

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D57/95

Penalty tax – incorrect tax return – salaries tax return forms completed as employer told – whether reasonable excuse.

Panel: William Turnbull (chairman), Lim Ken Y and David A Morris.

Date of hearing: 13 June 1995.

Date of decision: 13 September 1995.

The taxpayer was a salesman in a retail shop and received basic salary, commission, double pay and bonus. He completed salaries tax returns based on incorrect information provided by his employer. The information did not include his commission which was a very significant part of his total emoluments. The taxpayer said that he had not made a mistake on purpose and explained that his financial situation did not enable him to pay the penalty.

Held:

It should have been obvious to the taxpayer that he was not completing his full income in his salaries tax return. In a case of this nature the starting point for assessing penalties was 100% of the amount of tax that would have been undercharged. Yet, the under declaration of the emoluments by the employer to the Inland Revenue Department was one important mitigating fact.

Appeal dismissed.

Leung Chung Kan for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a Taxpayer against a penalty imposed upon him for filing an incorrect tax return. The facts are as follows:

1. The Taxpayer was employed as a salesman in a retail shop. His emoluments included basic salary, commission, double pay and bonus. All his emoluments were paid in cash. The basic salary was fixed and paid at the end of each month. The commission varied according to the gross profit earned from the

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Taxpayer's monthly sales volume and was paid in the middle of the following month. Double pay and bonus was paid before each Lunar New Year.

2. On divers dates the Taxpayer submitted salaries tax returns for the years of assessment 1988/89 to 1992/93 as follows:

Year of Assessment	Salaries Income Per Return \$
1988/89	47,995
1989/90	93,600
1990/91	107,640
1991/92	133,646
1992/93	167,124

3. The assessor raised salaries tax assessments on the Taxpayer in accordance with the salaries tax returns submitted by the Taxpayer.
4. In 1994 the Inland Revenue Department investigated the affairs of the Taxpayer. On 26 October 1994 the Taxpayer was interviewed by the Inland Revenue Department. During that interview the Taxpayer said that the sums included in the salaries tax returns were in accordance with the employers tax returns copies of which had been given to the Taxpayer. He said that he had not kept records of the money paid to him by his employer. When he was shown his salaries tax returns for the years of assessment 1988/89 to 1992/93 the Taxpayer admitted that the salaries income reported by him was incorrect. The investigation officer then showed the Taxpayer a statement which they obtained from the employer. After reading the details the Taxpayer admitted that the income stated therein was correct. On the spot he completed and signed a statement to confirm his correct salaries income for the years of assessment 1988/89 to 1992/93.
5. On 16 November 1994 based on the statements of salaries income confirmed by the Taxpayer additional salaries tax assessments for the years of assessment 1988/89 and 1992/93 were issued to the Taxpayer as follows:

Year of	Total of Assessable
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Assessment	Income \$
1988/89	122,255
1989/90	161,100
1990/91	184,498
1991/92	164,410
1992/93	232,110

6. The following is a comparative table of the assessable income before and after investigation and the amount of tax undercharged in consequence of the Taxpayer's submission of incorrect salaries tax returns:

Year of Assessment	Income Before Investigation \$	Income After Investigation \$	Income Understated \$	Percentage of Income Undercharged	Tax Undercharged \$
1988/89	47,995	122,255	74,260	60.7%	13,722
1989/90	93,600	161,100	67,500	41.9%	16,863
1990/91	107,640	184,498	76,858	41.7%	19,160
1991/92	133,646	164,410	30,764	18.7%	7,691
1992/93	<u>167,124</u>	<u>232,110</u>	<u>64,986</u>	28.0%	<u>13,935</u>
	550,005 =====	864,373 =====	314,368 =====	36.4%	71,371 =====

7. The Commissioner of Inland Revenue was of opinion that the Taxpayer had without reasonable excuse made incorrect salaries tax returns for the years of assessment 1988/89 to 1992/93 inclusive and gave notice to the Taxpayer of his intention to assess additional tax by way of penalty under section 82A of the Inland Revenue Ordinance (the IRO).
8. By letter dated 11 January 1995 the Taxpayer made written submissions to the Commissioner. Having considered and taken into account the representations by the Taxpayer the Commissioner issued on 7 February 1995 penalty tax assessments under section 82A of the IRO for the years of assessment 1988/89 to 1992/93 as follows:

Additional Tax

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Year of Assessment	Tax Undercharged \$	Section 82A Additional Tax \$	as percentage of Tax Undercharged
1988/89	13,722	10,200	74%
1989/90	16,863	12,600	75%
1990/91	19,160	14,000	73%
1991/92	7,691	5,000	65%
1992/93	<u>13,935</u>	<u>8,000</u>	57%
	71,371 =====	49,800 =====	70%

9. By letter dated 18 February 1995 the Taxpayer gave notice of appeal to the Board of Review against the above assessments to additional tax by way of penalty.

At the time and date fixed for the hearing of the appeal the Taxpayer appeared before the Board in person and explained that he had completed the original salaries tax return forms in accordance with what his employer had told him. He explained that he was paid in cash and signed receipts for what he was paid but did not keep any record of what he received. He said that he had not made a mistake on purpose and that he did what the accountant of his employer said he should do. He explained that his financial situation did not enable him to pay the penalty.

It was not necessary for the Board to hear submissions by the representative for the Commissioner to support the assessments under appeal.

This case is quite clear. The Taxpayer was, at best, very negligent. He completed salaries tax returns based on information provided by his employer which failed to include the commission income which he was paid. The commission income received by the Taxpayer was a very significant part of his total emoluments. It should have been obvious to the Taxpayer that he was not completing his full income in his salaries tax return. In a case of this nature the starting point for assessing penalties is 100% of the amount of tax which would have been undercharged, and in this particular case was in fact undercharged. Without any extenuating circumstances the penalty could well be substantially more. However there is one important mitigating fact. This is that apparently the employer, if what the Taxpayer says is correct, had under declared the emoluments paid to the Taxpayer when reporting the income of the Taxpayer to the Inland Revenue Department. It is no doubt because of this mitigating circumstance that the Commissioner has decided to impose penalties of a total of only 70% of the tax undercharged.

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In our opinion the penalties imposed by the Commissioner are not excessive and are reasonable in the circumstances. A taxpayer who blindly follows what someone else has said and with little regard for the accuracy thereof must accept the consequences of such gross negligence. Having said that, it seems to us that the investigative process should have included the employer's records, and in particular the employer's declaration of emolument (that is the 'pink form'), which if done could have shed more light on the Taxpayer's assertions.

For the reasons given this appeal is dismissed and the penalties imposed upon the Taxpayer and against which the Taxpayer has appealed are confirmed.