

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D61/93

Salaries tax – failure to return full amount of income assessable to salaries tax – section 82A of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Gordon Macwhinnie and E M I Packwood.

Date of hearing: 5 January 1994.

Date of decision: 24 February 1994.

The taxpayer failed to include a substantial part of his assessable income in his salaries tax return. The Commissioner imposed a penalty of \$2,000 on the taxpayer for this omission.

Held:

The appeal was dismissed. The taxpayer had no reasonable excuse. The penalty of \$2,000 was a token penalty and was not excessive.

Appeal dismissed.

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

Decision:

1. THE SUBJECT MATTER OF THE APPEAL

The Taxpayer appealed against an assessment to additional (salaries) tax of \$2,000 pursuant to section 82A of the Inland Revenue Ordinance ('the Ordinance') with respect to the year of assessment 1991/92 ('the relevant year'). This assessment was raised by the Commissioner on 5 August 1993 subsequent to the service of a notice pursuant to section 82A(4) of the Ordinance dated 13 May 1993.

2. THE FACTS

The following facts were not in dispute.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- 2.1 From the first day of the relevant year, namely 1 April 1991, until 2 December 1991 the Taxpayer had been employed. On 2 December 1991 he reached retirement age and has retired. On 31 December 1991 his employers lodged a notification under section 52(5) of the Ordinance reporting that the Taxpayer was to cease to be employed and reported that for the period 1 April to 2 December 1991 he had received salary/wages totalling \$110,179. This notification also reported that on his retirement the Taxpayer had been paid \$71,046 pursuant to an unapproved retirement scheme.
- 2.2 From 16 December 1991 to the end of the relevant year, namely 31 March 1992, the Taxpayer was employed by another company. On 30 April 1992 this company reported that he had been paid salary totalling \$21,097 during this period.
- 2.3 On 11 June 1992 the Taxpayer completed and returned his salaries tax return for the relevant year. In this return he reported income of \$74,640 from his principal employment, namely the company referred to in sub-paragraph 2.1 above.
- 2.4 On 4 January 1993 the assessor raised an assessment for the relevant year as follows:

Principal Income	\$181,225
Other Income	<u>21,097</u>
Total Assessable Income	<u>\$202,322</u>
Tax thereon	<u>\$20,680</u>

- 2.5 The 'Principal Income' was that reported by the employer referred to in sub-paragraph 2.1 above. The 'Other Income' was that reported by the employer referred to in sub-paragraph 2.2 above.
- 2.6 On 13 May 1993 a notice under section 82A(4) of the Ordinance was served on the Taxpayer stating that it was proposed to assess him to additional tax because of his understatement or omission of taxable income from his return.
- 2.7 On 5 August 1993 an assessment to additional tax of \$2,000 was served on the Taxpayer.
- 2.8 The Taxpayer appealed against this additional assessment.

3. THE CASE FOR THE TAXPAYER

The Taxpayer appeared in person. His case may be summarised as follows:

INLAND REVENUE BOARD OF REVIEW DECISIONS

3.1 Evidence-in-chief:

3.1.1 It was only when the Revenue notified him of the tax he had to pay that he realised that reports (namely those referred to in sub-paragraph 2.1 and 2.2 above) had been made to the Revenue and of which he had been unaware.

3.1.2 He had then sent a letter to the Revenue explaining that that was why he had not reported the income. He had not attempted to evade tax. Put simply, he had not been informed of the tax he had to pay on his income from his employers.

3.1.3 The fact that he accepted the matter was serious was established by the fact that when he learned that his original letter of explanation had not been received by the Revenue he sent another copy by registered mail.

3.1.4 In the past he had always paid his tax. He had done all that was required of him and there was no reason why a penalty should be imposed on him.

3.2 Questions from the Board:

In reply to questions from the Board the Taxpayer stated that:

3.2.1 He was paid by auto-pay into a savings account and his pass book was updated regularly.

3.2.2 The pass book only recorded his monthly salary.

3.2.3 Neither he nor his wife were able to read.

3.2.4 All of his children lived overseas.

3.2.5 He was too proud to ask others to assist him to complete a tax return.

3.2.6 He was asking the Board to be sympathetic.

3.3 Cross-examination:

There were no questions from the Revenue.

4. THE CASE FOR THE REVENUE

4.1 The Taxpayer had:

4.1.1 Understated his income, namely the salary and payment under the unapproved Retirement Benefits Scheme, from the employer referred to in sub-paragraph 2.1 above by \$105,000; and

INLAND REVENUE BOARD OF REVIEW DECISIONS

- 4.1.2 Not reported any of the income from the employers referred to in sub-paragraph 2.2 above.
- 4.2 The Revenue did not accept that he did not read. For several years he had completed his tax returns personally and all letters from him were in handwritten characters. The Revenue did not accept that he was unable to read the guidance notes provided for the completion of a salaries tax return and, in any event, there was a telephone number provided for those who questions with respect to the information required in a tax return.
- 4.3 The Revenue did not accept his statement that he took the matter seriously, at least prior to his receipt of the notice referred to in paragraph 1 above. The assessment was raised in January 1993 and, apparently, the Taxpayer had made no enquiries of his employers.
- 4.4 He claimed that he had not received copies of the notifications referred to in sub-paragraphs 2.1 and 2.2 above. Whether this was or was not true was of no assistance to him. It is an employee's obligation to complete a return correctly and an employer's omission to supply a copy of a notification did not alter this position.
- 4.5 He had understated his taxable income by \$127,682. The Commissioner had imposed a penalty of \$2,000. This was 10% of the tax which would have been undercharged because of the understatement in the return or 1.5% of the taxable income omitted. The penalty was in no way unreasonable.

