

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D22/97

Penalty tax – making incorrect salaries tax return by omitting part of income – whether assessable to penalty tax – whether assessment of 25% excessive.

Panel: Robert Wei Wen Nam SC (chairman), Dianthus Tong Lau Mui Sum and William Tsui Hing Chuen.

Date of hearing: 26 March 1997.

Date of decision: 14 May 1997.

In the year of assessment 1994/95, the taxpayer had two sources of income, T Ltd and S Ltd, for which he respectively received the annual incomes of \$341,000 and \$280,000. However, in his tax return for the relevant year, he only reported the income of \$341,000 from T Ltd. In his written representations to the Commissioner, the taxpayer stated that he had fully declared his incomes totalling \$621,000. Before the Board he admitted that the statement was wrong: he had mistaken his employers' declarations in the employer's return for his own. In his notice of appeal, he stated that he had received two separate tax returns for the relevant year, one for T Ltd and the other for S Ltd and that he had made the mistake of filling in the income from T Ltd and that from S Ltd respectively in the two tax returns, not realizing that he should put both incomes in one tax return. In fact he only received one tax return for that year. At the hearing of this appeal, the taxpayer put forward yet another plea of a mistake, that is, that he had wrongly thought that two tax returns would be issued to him, one respect of each of his employers. He therefore filled in the income from T Ltd in the tax return which he had received, thinking, wrongly, that a separate tax return for income from S Ltd was on its way. The Board rejected all his pleas of a mistake.

Held:

The taxpayer has, without a reasonable excuse, made an incorrect tax return by omitting therefrom his income from S Ltd. As for quantum of the penalty tax assessment, the taxpayer pointed out that he had no intention to under-report any income. It has been stated many times by the Board that, while such intention is an aggravated circumstance, its absence is not a mitigating circumstance because no taxpayer should have it. The taxpayer has not satisfied the Board that the omission was the result of any genuine mistake. Bearing in mind the size of the omission, only gross negligence could have caused it. The additional (penalty) tax of \$14,000, being 25% of the tax which would have been undercharged if the tax return had been accepted as correct, is not excessive.

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Appeal dismissed.

Tung Wai Wah for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

Nature of appeal

1. This is an appeal by an individual (the Taxpayer) against the additional tax assessment raised on him for the year of assessment 1994/95 under section 82A of the Inland Revenue Ordinance (the IRO) for making an incorrect tax return without reasonable excuse.

Facts

2. In his tax return for the year of assessment 1994/95 dated 28 May 1995, the Taxpayer declared the following income particulars in column D:

Principal Office or Employment	
Salary/Wages	\$341,000
Name of employer	T Ltd
Capacity in which employed	Deputy General Manager
Period of Employment	1-4-1994 to 31-3-1995

3. The employer's return for the year of assessment 1994/95 dated 30 April 1995 and filed by the Taxpayer's employer T Ltd showed the following income of the Taxpayer:

Name of Employer	Period of Employment	Amount
T Ltd	1-4-1994 to 31-3-1995	\$341,000

4. The employer's return for the year of assessment 1994/95 dated 15 May 1995 and filed by the Taxpayer's employer S Ltd showed the following income of the Taxpayer:

Name of Employer	Period of Employment	Amount
S Ltd	1-4-1994 to 31-3-1995	\$280,000

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5. On 25 September 1995, the assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1994/95 showing a total assessable income of \$621,000 (\$341,000 + \$280,000).

6. No objection was made against the assessment.

7. On 18 March 1996, the Commissioner of Inland Revenue gave notice to the Taxpayer under section 82A(4) of the IRO that he proposed to assess the Taxpayer to additional tax in respect of the year of assessment 1994/95 and that the Taxpayer had the right to submit written representations to him with regard to the proposed assessment of additional tax.

