Case No. D15/83

Board of Review:

Charles A. Ching, *Chairman*; N. D. Dicker & N. J. Gillanders, *Members.*

14 November 1983.

Section 82A Inland Revenue Ordinance—penalty assessment—incorrect return—reasonable excuse—intention of taxpayer.

The appellant, a civil servant, forgot to include a gratuity and other allowances in his Salaries Tax return, reducing his stated income by over 40%. The Deputy Commissioner imposed a penalty assessment by way of additional tax. The appellant appealed on the ground, *inter alia*, that due to his personal circumstances the omitted items of income slipped his mind.

Held:

(1) It was unreasonable to make a mistake of this magnitude, even in the appellant's circumstances.

(2) For the purposes of section 82A it is sufficient that the appellant intended to and did make a return which was in fact incorrect.

Appeal dismissed.

L. A. Wimpress for the Commissioner of Inland Revenue.
The appellant in person.

Reasons:

The taxpayer appeared personally on this appeal. He is a Senior Architect employed by the Hong Kong Government. On 30th June 1981, he filled in his return for the year ended 31st March 1981. It was submitted on 4th July 1981. This showed a total income for that period in the sum of $158,518.00. By a letter dated 19th February 1982, the Assessor, Salaries Tax, told the taxpayer that he had been informed that the taxpayer's total income for that period was in fact $279,431.00 and asked for an explanation for the discrepancy. On 14th April 1982, the taxpayer was sent a reminder. He replied on 22nd April 1982. On 7th June 1982, the Deputy Commissioner of Inland Revenue informed the taxpayer that he was of the opinion that the taxpayer had made an incorrect return without reasonable excuse and that the taxpayer had a right to submit written representations. The amount of tax underpaid was $23,378.00. P replied on behalf of the taxpayer on 20th August 1982. On 9th September 1982, the taxpayer was assessed to additional tax in the sum of $4,700.00. Under section 82A of the Inland Revenue Ordinance, Cap. 112, P lodged this appeal on behalf of the taxpayer on 23rd September 1982.

Basically, the taxpayer stated to us that he had forgotten to include in his return contract gratuities and other allowances. He said that this occurred in the following circumstances:—

(1) He and his family had been tenants of a terrace house in Singapore which was subject to a rent control Act. The landlord wished to evict them and the case came up for hearing in Singapore in July of 1980.

(2) Throughout the period December 1980, to February 1983, work in his department was very heavy.

(3) While he was on long leave in 1980, his younger daughter fell ill with a persistent fever. She was hospitalised in Singapore on 1st September 1980, and was discharged on 6th September 1980, her fever having abated. On medical advice she was left in Singapore with her mother, the taxpayer and his elder daughter returning to Hong Kong on 12th September 1980. His daughter was eventually readmitted to hospital on 22nd September 1980, and was not discharged until 8th October 1980, having had her spleen removed. The taxpayer went to Singapore for the purposes of his daughter's operation, leaving here on 28th September 1980, and returning on 12th October 1980.

(4) His wife and younger daughter returned to Hong Kong on 26th October 1980, when the taxpayer, his wife and two daughters were living in a single room in a hotel. When his son returned for a holiday in the latter part of November 1980, they lived five in the room. On 30th January 1981, the taxpayer secured accommodation for himself and his family in Fairmont Gardens and there was the upheaval of removal.

(5) Meanwhile, the taxpayer had been having consultations with T at the University side of the Queen Mary Hospital where he was advised that his elder daughter and his son should also have their spleens removed because the trouble was hereditary and congenital. The elder daughter and the taxpayer's wife went to Singapore on 1st July 1981, the day after the taxpayer filled in his return, and returned on 3rd August 1981. The elder daughter had the operation in Singapore and the taxpayer went there for that purpose on 8th July 1981, returning here on 16th July 1981. On 2nd December 1981, the son was also operated on in Singapore but the taxpayer did not go there.

In substance these were the circumstances set out in the taxpayer's letter of 22nd April 1982, although he elaborated them before us. In his letter of 22nd April 1982, the taxpayer had also stated that he had had the impression that the gratuity had been paid to him before the relevant period.

