

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D63/94

Penalty tax – salaries tax – omission to include part of income in salaries tax return – section 82A of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Sydney Leong Siu Wing and William E Mocatta.

Date of hearing: 29 July 1994.

Date of decision: 13 January 1995

The taxpayer filed a salaries tax return in which he omitted part of his income.

Held:

A penalty of 21% of the amount of tax involved was not unreasonable or excessive in the circumstances.

Appeal dismissed

Case referred to:

D62/90, IRBRD, vol 5, 451

Au Ting Yuk 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 tax imposed under section 82A of the Inland Revenue Ordinance ('the IRO') as a result of his failure to disclose his full taxable emoluments for the year of assessment 1992/93 ('the relevant year').

2. THE FACTS

The facts, which were not in dispute, were:

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- 2.1 In his salaries tax return ('the return') for the relevant year the Taxpayer declared the sum of \$99,925 as his income from his principal employers [named].
- 2.2 An examination of employers' returns by the assessor revealed that the Taxpayer had an additional source of income during the relevant year totalling \$37,128.
- 2.3 On 10 September 1993 the assessor raised an assessment on the Taxpayer for the relevant year based on a total assessable income of \$137,053 being the total of the amount returned by the Taxpayer, see sub-paragraph 2.1 above, and the amount ascertained by the assessor from his scrutiny of employers' returns, see sub-paragraph 2.2 above.
- 2.4 On 7 February 1994 the Commissioner issued a notice under section 82A(4) of the IRO in which the Taxpayer was notified that he proposed to assess the Taxpayer to additional tax by way of penalty in respect of the relevant year.
- 2.5 On 17 February 1994 the Taxpayer made written representations to the Commissioner pursuant to section 82A(4)(a).
- 2.6 On 30 March 1994 the Commissioner, having considered and taken into account the representations made by the Taxpayer issued a notice of assessment for additional tax in respect of the relevant year in the sum of \$1,850.
- 2.7 On 25 April 1994 the Taxpayer gave notice of appeal.

3. THE CASE FOR THE TAXPAYER

The Taxpayer appeared in person. He is a married man, having been married in Country A more than twenty years previously, with a daughter over the age of twenty. He came to Hong Kong in 1972. His wife and daughter both live in Country A. His submission may be summarised as follows:

- 3.1 During the relevant year his principal employment was as a security guard, the employer being the corporation which paid him the salary referred to in sub-paragraph 2.1 above. During a part of the relevant year, that is until a date in February 1993, he also had a part-time job with the employer whose employer's return was identified by the assessor, refer sub-paragraph 2.2 above.
- 3.2 When he left his part-time employment he spoke on the telephone to a person in the employer's accounts department he was unable to identify and requested a copy of the employer's return and was told the form would be issued.
- 3.3 He completed and delivered the return to the Inland Revenue Department personally. Subsequently, in June 1993 not 25 April 1993 as stated in his

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notice and grounds of appeal, he went again to the Inland Revenue Department to ask for a tax return to enable him to report the salary he had received from his part-time employment. The Inland Revenue Department was on 21/F of its new building in Wanchai. The person he saw was surnamed [individual named] also on 21/F. He was assured by that individual that a verbal report was all that was necessary and, armed with that assurance, he left.

3.4 The exact words spoken by the individual were:

‘O.K. We will add it. It’s O.K.’

3.5 He received the assessment but had not brought it to the appeal.

3.6 He received the Commissioner’s letter of 7 February 1994 and he replied on 17 February 1994. He had also received the assessment to additional tax by way of penalty.

3.7 Thereafter, he had lodged a complaint with the Revenue’s complaints section and was told that the Revenue denied that he had made any personal visit. At this time he was on night shift and busy. He was now satisfied that the date he gave was incorrect.

3.8 He was applying for the penalty to be annulled. On the basis that he had been assured that he was not required to make a written return of the income from his part-time employment. Additionally, because of financial difficulties he was unable to afford to pay the penalty.

4. THE CASE FOR THE REVENUE

The submission for the Revenue may be summarised as follows:

4.1 The appeal was against the penalty assessment imposed by the Commissioner upon the Taxpayer under section 82A of the IRO with respect to an omission from his salaries tax return for the relevant year of his income from his part-time employment. The Taxpayer had written a considerable number of letters and he had been interviewed on more than one occasion by the Revenue. Copies of his letters and of the notes of his interviews had been provided to the Board and would be referred to during the course of the submission.