8. On 19 March 1996, the Taxpayer submitted to the Commissioner written representations, stating, inter alia:

‘Attached you will see that I have fully declared the incomes

S Ltd	1-4-1994 to 31-3-1995	280,000
T Ltd	1-4-1994 to 31-3-1995	<u>341,000</u>
		<u>621,000</u>

The documents attached to his representations were copies of the two employer’s returns referred to in paragraphs 3 and 4 above, a notice of assessment and demand for tax in respect of his salaries tax assessment for the year of assessment 1994/95 referred to in paragraph 5 above and the notice under section 82A(4) of the IRO referred to in paragraph 7 above.

9. On 16 April 1996, the assessor wrote to the Taxpayer as follows:

‘I refer to your letter dated 19 March 1996 and have enclosed herewith photocopy of your tax return – individuals for the year 1994/95 for your reference. You will notice that you have only included your income of \$341,000 from T Ltd in your return.

As such, you are required to submit written representations regarding your failure to report your income of \$280,000 from S Ltd.’

10. On 25 April 1996, the Taxpayer submitted representations in reply as follows:

‘I am sorry that I have incorrectly filled my tax return-individuals years of assessment 1994/95 in the column D. That is, I have omitted the income from S Ltd though this part of income was calculated to my total assessment and the appropriate tax settled in time.

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...'

11. On 20 May 1996, the Commissioner, having considered the Taxpayer's representations, issued a notice of assessment for additional tax under section 82A of the IRO for the year of assessment 1994/95 in the amount of \$14,000, being 25% of \$56,000, the amount of the tax which would have been undercharged if the tax return had been accepted as correct.

Notice of appeal

12. On 22 May 1996, the Taxpayer gave notice of appeal to the Board against the additional tax assessment in the following terms:

'During 1994/1995 I was working in T Ltd, which being my major job, and in the meantime taking some time to help friends' business in another company S Ltd by receiving payment from it. I had received two separate tax returns year of assessment 94/95, one for T Ltd and the other for S Ltd. So I filled in my income of T Ltd and income of S Ltd respectively in the two tax returns. It was my mistake and unknowing that I should have put both incomes in one tax return, the outcome is very serious. I received the notice of assessment and demand for additional tax. What I would like to appeal to you is that I have been not in a bit attempting to avoid evaluation of my incomes by means of hiding the other income in the tax return. It was truly my inexperience and unknowing. In the past few years I have been fully paying my every income tax in time. I personally think I have been honest to the Inland Revenue Department. I would like that you would grant your precious time to review my case and give me a chance to waive the additional tax. Thank you very much for your kind attention.'

Hearing and parties

13. At the hearing of this appeal, the Taxpayer appeared in person while Miss Tung, senior assessor, represented the Commissioner. The Taxpayer gave evidence for himself. No other witness was called.

14. In answer to questions from the Board, the Taxpayer stated that he had written the notice of appeal himself. At that time, he mistakenly thought that he had received two separate tax returns. It was also wrong, he said, for him to state that he had filled in the two incomes respectively in two tax returns.

15. The Taxpayer then read out a prepared statement as his evidence in chief which may be summarised in this way. Prior to the year of assessment 1994/95, he had been working in a single company and paying tax on a single source income. Thereafter he had two jobs and received two incomes from two different firms. He thought there would be different salaries tax returns, one for each source of income. So when he received the salaries tax return addressed to the office of T Ltd, he filled in the income from T Ltd only.

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He mistakenly thought that there would be another salaries tax return to S Ltd for him to fill in the income from it. He had no intention to under-report any income to the Inland Revenue and he could not have anyway because the Revenue would have information from the two employer's returns filled by his employers. The omission to report his income from S Ltd was solely due to his misunderstanding that a separate salaries tax return would be issued. He had paid his tax in full and in time. He has caused no loss to the Revenue as a result of his oversight. The additional tax imposed on him was neither fair nor reasonable.

16. He was employed as a general manager of S Ltd and as a deputy general manager of T Ltd. He signed employer's returns for S Ltd in respect of its other employees but did not sign any employer's returns for T Ltd. He received only one tax return for the year of assessment 1994/95.