Mr. L. A. Wimpress, Senior Assessor, who appeared for the Commissioner accepted the truth of the matters stated by the taxpayer. We therefore found all of the facts set out in the preceding paragraph as being proved, including the fact that the taxpayer had forgotten to include the gratuities and other allowances in his return.

Mr. Wimpress handed to us a typewritten submission which dealt with the grounds of appeal submitted on 23rd September 1982. He stressed that under section 68(4) of the Ordinance, the burden was on the taxpayer and this was accepted by the taxpayer.

The first ground of appeal was that there had been a simple "slip of the mind" in the circumstances we have outlined. Part of the typewritten submission of Mr. Wimpress on this ground reads:—

> "Despite his constant day-to-day living and family problems, can an educated, professional man forget that he has received some $84,000 in gratuities, over $22,000 in hotel subsistence and over $16,000 allowances for his older child to be educated abroad? Does he need to be reminded by various notifications by the Treasury?"

We were concerned that this ran contrary to the acceptance of the facts that had already been made. However, Mr. Wimpress stated that he was not resiling from that acceptance. He explained that it was his argument that although forgetfulness could be a "reasonable excuse" under section 82A of the Ordinance it was always a question of whether in the circumstances the forgetfulness or mistake was a reasonable one: It is a matter of degree. As we understood his submission, Mr. Wimpress was saying that, given the personal circumstances of the taxpayer, the matters raised did not constitute a reasonable excuse.

We accept that one of the questions to be answered under section 82A is whether in all of the circumstances the forgetfulness or mistake was a reasonable excuse. The litigation concerning the house in Singapore and the operation on the taxpayer's younger daughter occurred well before the taxpayer filled in his form while the operation on his son occurred well after it. We accept, however, that these matters must have preyed upon the mind of the taxpayer. He knew that operations would have to be performed on the elder daughter and son and he had already gone through the experience of his younger daughter having her spleen removed. He showed us a photograph of the very large operational scar left upon one of his daughters. Mr. Wimpress submitted that what the taxpayer had gone through was not unique, but we agree with the taxpayer that not everyone has the experience of having three children undergo an operation, especially not one as serious as removal of the spleen and especially not when two of them (the daughters) were then of the very tender age of about 7 and 9 years. We take into account also that the documents supplied to him by his employer showing his gratuities and allowances may be confusing. His living conditions and pressure of work no doubt aggravated his situation.

On the other hand, the taxpayer is an educated man who occupies a senior position. He had been a government servant since October of 1977 and he ought to have been familiar with the form of the documents supplied to him by his employer showing his gratuities and

allowances. Indeed, he must have been familiar with the fact that over and above his basic salary he would be receiving a large total amount of gratuities and allowances. Had he made a mistake of a few thousand dollars our decision on this point might have been different. However, he understated his salary by just over $128,000.00, over 40% of his total income. Even in the very trying circumstances proved, we cannot find that it was reasonable that this taxpayer should have made this mistake.

We were concerned as to whether section 82A requires that the taxpayer should have intended to make an incorrect return: That is to say, whether he should have known that the return was incorrect when he made it. We have decided that this is not necessary. Although the section is a penal one, proceedings for recovery of the penalty are not criminal proceedings. By contrast, section 82 does provide for criminal proceedings and begins with the words "Any person who willfully with intent …" We hold that for the purposes of section 82A it suffices that the taxpayer intended to and did make a return which was in fact incorrect.

We can deal briefly with the second ground of appeal. This was that the government always passes exact details of its employees' income to the Inland Revenue Department and that the Department should have contracted the taxpayer about the discrepancy before issuing the original notice of assessment. We see nothing in this point. It is the duty of the taxpayer to make a correct return. It is fair to say that although this ground of appeal was contained in the letter of Price Waterhouse dated 23rd September 1982, the taxpayer did not argue it.

The third ground of appeal was that the penalty should be either waived or reduced to one third. The taxpayer in argument described the penalty as being "a little high". We need only say simply that we can see no reason to interfere with the figure.

For these reasons we dismiss this appeal.