

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D62/96

**Penalty tax** – incorrect salaries tax returns for two successive years – incorrectness caused by a continuing cavalier attitude – whether 25% of the amount of tax undercharged excessive in respect of the first year.

Panel: Robert Wei Wen Nam QC (chairman), John Peter Victor Challen and Benjamin Kwok Chi Bun.

Date of hearing: 15 July 1996.

Date of decision: 8 November 1996.

The taxpayer made incorrect salaries tax returns for 1993/94 and 1994/95 by omitting part of his income. An additional tax assessment equal to 25% of the tax which would have been undercharged if the return had been accepted as correct was raised for 1993/94 and is the subject of this appeal. No additional tax assessment has been raised for 1994/95. The Board found, having heard the taxpayer in evidence, that the incorrectness of the returns was caused by a continuing cavalier attitude.

Held:

The continuing cavalier attitude was a factor to be taken into account when considering the quantum of the penalty in respect of the 1993/94 assessment. Having regard to the circumstances, the assessment is not excessive.

**Appeal dismissed.**

Yip Sham Yin Har for the Commissioner of Inland Revenue.  
Taxpayer in person.

**Decision:**

**Facts**

1. This is an appeal by an individual against the additional tax assessment raised on him by the Commissioner of Inland Revenue (the CIR) under section 82A of the Inland Revenue Ordinance (the IRO) for the year of assessment 1993/94. The CIR is of the opinion that the Taxpayer has, without reasonable excuse, made an incorrect return for that year by omitting part of his income which accrued to him during that year.

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2. In his return for the year of assessment 1993/94, the Taxpayer declared a total income of \$144,000 from his employment with S Ltd during the period from 1 August 1993 to 31 March 1994.

3. Relevant employer's returns revealed that during the year of assessment 1993/94 the Taxpayer had a total income of \$234,500 made up as follows:

<b>Name of Employer</b>	<b>Period of Employment</b>	<b>Amount of Income</b> \$
D Ltd	1-4-1993 to 30-8-1993	90,500
S Ltd	1-9-1993 to 31-3-1994	<u>144,000</u>
		234,500 =====

4. On 12 December 1994, the assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1993/94 showing assessable income of \$234,500 with tax payable thereon of \$32,825 and balance of total tax payable thereon of \$39,875.

5. No objection was lodged against the salaries tax assessment for the year of assessment 1993/94.

6. On 22 May 1995, the CIR gave notice to the Taxpayer under section 82A of the IRO that he proposed to assess the Taxpayer to additional tax in respect of the year of assessment 1993/94 and that the Taxpayer had the right to submit written representations to the CIR with regard to the proposed assessment of additional tax.

7. By a letter dated 1 June 1995, the Taxpayer submitted written representations to the CIR which read as follows:

'I have left D Ltd and joined another company for several months when I received tax return form. I might have forgotten to complete full details by omitting the income from D Ltd.

After I received the notice of demand for tax, I found the tax amount has included the income from D Ltd. I thought I had given you correct details therefore did not make a further return and paid full amount of tax as per schedule.

Regret if this has caused you any inconvenience. Please understand I have no intention to evade from paying tax. As you can see, I have paid correct amount of tax and have a clean record in the past.'

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8. On 3 November 1995, the CIR issued a notice of assessment of additional tax under section 82A for the year of assessment 1993/94 in the sum of \$5,600.

9. By a letter dated 25 November 1995, the Taxpayer gave notice of appeal to the Board against the additional tax assessment on the following grounds of appeal:

‘(1) I realised I have made a written mistake on my tax return (93-94) but I did fully pay all the whole amount of tax that you have requested including the mistakenly unadvised portion. I have already made full responsibility of what a good citizen should do.

(2) I have sent my written explanation to your department before that was solely a written mistake and didn't mean to get rid of any tax. Please check back my previous record that I never neglect any tax requested and have paid every single dollar in time!

(3) How the penalty amount \$5,600 was made up? Really feel the amount is huge. Will not agree to pay that huge amount as I have fully paid the tax you required in time.

(4) Plus, I don't have the ability to pay this penalty amount because the original tax amount was already loan from a bank. I can prove this to you at any time as this loan is still existing.

(5) I have received a new tax demand note (94-95) in which the chargeable amount is \$46,700!

(6) Starting from the end of November 1995, I was being laid off from my present employer "S Ltd" and I lost the income completely! How can you expect me to pay \$5,600 additional tax!

Based on all above reason, I do hope you can understand my situation and cancel the additional tax demand from me. In the present stage, I have serious financial problem and I will write another letter to your department requesting the holding over of provisional tax and partial payment of the net balance tax. I can tell, I can't get any more loan from either bank for tax payment as I don't have the job, don't have the ability for repayment. Your prompt attention and help would be much appreciated and I am available for any information and proofs required.'

