

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D115/01

Salaries tax – failure to report gain under share option scheme due to an ‘oversight’ – additional tax levied at 9.72% of the originally understated and undercharged tax – section 82A of the Inland Revenue Ordinance (‘IRO’).

Panel: Patrick Fung Pak Tung SC (chairman), Michael Robert Daniel Bunting and Susan Beatrice Johnson.

Date of hearing: 15 October 2001.

Date of decision: 30 November 2001.

As part of her remuneration package, the taxpayer was given certain share option which she exercised to her own advantage during the relevant year of assessment. In her return to the Commissioner, the taxpayer simply put a line across the sub-paragraph which contained five items, including the item ‘share option gain’, indicating that the same was not applicable. It transpired by the employer’s return of the taxpayer that she had accrued to her US\$86,085 under a share option scheme. The taxpayer explained that the failure to report the gain under the share option scheme was due to an ‘oversight’ on her part.

The Commissioner assessed additional tax under section 82A of the IRO in the sum of \$11,000, representing a penalty of about 9.72% of the originally understated and undercharged tax of \$113,112.

Held:

1. Having heard the taxpayer in the appeal and seen her behaviour after she had become aware that she had failed to report her gain under the share option scheme, the Board had no doubt that she had at no time intended to act dishonestly or dishonourably. Nevertheless, the Board did not think she could succeed on the appeal.
2. The notes accompanying a tax return form make it quite clear that the duty is on a taxpayer to complete a true and correct tax return. As is stated in the Guidelines, the effective operation of Hong Kong’s simple tax system requires a high degree of compliance by taxpayers. If every taxpayer is careless or reckless in making tax returns, the task of the already over-burdened Inland Revenue Department (‘IRD’)

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will become impossible to perform. This is unfair to the community at large. A careless taxpayer therefore cannot be heard to complain if a penalty is imposed against him or her according to the statutory provisions.

3. Under the Guidelines, the starting point for considering any penalty is 10%. By not instituting any prosecution against the taxpayer or imposing a higher penalty, the Commissioner has implicitly accepted that there has been no dishonesty or recklessness on the part of the taxpayer. In all the circumstances, the Board does not find the penalty imposed by the Commissioner to be in anyway excessive.

Appeal dismissed.

Go Min Min for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against a notice of assessment and demand for additional tax for the year of assessment 1999/2000 ('the Assessment') issued by the Respondent ('the Commissioner') on 9 July 2001.

The facts

2. The facts of the case are simple and not in dispute.

3. At the hearing of the appeal, the Taxpayer elected to make an unsworn statement. As a result, she was not cross-examined by the representative for the Commissioner but was asked certain questions by members of the Board which she readily answered. In the circumstances of the present case, we do not think that the fact that the Taxpayer has elected to make an unsworn statement as opposed to giving sworn evidence makes any difference to the result of the appeal.

4. The Taxpayer has been employed by Bank A for nine years and occupies the position of a vice-president. As part of her remuneration package, she was given certain share option. In October and November 1999, she exercised such share option to her own advantage.

5. The Taxpayer made a return to the Commissioner in the prescribed form on 2 May 2000. Under paragraph 4.1(1) thereof, she reported the amount of income which accrued to her during the year as \$1,187,893. Under sub-paragraph (2) of paragraph 4.1, the Taxpayer was supposed to indicate whether any one or more of five items was included in the total income

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reported under paragraph 4.1(1) above. One of the five items was 'share option gain'. The Taxpayer simply put a line across sub-paragraph (2) indicating that the same was not applicable. On the basis of such tax return, on 16 August 2000, the Commissioner issued a notice of assessment and demand for salaries tax to the Taxpayer demanding tax on a total assessable income of \$1,187,893.

6. It transpired that by an employer's return of remuneration and pensions dated 16 May 2000, Bank A had reported to the Commissioner that the particulars of income accruing to the Taxpayer during the year ended 31 March 2000 consisted of two major items:

- (a) her salary, bonus and other allowances totalling \$1,187,893; and
- (b) 'Gain realized under share option scheme' in the sum of US\$86,085.

As indicated above, this gain from the share option scheme had not been reported by the Taxpayer in her tax return.

