

Case No. D22/07

Penalty tax – additional tax – section 82A of the Inland Revenue Ordinance (‘IRO’)

Panel: Kenneth Kwok Hing Wai SC (chairman), Donald Choi Wun Hing and David Kwok Sek Chi.

Date of hearing: 16 August 2007.

Date of decision: 11 September 2007.

This was an appeal against the assessment (‘the Assessment’) dated 18 May 2007 by the Deputy Commissioner of Inland Revenue, assessing the appellant to additional tax under section 82A of the IRO.

In the year of assessment 2005/06, the appellant was employed by his former employer as the chief executive officer from 1 April 2005 to 31 October 2005 with a total salary income of \$1,225,002. His former employer reported the appellant’s income to the Revenue by a notification dated 26 January 2006.

In that year of assessment, the appellant was also employed by another company in a part-time capacity with a salary income of \$857,500 for the period between 1 April 2005 and 31 March 2006.

In his Tax Return – Individuals for 2005/06, the appellant reported his salary income from his part-time job but omitted the income from his former employer.

The assessor assessed the appellant to salaries tax based on the amounts of income reported in the employers’ returns. The appellant did not appeal against the salaries tax assessment.

The Revenue did not prosecute the appellant under section 80(2) or section 82(1) of the IRO. After considering representations made on behalf of the appellant, the Deputy Commissioner made the Assessment which is equivalent to 8.16% of the tax which would have been undercharged had his return been accepted as correct.

Held:

(2007-08) VOLUME 22 INLAND REVENUE BOARD OF REVIEW DECISIONS

1. The requirement of section 82A(1) was the absence of any prosecution, whether by the Revenue or the Secretary for Justice or any other person, not just the Revenue. Nothing turned on it in this case because the appellant had not made any allegation of any prosecution.
2. The Board, having considered all the matters urged by on behalf of the appellant, did not think that the Assessment was excessive (D16/07, unreported, 13 August 2007, and D50/05 (2005-06) IRBRD, vol 20, 656 followed).
3. The Board decided not to increase the assessment for the following reasons:
 - (a) The appellant had taken and was taking steps to ensure further compliance. It was a mitigating factor for a taxpayer to put in place an effective system or mechanism to prevent any further contravention.
 - (b) The appellant had learnt a lesson and was sincere in his promise to comply with his reporting duties in future.

Appeal dismissed.

Cases referred to:

D16/07, unreported
D50/05, (2005 – 06) IRBRD, vol 20, 656

Taxpayer in person.

Cheung Mei Fan and Leung Cheng Kam Wan for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the assessment ('the Assessment') dated 18 May 2007 by the Deputy Commissioner of Inland Revenue, assessing the appellant to additional tax under section 82A of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') in the following sum:

| Year of assessment | Additional tax | Charge no |
|---------------------------|-----------------------|------------------|
| 2005/06 | \$16,000 | 9-1943843-06-A |

The salient facts

(2007-08) VOLUME 22 INLAND REVENUE BOARD OF REVIEW DECISIONS

2. The parties agreed the facts stated in the Statement of Facts and we find them as facts.
3. The salient facts are as follows.
4. In the year of assessment 2005/06, the appellant was employed by his former employer as the chief executive officer from 1 April 2005 to 31 October 2005 with a total salary income of \$1,225,002. His former employer reported the appellant's income to the Revenue by a notification dated 26 January 2006.
5. In that year of assessment, the appellant was also employed by another company in a part-time capacity with a salary income of \$857,500 for the period between 1 April 2005 and 31 March 2006.
6. In his Tax Return – Individuals for 2005/06, the appellant reported his salary income from his part-time job but omitted the income from his former employer.
7. The assessor assessed the appellant to salaries tax based on the amounts of income reported in the employers' returns. The appellant did not appeal against the salaries tax assessment.
8. The Revenue did not prosecute the appellant under section 80(2) or section 82(1) of the Ordinance based on the facts stated in paragraphs (1) to (7) of the Statement of Facts. We interpose here to point out that the absence of prosecution should not be restricted to prosecution by the Revenue. The requirement of section 82A(1) is the absence of any prosecution, whether by the Revenue or the Secretary for Justice or any other person, not just the Revenue. Nothing turns on it in this case because the appellant has not made any allegation of any prosecution.
9. After considering representations made on behalf of the appellant, the Deputy Commissioner made the Assessment which is equivalent to 8.16% of the tax which would have been undercharged had his return been accepted as correct.

The hearing

10. The appellant told us that he accepted that it was his error and his fault, a one off carelessness. He impressed on us that he had no intention to, and did not, deceive the Revenue. He left it to his wife to handle tax reporting because he did not like paper work. He had also retained a firm of certified public accountants as his representatives for his tax reporting purposes. He was quite candid in his answers given during a crisp and effective cross-examination by Ms Cheung Mei Fan and accepted that he:

(2007-08) VOLUME 22 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) had forgotten to provide his wife with his former employer's return;
- (b) had not checked the information on his composite tax return, including the amount of his income, before the return was submitted; and
- (c) was irresponsible.

Steps taken with a view to ensuring compliance

11. Towards the end of his reply, he told us that he had learnt a lesson and that he had taken and will take the following steps to ensure correct reporting of his income:

- (a) he will personally be responsible for dealing with tax returns;
- (b) he has opened a file to keep a complete record of all his income from all sources, together with a photocopy of any cheque which he has received or may receive; and
- (c) he will pass on the information to professional accountants for advice on the requirements of the tax returns.

The Board's Decision

12. The relevant authorities on additional tax are set out in paragraphs 107 – 114 in D16/07 (Kenneth Kwok Hing Wai SC, Eva Chan Yee Wah and Paul Lam Ting Kwok), unreported, 13 August 2007.

13. The incorrectness of the tax return is not disputed by the appellant.

14. The appellant did not argue that he had any reasonable excuse for understating or omitting his income. In any event, we do not think there is any.

15. For reasons given in paragraphs 125 – 128 in D16/07, including paragraph 128(c), (d), (f) and (i) in particular, and for reasons given in D50/05 (Kenneth Kwok Hing Wai SC, Peter Sit Kien Ping and Adrian Wong Koon Man), (2005-06) IRBRD, vol 20, 656, and having considered all the matters urged by or on behalf of the appellant, we do not think that the Assessment is excessive.

16. We have considered whether to increase the Assessment, but we have decided not to for the following reasons:

(2007-08) VOLUME 22 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) The appellant has taken and is taking steps to ensure further compliance. It is a mitigating factor for a taxpayer to put in place an effective system or mechanism to prevent any further contravention.
- (b) We accept that the appellant has learnt a lesson and is sincere in his promise to comply with his reporting duties in future.

Disposition

17. We dismiss the appeal and confirm the Assessment.