### **Evidence**

10. At the hearing, the Taxpayer appeared in person. He gave evidence as well as acting as his own advocate.

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11. His evidence in chief, which concerned the assessment for the year of assessment 1993/94, was briefly as follows.

11.1 The omission was only an 'incidental' one rather than a wilful attempt to evade tax.

11.2 He got a new job. Maybe because of the switch of jobs he made a mistake in his tax return.

11.3 Even if he had intended to evade tax, he would not have been able to do so because his employer would also have to send in their own tax return.

11.4 When he received the demand for tax, he noticed that the tax chargeable (meaning, we think, the assessable income) already included the income he had omitted.

11.5 He fulfilled the responsibility of a citizen by paying the tax in full and on time. The government did not suffer any loss.

11.6 He has been a taxpayer for eight years and he has never committed such a mistake before.

12. In cross-examination the Taxpayer admitted that he had signed the tax return for the year of assessment 1993/94 and also the tax returns for the years of assessment 1991/92 and 1994/95. All three returns were shown to him and he identified his signature to all three.

### **Statements made by the Taxpayer during submissions**

13. Speaking as an advocate, the Taxpayer stated that:

13.1 When he filled in the tax return, he had already left D Ltd and he did not receive any pink copy of the tax return from D Ltd.

13.2 He did contact D Ltd for relevant information in order to fill in his tax return. They said they would send him the information but he never received any.

13.3 He started working for D Ltd in November 1992 and continued doing so until late July or August 1993.

13.4 He agreed that 'forgetfulness' might not be the right word. He admitted that he had committed a 'mistake of negligence'.

### **Liability to additional tax**

14. We are unable to accept the Taxpayer's explanation of his omission of the income of \$90,500 from D Ltd. He gave two conflicting reasons.

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14.1 In his written representations, he stated that when he received the tax return form, he might have forgotten to complete the full details. Later when he received the notice of demand for tax, he found that the tax amount included the income from D Ltd. He thought that he had given the Inland Revenue Department correct details and therefore did not make a further return but simply paid the full amount of tax (see paragraph 7 above). Those statements suggest that the Taxpayer knew the full details of his income from D Ltd, but did not fill them in for the reasons given.

14.2 In the course of his submissions at the hearing, the Taxpayer stated that he had contacted D Ltd for relevant information in order to fill in his tax return. D Ltd said they would send him the information, but he never received any. Those statements suggest that the Taxpayer did not fill in the income from D Ltd because he did not have information about it (see paragraph 13.2 above).

15. We accept the argument that the omission was not the result of a deliberate attempt to evade tax. Nevertheless we are satisfied that there was no reasonable excuse for the omission. In our view, in completing his tax return, the Taxpayer was fully aware that he was leaving out his income from D Ltd, but he did not care, knowing that his employer would send in the employer's return. He was prepared, and did, pay the full amount of tax on his total income, including the omitted income. One of his main grounds is that the Revenue have suffered no loss from his omission. But that is not the point. The point is that the Taxpayer failed to make a true, correct and complete return of his total income as he declared and promised in his tax return. That is a duty of every taxpayer upon the due performance of which the success of our taxation system depends. The employee cannot pass the buck to the employer and say, 'What is the point of me reporting my income? My employer does it anyway.' Our taxation system would collapse if the employer took the same attitude and left it to the employee to do the reporting. The law requires both the employer and employee to file their returns to ensure that the Revenue obtain the correct information. For those reasons, we are of the view that the Taxpayer is liable to be assessed to additional tax under section 82A. The question that remains is whether the assessment under appeal is excessive having regard to the circumstances.

### **Quantum**

16. On the question of quantum, Mrs Yip, the Commissioner's representative, drew the attention of the Board to the Taxpayer's tax returns for the years of assessment 1991/92 and 1994/95 as other instances of omission. She stated that the omissions were revealed by the relevant employer's returns, that assessments to salaries tax were raised on the income as reported by the employers and that tax was paid without any objection. She submitted that the amount of additional tax imposed in this case was reasonable and not excessive in the circumstances.

### **Tax return for 1991/92**

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17. With regard to the tax return for the year of assessment 1991/92, the Taxpayer stated that, because of the long time lapse, he could not say for sure if he really made any mistake. The matter was resolved when Mrs Yip made a concession. She stated that, since no warning letter or notice was issued to the Taxpayer regarding the omission in respect of the year of assessment 1991/92, it would be unfair to treat the omission in respect of the year of assessment 1993/94 as a second offence. That was why, she stated, the Revenue treated the 1993/94 omission as a first offence. In other words, the Revenue were disregarding what had happened in the year of assessment 1991/92. By reason of that concession, the tax return for the year of assessment 1991/92 became irrelevant to this appeal, and we shall say no more about it.

