

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D54/93

Penalty tax – salaries taxpayer – omission of part of income – section 82A of the Inland Revenue Ordinance.

Panel: Robert Wei Wen Nam QC (chairman), Philip Fu Yuen Ko and Peter F Rhodes.

Date of hearing: 14 December 1993.

Date of decision: 1 February 1994.

The taxpayer appealed against a penalty imposed upon him for failing to include the whole of his taxable income in his salaries tax return. A penalty equal to 10% of the tax undercharged was imposed. The taxpayer submitted that it was excessive.

Held:

The penalty of 10% of the tax undercharged was not excessive. The efficient collection of tax depends on taxpayers filing correct tax returns. If they are careless they should be penalized.

Appeal dismissed.

Tang Chan Wai Yee for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. The Taxpayer is appealing against the additional tax assessment for the year of assessment 1991/92 raised on him by way of penalty under section 82A of the Inland Revenue Ordinance with respect to the omission of part of his income from his salaries tax return submitted for that year.

2. The following facts are not in dispute. From September 1983 to October 1987 the Taxpayer was a full-time employee in an academic field; at the same time he also got a part-time job in the same field. Thereafter he had a job as a director of a limited company. He resumed his previous career in the academic field in 1990. The Taxpayer had been filing salaries tax returns since the year of assessment 1982/83. In the year of assessment 1991/92, the Taxpayer had two full-time employments both in academic field, one after the other, and also a part-time employment; however, in his salaries tax return for that year he left out his income from the first full-time employment and the part-time one, reporting only

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the income from the second full-time employment. The omissions were discovered by the assessor upon an examination of the employer's returns for the year of assessment 1991/92. The total amount omitted was \$85,614, equivalent to 42% of his total income for that year.

3. On 28 May 1993 the Deputy Commissioner of Inland Revenue served notice on the Taxpayer under section 82A(4) that he proposed to assess the Taxpayer to additional tax in respect of the year of assessment 1991/92 and that the Taxpayer had the right to make written representations before the assessment was made.

4. On 11 June 1993 the Taxpayer submitted his written representations.

5. On 14 July 1993 the Deputy Commissioner, after having considered the Taxpayer's representations, assessed him to additional tax in the sum of \$2,100.

6. The Taxpayer appealed against the assessment. In his notice of appeal, he stated that as a matter of fact, the Revenue had successfully collected his salaries tax and that therefore he was asking the Board of Review for a fair hearing. For other grounds of appeal he relied on his written representations to the Deputy Commissioner (a copy of which was enclosed with the notice of appeal) which were as follows:

'I would like to take this opportunity to explain my wrongdoing during this particular period as follows:

- (1) It was the first time for me to start a new assignment with [X] academic institution in September 1990. I forgot the routine procedure for filing my salaries tax for many years since I left my previous job in this field 1987.
- (2) My mother passed away in 1990 after five long years of suffering from cancer. It had created me lots of problems as I was the only one here to take care the business and thus I might have overlooked this matter.
- (3) Again, working with the [Y] academic institution in 1991 was my first experience and I did not realise the income should be included as part of my salaries tax.

In general, I believe that I am a law-abiding citizen in which my past taxes record reflected that I always paid my salaries tax on time. I should deserve your kind attention to this matter as the mistake I had created had no intention to evade taxes. Once again, thanking you very much for letting me know and I am certain that this sort of things will not happen again.'

7. A penalty assessment may be contested as to liability or quantum, usually by contending that there was a reasonable excuse or that the assessment was excessive having regard to the circumstances of the case.

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8. To deal first of all with the ground stated in the notice of appeal, the fact that the Revenue were able to discover and recover the omitted income through examining the employer's returns does not in our view excuse or mitigate the omissions. If the employers had taken the same approach and had thereby defaulted in reporting the Taxpayer's remuneration, the result would have been that the Revenue would have received no information about the omitted income. It is as much the duty of a taxpayer to report his income correctly as it is the duty of his employer to report his remuneration correctly; a default in the performance of either duty is liable to be sanctioned under section 82A.

9. Moving on to the written representations which were treated as part of the Taxpayer's statement of grounds, we note that the Taxpayer admitted that the omissions were a 'wrongdoing'; in other words, he was saying that the assessment was excessive having regard to the existence of mitigating factors. Having considered the three sub-paragraphs (see paragraph 6 above), we have not been able to find any mitigating factor:

Sub-paragraph (1) In the interim years between 1987 and September 1990, the Taxpayer was employed as a director of a limited company and duly returned his income to the Revenue. We cannot accept that he could have forgotten the procedure for filing salaries tax returns.

Sub-paragraph (2) In his salaries tax return for the year of assessment 1990/91, that is, the year ending 31 March 1991, he filled in his income from a full-time employment. However, in his return for the year of assessment 1991/92 he omitted his income from the full-time employment which was a continuation of the full-time employment the income from which he had reported in the 1990/91 return. We cannot see why the loss of his mother in 1990 should have caused the omissions in respect of the year of assessment 1991/92 while it did not cause any omission in respect of the year of assessment 1990/91.

Sub-paragraph (3) The representation does not make sense. We fail to see why, because the employment was a new experience, he should have failed to realise that the income should be included in his salaries tax return.

In the concluding paragraph of his written representations, the Taxpayer stated that he had no intent to evade tax. We have to point out that lack of intent to evade tax is not a mitigating factor, while presence of such intent is an aggravating one.

10. The penalty of \$2,100 is equivalent to 10% of the tax which would have been undercharged had it not been detected. Mrs Tang, the Commissioner's representative submitted that it was reasonable. We agree. Needless to say, our conclusion is that it was not excessive. The efficient collection of tax depends on the due performance by taxpayers of their obligation to file correct returns; if they are careless in filling in the returns with the result that the returns are incorrect, they are liable to be penalised.

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11. This appeal is therefore dismissed and the additional tax assessment in question is hereby confirmed.