

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D134/98

Penalty tax – income from old employer omitted – whether reasonable excuse – section 82A of Inland Revenue Ordinance.

Panel: Terence Tai Chun To (chairman), Philip St John Smart and Michael Neale Somerville.

Date of hearing: 27 October 1998.

Date of decision: 15 December 1998.

The taxpayer failed to include her income from her old employer for the year of assessment 1995/96 although she reported in full her income from her new employer. There was merger of her two employers. The omission came to the notice of the Inland Revenue Department (the IRO) which rectified the mistake. It went on to issue to the taxpayer an assessment based on the taxpayer's total as rectified. The taxpayer did not raise any objection to the assessment and paid the tax accordingly.

More than one year later, the taxpayer received from the Commissioner a notice of intention to evoke section 82A of the Inland Revenue Ordinance (the IRO). The taxpayer was asked to make representations as to the proposed assessment of additional tax.

The taxpayer made the representations by explaining that she omitted part of her income from tax returns partly because she was making frequent trips to China then. She was too busy to handle her tax returns with great care. Besides, her employer companies were being merged around that time the taxpayer was preparing her tax returns, thereby adding a slight complication to the preparation of her tax returns.

Having considered the taxpayer's representation, the Commissioner made an assessment for additional tax under section 82A of the IRO in the sum of \$7,000.

The taxpayer contended that she did not receive any tax return from her old employer as a result of the merger of her old and her new employers. The IRD spotted her omission but did not inform her of the omission. The IRD went on to issue an assessment and the taxpayer made a prompt payment. Thus the Government suffered no loss. The IRD took more than a year to impose a penalty.

Held:

1. The reasons given by the taxpayer did not constitute a reasonable excuse which would exonerate her liability under the IRO. It is the obligation of the

INLAND REVENUE BOARD OF REVIEW DECISIONS

taxpayer to report her true income in time. It is not enough to say that she did not receive her employer's return. There is no obligation on the IRD to notify the taxpayer of any omission. Furthermore, the taxpayer was given opportunity to make representations before whether additional tax was assessed.

2. However, the Board found the taxpayer had been cooperative with the IRD. The Board also believed that the mistake was due to her unintentional slip compounded by the merger of her old and her new employers. The Board found a suitable penalty should be 7.35% of the tax undercharged. Thus additional tax should be reduced from the sum of \$7,000 to \$3,500.

Obiter:

To avoid inflicting unwitting hardship on a taxpayer and to promote better relationship between the IRO and the public, the IRD might consider it sensible giving taxpayers advance warning of any potential imposition of penalty at the earliest opportunity.

Appeal allowed in part.

Tong Watt Po Kuen for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by the Taxpayer against the imposition of additional tax by way of penalty under section 82A of the Inland Revenue Ordinance for the year of assessment 1995/96.
2. The statement of facts has been agreed between the Taxpayer and the representative of the Commissioner.
3. The Taxpayer appeared in person at the hearing.
4. She admitted that when she filed her tax return for the year of assessment 1995/96 she omitted to include in her return her income from her old employer although she reported in full her income from her new employer.
5. There was a merger of her two employers.

