

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D79/01

Salaries tax – failure to report additional earnings – whether or not employer’s agreement to pay tax for the taxpayer relieved the taxpayer of his responsibility to pay tax on his earnings – section 68(4) of the Inland Revenue Ordinance (‘IRO’) – onus of proof.

Panel: Patrick Fung Pak Tung SC (chairman), Benjamin Chain and Kenneth Chow Charn Ki.

Date of hearing: 23 July 2001.

Date of decision: 17 September 2001.

The taxpayer was employed by Company A. For the years of assessment in question, tax returns were made by Company A on behalf of the taxpayer and tax was duly paid. Later Company A informed the Commissioner that Company A had failed to report additional earnings by the taxpayer during the years of assessment in question. The Commissioner issued the assessments in respect of the additional sums.

The taxpayer admitted that he did receive those additional sums but the taxpayer objected to the additional salaries tax assessments on the grounds that (1) the additional sums were not formed part of his pay package agreed with Company A; (2) it was always the responsibility of Company A to make tax returns on his behalf; (3) Company A had promised to pay the whole or part of his tax for him.

Held:

1. The evidence supports that the additional sums were in fact double pay and bonus paid by Company A to the taxpayer just before Chinese New Year by reason of the taxpayer’s employment by Company A. The taxpayer put forward no or no credible reason as to why Company A would otherwise make the said payments to him.
2. Even if there is truth in the taxpayer’s allegation that Company A had agreed to pay his tax for him, that is a matter between the taxpayer and Company A and does not relieve him of his responsibility to pay tax on his earnings.

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3. The fact that Company A had always made tax returns on behalf of the taxpayer did not assist the taxpayer's case. The Board is not satisfied that the taxpayer has discharged his onus.

Appeal dismissed.

Wong Kai Cheong for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal by the Taxpayer against three notices of assessment and demand for additional salaries tax for the years of assessment 1994/95, 1995/96 and 1996/97 ('the Assessments') issued by the Commissioner on 29 March 2000. An objection was lodged by the Taxpayer. By his letter dated 20 April 2001, the Commissioner made a determination and rejected the Taxpayer's objection. The Taxpayer has brought this appeal against such determination.

2. The representative of the Commissioner took the preliminary objection that the Taxpayer was late in lodging his appeal by five days. As the period of delay was slight and as it did not appear that any prejudice had thereby been caused to the Commissioner, we decided to allow the Taxpayer to appeal out of time and proceeded to deal with the merits of his appeal.

The facts

3. The Taxpayer gave evidence on affirmation and called no other witness. He was cross-examined by the representative of the Commissioner. The basic facts are really not in dispute.

4. For the years of assessment in question, the Taxpayer was employed by one Company A.

5. For the years of assessment in question, tax returns were made by Company A on behalf of the Taxpayer and tax was duly paid as particularised below:

Year of assessment	Total earnings	Tax paid
	\$	\$
1994/95	117,626	2,706
1995/96	135,632	4,227
1996/97	148,759	4,589

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6. By a letter dated 13 May 1999, Company A notified the Commissioner that, owing to carelessness of its accounting staff, there were variances between its financial statements and employer's returns. By that letter and subsequent letters dated 24 July 2000, Company A informed the Commissioner that, insofar as relating to the Taxpayer, it had failed to report additional earnings by the Taxpayer as follows:

Year of assessment	\$
1994/95	27,000
1995/96	31,500
1996/97	34,800

7. The Commissioner issued the Assessments against the Taxpayer in respect of the three sums referred to in paragraph 6 above.

8. From the documentary evidence produced before the Board, it is clear that each of the three sums referred to in paragraph 6 above was paid into the bank account of the Taxpayer by Company A (just as his normal monthly salary) shortly before Chinese New Year for each of the three years. The Taxpayer plainly admitted that he did receive those sums from Company A and used the same.

9. The Taxpayer himself put forward three reasons to support his argument that he should not have to pay the additional salaries tax, the subject matter of the Assessments:

- (i) The three sums referred to in paragraph 6 above were not sums which formed part of his pay package agreed with Company A. In other words, such payments were not guaranteed.
- (ii) It was always the responsibility of Company A to make tax returns on his behalf.
- (iii) Company A had promised to pay the whole or part of his tax for him.

Conclusion

10. Section 8(1) of the IRO provides as follows:

'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –

- (a) any office or employment of profit; and*

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(b) *any pension.*'

11. The relevant part of section 9(1) of the IRO provides as follows:

'(1) Income from any office or employment includes –

(a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others...'

12. We are of the view that the evidence supports the contention of the Commissioner that the three sums referred to in paragraph 6 were in fact double pay and bonus paid by Company A to the Taxpayer just before Chinese New Year by reason of the Taxpayer's employment by Company A. The Taxpayer has put forward no or no credible reason as to why Company A would otherwise make the said payments to him.

13. Even if there is truth in the Taxpayer's allegation that Company A had agreed to pay his tax for him (which is not supported by any documentary evidence adduced by the Taxpayer), this is a matter between the Taxpayer and Company A and does not relieve him of his responsibility to pay tax on his earnings.

14. We also do not think that the fact that Company A has always made tax returns on behalf of the Taxpayer assists his cause.

15. Section 68(4) of the IRO provides that at an appeal to the Board:

'The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

We are not satisfied that the Taxpayer has discharged his onus.

16. In the result, we dismiss the Taxpayer's appeal.