4.2 In the notice of appeal dated 25 April 1994, the Taxpayer has essentially put forward two grounds of appeal namely:

4.2.1 That he received no employer’s return after leaving his part-time employer; and;

4.2.2 That on 25 April 1993 he called at the Inland Revenue Department to ask for a tax return for the purpose of reporting that income and that when he asked for the tax return a male staff member who claimed to be an assessor informed him

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there was no such need as the income concerned would be included by the Revenue who would add it to the salaries tax demand note.

4.3 The first ground of appeal:

It is each taxpayer's personal responsibility to declare all sources of income in his salaries tax return. The copy of the employer's return issued to a taxpayer is merely for his cross check purposes. In this case the employer's return for the relevant year was completed by the part-time employer on 15 March 1993. Therefore the amount of the Taxpayer's income of \$37,128 from that employer was already computed and ascertained by that employer on that date. There should not have been any difficulty for that employer to advise the Taxpayer of the amount of his income if he had requested the information. As the Taxpayer did not even disclose in the return that he had had a source of his income from that employer the appeal could not be allowed on the first ground of appeal.

4.4 The second ground of appeal:

4.4.1 As the Board could verify from the copy supplied to it, the return was only issued by the Revenue on 3 May 1993 and submitted by the Taxpayer on 21 June 1993. The Taxpayer could have declared the income from the part-time employer when completing the return. Additionally, if, in truth, he had called at the Inland Revenue Department on 25 April 1993 to disclose the income from that employer one is compelled to ask why he did not mention that incident in his response to the notice under section 82A(4) and during his various interviews with officers of the Revenue.

4.4.2 There are many discrepancies or inconsistencies in the Taxpayer's statements and his various letters, including:

4.4.2.1 In his response to the notice under section 82A(4), he advised that his wages were computed on an hourly basis and that he worked irregular hours. Without having any record he was unable to make a rough estimate of this income. He even questioned how the figure of \$37,128 was arrived at. In view of his allegation that he lacked records to make a rough estimate, one is compelled to question how, as he now alleges, he was in a position on 25 April 1993 to report the figure of \$37,128 to the Revenue.

4.4.2.2 His statement in his letter dated 20 May 1994 to the effect that he sent back the return in April 1993 and later went to the Inland Revenue Department to report the income from his part-time employer is patently incompatible with the fact that the return for the relevant year had not even been issued at the time of his alleged visit to the Inland Revenue Department on 25 April 1993.

4.4.2.3 In his letters dated 25 April 1994 and 9 May 1994 he alleged that he called at Inland Revenue Department on 25 April 1993 to ask for a tax return for the purpose of reporting the income of \$37,128. His allegation was rebutted both during an interview on 23 May 1994 and in the letter issued by the chief

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assessor who advised him that 25 April 1993 was a Sunday. It was only upon this challenge as to the exact date of the Taxpayer's alleged visit that he subsequently amended the date of his alleged visit from 25 April 1993 to June 1993 in his subsequent letters dated 25 May 1994 and 13 June 1994.

4.4.2.4 In his letters dated 20 May 1994 and 25 May 1994, the Taxpayer alleged that he had reported the omitted income to a female officer. This is in contradiction to his statement in his letter of 13 June 1994 wherein he alleged that it was a male officer, named, to whom he verbally reported the omitted income and who accepted his verbal report.

4.4.2.5 It was Revenue's practice when a Revenue officer is informed by a taxpayer who has omitted to declare a source of income in his return for the officer to give a general reply advising the taxpayer to report the omission in writing and that he is not permitted to accept a verbal report. On 10 June 1994, the Taxpayer came to the Inland Revenue Department and was interviewed by Mr X [individual named].

4.4.2.6 In view of the foregoing discrepancies and inconsistencies the authenticity of the Taxpayer's alleged visit to the Inland Revenue Department to report verbally the omission of the income from his part-time employer has to be in doubt. Further, the register of personal callers for the months of April, May and June 1993 has been thoroughly checked and there is no record of the Taxpayer's alleged visit to the Inland Revenue Department during those months.

It was submitted that the foregoing rebutted the second ground of appeal and the Board was requested to find that no reasonable excuses had been offered for the omission whereby the Taxpayer was liable to additional tax under section 82A.

4.5 The duty to complete a true and correct salaries tax return falls solely on the taxpayer and by signing his salaries tax return the taxpayer declares that to the best of his knowledge and belief he has truly and correctly disclosed the whole of his income arising in or derived from Hong Kong from offices of employment and pensions during the year to which the return relates. If a taxpayer defaults in the performance of this duty by omitting part of his total income he is liable to be sanctioned under section 82A.

