

**Case No. D64/05**

**Penalty tax** – incorrect tax return – omission to furnish details of income from employment – whether penalty tax excessive – section 82A of the Inland Revenue Ordinance ('IRO').

Panel: Andrew J Halkyard (chairman), Krishnan Arjunan and Peter F T Roberts.

Date of hearing: 7 December 2005.

Date of decision: 21 December 2005.

The appellant omitted to return her employment income from Bank A in her 2003/04 tax return. The Deputy Commissioner assessed the appellant to penalty tax of 7.54% of the amount of tax undercharged.

The appellant contended that the penalty tax should be reduced to an interest charge as compensation for her late tax payment only. There had been mitigating factors and her mistake was only inadvertent.

**Held:**

1. Penalty tax was assessed for the appellant's failure to file a true and correct tax return as she had declared and promised therein.
2. The Board accepted that the appellant had only been inadvertent and did not intend to evade tax.
3. For the first simple and inadvertent omission of income by a taxpayer, the normal practice is to assess penalty tax of around 10%.
4. Apparently, mitigating factors of the appellant had been taken into account and the penalty tax of 7.54% is within the norm.

**Appeal dismissed.**

Cases referred to:

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D23/00, IRBRD, vol 15, 316

D8/96, IRBRD, vol 11, 400

D62/96, IRBRD, vol 11, 633

Taxpayer in person.

Lam Fung Shan and Lee Kit Mee May for the Commissioner of Inland Revenue.

**Decision:**

1. This is an appeal under section 82B of the Inland Revenue Ordinance ('IRO') against the additional or penalty tax assessment raised on the Appellant under section 82A for the year of assessment 2003/04.

**The facts**

2. The agreed facts, which we so find, are set out in a document produced to us entitled 'Statement of Facts' (Bundle R1). For convenience, we summarise the key facts as follows.

1. During the year of assessment 2003/04 the Appellant was employed by Bank A as Assistant Vice-President, receiving a salary slightly in excess of \$1,000,000 (plus subsidised accommodation). On 21 May 2004, Bank A filed with the IRD an Employer's Return for 2003/04 disclosing the Appellant's employment status and her income from employment.
2. On 24 May 2004, the IRD received the Appellant's Tax Return – Individuals for 2003/04. That return was incorrect. Specifically, the Appellant omitted to furnish any details of her income from employment. In response to the question in the return 'Did you have any income chargeable to Salaries Tax during the year?' the Appellant answered 'No'. In Part 4.1 of the return, she had written the word 'Bank A' and later crossed it out. She then left blank the relevant space for all other details concerning her employment status and income.
3. On 16 July 2004, the assessor sent the Appellant a notice of assessment for salaries tax for 2003/04 showing an income figure of nil, and a refund of the provisional tax previously charged amounting to \$109,084.
4. On 25 February 2005, the assessor, having discovered the omission of salary and accommodation benefit as per facts 1 and 2, assessed the Appellant to salaries tax for 2003/04 in the amount of \$172,356. The Appellant paid this amount without objection.

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5. On 13 September 2005, the Deputy Commissioner assessed the Appellant to penalty tax in the amount of \$13,000 for the incorrect return. This amount represented 7.54% of the tax which would have been undercharged if the assessor had accepted the return as correct.

**The hearing before us**

3. The Appellant gave sworn evidence and was cross-examined thereon by the Commissioner's representative. We find therefrom the following additional facts.
  6. At the time the Appellant filed her 2003/04 Tax Return with the IRD, she had resigned from Bank A and had just commenced a new employment with Bank B.
  7. In previous years when she completed her tax return, the Appellant sought the assistance of Bank A's Human Resources Department as to how she should fill in the return. She did not seek such assistance in 2003/04, since she had already left Bank A when she completed her return.

**The contentions of both parties**

4. The Appellant accepted that she was careless, and that she did not pay sufficient attention to furnishing a full and proper tax return. Although she agreed that she had no reasonable excuse, she argued that the penalty tax should be reduced to a smaller amount representing an interest charge for late tax payment because:
  - Her mistake was inadvertent and she had no intent to evade tax. Indeed, she only realized her mistake in April 2005 when the Deputy Commissioner indicated that he proposed to assess her to penalty tax;
  - She misunderstood the terms of the tax return because when she ticked the box saying she had no income she thought this meant she had no "other" income chargeable to salaries tax (apart from her Bank A income);
  - She thought her tax return had already been filed by Bank A;
  - Although appreciating that the burden is on the taxpayer, in this case part of the burden should be shared by the IRD, since it contributed to the problem by first refunding tax to her when it knew full details of her employment income from Bank A. Thereafter, it only demanded penalty tax after one year had elapsed; and

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- Hong Kong suffered hard times in 2003/04 facing SARS and other economic difficulties. Looking at all the circumstances in the round, the appropriate amount of penalty tax in this case should be restricted to compensation for late payment of salaries tax.

5. In reply, the Commissioner's representative, Ms Lam Fung-shan, referred us to a number of Board of Review decisions showing that the penalty level assessed of 7.54% was appropriate to this case. Those cases included: D23/00, IRBRD, vol 15, 316 and D8/96, IRBRD, vol 11, 400.

### Analysis

6. We have considered the authorities relied upon by Ms Lam and agree that the penalty tax assessed to the Appellant is well within the established norm supported by previous decisions of the Board of Review in cases involving taxpayers who had omitted salary income from a tax return.

7. Although we accept that the Appellant made an inadvertent mistake, and did not intend to evade tax, the facts found and her evidence before us show a fair degree of lack of care. Although she was familiar with Hong Kong's tax system and had filed returns in prior years, during the year in dispute she simply assumed that Bank A had taken care of her tax filing. It had not. As the Appellant appreciates, an Employer's Return and an Individual Tax Return are two separate matters with separate compliance obligations. And then, when she received a significant refund from the IRD showing nil income, she simply banked the cheque without checking how such a situation could have come about. And then, she raised no query or objection when she was later assessed to the proper and again significant amount of salaries tax.

8. Whether the IRD was wrong in refunding tax to her or was dilatory in pressing its demand for penalty tax is not to the point. As pointed out in many cases, such as D62/96, IRBRD, vol 11, 633: 'The point is that the Taxpayer failed to make a true, correct and complete return of [her] total income as [she] declared and promised in [her] tax return. That is a duty of every taxpayer upon the due performance of which the success of our taxation system depends.' It is trite to reiterate that the penalty tax is assessed for the *Appellant's* failure to file a true and correct tax return.

9. In our view, the penalty tax raised in this case could not be said to be excessive in the circumstances. As shown by Ms Lam, it is the normal practice of the Commissioner to assess, for the first simple and inadvertent omission of income by a taxpayer, penalty tax of around 10%. This has been supported by the Board of Review in many cases. Furthermore, to the extent that mitigating factors exist in this case, such as the Appellant's previous compliance record and her apology and promise to pay better attention to her tax filing obligations in future, these have apparently been taken into account by the Deputy Commissioner since the penalty tax was only

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assessed at \$13,000, or 7.54% of the tax undercharged. As indicated above, this amount is clearly within the norm and is well supported by various Board of Review decisions cited by Ms Lam.

10. On the facts found, we conclude that the Deputy Commissioner's assessment is entirely appropriate and we thus dismiss this appeal.