

Case No. D32/05

Penalty tax – failure to declare amount of income unintentionally – whether reasonable excuse – whether penalty excessive.

Panel: Anna Chow Suk Han (chairman), Peter K F Ng SC and William Thomson.

Date of hearing: 27 June 2005.

Date of decision: 26 July 2005.

In his tax return, the taxpayer declared that he had income chargeable to salaries tax but failed to declare the amount in it.

Additional tax, as a result, was assessed at \$5,900 based on salaries tax assessment in the amount of \$119,885.

The taxpayer explained that he failed to declare the amount unintentionally.

Held:

1. The Board found that the explanation does not constitute a reasonable excuse that renders him not liable to additional tax.
2. It is normal practice for the Revenue to assess for the first offence and simple, inadvertent omission or understatement of income cases at 10% of the tax that would have been undercharged. The penalty of \$5,900 representing 4.92% of the amount of the tax which would have been undercharged is not excessive.

Appeal dismissed.

Taxpayer in person.

Tang Wai Min and Tse Yuen Ling for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by Mr A ('the Taxpayer') against the imposition by the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') of additional tax by way of penalty under section 82A of the Inland Revenue Ordinance ('IRO') in respect of his failure to declare the amount of his income in his Tax Return – Individuals for the year of assessment 2003/04.

2. The facts of this case are simple and not in dispute. The agreed facts between the parties are briefly as follows.

3. In his tax return for the year of assessment 2003/04, the Taxpayer declared that he had income chargeable to salaries tax during the year. However, he failed to declare the amount of his income in the return. On the hand other, Company B, the Taxpayer's employer filed an Employer's Return of Remuneration and Pensions in respect of the Taxpayer for the said year of assessment 2003/04 in which it was stated that the Taxpayer's income for the year was \$920,000. Consequently, the assessor raised upon the Taxpayer salaries tax assessment in the amount of \$119,885 basing on the Taxpayer's net chargeable income of \$706,000. On 3 February 2005, the Deputy Commissioner gave notice to the Taxpayer that he proposed to assess the Taxpayer to additional tax under section 82A of the IRO for the said year of assessment 2003/04. The Taxpayer submitted his written representations in this respect. Having considered the Taxpayer's written representations, the Deputy Commissioner assessed the Taxpayer to additional tax of \$5,900. The additional tax was calculated according to the scale of 'First Offence' for salaries tax cases as stated in Part F of the Penalty Policy Statement with adjustment for mitigating factors. On 14 April 2005, the Taxpayer served his notice of appeal to the Board of Review against the said assessment of additional tax under section 82A.

4. The grounds of appeal advanced by the Taxpayer are summarized as follows:

- (a) He had ticked the box indicating that he had income chargeable to salaries tax. In the haste of sending out the return form, the amount required in table 4.1 was left blank unintentionally. He had no intention to submit an incorrect tax return and the omission was due to an oversight on his part.
- (b) He had paid the first instalment and final instalment of his salaries tax.
- (c) He had been a good taxpayer in that he submitted his tax returns timely and paid his salaries tax promptly.

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

5. The question for us to decide in this appeal is firstly, 'whether the circumstances of this case under which the Taxpayer omitted to fill in the amount of his income in the tax return, constitute reasonable excuse and thus render the Taxpayer not liable to be assessed to additional tax under section 82A(1)', and if the answer to this question is not in the Taxpayer's favour, the next question is 'whether the penalty imposed by the Deputy Commissioner against the Taxpayer is excessive'.

6. The Taxpayer appeared in person at the hearing. He did not add anything further to his grounds of appeal save that he expressed strong grievance on the fact that he was not informed of his omission to fill in the amount of his income in his tax return and also of the resulting assessment of penalty at the same time as he was notified of his tax assessment and he should only be informed of the additional assessment after the payment of his salaries tax. He said that he would have accepted the assessment of additional tax more readily if he was informed of the same when he was notified of the tax assessment and not after he had concluded the payment of his tax. On this point as to why taxpayers cannot be informed of their mistakes or omissions at the same time of their tax assessments, the representative of the Revenue explained that because of the immense workload which the Revenue had to deal with during that particular period of time each year, the Revenue did not have sufficient manpower nor time to ask taxpayers to rectify their mistakes once when they were found and furthermore because many mistakes were usually found, the Revenue could not deal with some and not the others.

7. We have seen and heard the Taxpayer in person and have not for a moment doubted his complete honesty in the matter. We accept fully the Taxpayer's explanation that the omission in the tax return was caused by mere carelessness on his part and also that he had a good record as a taxpayer and had always discharged his tax liability promptly. However, we do not accept that these matters constitute reasonable excuse for the omission. Every taxpayer has the duty to complete his tax return fully and carefully and to discharge his tax liability promptly. The Taxpayer in this case was expected to perform the same duty, or else, the task of the already over-burdened Inland Revenue Department will become impossible to perform. The aforesaid matters raised are ones for mitigation purpose only and not those constituting reasonable excuse which would exonerate the Taxpayer from liability under section 82A of the IRO. As to the Taxpayer's expressed grievance, it is difficult for us to discern the difference whether he was told of the omission and the penalty at the same time of the notification of his tax liability or after the payment of his tax liability. The fact remains that there was a breach of an obligation on the part of the Taxpayer. Whether he was told of it at the same time of or after the tax assessment is irrelevant. The fact that he was only informed of the omission and the resulting penalty after the payment of his tax liability cannot in any way constitute reasonable excuse under section 82A of IRO. Thus, the Taxpayer's appeal must fail.

8. Since we do not favour the Taxpayer in the answer to the first question, we have to decide the next question as to whether the penalty is excessive. According to the Penalty Policy of the Revenue, it is normal practice of the Revenue to assess, for first offence and simple, inadvertent omission or understatement of income cases, additional tax of about 10% of the tax that has been

(2005-06) VOLUME 20 INLAND REVENUE BOARD OF REVIEW DECISIONS

undercharged or would have been undercharged. Having considered the matters pleaded by the Taxpayer in his grounds of appeal and at the hearing and also the penalties imposed in other Board of Review cases, we do not think the present penalty of \$5,900 which represents 4.92% of the amount of tax that would have been undercharged if the tax return had been accepted as correct, is excessive.

9. In the circumstances, we dismiss the Taxpayer's appeal.