5. REPLY OF THE TAXPAYER

- 5.1 That his first wife, who had died in 1988 or 1989, had been a teacher and had completed forms such as his annual salaries tax return for him. He signed after she had completed it. Her English was better than his. Because of that he did not know much about tax. All he really knew was that he had to pay tax.
- 5.2 If he needed to write a letter a third party prepared this for him and he then copied it out himself.
- 5.3 His remuneration from both employers had been paid into his savings account by auto-pay.
- 5.4 His retirement benefit was from an unapproved scheme.
- 5.5 As he had not been supplied with copies of the notifications lodged by his employers he was innocent.

6. REASONS FOR THE DECISION

INLAND REVENUE BOARD OF REVIEW DECISIONS

- 6.1 Section 82B of the Ordinance provides that the taxpayer who appeals against an assessment to additional tax is entitled to argue that:
- 6.1.1 He is not liable to additional tax;
- 6.1.2 The amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A;
- 6.1.3 The amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.
- 6.2 In the case of an incorrect return, section 82A(e)(i) limits the additional tax which may be levied to three times the tax which would not have been recovered if the return had been accepted as correct.
- 6.3 In this appeal the Board accepts that the Taxpayer did not suggest the additional assessment exceeded the amount for which he was liable under section 82A but that he was innocent and/or subjected to an assessment which, in the circumstances, was excessive.
- 6.4 As to innocence:
- The Board is satisfied that the Taxpayer is to be deemed to have been fully aware of the sums received by him during the relevant year. All income was paid into his savings account by auto-pay and the Board assumes that he checked his savings account regularly, at least to be satisfied that he had been duly and correctly paid. Had he taken care to ensure that this return was correct he could have verified any actual or potential lack of understanding on his part by enquiry of the employers. He made no suggestion that he had done so and had been misled.
- 6.5 As to an excessive assessment:
- 6.5.1 The Taxpayer drew no facts to the attention of the Board which would justify such a conclusion. Had, for example, the omission been the sum received from the unapproved Retirement Benefits Scheme, a suggestion that he had been under the mistaken belief that this sum was not taxable might have had some credibility. However, the factual position was as submitted by the Revenue, refer paragraph 4.1 above.
- 6.5.2 Factually, the facts relied on by the Taxpayer were that he claimed to be unable to read the explanatory notes and to have been too proud to seek assistance from any third party. However, he appears to have been prepared to allow third parties to prepare letters for him to copy. This information requires the Board to accept that, on the one hand, he is unable to read but, on the other hand, he is well able to copy Chinese characters. The Board is obliged to question this

INLAND REVENUE BOARD OF REVIEW DECISIONS

explanation. If, on the one hand, he was prepared to confide in others for the purpose of writing a letter, why, on the other hand, would he not be prepared to ask what information was required by each part of a salaries tax return? A letter requires the provision of the information to be included and this information could be personal and, accordingly, sensitive. Asking for assistance with respect to a salaries tax return merely requires the identification of and the place at which the information is to be inserted in a form, as opposed to disclosing the detailed figures to be inserted. The Board finds an inconsistency in this explanation and, accordingly, it is rejected.

6.5.3 The suggestion that the Taxpayer was placed at a disadvantage by not having been provided by his employers with the copies of the returns referred to in sub-paragraphs 2.1 and 2.2 above does not alter the position. The Taxpayer had in his possession a savings account pass book whereby he was in a position to verify all income he had received for the purpose of completing his return. If he failed to do so, in which event the only alternative explanation is that he relied on his memory, he is the author of his own misfortune. That does not make the assessment excessive.

6.6 For some time the Board has taken the view that the appropriate penalty for cases in which there has been either a consistent failure on the part of a taxpayer to lodge returns or a consistent failure to lodge a correct return is an amount equal to the tax which would have been unpaid had the failure gone undetected. That level of penalty is 33.3% of the maximum penalty permitted by section 82A. Whilst this would appear to have been the only failure of the Taxpayer to file a correct return, the amount of income omitted represents a considerable proportion of the Taxpayer's taxable income in the relevant year. By assessing the quantum of the penalty at \$2,000 the Commissioner would appear to have recognised that this was the first failure and to have taken a lenient view notwithstanding the actual percentage of the income omitted.

6.7 The penalty assessed is in the opinion of the Board a token penalty and the Taxpayer has drawn no factor to the attention of the Board which would justify any interference in the quantum thereof.

7. DECISION

For the reasons given, this appeal is dismissed.