

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D25/96

Penalty tax – failure to declare income from two out of three sources of salary – cavalier disregard for complying with obligations to provide a true and complete return – whether penalty tax of 25% excessive in the circumstances – Inland Revenue Ordinance section 82A and 82B.

Panel: Andrew Halkyard (chairman), Brian Hamilton Renwick and Manuel Rosas Woo.

Date of hearing: 25 June 1996.

Date of decision: 12 July 1996.

The taxpayer, who was employed in the construction industry, declared income amounting to \$134,418 from his employment in Company A but omitted to disclose income totalling \$111,926 earned from his employment in Companies B and C in the year of assessment. The taxpayer alleged that the omission had been the result of frequent changes in jobs, inadequate records and reliance on the Inland Revenue Department as having full records. Penalty tax was raised on the taxpayer in the amount of approximately 25% of the tax which would have been undercharged if the taxpayer's omissions of income had not been detected. The taxpayer appealed on the grounds that the penalty tax imposed was excessive.

Held:

The evidence showed, at best, a cavalier disregard by the taxpayer for complying with the obligations imposed on him by the Inland Revenue Ordinance for setting out a true and complete return of all his taxable income in a particular year. The omissions in this case did not amount to a mere lack of care; rather, they amounted to gross negligence. The totality of the facts fully justified the level of penalty tax imposed.

Appeal dismissed.

Tong Cheng Yuet Kiu for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

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This is an appeal against an assessment for the amount of additional or penalty tax imposed by the Commissioner under section 82A(1) of the Inland Revenue Ordinance ('IRO').

The facts

The following facts are not in dispute.

1. In the tax return – individuals for the year of assessment 1993/94, the Taxpayer declared the following particulars of income:

Employer:	Company A
Capacity in which employed:	Office Manager
Salary/Wages (15-10-93 to 31-3-94):	\$134,418

2. Employer's returns filed with the Inland Revenue Department in respect of the Taxpayer revealed that the Taxpayer had the following sources of income for the year of assessment 1993/94:

	Employer	Period of Employment	Amount \$
(a)	Company B	1-4-93 to 7-4-93	1,760
(b)	Company C	20-4-93 to 12-10-93	110,166
(c)	Company A	15-10-93 to 31-3-94	<u>134,418</u>
			246,344

3. On 17 October 1994 the assessor raised the following salaries tax assessment on the Taxpayer for the year of assessment 1993/94:

Self Income	\$246,344
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4. The Taxpayer did not lodge any objection to this assessment.
5. On 19 July 1995 the Commissioner gave a notice to the Taxpayer under section 82A(4) that he proposed to assess the Taxpayer to additional tax by way of penalty in respect of the year of assessment 1993/94 for making an incorrect return by omitting the income disclosed at fact 2(a) and (b).

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6. On 16 August 1995 the Taxpayer submitted to the Commissioner representations in response to the notice issued on 19 July 1995. The Taxpayer alleged that:
 - (a) 'In the absence of information from Company B and Company C, I dared not report any information casually. Besides, I thought that your Department had the information in respect of my incomes. Therefore I made this mistake but I had no intention to do so.'
 - (b) 'Since I changed job frequently, the records of my incomes were in a mess. I had changed four jobs since 1993. This was because of the instability of the construction industry and I did not change job intentionally in order to avoid tax.'
7. On 23 October 1995 the Commissioner, having considered and taken into account the Taxpayer's representations, issued an assessment for additional tax in respect of the year of assessment 1993/94 in the sum of \$6,600. This amount is 24.9% of the tax which would have been undercharged if the Taxpayer's omissions of chargeable income from his return had not been detected.
8. On 23 November 1995 the Taxpayer appealed to this Board against the assessment of additional or penalty tax on the grounds that the amount imposed was excessive. The Taxpayer stated:

'I have no intention to cheat the Hong Kong Government by omitting my income during 1993/94, since the form was filled in by my wife and at that moment she did not know some information were missing and I have paid the income tax in full already.'

... I work in construction field and always changing job so I cannot keep my record of income properly.'

