

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D158/01

Penalty tax – failing to report income fully – whether reasonable excuse – financial difficulty.

Panel: Patrick Fung Pak Tung SC (chairman), Herman Fung Man Hei and Henry Lau King Chiu.

Date of hearing: 4 December 2001.

Date of decision: 22 February 2002.

The taxpayer was a car salesman. He failed to report fully his income for the relevant years of assessment. He admitted to it upon being investigated by the Revenue. As a result, additional tax was assessed and demanded on him.

The taxpayer explained that he was inexperienced. He was also wrongly advised by his colleagues that, as trade practice, there was no need to report the receipt of commission from introducing car buyers to finance companies and insurance companies.

Besides, he was in grave financial difficulty.

Held:

1. The Board found the taxpayer failed to make out any reasonable excuse.
2. Financial difficulty is not a valid reason for not paying the penalty (D71/91 followed).

Appeal dismissed.

Cases referred to:

D179/98, IRBRD, vol 14, 78

D71/91, IRBRD, vol 7, 1

D52/93, IRBRD, vol 8, 372

Mei Yin for the Commissioner of Inland Revenue.

Taxpayer in person.

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Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against an assessment for additional tax under section 82A of the Inland Revenue Ordinance ('IRO') by the Respondent ('the Commissioner').

2. The additional tax assessed and demanded are contained in two notices of assessment and demand both dated 13 August 2001 and are in relation to the following years of assessment:

	\$
(a) 1993/94	10,300
(b) 1994/95	<u>9,400</u>
	<u><u>19,700</u></u>

The facts

3. The Taxpayer was a car salesman employed by Company A between August 1993 and January 1995. Before and after that period of employment by Company A, the Taxpayer was a sales representative of various insurance companies.

4. The Taxpayer submitted tax returns - individuals for the years of assessment 1993/94 and 1994/95 as follows:

Year of assessment	Source of income	Reported income	Deduction for expenses claimed	Date
		\$	\$	
1993/94	Company A	49,920	10,000	20-10-1994
1994/95	Company A	79,493	8,000	25-6-1995

There were of course also submitted by the Taxpayer tax returns for the subsequent years of assessment.

5. Assessments and demands for tax were issued by the Inland Revenue Department ('IRD') in accordance with the tax returns submitted by the Taxpayer.

6. Subsequently, as a result of investigation by the IRD, it was discovered that the Taxpayer had under-declared income and underpaid tax as follows:

Year of assessment	Assessable income after	Assessable income before	Under-declared assessable	Underpaid tax
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	investigation	investigation	income	
	\$	\$	\$	\$
1993/94	158,154	49,920	108,234	13,738
1994/95	193,349	79,493	113,856	12,602
1995/96	32,345	25,000	7,345	122
1996/97	160,219	159,969	250	43
1997/98	<u>175,750</u>	<u>140,650</u>	<u>35,100</u>	<u>0</u>
	<u><u>719,817</u></u>	<u><u>455,032</u></u>	<u><u>264,785</u></u>	<u><u>26,505</u></u>

The under-declared assessable income amounted to 36.79% of the assessable income after investigation.

7. It transpired that, for the years of assessment 1993/94 and 1994/95, the Taxpayer was in receipt of commission from various finance companies and insurance companies for introducing purchasers of motor cars for hire-purchase transactions and/or the taking out of insurance policies which had not been declared or fully declared by the Taxpayer.

8. The Taxpayer attended various interviews with the IRD and admitted that he had failed to report fully the income received by him for the relevant years of assessment.

9. The interviews culminated in the Taxpayer signing an agreement dated 6 February 2001 (‘ the Agreement ’) wherein he stated as follows:

‘ 1. I hereby propose that my net assessable income be computed as follows:

<u>Year of assessment</u>	<u>Net assessable income</u>	<u>Net assessable income already reported/assessed</u>	<u>Additional net assessable income</u>
	\$	\$	\$
1994/95	174,014	71,544	102,470
1995/96	32,345	25,000	7,345
1996/97	160,219	159,969	250
1997/98	<u>175,750</u>	<u>140,650</u>	<u>35,100</u>
	<u><u>542,328</u></u>	<u><u>397,163</u></u>	<u><u>145,165</u></u>

2. I also understand that acceptance of the proposed net assessable income does not conclude the whole matter and that the case will be put up to the Commissioner or Deputy Commissioner for consideration of penal actions under Part XIV of the Inland Revenue Ordinance, which include prosecution, compounding or imposition of additional tax. If additional tax is imposed, the maximum amount could be treble the amount of the tax undercharged.’

