpayer agreed that it took him only 7 days to complete the Return. When asked why he had not thought of checking his own bank statements to add the amounts to ascertain the exact amount, the Taxpayer claimed that he thought about that too *'because sometimes there are not only one date they issue the cheque to me, maybe twice or maybe three times a month. Sometimes I forget to deposit my cheque. Sometimes I ask for cash. I ask for cash if the amount is not a big amount. So in my case I do sign ... receipt to them. Sometimes if it is small amount I receive cash from the clerk'*. The Taxpayer further admitted that Employer A gave him a statement showing him the calculations for the commission, but claimed that he *'didn't keep every copy of the statement. I keep some. Yes, some I did keep but I failed to keep all ... I did keep the record but I lost the record.'*

18. Significantly, the Taxpayer said:

'Actually I decided to fill it in when there is another request from Inland Revenue ... I meant they must be curious because I know that my employers will lodge this, my income, to the Inland Revenue so whenever Inland Revenue receive my copies of my employers they will compare to the return, the tax return that I lodged to them, and see there is a difference, a big difference. So, I was expecting Inland Revenue will ask me for the explanation ... I choose to deliberately to leave it out because of the period of time ... Because I don't want to have any offence with the submitting of the return in time.'

19. After hearing the Taxpayer's evidence and submission, we did not call on the representative for the Respondent (the CIR) and said that we would give our decision in writing which we now do.

20. The Taxpayer does not impress us as a credible witness. Even if the Taxpayer had not received the employer's return of Employer A, the Taxpayer should at least have disclosed the fact of his employment, declared such income as he was able to ascertain from such of the bank and other statements that he had, explained his position, and requested Employer A to supply him with a copy of the employer's return. The Taxpayer cannot reply on his own failure to make and keep a record of his income and of the statements given to him by Employer A. The Taxpayer has no excuse (let alone reasonable excuse) in making the Return which was incorrect by omitting the income of \$1,264,700 from Employer A. Deliberately omitting all his income from Employer A, leaving it to the Revenue to raise

INLAND REVENUE BOARD OF REVIEW DECISIONS

questions [if the Revenue should come to know about it] is reprehensible conduct on the part of the Taxpayer.

21. The maximum amount of additional tax would have been \$584,526 or 300% of the amount of tax involved. The Assessment is only 10.21% of the amount of tax involved.

22. We have carefully considered all the materials before us and come to the conclusion that the Assessment is neither incorrect nor excessive. We dismiss the appeal and confirm the Assessment.

23. The discretion of the Board under section 68(9) to order an unsuccessful taxpayer to pay costs is not expressed to be restricted to appeals which are obviously unsustainable. The maximum sum was increased from \$100 to \$1,000 in 1985 and further increased to \$5,000 in 1993. \$5,000 represents only a small fraction of the costs of the Board in disposing of an appeal.

24. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9) of the IRO, we order the Taxpayer to pay the sum of \$2,000 as costs of the Board, which \$2,000 shall be added to the tax charged and recovered therewith.

25. Before we part with this case, we suggest that it may assist the Board of Review hearing appeals from additional tax assessments if the statement of facts include a statement of the amount of tax involved and a statement of the additional tax as a percentage of the amount of tax involved.