INLAND REVENUE BOARD OF REVIEW DECISIONS

6. The omission came to the notice of the IRD which rectified the mistake. It went on to issue to the Taxpayer an assessment based on the Taxpayer's total income as rectified.
7. The Taxpayer did not raise any objection to the assessment and paid the tax accordingly.
8. However, more than a year later, the Taxpayer was surprised to receive from the Commissioner a notice of intention to evoke section 82A. The notice was dated the 13 May 1998 asking the Taxpayer to submit representations regarding the proposed assessment of additional tax.
9. On 26 May 1998, the Taxpayer wrote to the IRD seeking clarification.
10. The Taxpayer made further representations on 13 June 1998 explaining in effect that she omitted part of her income from her tax returns partly because she was making frequent trips to China in connection with her China trade. As a result, she was too busy to handle her tax returns with greater care. In addition, her employer companies were being merged around the time the Taxpayer was preparing her tax returns, thereby adding a slight complication to the preparation of her tax returns. The Taxpayer found it fortunate that the IRD should have discovered the omission and issued the correct assessment for which the Taxpayer had paid in full.
11. On 9 July 1998, having considered the Taxpayer's representations, the Commissioner made an assessment for additional tax under section 82A in the sum of \$7,000.
12. An exchange of correspondence and telephone conversation then ensued between the Taxpayer and the IRD leading to an interview on 14 July 1998.
13. After the interview the Taxpayer sent a letter on the same day to the IRD to reconsider her case.
14. In the letter, the Taxpayer frankly reiterated that she had omitted to report part of her income. She pointed out that the IRD spotted the omission but did not inform her of the omission. Therefore she had no opportunity to make a correction.
16. At the interview, the Taxpayer repeated her contention that she had reasonable excuse for failing to report her full income.
17. The Taxpayer's case can be succinctly set out as follows:
 - (i) On account of her change of employment as a result of the merger of her old and new employers, the Taxpayer was in possession of a copy of a tax return from her new employer. She did not receive any tax return

INLAND REVENUE BOARD OF REVIEW DECISIONS

from her old employer. Hence, she omitted to report her income from her old employer.

- (ii) The IRD spotted her omission but did not inform her of the omission. The IRD went on to issue an assessment without giving the Taxpayer an opportunity to explain why she omitted to report her full income. The Taxpayer made a prompt payment of the tax as assessed and Government had suffered no loss.
- (iii) The Taxpayer complained that it had taken the IRD more than a year to impose a penalty.

18. We are of the view that none of the reasons given by the Taxpayer constitutes a reasonable excuse which would exonerate the Taxpayer from liability under the Inland Revenue Ordinance.

19. It is always the obligation of the Taxpayer to report her true income in time. It is not enough to say that she did not receive her employer's return.

20. There is no obligation on the IRD to notify the Taxpayer of any omission. Even if the IRD took the trouble of reminding the Taxpayer of the omission, an incorrect return would have already been made.

21. In any event, the notice of intention to invoke section 82A expressly gave the Taxpayer every opportunity to make representations before any assessment of additional tax was decided.

22. The IRD is given 6 years after the expiration of any year of assessment to make an additional assessment by way of penalty and in case of fraud or wilful evasion within 10 years after the expiration of the year of assessment. There is no doubt that the IRD acted well within the legal limit. However, the Taxpayer did not hear from the IRD for more than a year and out of the blue came the IRD's notice of intention to invoke section 82A. The Taxpayer was caught off guard.

23. During the period of inactivity on the part of the IRD, the personal fortune of the Taxpayer changed for the worse partly on account of the general economic downturn. The Taxpayer is now without a job and in financial difficulty. If the Taxpayer had somehow been told at an early stage that she would be subject to an assessment for additional tax, she would have been better prepared for her present predicament. To avoid inflicting unwitting hardship on a taxpayer such as the Taxpayer trapped in adverse circumstances and to promote better relationship between the IRD and members of the public, the IRD might consider it sensible giving taxpayers advance warning of any potential imposition of penalty at the earliest opportunity.

24. We find that the Taxpayer had been co-operative with the IRD in that she promptly agreed to the assessment made on her although it exceeded her original returns.

INLAND REVENUE BOARD OF REVIEW DECISIONS

She made no excuses for her mistake. We believe that the mistake, which related to only one year of assessment, was due to her unintentional slip compounded by the merger of her old and new employers.

25. On the facts of this case, we find that the Taxpayer had no reasonable excuse to have filed a tax return which was incorrect by omitting the income from her old employer. We are duty bound to impose a penalty. Having carefully reviewed all the circumstances, we find that a suitable penalty should be 7.35% of the tax undercharged. Accordingly, we order that the additional tax assessment appealed against should be reduced from the sum of \$7,000 to \$3,500.