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The Agreement is backed up by an income schedule also dated 6 February 2001 and signed by the Taxpayer which shows the receipt of commission from various finance and insurance companies which had not previously been reported by the Taxpayer.

10. Accordingly, between 14 and 28 February 2001, the IRD issued the following notices of assessment and demand for salaries tax against the Taxpayer:

Year of assessment	Tax demanded
	\$
1993/94	13,738
1994/95	12,602
1995/96	25
1996/97	3,986
1997/98	0

There was no objection by the Taxpayer against such notices of assessment and demand.

11. On 14 June 2001, the Commissioner issued a notice under section 82A(4) of the IRO informing the Taxpayer of his intention to assess and demand against him additional tax under section 82A of the IRO for having made incorrect tax returns.

12. By a letter dated 9 July 2001, the Taxpayer admitted that he had failed to report the commission in question but explained that the reason for that was that he was inexperienced and that he had been told by his colleagues that such commission would have been paid to him after tax had been retained and paid by the payers. He apologised to the Commissioner in the letter.

13. On 13 August 2001, the Commissioner issued the two Notices referred to in paragraph 2 above.

14. The percentage analysis of the additional tax assessed is set out below:

Year of assessment	Undercharged tax	Additional tax assessed under section 82A	Percentage of additional tax assessed over undercharged tax
	\$	\$	%
1993/94	13,738	10,300	74.97
1994/95	<u>12,602</u>	<u>9,400</u>	<u>74.59</u>
	<u>26,340</u>	<u>19,700</u>	<u>74.79</u>

The law

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15. Section 82A(1) of the IRO provides as follows:

‘ 82A. *Additional tax in certain cases*

(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 case of the Taxpayer

16. Basically, the case put forward by the Taxpayer is that, when he filed the relevant tax returns, he was inexperienced and advised by his colleagues that there was no need to report the

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commission in question because it was the practice of the trade, and that he is at present in grave financial difficulty.

Conclusion

17. We are of the view that the Taxpayer has not proved that he had any ‘reasonable excuse’ within the meaning of section 82A(1) of the IRO for not reporting to the IRD the receipt of the commission in question.

18. The advice given to the Taxpayer by his colleagues was obviously wrong. There are well-established authorities to the effect that a taxpayer cannot seek to excuse himself from complying with his duty to make correct returns by claiming that he was ignorant of the law or that he had been misled by someone, particularly, someone who was consulted only casually. See, for example, the decision of the Board of Review in D179/98, IRBRD, vol 14, 78. Nor can the practice of a particular trade be a valid reason, otherwise the people in the trade would be creating their own law.

19. The financial difficulty on the part of the Taxpayer is also not a valid reason for not paying the penalty. In D71/91, IRBRD, vol 7, 1 at page 7, it was said by the Board of Review:

‘ ... the ability of a taxpayer to pay an assessment is not a matter for the Board ... ’

20. It is clear from the authorities, for example, Board of Review decision D52/93, IRBRD, vol 8, 372, that the standard practice is to use as a starting point penalty equivalent to 100% of the tax underpaid in cases of this nature. Here, the Taxpayer has been given only an average penalty of about 75% which is some way below the standard of 100%.

21. In all the circumstances, we have no basis or justification for saying that the Commissioner has been wrong in imposing such a penalty and, accordingly, we must dismiss the appeal.

22. We should add that, when giving evidence and making his submission, the Taxpayer came across as a very sincere person who was genuinely in grave financial difficulty. He was very apologetic both to the Board and the IRD. It seems to us that he was more concerned with having sufficient time to pay the penalty than with the success of the appeal. We have great sympathy for him. He was in the motor car sales trade for only a short time and does not appear to have earned a lot of money from that trade during that time. In the circumstances, we wish to record our sentiment and hope that the Commissioner will see fit to allow him as much time as possible to pay the penalty. What we say above is, of course, not in any way binding on the Commissioner who must act within the bounds of her discretion and of the guidelines laid down within the IRD.

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