7. By a notice of additional assessment and demand for tax dated 12 March 2001, the Commissioner demanded additional tax from the Taxpayer based on a net chargeable income in the sum of \$665,360 being the Hong Kong Dollar equivalent of the sum of US\$86,085. The additional tax payable was in the sum of \$113,112. The Taxpayer duly made payment of such sum on 23 April 2001.

8. By a letter dated 14 March 2001, the Taxpayer asked the Commissioner to hold over the provisional tax on the sum of \$665,360 because it was an exceptional income for a particular year. By a letter dated 29 March 2001, the Commissioner replied and said that no provisional tax had been assessed in relation to the sum of \$665,360.

9. By a notice under section 82A(4) of the IRO, the Commissioner notified the Taxpayer that he was minded to impose a penalty for the Taxpayer's failure to report the gain of \$665,360 under the share option scheme and invited written representations from her. By a letter received by the Commissioner on 8 June 2001, the Taxpayer explained that the failure by her to report the gain under the share option scheme was due to an 'oversight' on her part.

10. By the Assessment, the Commissioner assessed additional tax under section 82A of the IRO in the sum of \$11,000 payable on or before 20 August 2001. This represents a penalty of about 9.72% of the originally understated and undercharged tax of \$113,112. The Taxpayer has again paid this sum duly to the Commissioner without prejudice to the appeal.

11. At the hearing of the appeal, Ms Go for the Commissioner handed to the Board and the Taxpayer a copy of the guidelines for imposing penalty issued by the IRD ('the Guidelines'). We were told that the same would also be available on the internet.

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Conclusion

12. Section 82A(1) of the IRO reads as follows:

- ‘ (1) 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, either on his behalf or on behalf of another person or a partnership; or
 - (b) makes an incorrect statement in connection with a claim for any deduction or allowance under this Ordinance; or
 - (c) gives any incorrect information in relation to any matter or thing affecting his own liability to tax or the liability of any other person or of a partnership; or
 - (d) fails to comply with the requirements of a notice given to him under section 51(1) or (2A); or
 - (e) fails to comply with section 51(2),
- 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 –
- (i) has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct; or
 - (ii) has been undercharged in consequence of the failure to comply with a notice under section 51(1) or (2A) or a failure to comply with section 51(2), or which would have been undercharged if such failure had not been detected.’

The question in this appeal is whether the ‘oversight’ on the part of the Taxpayer in the circumstances of this case amounts to a ‘reasonable excuse’ within the meaning of section 82A of the IRO so as to exonerate her from liability and penalty for failing to report her gain under the share option scheme. If this question is decided against the Taxpayer, the subsidiary question also arises as to whether the penalty imposed by the Commissioner is excessive.

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13. Having heard the Taxpayer in the appeal and seen her behaviour after she had become aware that she had failed to report her gain under the share option scheme, we have no doubt that she has at no time intended to act dishonestly or dishonourably. As she said herself, there was no way in which she could have hoped to 'get away with it' in view of the employer's return of remuneration and pensions which she knew would be or had been furnished by Bank A to the Commissioner. We are impressed by the candid and sincere manner in which she made her unsworn statement and submission to the Board. We do not doubt her statement that the failure to report was completely due to an oversight and carelessness on her part. Nevertheless, we do not think that she can succeed on this appeal.

14. The notes accompanying a tax return form make it quite clear that the duty is on a taxpayer to complete a true and correct tax return. As is stated in the Guidelines, the effective operation of Hong Kong's simple tax system requires a high degree of compliance by taxpayers. If every taxpayer is careless or reckless in making tax returns, the task of the already over-burdened IRD will become impossible to perform. This is unfair to the community at large. A careless taxpayer therefore cannot be heard to complain if a penalty is imposed against him or her according to the statutory provisions.

15. Under the Guidelines, the starting point for considering any penalty is 10%. By not instituting any prosecution against the Taxpayer or imposing a higher penalty, the Commissioner has implicitly accepted that there has been no dishonesty or recklessness on the part of the Taxpayer. In all the circumstances, we also do not find the penalty imposed by the Commissioner to be in anyway excessive.

16. Accordingly, we dismiss the appeal by the Taxpayer.