INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D58/89

Penalty tax – husband and wife – reasonable excuse – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Francis Jerome Law and Winston Lo Yau Lai.

Date of hearing: 20 July 1989.
Date of decision: 4 October 1989.

The Deputy Commissioner imposed two penalty tax assessments upon the taxpayer under section 82A of the Inland Revenue Ordinance. The taxpayer and his wife came to Hong Kong from England having previously lived in Malaysia. The taxpayer had no knowledge of the Hong Kong tax system. The Inland Revenue Department issued a tax return in the name of the wife only which the taxpayer and the wife completed to the best of their ability and made a true and full disclosure of their joint incomes. In the second year in question, the mistakes in issuing a tax return in the name of the wife was perpetuated. The taxpayer thought that he had complied with the tax requirements of Hong Kong and had correctly declared the income of himself and his wife.

Held:

The Deputy Commissioner may not have fully understood the facts of the case when he imposed the penalties. In the course of the hearing of the appeal, it was clear that through no fault of the taxpayer or the Revenue, mistakes had arisen which had caused the taxpayer to believe that he had complied with his requirements under the Inland Revenue Ordinance. In such circumstances, the taxpayer had a reasonable excuse and the two penalty tax assessments should be annulled.

Appeal allowed.

Yu Chun Wah for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a taxpayer against the imposition of additional tax under section 82A.

The facts are as follows:

1. The Taxpayer and his wife were educated in England. They came to Hong Kong in 1983 after they had been married. They both obtained employment when they came to Hong Kong. They had no knowledge of the Hong Kong tax procedures. The Taxpayer had originally come from Malaysia and this was the first time he had lived and worked in Hong Kong.

2. The employer of the wife submitted an employer's tax return to the Inland Revenue Department in which the wife was described as a single person. As a result of this the Inland Revenue Department sent a tax return form to her in her maiden name for completion.

3. The first year was the year of assessment 1983/84. The form sent to the wife in her maiden name was completed by both the Taxpayer and his wife with all details including the Taxpayer's name and that of his wife and was correctly completed showing the Taxpayer's total income and that of his wife. The only errors and mistakes were that he did not claim personal allowances for himself or his wife and both he and his wife signed all the declarations claiming both joint and separate assessment.

4. The tax return for the year of assessment 1983/84 was duly filed with the Inland Revenue Department and the Inland Revenue Department rejected it because it had been signed by the Taxpayer and his wife and not the wife alone. Acting on the instructions or advice of the Inland Revenue Department the Taxpayer's income was deleted and marked 'cancelled', his signature was opaqued and his wife signed the form as if it was a return made by an unmarried person. The Inland Revenue Department informed the Taxpayer and his wife that in due course the Taxpayer would receive a separate tax return form for his own income.

5. In due course the Taxpayer did receive a return form for the year of assessment 1983/84 which he duly completed and returned to the Inland Revenue Department. In this second tax return form the Taxpayer provided details of his own income only but not that of his wife which had been separately declared by his wife in her maiden name in the other tax return.

6. The Inland Revenue Department appeared to have accepted the two individual tax returns for 1983/84 because they proceeded to issue one tax assessment in the name of the Taxpayer based on the two returns which they had required the Taxpayer and his wife to complete separately. This assessment on the Taxpayer included both his own and his wife's income.

7. In respect of the next year of assessment, 1984/85, a similar procedure was followed in that the Inland Revenue Department sent two tax return forms, one to the Taxpayer and the other to the wife in her maiden name. Following the procedure of the preceding year but without further reference to the Inland Revenue Department, the Taxpayer completed his tax return in which he provided details of his own income only. With regard to his wife he declared the amount as 'nil' and the wife gave particulars of her income in the separate return form which was sent to her in her maiden name. As in the preceding year the Inland Revenue Department appeared to have accepted the two individual tax returns and issued one tax assessment in the name of the husband covering their joint incomes.

8. In respect of the third year of assessment 1985/86 the Inland Revenue Department sent only one tax return form to the Taxpayer which he completed in the same way as he had completed the previous tax returns for the previous two years, that is, he stated his own income only and stated that the income of his wife as 'nil'. However unknown to the Taxpayer the Inland Revenue Department had decided that it would combine the two tax files of his wife and himself into one file and that with effect from this third year they would not send a separate tax return form to the wife in her maiden name. There may have been a computer generated notification to the wife that the file number for her tax affairs had been changed but no other notification was given to the Taxpayer or his wife. As in previous years the employer of the wife filed notice with the Inland Revenue Department of her income assessable to salaries tax. The assessor issued a tax assessment on the income of the Taxpayer alone as per the return he had filed. An additional assessment was issued to the Taxpayer covering the income of his wife.