### **Tax return for 1994/95**

18. The Taxpayer's tax return for the year of assessment 1994/95 was completed on 30 May 1995. It furnished details of his income as follows:

<b>1994/95</b>	
Name of employer	S Ltd
Capacity	Sales manager
Period covered	1-4-1994 to 31-3-1995
Amount	\$270,000

However according to the relevant employer's return, the Taxpayer's income for the year of assessment 1994/95 should be \$293,000. A salaries tax assessment was raised on that amount, and a notice of assessment and demand for tax for the year of assessment 1994/95 dated 24 October 1995 was issued to the Taxpayer, showing total assessable income of \$293,000 with total tax payable thereon of \$46,700. The Taxpayer paid the tax without any objection.

19. The Taxpayer's explanation was to the following effect.

19.1 He did not believe he had made any mistake in his tax return for the year of assessment 1994/95.

19.2 Before he submitted his tax return, he had discussed with his employer how he was to calculate his income.

19.3 He did not insist on getting the pink copy of the employer's return. He did ask for it but his employer kept on delaying and never gave him any pink copy throughout the years he had worked for them. He did not want to argue with his employer over these minor details. The deadline was approaching, so he just completed the return according to the

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information he had. He did not know how his employer came up with the amount of \$23,000.

19.4 Until the day of the hearing of this appeal, he did not know that the amount he declared in his return was different from the amount his employer declared.

19.5 When he received the demand note, he saw that there was not a large difference between the 'undercharged amount' (meaning, we think, the amount of total assessable income shown in the notice of assessment and demand for tax) and the amount he had declared. Therefore he paid the tax.

20. We are unable to accept the Taxpayer's explanation.

20.1 If he believed in the correctness of his tax return showing a total income of \$270,000, as he said he did, he should have objected to the assessment which showed a total income of \$293,000. But he did not.

20.2 Instead, the Taxpayer paid the tax payable on the assessment. The reason he gave was that the difference between the two figures was not a large one. We find it hard to believe that the Taxpayer would simply have paid the tax on the total income of \$293,000, which, according to his story, was overstated by \$23,000, particularly at a time when the Taxpayer was apparently going through a period of acute financial embarrassment (see paragraphs (3) to (6) and unnumbered last paragraph in the notice of appeal set out in paragraph 9 above).

20.3 For those reasons, we find that when completing his tax return, the Taxpayer did not care whether the total income he was filling in was correct or not, and that when he received the notice of assessment and demand for tax, he realised that the assessment was correct and that his tax return was incorrect. That is, in our view, why the Taxpayer did not object to the assessment.

### **Tax return for 1993/94**

21. Coming back to the tax return for the year of assessment 1993/94, we find that its incorrectness was caused, not by an isolated lapse, but by a continuing cavalier attitude towards the fulfilment of tax reporting obligations which went on to influence the way the Taxpayer completed his tax return for the year of assessment 1994/95. That is a factor to be taken into account when considering the quantum of the penalty in respect of the year of assessment 1993/94. The additional tax assessment is \$5,600 or 24.75% of the amount of tax which would have been undercharged if the tax return had been accepted as correct. It is not a low rate, but, having regard to the circumstances, we do not think it is excessive either.

### **Impecuniosity**

22. The Taxpayer devoted a considerable portion of the notice of appeal to describing his financial difficulties and resultant inability to pay the additional tax.

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However, impecuniosity is not a mitigating factor. The Taxpayer could apply to the Inland Revenue Department for easy terms of payment, but that is a matter entirely within their discretion. The Board has no jurisdiction over matters of payment.

### **No intention to evade tax**

23. The Taxpayer repeatedly stated that he had no intention to evade tax. We accept that. However, while an intention to evade tax is undoubtedly an aggravating factor, lack of such an intention is not a mitigating factor, because no taxpayer should have it.

### **Approach to assessment**

24. In the course of the hearing, reference was made to the Commissioner's recent practice, in effect since July 1995, whereby the normal rate of penalty is raised to 25% of the amount of tax which would have been undercharged from the previous norm of 10% in cases of understated income. Mrs Yip told us that the rate of 25% applies to cases involving omissions of \$20,000 or over, that for omissions of under \$20,000 but over \$5,000, a warning letter is issued and that for omissions of up to \$5,000 no action is taken. The rationale of the practice was not gone into. That, however, is not important, because Mrs Yip's submission did not centre on any normal rate of tariff; the question she addressed was whether, in all the circumstances of this case, 25% is a reasonable rate. Our answer is yes.

### **Decision**

25. It follows that this appeal is dismissed and that the additional tax assessment under appeal is hereby confirmed.