

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D44/89

Penalty tax assessment – husband and wife – wife inadvertently omitted her entire income in one year of assessment only – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Vincent Liang Wan Sang and Norman Ngai Wai Yiu.

Date of hearing: 13 July 1989.

Date of decision: 30 August 1989.

A husband and wife filed tax returns which were signed by both of them and in which they claimed separate assessment. In respect of the tax return filed for the year of assessment 1986/87, the wife, by mistake, omitted to include her taxable emoluments in the tax return but signed it and it was duly submitted to the Inland Revenue Department. In previous years, she had correctly stated her income. The Inland Revenue Department received notice from the employer of the wife in the usual way informing the Department of her taxable income. Accordingly, the full amount of her taxable income was included in the tax assessment which was issued. The Deputy Commissioner imposed a penalty upon the taxpayer under section 82A of the Inland Revenue Ordinance in respect of her failure to include her taxable emoluments in the sum of \$1,400. The taxpayer appealed against this assessment on the ground that it was excessive.

Held:

The penalty tax assessment was excessive and should be reduced to the sum of \$100. It was a genuine inadvertent mistake and a nominal penalty was sufficient in the circumstances.

Appeal allowed in part.

Chan Chung Hong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a taxpayer against an additional tax assessment imposed under section 82A of the Inland Revenue Ordinance by the Deputy Commissioner.

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The facts are as follows:

1. The Taxpayer and her husband were separately employed during the years of assessment 1985/86 and 1986/87. In respect of both years of assessment they filed tax returns which they both signed and in which they claimed separate assessment. With regard to the year of assessment 1985/86 the amounts were correctly stated and the Taxpayer and her husband were duly assessed to tax.
2. On 1 May 1987 a tax return form was sent to the Taxpayer's husband requiring declaration of all of the salaries tax income of the Taxpayer and her husband for the year ended 31 March 1987. The form was completed so far as the husband's income was concerned but was inadvertently left blank so far as the Taxpayer herself was concerned. However when claiming separate assessment the Taxpayer signed a declaration stating that she had truly and correctly disclosed the whole of her income arising in or derived from Hong Kong from offices, employments and pensions during the year ended 31 March 1987.
3. The tax return was duly filed with the Inland Revenue Department on 3 June 1987. Though the Taxpayer had omitted to include her taxable income, notice by her employer was given in the usual way to the Inland Revenue Department declaring the amount of her taxable income. This amount was included in a tax assessment which was issued to the Taxpayer and her husband and the amount of tax assessed was apportioned between the Taxpayer and her husband and was duly paid.
4. The total amount of the taxable income which was declared by the husband in the tax return for the year ended 31 March 1987 was \$74,840. The Taxpayer earned total taxable income for the year ended 31 March 1987 of \$81,617 which was omitted from the tax return.
5. On 13 July 1988 the Deputy Commissioner gave notice to the Taxpayer informing her that he proposed to assess her to additional tax under section 82A of the Inland Revenue Ordinance. The Taxpayer submitted representations to the Deputy Commissioner on 18 July 1988. The Deputy Commissioner took these representations into account and on 17 August 1988 issued a notice of assessment to additional tax for the year of assessment 1986/87 under the provisions of section 82A of the Inland Revenue Ordinance in the sum of \$1,400.
6. On 31 August 1988 the Taxpayer gave notice of appeal to the Board of Review against this assessment to additional tax under section 82A of the Inland Revenue Ordinance.

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At the hearing of the appeal the Taxpayer appeared and informed the Board that she had made a mistake when she signed the tax return and omitted to include her taxable emoluments therein. She pointed out that she had always declared her full taxable income punctually in previous years and had no intention to omit or understate her income. She had been employed by the same employer for the last ten years during which both she and her employer had reported her full income to the Inland Revenue Department. She had simply made a human mistake. She did not dispute the power of the Deputy Commissioner to impose a penalty upon a person who like herself had made a mistake but said that the quantum of the penalty imposed upon her was excessive in the circumstances.

The representative for the Commissioner agreed that the Taxpayer had made a mistake and did not have any intention to evade tax. He also confirmed that in the previous year the Taxpayer and her husband had correctly declared their respective incomes for salaries tax purposes. He submitted that it was the duty of a person to file a true and correct return and that if the taxpayer was not able to recall or verify the exact amount of income there was nothing to prevent her from disclosing such difficulty. In this case the Taxpayer had not notified the Commissioner of any difficulties which she had and he submitted that the Taxpayer had not made any effort to ensure the filing of a correct return. He said that in many cases the Commissioner would issue a warning to a taxpayer but in cases of this nature where the amount of the omission was substantial, it was appropriate to send a warning letter and the Deputy Commissioner considered that an appropriate penalty to be imposed was the amount of \$1,400 which represented only a small percentage of the maximum permitted by the Ordinance.

Having heard the submissions by the parties and having carefully reviewed the facts of this case the Board finds that the amount of the penalty is excessive. The Taxpayer has made no attempt to cover up or conceal the fact that she made a mistake. Instead she relies upon her good record with the Inland Revenue Department in filing tax returns previously both promptly and accurately. She fully accepts that she made a mistake but points out that it is human to make an error. In view of the comparatively small salary which she earns she considers that a penalty of \$1,400 is excessive for the type of mistake which she made.

We agree with the Taxpayer. Whilst it is true to say that the quantum of the income which she failed to include in the tax return was substantial, it was also obvious on the face of the tax return that a mistake had been made. The Taxpayer claimed separate assessment from her husband. The question which we ask ourselves and which the Commissioner should have asked himself was why should a taxpayer claim separate assessment when she had no income. This would be nonsense. Obviously she had made a mistake. Having made a mistake of this nature it is not appropriate to consider the amount involved but the nature of the mistake. She has forgotten to complete that part of the form which relates to her entire income and left it blank. Obviously the amount which has been omitted is 100% of her total taxable income. As her income was approximately the same as that of her husband it is also obvious that the amount which she omitted must be approximately half of their joint income. The Commissioner's representative pointed out

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that if they had accepted the figures in the tax return, no tax would have been payable because the personal allowances would have exceeded the amount of the husband's Income. This again is obvious but does not justify imposing what is in this case a substantial penalty for the type of mistake made. In a case of this nature all that is necessary is to draw the attention of the Taxpayer to the fact that she has made a mistake and to warn her that she should not make such mistake in the future. To achieve this we consider that an appropriate penalty would be \$100. This is sufficient to bring to the Taxpayer's attention that she has made a mistake and should not make mistakes in the future.

Accordingly in the circumstances we find the amount of the additional assessment imposed by the Deputy Commissioner under section 82A to be excessive and order that it be reduced from the sum of \$1,400 to the sum of \$100.