INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D25/91

Penalty tax – omission of wife's salary in tax return – whether taxpayer entitled to delete reference to wife's income – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), John C Broadley and Walter Chan Kar Lok.

Date of hearing: 28 May 1991.
Date of decision: 3 July 1991.

The taxpayer was married and did not wish to ascertain his wife's income. He accordingly deleted reference to the wife's income from the tax return form issued to him by the Inland Revenue Department. The Commissioner imposed a penalty under section 82A of the Inland Revenue Ordinance of $2,000 in respect of the year of assessment 1987/88 and $2,500 in respect of the year of assessment 1988/89. The taxpayer appealed to the Board of Review and argued that he was permitted within the terms of the salaries tax return form to delete reference to his wife's income or alternatively that the amount of the penalties were excessive.

Held:

It was the duty of the taxpayer to fully declare his wife's income on the salaries tax return form and he had no reasonable excuse for failing to do so. The quantum of the penalties were of a token nature and were not excessive.

Appeal dismissed.

Tang Chan Wai Yee for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by a taxpayer against two additional tax assessments for the years of assessment 1987/88 and 1988/89 respectively raised on him under section 82A(1)(a) of the Inland Revenue Ordinance for making incorrect salaries tax returns for those years of assessment without reasonable excuse.

2. The incorrectness of the 1987/88 return consists of: (1) an omission of the sum of $4,703 in respect of the Taxpayer's salary and (2) an omission of the sum of $147,000 being his wife's salary, while the 1988/89 return omits the sum of $165,500 being his wife's salary. Argument centred around the omissions of the wife's salary.

3. The Taxpayer conducted the appeal in person. The facts mentioned in his opening address are not in dispute. The Taxpayer is 41 years old. He lived and was educated in Canada in 1969-80. He married in 1983. His wife has been working since 1987. For the years of assessment in question, the law required the Taxpayer to pay salaries tax on his wife's income. The Taxpayer did not really mind doing that; what he did not relish doing was to have to find out his wife's income. From his experience in Canada (the nature of which was not revealed) he thought that he could elect for separate reporting, that is, reporting his own income only in his return, leaving his wife to report hers separately. What he did was simply to omit all mention of his wife's income in the two returns by leaving the relevant part of each return form blank. In addition, in the return for 1988/89 he deleted the words 'and that of my wife' from the words 'I have truly and correctly disclosed the whole of my income, *and that of my wife …' contained in the declaration form. The asterisk refers to a note at the bottom of the declaration form stating 'delete if inapplicable'.

Liability

4. The matter is governed by section 51(1) of the Inland Revenue Ordinance under which any person may be required by an assessor by notice in writing to make a return containing such particulars and in such form as may be specified by the Board of Inland Revenue. Forms so specified are known as 'BIR forms'. The two return forms in question are both BIR form No 50 containing, inter alia, particulars relating to wife's income. By reason of their being issued under section 51(1), the Taxpayer was placed under a duty to fill in the return forms, giving all the particulars specified therein, including those relating to his wife's income. This duty to report a wife's income applied in all cases where the wife was living together with her husband and working, as was the case here; that is why note 4 of the 'notes on how to complete a salaries tax return' (issued together with the return and forming part of it) states in capital letters:

> 'YOU ARE REMINDED THAT YOU MUST PROVIDE FULL DETAILS OF YOUR/YOUR WIFE'S INCOME IN YOUR RETURN, EVEN IF YOUR/YOUR WIFE'S EMPLOYER HAS ALREADY FURNISHED THESE DETAILS TO THE DEPARTMENT.'

The expression 'YOUR/YOUR WIFE'S' which appears twice in that note means 'your and/or your wife's', so that if both spouses were working, the husband must report both their incomes, and this even if their employers had already reported their incomes by filing employers' returns.

5. In his representations to the Commissioner of Inland Revenue dated 19 January 1991 and his notice of appeal dated 7 April 1991, there was some suggestion that the Taxpayer had elected for 'separate assessment'. That is a reference to section 58A(1) (since

repealed) under which a husband and wife could elect to be separately charged to salaries tax for their respective incomes, but the election must be made by both spouses jointly in the same return. Pursuant to this, the BIR form No 50 contains an election and declaration form to be signed by both spouses. In the present case, neither the Taxpayer nor his wife signed that form. Furthermore, note 3 of the notes makes it clear that even in the case of such an election, the wife's income still had to be included in the husband's return and that no separate return would be issued to the wife. When it was pointed out to the Taxpayer at the hearing that no valid election for separate charging or separate assessment had been made, the Taxpayer indicated that he did not mind paying salaries tax on his wife's income and that what he had attempted to do was to make an election for separate reporting (that we accept, considering that he paid salaries tax in accordance with the salaries tax assessments raised on him for the years in question which took account of the omitted incomes mentioned in paragraph 2 above); he suggested that the form was not clear enough in this respect, particularly the note 'delete if inapplicable' in the declaration form referred to above. In our view, the form is clear enough; the words 'delete if inapplicable' clearly refer to cases where during the accounting period there was no wife, or where the wife was living apart from the husband or was not working; they certainly do not mean that if the wife was living with the husband and was working, the husband could elect not to report her income. The words are 'delete if inapplicable', not 'delete if you so wish'.

Quantum

6. The employer of the Taxpayer's wife reported her income for the year of assessment 1987/88 in an employer's return dated 26 April 1988 and that for 1988/89 in an employer's return dated 26 April 1989. The Taxpayer filed his salaries tax return for the year of assessment 1987/88 on 28 May 1988 and that for the year of assessment 1988/89 on 30 June 1989, and was assessed to salaries tax in respect of both his and his wife's incomes – for 1987/88 by an assessment dated 19 September 1988 and for 1988/89 by an assessment dated 10 October 1989. The Taxpayer duly paid the tax payable on each assessment. There was no further communication from the Revenue until 8 January 1991 when the Deputy Commissioner of Inland Revenue gave notice to the Taxpayer under section 82A(4) that he was of the opinion that the Taxpayer had without reasonable excuse made incorrect returns for the years of assessment 1987/88 and 1988/89 and invited the Taxpayer to make representations before additional tax was assessed. The Taxpayer made his representations by letter dated 19 January 1991. By notice dated 21 March 1991, the Deputy Commissioner informed the Taxpayer that he had been assessed to additional tax in the sum of $2,000 for the year of assessment 1987/88 and in the sum of $2,500 for the year of assessment 1988/89. The Taxpayer complained that twenty-seven months had elapsed since the year of assessment 1987/88, and fifteen months since the year of assessment 1988/89, before he received the section 82A(4) notice dated 8 January 1991. Mrs Tang, the Commissioner's representative, mentioned the need for double cross-checking which was not completed until December 1990. Be that as it may, the fact remains that there was a long time lapse; we can understand the Taxpayer's complaint in view of the fact that the omitted incomes were included in the assessments on which the Taxpayer had paid his tax in full without any objection. However, we do not think that these circumstances can justify an interference with the additional tax imposed. The Taxpayer has suffered no hardship or

loss as a result of the delay, even although the section 82A(4) notices may have come as an unpleasant surprise to him. After all, the Taxpayer has himself to blame for not understanding the law properly; he could have made the necessary inquiry with the assessor at the telephone number which was given at the front page of each return. Moreover, the additional tax assessments are token penalties: $2,000 or 8% of the tax which could have been undercharged for the year of assessment 1987/88 and $2,500 or 9.7% of the tax which could have been undercharged for the year of assessment 1988/89, as compared with the norm of 100% of the such tax.

7. For all those reasons this appeal is dismissed and the additional tax assessments in question are hereby confirmed.