

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D52/95

Penalty tax – Hong Kong Government employment contract gratuity – whether reliance on employer's tax return form reasonable excuse.

Panel: William Turnbull (chairman), Felix Chow Fu Kee and Richard Lee.

Date of hearing: 20 July 1995.

Date of decision: 30 August 1995.

The taxpayer was employed by the Hong Kong Government under a contract and would be paid a gratuity at the end of the contract period. The taxpayer did not disclose the contract gratuity received. He argued that he had relied upon the tax return form given by his employer, and that his mistake was caused by the mistake of the Hong Kong Government Treasury.

Held:

A penalty of approximately 10% of the amount of tax involved was not excessive in the circumstances. It was accepted that the taxpayer was careless and did not intend to evade tax. However, there would be little sympathy for the attempt to place all of the blame on his employer.

Appeal dismissed.

Li Mei On for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a Taxpayer against a penalty tax assessment assessed upon him for the year of assessment 1993/94 under section 82A of the Inland Revenue Ordinance (the IRO). The facts are as follows:

1. The Taxpayer was employed by the Hong Kong Government under a contract which commenced on 1 October 1991 and ended on 31 March 1994. One of the terms of the contract of employment was that the Taxpayer would be paid a gratuity at the end of the period of his employment.

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2. The gratuity which amounted to \$307,140 was paid to the Taxpayer by the Hong Kong Government in the month of March 1994.
3. A salaries tax return form was sent to the Taxpayer dated 2 May 1994 requiring the Taxpayer to inform the Commissioner of all of his income chargeable to salaries tax for the year of assessment 1993/94.

The Taxpayer duly filed his salaries tax return in which he declared his salary/wages as \$544,415 and his home mortgage finance allowance as \$204,000 making a total of \$748,415. The Taxpayer did not disclose the contract gratuity of \$307,140 that he had received.

4. On 28 November 1994 the assessor raised an assessment for the year of assessment 1993/94 on the total assessable income of the Taxpayer including the contract gratuity of \$307,140. No objection was made against this assessment by the Taxpayer.
5. On 13 March 1995 the Commissioner of Inland Revenue gave notice to the Taxpayer that he proposed to assess the Taxpayer to additional tax by way of penalty under section 82A of the IRO.
6. On 16 March 1995 the Taxpayer made representations to the Commissioner of Inland Revenue. After taking these representations into account, on 6 April 1995 the Commissioner of Inland Revenue assessed the Taxpayer to additional tax by way of penalty under section 82A of IRO in the sum of \$4,600.
7. On 13 April 1995 the Taxpayer gave notice of appeal to the Board of Review against this penalty tax assessment.

At the time and date fixed for the hearing of the appeal the Taxpayer duly appeared before the Board in person. He said that he had been working for the civil service for three years and was still employed by the Hong Kong Government. He said that when he filled in his tax return he had relied upon an employer's tax return form given to him by the Hong Kong Government which did not include the contract gratuity payment. He said that he had not received a second notification from the Hong Kong Government which set out details of the contract gratuity as the Hong Kong Government alleged. He said that he had completed his tax return form in accordance with the information provided to him by the Hong Kong Government in the first notification. He said that he thought that the gratuity in respect of his employment contract need not be included in the tax return form because he did not expect it would be paid before 31 March 1994 because the Government was usually late in making payments of sums other than his regular salary.

He said that the cause of his mistake was because of a mistake made by the Hong Kong Government Treasury.

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The representative for the Commissioner submitted that there was no reasonable excuse for the Taxpayer having failed to include the contract gratuity in his tax return form. He pointed out that a penalty of about only 10% of the amount of tax which would have been undercharged had the return been accepted as correct was not excessive and submitted that the appeal should be dismissed.

We find that this appeal has no merit. A penalty of approximately 10% of the amount of tax involved is not excessive in such circumstances. We accept that the Taxpayer was careless and did not intend to evade tax. However we have little sympathy for his attempt to place all of the blame on his employer. He said that he did not receive the second employer's tax return from the Hong Kong Government which provided particulars of the contract gratuity. We have no way of telling whether or not this is correct. Assuming that it is correct it does not explain why the Taxpayer failed to include in his tax return a very significant sum of money which he had received only shortly before he completed and filed his tax return.

We particularly note that the Taxpayer put forward as an excuse the statement that he thought that the gratuity should not be included until the following year because the Government was often late in making payment of money due to him. What the Taxpayer forgot was that he had actually received payment of this sum of \$307,140 during the month of March 1994, just two or three months before he completed his tax return. It was very careless of him to forget about such a substantial sum of money which had been paid to him in the preceding year and which he could not possibly have believed would not be paid by the Hong Kong Government until the following taxation year.

As stated above this appeal has no merit. We dismiss the appeal and confirm the assessment against which the Taxpayer has appealed.