17. Referring to his written representations to the Commissioner dated 19 March 1996 (see paragraph 8 above), wherein he stated that he had 'fully declared' his incomes totalling \$621,000, the Taxpayer explained that it was another mistake on his part: he had mistaken his employers' declarations for his own.

Findings and reasons

18. The Taxpayer had two sources of income, T Ltd and S Ltd, from which he respectively received the annual incomes of \$341,000 and \$280,000. However, in his tax return for the relevant year of assessment 1994/95, he only reported the income of \$341,000 from T Ltd. The omitted income of \$280,000 from S Ltd, being 45% of his total income from the two sources, was hardly an amount which the Taxpayer could easily have forgotten. The Commissioner proposed to assess additional tax under section 82A of the IRO. In his written representations dated 19 March 1996, the Taxpayer stated that he had fully declared his incomes totalling \$621,000 (see paragraph 8 above). Before us he had admitted that the statement was wrong: he had mistaken his employers' declarations in the employer's returns for his own (see paragraph 17 above). We are unable to accept that explanation. An employer's return is a return made by an employer of his employee's income while a salaries tax return is a return made by an employee of his own income. The difference in nature is apparent on the face of the two returns. Furthermore, the Taxpayer should be familiar with these returns as he had the experience of signing both kinds. Moreover, the two relevant employer's returns, one filed by T Ltd and the other by S Ltd, were in neither case signed by the Taxpayer. We fail to see how the confusion could have arisen.

19. By a letter dated 25 April 1996, the Taxpayer admitted to the Inland Revenue Department that he had incorrectly completed his tax return for the year of assessment 1994/95 in the column D by omitting the income from S Ltd (see paragraph 10 above).

20. The Commissioner raised the additional tax assessment in question on the Taxpayer (see paragraph 11 above). In his notice of appeal he stated that he had received two separate tax returns for the year of assessment 1994/95, one for T Ltd and the other for S Ltd and that he made the mistake of filling in the income from T Ltd and that from S Ltd

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and that he made the mistake of filling in the income from T Ltd and that from S Ltd respectively in the two tax returns, not realising that he should put both incomes in one tax return. That plea of mistake cannot possibly succeed because he only received one tax return for the year of assessment 1994/95 (see paragraph 16 above).

21. At the hearing of this appeal, the Taxpayer retracted the plea of a mistake contained in his notice of appeal and put forward yet another plea of a mistake, that is, that he had wrongly thought that two tax returns would be issued to him, one in respect of each of his employers. He therefore filled in the income from T Ltd in the tax return which he had received, thinking, wrongly, that a separate tax return for income from S Ltd was on its way. Again, we find the story hard to accept. The tax return which he filled in clearly provided space for stating income from more than one source. Further, when asked by the Revenue to explain why he had not reported his income from S Ltd in the tax return, he said nothing about any mistake of thinking that two tax returns would be issued (see paragraphs 9 and 10 above).

22. There can be no doubt that the Taxpayer made an incorrect return by omitting therefrom his income from S Ltd. He sought to establish a reasonable excuse for the incorrectness but without success. One after the other, his pleas of a mistake collapsed. He has lost his credibility. We are satisfied that there was no reasonable excuse.

23. As for quantum of the additional tax assessment, one must consider all the circumstances surrounding the non-compliance. The Taxpayer pointed out that he had no intention to under-report any income. It has been stated many times by the Board that, while such intention is an aggravating circumstances, its absence is not a mitigating circumstances because no taxpayer should have it. He pointed out that he had caused no loss to the Revenue. In our view, the absence of such a loss is only one factor and should be considered in the light of other relevant factors. The Taxpayer has not satisfied us that the omission was the result of any genuine mistake. Bearing in mind the size of the omission, we find that nothing short of gross negligence could have caused it. The additional tax of \$14,000, being 25% of the tax which would have been undercharged if the tax return had been accepted as correct, is not in our view excessive.

24. It follows that this appeal is dismissed and that the additional tax assessment in question is hereby confirmed.