4.6 As regards the quantum of the additional tax; this amounted to approximately 1.34% of the Taxpayer's total assessable income for the year or 4.98% of the income omitted. It represented 21% of the amount of tax that would have been undercharged in consequence of the incorrect return which could not be regarded as unreasonable and/or excessive.

5. **REPLY BY THE TAXPAYER**

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He noted that there was no record of him having attended at the Inland Revenue Department. He stated that he saw the individual referred to in sub-paragraph 4.4.2.4 above who told him at that time that he had been seen by him on one previous occasion.

6. EVIDENCE FOR THE REVENUE

The Revenue called one witness, namely the individual referred to in sub-paragraph 4.4.2.4 above, who was a taxation officer with the Revenue.

6.1 His evidence in chief was to the following effect:

6.1.1 He had been on counter duty in the period April to June 1993 where his duties included advising taxpayers on procedures. It is standard procedure to advise these individuals who say they have omitted income to report the omission in writing.

6.1.2 The name of every visitor was recorded.

6.1.3 Because of the number of people seen during each day he would be unable to say whether or not he had seen a particular individual.

6.2 Under cross-examination:

6.2.1 He was unable to say whether or not he had interviewed the Taxpayer during 1993.

6.2.2 He confirmed that he had interviewed him on 10 June 1994 and a note of the interview had been provided to the Board.

7. REASONS FOR THE DECISION

7.1 Sections 82A, 82B and 68(4) of the IRO.

7.1.1 In synopsis, pursuant to section 82A of the IRO any person who, without reasonable excuse, makes an incorrect return by omitting or understanding anything in respect of which he is required by the IRO to make a return and who is not prosecuted is liable to be assessed to additional tax in an amount not exceeding three times the tax which has been undercharged in consequence of such failure, refer sub-sections (1)(a) and (e).

7.1.2 Under section 82B any person who is assessed to additional tax under section 82A may submit to the Board that the quantum of the additional tax 'is excessive having regard to the circumstances', refer sub-section 82B(2)(c).

7.1.3 Section 68(4) of the IRO places the onus of proof in all appeals on the taxpayer.

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- 7.2 It was not in dispute that the Taxpayer omitted certain income from his return for the relevant year whereby the only questions for the Board to consider are:
- 7.2.1 Whether the explanation tendered to the Board constitutes a reasonable excuse for such failure?
- 7.2.2 Whether, in the circumstances, the penalty assessed was excessive?
- 7.3 The statement that a verbal report had been accepted by the Revenue whereby confirming the omission in writing was unnecessary.

The Board regrets to have to say that it is unable to attach any weight to the Taxpayer's version of the events. There are so many inconsistencies between his version of the events from time to time as well as a comprehensive lack of corroboration from his own letters to the Revenue as to leave the Board with no alternative but to accept that his version of the events has to be taken as entirely self-serving and, therefore, unreliable. The Taxpayer has failed to establish a reasonable excuse for his omission of the earnings from his part-time employment from the return.

- 7.4 Whether or not the assessed penalty was, in the circumstances, excessive?
- 7.4.1 The maximum penalty could have been three times the amount of tax that would have been undercharged in consequence of the incorrect return had the omission gone undetected. Factually, the Commissioner has imposed a penalty which is about 21% of the quantum of penalty which the Board has frequently stated should be accepted as the norm in cases in which there are no aggravating circumstances, for example D62/90, IRBRD, vol 5, 451, where the Board spelt out the norm at page 454:

'As to the quantum of an additional tax assessment, it has been the view of these Boards that 100% of the tax undercharged should be taken as the norm, that is, the measure for a case where there are neither aggravating nor mitigating circumstances;'

Whilst it is open to suggestion that the Taxpayer's attitude has been aggravating and undeserving of sympathetic consideration the Commissioner would appear to have been sympathetic and the Board sees no reason for interfering with the quantum decided upon by him.

- 7.4.2 Whilst the Taxpayer has pleaded that he is unable to meet the penalty, that is not a matter for the Board. His sole resource is to endeavour to persuade the Revenue to accept payment of the penalty by instalments.

8. DECISION

For the reasons given, the Taxpayer has failed to satisfy the Board that it had a reasonable excuse for filing an incorrect return or that the penalty assessed was,

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in the circumstances, excessive. Accordingly, this appeal fails and is dismissed.