

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D75/94

**Penalty tax** – salaries tax – omission of part of emoluments – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Victor Hui Chun Fui and Herbert Liang Hin Ying.

Date of hearing: 17 January 1995.

Date of decision: 9 March 1995

The taxpayer filed a tax return in which he omitted the commission income which he had received. The Commissioner imposed a penalty of approximately 10% of the tax which would have been undercharged if the error had not been found out. The taxpayer appealed to the Board of Review.

Held:

The penalty of 10% is not excessive. In dismissing the appeal the Board questioned whether a penalty of approximately 10% was sufficient in such circumstances.

**Appeal dismissed with \$1,000 awarded being costs of the Board.**

Chan Kam Tat for the Commissioner of Inland Revenue.

Taxpayer in person.

### **Decision:**

This is an appeal by a taxpayer against a penalty tax assessment raised under section 82A of the Inland Revenue Ordinance (the IRO) in respect of the filing of an incorrect salaries tax return. The facts are as follows:

1. In his salaries tax return for the year of assessment 1992/93 the Taxpayer reported his income in the amount of \$114,677 only being his salary and bonus. He omitted to include in his salaries tax return a sum of \$147,913 being commission paid to him. (Note: When filling in the total figures of his income the Taxpayer made a clerical error and showed the sum of \$114,677 as being \$114,699)
2. The employer filed a tax return with the Inland Revenue Department in respect of the Taxpayer which showed the salary and bonus paid to the Taxpayer of

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\$114,677 and also revealed the commission of \$147,913 paid to the Taxpayer, making a total of \$262,590.

3. On 4 November 1993, the assessor raised a salaries tax assessment on the Taxpayer for the year of assessment 1992/93 showing total assessable income of \$262,590 with tax payable thereon of \$39,388.
4. The Taxpayer raised no objection to the assessment assessing his total income of \$262,590.
5. On 28 April 1994 the Commissioner of Inland Revenue gave notice to the Taxpayer under section 82A of the IRO that he proposed to assess him to additional tax in respect of the year of assessment 1992/93.
6. No written representation was made by the Taxpayer and on 14 October 1994 the Commissioner of Inland Revenue issued notice of assessment to additional tax under section 82A of the IRO for the year of assessment 1992/93 in the sum of \$3,100.
7. By letter dated 21 October 1994 the Taxpayer appealed to the Board of Review against this assessment to additional tax. In his grounds of appeal the Taxpayer said that he had made a mistake which resulted in his understating his income. He pointed out that the Inland Revenue Department had corrected the mistake when assessing him to salaries tax and he had accepted this assessment to salaries tax without dispute and had paid the tax. He said that he considered the section 82A tax assessment to be punitive and unreasonable.

The Taxpayer appeared before the Board in person and informed the Board that he was not prepared to pay the additional assessment to tax because he considered it to be a penalty and not to be fair. He informed the Board that previously he had carried on business as a consultant with a business registration certificate. Subsequently he was employed by a financial services company with a salary and commission. He included the salary in his salaries tax return but omitted the commission because he intended to include the commission part of his remuneration in his profits tax return. He said that his employer had filed a tax return with the Inland Revenue Department in which they had disclosed both the salary and the commission paid to him. As a result the full amount paid to him had been assessed to salaries tax and accordingly he had not filed a profits tax return.

The representative for the Commissioner pointed out to the Board that it was the obligation of all salaries taxpayers to file true and correct tax returns. In this case the Taxpayer had clearly failed in his obligations under the IRO. The penalty imposed by the Commissioner was \$3,100 which amounted to approximately 10% of the tax which would have been undercharged if the error made by the Taxpayer had not been found out. In the circumstances the representative for the Commissioner submitted that the penalty was not excessive and that there was no reasonable excuse.

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Having heard the parties and having carefully considered the facts and submissions this Board finds that the appeal lodged by the Taxpayer is without any merit whatsoever. All salaries taxpayers are obliged to file true and correct returns of their assessable income. This the Taxpayer clearly failed to do. The IRO provides for penalties to be imposed on those persons who fail to perform their obligations. Such penalties are punitive and are intended to ensure that taxpayers fulfil their obligations. The Taxpayer filed an incorrect salaries tax return and thereby became liable to be assessed to additional tax. A penalty of approximately 10% of the tax which would have been undercharged is normal in such cases. The question which raises itself in this appeal is whether in the circumstances the quantum of the penalty is sufficient. It would appear from the submission of the Taxpayer himself that he deliberately understated his income which was assessable to salaries tax. His statement that he did so because he thought that the commission income could be included in a business profits tax return is somewhat curious. It is obvious that commission income earned by an employee is liable for assessment to salaries tax. Indeed the salaries tax return form refers specifically to 'commission'. The Taxpayer gave no explanation as to why he considered the commission income not to be liable to assessment to salaries tax; nor why he had not filed a profits tax return with regard thereto; nor why he had raised no objection to the salaries tax assessment when he received it and saw that it included income which he said he considered not to be liable to be assessed to salaries tax.

For the reasons given the Board has no hesitation in dismissing this appeal and confirming the additional section 82A assessment against which the Taxpayer has appealed.

As this appeal is without merit it is appropriate that the Board should make an order for costs to be paid by the Taxpayer under section 68(9) of the IRO. The Board orders that the Taxpayer shall pay \$1,000 by way of costs in addition to the amount of the additional assessment.