9. In respect of the fourth year of assessment 1986/87 the facts and events were similar to the preceding year save that the assessor only issued one assessment covering both the Taxpayer's income as declared in the Taxpayer's return and that of his wife as reported by the employer of the wife.

10. On 5 July 1988 the Deputy Commissioner gave notice to the Taxpayer under the terms of section 82A(4) that he proposed to assess additional tax in respect of the years of assessment 1985/86 and 1986/87 because the Taxpayer had filed incorrect tax returns by omitting his wife's income.

11. On 5 August 1988 the Taxpayer made representations to the Deputy Commissioner. On 1 September 1988 the Deputy Commissioner having considered and taken into account the Taxpayer's representations, assessed the Taxpayer to additional tax under section 82A of the Inland Revenue Ordinance in the sum of $500 for the year of assessment 1985/86 and $1,000 in respect of the year 1986/87.

12. On 17 September 1988 the Taxpayer gave notice of appeal against these two additional section 82A tax assessments.

At the hearing of the appeal the Taxpayer appeared and represented himself. He produced a copy of a note dated 22 January 1985 which had been received from the Inland Revenue Department and which was addressed to his wife in her maiden name and read as follows:

> ‘This salaries tax return is only for [wife in maiden name], a separate return will be issued to [the Taxpayer] later. Would you please delete all the signatures in A-1 to A-4 and sign again in A-1 [maiden name].’

This note at first could not be understood by the Board of Review. In the course of hearing the appeal the Board made enquiries of the Taxpayer and the representative for the Commissioner and it was as a result of these enquiries that the full story of the Taxpayer and his tax returns became apparent. Whether the entire situation was known and understood by the Deputy Commissioner when he imposed the two section 82A additional tax assessments on the Taxpayer is not known.

It appears to us that a mistake has been made by the Deputy Commissioner in imposing the section 82A additional assessments. The Taxpayer would appear to us to have had a reasonable excuse for what he did. The first time that he had ever worked in Hong Kong was when he returned from England with his wife. He originally came from Malaysia. He had no knowledge of the Hong Kong tax system. When his wife received a tax return he and she jointly completed it to the best of their ability and made a true and full disclosure of their joint incomes. At this moment in time the Inland Revenue Department should have cancelled the original return which had been erroneously issued to the wife in her maiden name and requested the Taxpayer to complete a new return in his own name or, perhaps could have simply deleted the name of the wife and replaced it with the name of the Taxpayer. We live in an age of computers and systems without which the Inland Revenue Department could not operate. However there are and must be exceptions to any system. Through the fault of no one, the wife was incorrectly asked to complete a tax return in her maiden name. When the error came to the attention of the Inland Revenue Department, the assessor resolved the matter by asking the wife to complete the form so far as her income alone was concerned and to ask the husband to complete a separate form with his income. The assessor could then rationalise the matter internally and ensure that from the information supplied a correct assessment was issued. Our decision in this case in no way criticizes the obviously helpful and practical way in which the assessor handled and resolved the case.

For the second year of assessment the correct procedure should have been followed. Here again there are reasons to excuse the procedure followed because when someone first starts working it is usual for the tax returns and assessments for the first two years to be handled, if not simultaneously, then close together. That is what happened in this

case and led to the second year following the technically incorrect procedures of the first, and to the ultimate confusion which has led to this appeal.

The Taxpayer was entitled to believe that the procedure which he had followed in the first two years was correct and that he should follow a similar procedure in future. Unfortunately that was not the case. Coming from Malaysia and with experience in the United Kingdom the Taxpayer was totally ignorant of the Hong Kong tax systems. He did what was reasonable in the circumstances and that must constitute a reasonable excuse. Perhaps he should have queried why his wife's income was omitted from the first assessment in respect of the third year but we do not consider this to be fatal to his case. Likewise, in a perfect world, the Taxpayer would not have omitted his wife's income or declared it as nil but would have restated what she had already put in her own separate return. However it is not unreasonable to do as he did. Few people would 'double declare' the same income for obvious reasons. A double declaration may well lead to payment of double tax.

For the reasons given we allow this appeal and order that the two additional assessments appealed against be annulled.