The proceedings before Board

The Taxpayer gave sworn evidence before the Board. Little in the way of new evidence was introduced by the Taxpayer, but the Taxpayer did advance the following arguments as to why the additional or penalty tax was, in terms of section 82B(2), excessive in the circumstances:

- (1) He regretted that he filed an incorrect return and stated that he had no intention to cheat the Revenue.
- (2) He repeated the matters raised at facts 6 and 8 and added that complicating factors were that he changed his residence (as well as his job), and that his record keeping was not complete (he only kept the employer's return from

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Company B; the other employer's returns for the year of assessment 1993/94 were lost).

In the course of cross-examination by the Commissioner's representative, Mrs Tong Cheng Yuet-kiu, the Taxpayer made some extraordinary statements. The background to these related to ascertaining whether the Taxpayer also omitted income (albeit a small amount) from his tax return in the year of assessment 1992/93. The Taxpayer's own words best describe his attitude to his taxation compliance obligations.

Question: Did you omit income from your tax return in previous years (that is, before the year of assessment under appeal)?

Answer: I don't know. The return for the year of assessment 1992/93 was completed by my wife. [Subsequently, the Taxpayer admitted that he had signed the return, declared it to be true and correct, and that indeed he had omitted income from this return.]

Question: Did you sign and read the return?

Answer: I signed the return for the year of assessment 1992/93. I can't afford [the time] to read my salaries tax return because I was too busy. Another reason was that I had to visit the doctor. [The Taxpayer then stated that he made some ten visits to the doctor.]

Question: When you were assessed in respect of this additional income [for the year of assessment 1992/93] did you object to the assessment?

Answer: No. I don't complete everything in the tax return. I just let the IRD do this.

Contentions of the Commissioner

Mrs Tong presented a written submission. Given our view of the Taxpayer's evidence and the nature of his submissions, we do not find it necessary to set out Mrs Tong's submissions in detail. We do, however, note that Mrs Tong dealt with the Taxpayer's arguments point by point and emphasised that it was the Taxpayer's responsibility to ensure that the information contained in his tax return was correct, even if it were completed and filed by his wife. Mrs Tong concluded by submitting that, in all the circumstances including the Taxpayer's omission of income in his tax return for the year of assessment 1992/93, the amount of additional or penalty tax imposed for the omissions in the year of assessment 1993/94 was not excessive in the circumstances.

Reasons for our decision

Throughout this appeal the Taxpayer's express attitude was: first, that he did not worry about the accuracy of his tax returns because the Inland Revenue Department would find out the correct taxable income anyway; second, that his lack of care could be explained by stating that his wife (whom, incidently, we do not blame in any way for the Taxpayer's misfortunes) prepared his tax return (for the year of assessment under appeal, we find that this was simply not borne out by the Taxpayer's evidence); and third, that his omissions of income from his tax returns could be somehow excused by his changing jobs, by his inadequate records and by the fact that he simply did not read the details recorded in

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his tax returns before signing them. None of these explanations or submissions by the Taxpayer were satisfactory. Indeed, it is quite the reverse. In short, the Taxpayer's evidence showed, at best, a cavalier disregard for complying with the obligations imposed upon him by the IRO for setting out a true and complete return of all his taxable income in a particular year. In our view, the omissions of income in this case did not amount to mere lack of care; rather, they amounted to gross negligence.

During the course of the Board hearing, we were assisted by the Assistant Commissioner, Mr Luk Nai-man, who supported Mrs Tong's arguments for the Commissioner. Mr Luk provided us with background information and argument which attempted to support the Commissioner's recent practice, implemented since July 1995, of imposing a penalty of more than the previous normal tariff of 10% in cases involving omissions to report the total amount of a person's taxable income.

We indicated to the parties during the hearing that it would not be necessary to consider these interesting submissions for the purpose of this appeal. We now confirm this view. Firstly, although the amount of tax in dispute is undoubtedly a significant sum for the Taxpayer, we consider that Mr Luk's arguments might be better ventilated in a larger and more representative case. Second, and more importantly, we consider that the facts in this appeal were so clear and indicated a degree of lack of care and disregard by the Taxpayer that they more than justified the Commissioner's assessment. It has not, therefore, been necessary for us to consider the broader issues urged upon us by Mr Luk.

In conclusion, the totality of the facts before us, including the Taxpayer's express attitude towards his taxation compliance obligations, clearly justify the level of penalty tax imposed. The Taxpayer has been unable to advance any cogent reason to persuade us to change the Commissioner's considered opinion that penalty tax of some 25% was appropriate to the circumstances of this case.

For the reasons set out above we order that this appeal should be dismissed.