

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D4/94

Penalty tax – negligent omission of income in tax return – salaries tax – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Felix Chow Fu Kee and Vincent Liang Wan Sang.

Date of hearing: 3 March 1994.

Date of decision: 21 April 1994

The taxpayer was an employee of a company which terminated his employment. After a period of unemployment he obtained employment with another company. When filing his salaries tax return the taxpayer negligently omitted the income which he had received from his first employer.

Held:

A penalty of 10% of the amount of tax which would have been undercharged is not excessive. The taxpayer had made a genuine mistake but this was no excuse. The taxpayer was a senior person and not a junior low paid employee.

Appeal dismissed.

Lau Ming Sum for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against a penalty tax assessment imposed upon him for having understated his taxable emoluments in his salaries tax return. The facts are as follows:

1. The employee was employed as a manager by Company A on 1 April 1991. His employment with this company terminated on 31 July 1991. During the period from 1 April 1991 to 31 July 1991 he was paid taxable emoluments which totalled \$292,343.
2. The Taxpayer was then unemployed for a period of time. He recommenced working on 18 November 1991 when he was employed as a manager by Company B, also a

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company of the same field as with Company A. During the period from 18 November 1991 up to 31 March 1992 the Taxpayer earned taxable emoluments of a total of \$192,323.

3. A salaries tax return was issued to the Taxpayer by the Commissioner dated 1 May 1992 and the Taxpayer was required to complete the same by 1 June 1992. The Taxpayer completed his salaries tax return form and submitted the same to the Commissioner on 8 May 1992.

4. In his salaries tax return the employee negligently omitted to include the taxable emoluments which he had received from Company A. He only returned the sum of \$192,323 being the taxable emoluments which he received from Company B. However in his tax return he clearly stated that the period of employment was only from 18 November 1991 up to 31 March 1992.

5. The assessor, who had also received employee's tax returns from the two employers, assessed the Taxpayer to tax on the full amount of his taxable emoluments and the tax assessed thereon was duly paid by the Taxpayer.

6. The Commissioner then caused notice to be sent to the Taxpayer informing him that a penalty might be imposed upon him under section 82A of the Inland Revenue Ordinance and asking whether the Taxpayer wish to make any representations. The Taxpayer failed to make any representations in reply to this notice.

7. By assessment dated 20 August 1993 the Deputy Commissioner assessed the Taxpayer to penalty tax under section 82A in the sum of \$5,400.

8. The Taxpayer then appealed to the Board of Review.

At the hearing of the appeal the Taxpayer appeared and represented himself. He explained that he had made a mistake by omitting the income from his first employer when he completed and submitted his salaries tax return. He accepted full responsibility for making this mistake but stressed that it was a genuine oversight on his part and that there was no intention to evade tax. He said that the mistake had been made because of the change of employment and the fact that the income related to a period which was almost a year prior to the date when he completed and submitted his salaries tax return. He said that a contributing factor to the mistake was that at the time when he completed his tax return he was under considerable mental pressure.

The representative for the Commissioner said that the sum of \$5,400 had been computed on the basis of 10% of the amount of tax which would have been undercharged if the salaries tax return filed by the Taxpayer had been accepted by the assessor. The representative said that in all of the circumstances of the case the amount of the penalty was not excessive and the Taxpayer had no reasonable excuse for making the mistake.

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This Board places on record that it fully accepts the submission made by the Taxpayer to the effect that this was a genuine negligent mistake. There was no intention whatsoever on the part of the Taxpayer to evade payment of tax.

In the course of the hearing the Board pointed out to the representative for the Commissioner that previous similar cases had arisen where salaries taxpayers had made genuine mistakes when completing and filing their tax returns because there had been a change of employer during the 12-month period. In general the taxation system in Hong Kong appears to work smoothly and in salaries tax matters relies heavily, so far as both the Taxpayer and the Commissioner are concerned, upon the filing by the employer of tax returns in respect of each employee covering all of their taxable emoluments during the preceding fiscal year. It is common knowledge that many employees rely totally upon the form given to them by their employer when they come to complete their tax returns. Likewise the Commissioner places heavy reliance upon these forms provided to him by the employer. Unfortunately this system does not always work smoothly when there has been a change of employment because, as in this case, the employee will have received the employer's return from the first employer a long time prior to his completing his tax return. Perhaps the Commissioner might give consideration to redesigning the salaries tax forms in some way or including a clear notice somewhere therein drawing the attention of taxpayers to the fact that they must be extra careful where they have changed their employment during a fiscal year.

Unfortunately for the Taxpayer, the Inland Revenue Ordinance places a clear obligation on taxpayers to declare their true and correct taxable emoluments and this is a cornerstone of our system of simple and low taxation. Our rates of tax can only remain low and our system of taxation can only be simple if taxpayers take due care and attention when completing their tax return forms. In the present case the Taxpayer made a genuine mistake but it is no excuse to say that a mistake was made. Everyone when filing tax returns must exercise great caution. They must ensure that the return is correct. In the present case it is obvious that the Taxpayer did not take due care and attention. He omitted to include in his tax return a substantial percentage of the income which he earned during the year. He specified when completing the tax return that the income only related to the period from and after 18 November 1991. This should have put him on notice to the fact that he had to check to see what, if any, income he earned during the preceding 7 months and include that income in his tax return. This he clearly failed to do.

With regard to the quantum of the penalty we cannot find that in all of the circumstances it is excessive. This is not a case of an illiterate person who has no understanding or knowledge of forms and figures. The Taxpayer held a senior post with both of his two employers and received a substantial level of remuneration. He was not a junior low paid employee. In such circumstances we are not able to say that a penalty of 10% of the amount of tax which would have been undercharged is excessive.

For the reasons given we find that the Taxpayer did not have any reasonable excuse for making the mistake which he did and that in the circumstances the amount is not excessive. Accordingly the appeal is dismissed.