

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D46/94

Penalty tax – incorrect tax return – salaries tax – section 82A of the Inland Revenue Ordinance.

Panel: Robert Wei Wen Nam QC (chairman), Walter Chan Kar Lok and Felix Chow Fu Kee.

Date of hearing: 8 September 1994.

Date of decision: 21 October 1994

The taxpayer was employed by Company A and changed his employment to Company B. When he filed his salaries tax return he only filled in the income which he received from Company B. As a result the Commissioner imposed a penalty of approximately 10% of the tax involved. The taxpayer appealed and submitted that he had not been given information by Company A which it should have given to him. The taxpayer appealed to the Board of Review.

Held:

The difficulties which the taxpayer encountered in completing his tax return were not a reasonable excuse. However the mistake had been caused because of certain factors beyond the control of the taxpayer. The quantum of the penalty was excessive and should be reduced to approximately 5% of the tax involved.

Appeal partly allowed.

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

Decision:

1. This is an appeal by an individual (the Taxpayer) against the additional tax assessment raised on him by way of penalty under section 82A of the Inland Revenue Ordinance (the IRO) for making an incorrect tax return without any reasonable excuse.
2. In the year of assessment 1992/93 the Taxpayer was employed by Company A for the period 1 April 1992 – 19 February 1993 and then employed by Company B for the period 24 February 1993 – 31 March 1993.

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3. On 19 February 1993 Company A gave notice under section 52(5) of the IRO to the Revenue of the Taxpayer's cessation of employment, but failed to give a copy of the notice to the Taxpayer. The notice contained details of emoluments from 1 April 1992 to the date of cessation of employment.

4. On 21 June 1993 the Revenue issued a salaries tax return form to the Taxpayer requiring him to complete and file the return within one month from 21 June 1993. The return form was sent to Company B's address. Company B did not give the return form to the Taxpayer until about 15 July 1993.

5. On about 30 June 1993 the Taxpayer left the employment of Company B, unaware that the return form had been sent to Company B's address. He did not receive the return form from Company B until about 15 July 1993 when he got in touch with his former colleagues and learned that the return form had been sent to Company B.

6. In the return the Taxpayer only filled in his income from his employment with Company B.

7. As a result, the Taxpayer was assessed to an additional tax in the sum of \$2,700 by way of penalty for making an incorrect return without reasonable excuse by omitting from the return his income from his employment with Company A.

8. In his notice of appeal the Taxpayer set out his reasons for failing to report his income from Company A. They are briefly as follows:

- 1) He did not have any information from Company A about the total amount of his income.
- 2) His salary was paid by autopay and there was no pay-slip.
- 3) The pay for the last two months was different from his pay for the previous months; his bank passbook was of no assistance because it had not been updated for a substantial part of the relevant period.
- 4) There had been changes of department heads in Company A; endeavours to check with the Company came to nothing.
- 5) He learned from his friends that Company A had submitted a document regarding his income to the Revenue. As the tax return was due for lodgement, he thought he might just report the income from Company B for the time being.

9. We are not satisfied that the above-stated reasons disclose any reasonable excuse for failing to report his income from Company A. It would have been a matter of simply looking up its employer's returns file for Company A to provide the Taxpayer with the necessary information. Had he made a firm request for the information, we do not

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believe that Company A as his former employer would or could have refused to oblige. Moreover, we believe he could have obtained a statement of the missing entries from his bank had he asked. It seems to us that he did not use his best endeavours to obtain the required information from Company A or his bank. It is the duty of every taxpayer to order his tax affairs so that he is in a position to make a correct return. The Taxpayer has failed in that duty and has thereby rendered himself liable to a penalty under section 82A of the IRO.

10. It remains to consider the question of whether the penalty is excessive. We note that the difficulties the Taxpayer encountered in obtaining information about his income from Company A were in no small measure compounded by two factors: (a) Company A failed to give the Taxpayer, as it should have done, a copy of the notice given to the Revenue containing a statement of his income up to the date of cessation of employment, which notice Company A filed on 19 February 1993 (see paragraph 3 above); (b) Company B did not give the Taxpayer his tax return form until mid-July 1993 although it must have received the form much earlier. Those two factors were beyond the Taxpayer's control. The penalty of \$2,700, being just under 10% of the tax which would have been undercharged had the return been accepted as correct, would not have been excessive in a normal case of incorrect return, but is in our view excessive in the circumstances of this case. We would reduce the penalty by 50%.

11. It follows that the additional tax assessment in question is reduced to \$1,350 and that subject thereto, this appeal is dismissed.