Case No. D150/01

Penalty tax – submission of incorrect tax returns without reasonable excuse – imposition of additional tax assessments in a sum equivalent to 10% of tax undercharged – the Commissioner was entitled to impose additional tax but had not placed sufficient weight on the appellant's track record.

Panel: Ronny Wong Fook Hum SC (chairman), Ho Kai Cheong and Winnie Lun Pong Hing.

Date of hearing: 11 January 2002.
Date of decision: 6 February 2002.

The appellant omitted in her return a sum of $221,784 being her salary/wages, which amounted to about 29% of her total annual income. As a result, the Commissioner imposed additional tax on the appellant by way of penalty in the amount of $3,700 under section 82A of the Inland Revenue Ordinance on the ground of incorrect tax returns. It was equivalent to about 10% of the tax undercharged.

This was the appellant's appeal against the additional tax so imposed.

In her evidence and submission, the appellant frankly admitted that she was in error for non-inclusion of the said sum of $221,784. She said she was working under immense pressure at the time of her return. She could not recall any reason leading to her omission but emphasized that she had no intention to conceal her earnings. She had five years of good track record of submission of correct returns.

The facts appear sufficiently in the following judgment.

Held:

1. The appellant had no reasonable excuse for her non-compliance. There was no evidence from her indicating any care being taken in the preparation of her return. The Commissioner was fully entitled to exercise his power to impose additional tax.

2. Having had the benefit of seeing the appellant in person at the hearing, the Board was convinced that the appellant's omission was an unfortunate lapse of attention tarnishing thereby her good record of compliance.

3. The Board was confident that she would take heed of her experience arising from the current episode.

4. The Board was of the view that the Commissioner had not placed sufficient weight on her track record.

5. In these circumstances, the Board would allow the appellant's appeal to the extent of reducing the additional tax to $1,850 being about 5% of the amount of tax of $37,703 which would have been undercharged had the appellant's return been accepted as correct.

Appeal allowed in part.

Cases referred to:

D94/98, IRBRD, vol 13, 479
D76/99, IRBRD, vol 14, 525
D42/00, IRBRD, vol 15, 395

Lee Mei On for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. On 4 June 2000, the Appellant submitted her return for the year of assessment 1999/2000. She reported to the Revenue her earnings from her employment with Company A as comprising of a sum of $420,032 and a sum of $119,699 in respect of gain which she realised under Company A's share option scheme.

2. According to the employer's return of Company A dated 31 May 2000, the Appellant's earnings for the year of assessment 1999/2000 amounted in total to $761,151 made up of the followings:

(a) $221,784 by way of salary/wages;

(b) $420,032 by way of commission/fee; and

(c) $119,699 by way of gain under the share option scheme.

3. The Appellant had therefore omitted in her return the sum of $221,784 being her salary/wages for the year. This amounts to about 29% of her total annual income.

4. The Appellant was duly assessed on 9 August 2000 on the basis of Company A's return.

5. After considering representations from the Appellant, the Commissioner by notice dated 21 September 2001 imposed additional tax on the Appellant in the sum of $3,700. This amounts to about 10% of the amount of tax which would have been undercharged had the Appellant's return been accepted as correct.

6. This is the Appellant's appeal against the additional tax so imposed.

7. At the hearing before us, the Appellant frankly admitted that she was in error for non-inclusion of the sum of $221,784. She said she was working under immense pressure at the time of her return. She could not recall any reason leading to her omission but emphasized that she had no intention to conceal her earnings. She had been working since 1993 and had submitted returns on no less than five previous occasions with no error found. She submitted that a warning would be more than adequate to ensure due compliance in the future. She drew our attention to a typographical error in her friend's return and her friend was merely invited by the Revenue to correct the error without imposition of any penalty.

8. We are of the view that the Appellant has no reasonable excuse in relation to her non-compliance. There is no evidence from her indicating any care being taken in the preparation of her return. The Commissioner is fully entitled to exercise his power to impose additional tax.

9. Mr Lee for the Revenue drew our attention to D94/98, IRBRD, vol 13, 479, D76/99, IRBRD, vol 14, 525 and D42/00, IRBRD, vol 15, 395. In D76/99, the taxpayer omitted to state in his returns the gain he made under the option scheme of his employer in the sum of $243,000. This was about 32% of his total income. Bearing in mind the taxpayer's impressive record of compliance; the unlikelihood of the offence being repeated and the fact that the gain arose from an option which the taxpayer encountered for the first time, the Board of Review reduced the additional tax imposed from $4,000 to $2,000. Mr Lee sought to distinguish the present case from D76/99 on the basis that the Appellant's track record is shorter than that of the taxpayer in D76/99 (well over 20 years) and the omission in that case relates to income arising from the rare grant of an option. Mr Lee made no attempt to distinguish the Appellant's case from that of her friend. He was content to take refuge behind the veil of secrecy in relation to the tax affairs of the Appellant's friend.

10. Having had the benefit of seeing the Appellant in person at the hearing, we are convinced that the Appellant's omission was an unfortunate lapse of attention tarnishing thereby her

good record of compliance. We are confident that she will take heed of her experience arising from the current episode. We are of the view that the Commissioner had not placed sufficient weight on her track record. In these circumstances, we would allow the Appellant's appeal to the extent of reducing the additional tax to $1,850 being about 5% of the amount of tax of $37,703 which would have been undercharged had the Appellant's return been accepted as correct.