

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D8/96

**Salaries tax** – penalty tax – incomplete tax return – genuine mistake – quantum of penalty – section 82A of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Lester Kwok Chi Hang and Bernard Pun Wing Mou.

Date of hearing: 14 February 1996.

Date of decision: 9 May 1996.

The tax return of the taxpayer was filed with her personal particulars but the amount of her salary was left blank. The Commissioner assessed the taxpayer to additional tax of 25% of the tax involved by way of penalty under section 82A of the IRO. The taxpayer alleged that her tax return was mistakenly filed by her husband.

Held:

It was clear that the taxpayer was in default of her obligations under the IRO which placed an obligation upon all salaries taxpayers to file their salaries tax returns. Each taxpayer must provide true, correct and complete information. The onus of proof is clearly placed upon the taxpayer.

The Board accepted that the taxpayer did not deliberately try to evade paying salaries tax and accepted that a mistake was made. But these are relevant to the quantum of penalty only. The Board considered that it was a case of simple failure to perform an obligation under the IRO, the norm for penalty tax was 10% of the tax involved. Since the taxpayer made a genuine mistake, the norm of 10% penalty was appropriate.

**Appeal partly allowed.**

Case referred to:

D62/90, IRBRD, vol 5, 454

Tong Cheng Yuet Kiu for the Commissioner of Inland Revenue.  
Taxpayer in person.

**Decision:**

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This is an appeal by a salaries taxpayer against a penalty tax assessment raised on her under section 82A of the Inland Revenue Ordinance (the IRO) in respect of her filing an incorrect salaries tax return for the year of assessment 1993/94. The facts are as follows:

1. In respect of the year of assessment 1993/94 the Taxpayer filed a tax return in which she stated the name of her employer, the capacity in which she was employed, the period during which she was employed and a statement that she did not receive any commission. However she left blank the amount of her salary or wages. She signed the tax return certifying that the information given was true, correct and complete. She and her husband also signed electing for joint assessment.
2. The employer of the Taxpayer filed an employer's tax return in which the employer stated that a total of \$419,799 had been paid to the Taxpayer by way of salary/wages, bonus, and allowances.
3. In her tax return the Taxpayer stated that her employment capacity was 'assistant financial controller'. In the employer's tax return the capacity of the Taxpayer was stated to be 'chief accountant'.
4. On 3 November 1994 the assessor raised an assessment for salaries tax on the Taxpayer in respect of the year of assessment 1993/94 on taxable income of \$419,799 being the amount stated in the employer's return filed in respect of the Taxpayer. No objection was made by the Taxpayer against this assessment.
5. On 10 June 1995 the Commissioner of Inland Revenue gave notice to the Taxpayer that he proposed to assess her to additional tax by way of penalty in respect of the year of assessment 1993/94. This notice was sent by registered mail but was not received by the Taxpayer as she was then absent from Hong Kong.
6. On 16 August 1995 the Commissioner assessed the Taxpayer to additional tax by way of penalty under section 82A of the IRO in the sum of \$15,700.
7. On 19 September 1995 the Taxpayer gave notice of appeal to the Board of Review against the assessment of additional tax raised under section 82A of the IRO.

At the beginning of the hearing the Taxpayer appeared before the Board and represented herself. She explained to the Board that a tax return had been filed with the Inland Revenue Department in which she had filled in the name of her employer and had stated that she had not received any commission but had left blank the amount of her remuneration. She explained that the tax return form had been completed by herself with the exception of the information relating to her remuneration. She had left this blank

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intending to take the return form to her office where she wanted to check the amount of her remuneration before completing the form. She said that the form had been signed by herself and her husband. When she returned home she found out that her husband had filed with the Inland Revenue Department what he thought was his own tax return but what had in fact been her tax return because she had taken the wrong form to the office. She said that as soon as the error had been found she had immediately informed the Inland Revenue Department by telephone and the staff of the Inland Revenue Department had told her that it did not matter because they would assess the correct amount after they had received the salaries tax return filed by her employer in respect of the salary which they had paid to her. Relying on this assurance she said that she had not taken any further action in the matter until the penalty tax assessment was issued. She explained that the notice before assessment of the penalty tax had not been delivered to her by the post office because she had been absent from Hong Kong at the time and had not had the opportunity of making representations to the Commissioner with regard to whether or not a penalty should be imposed. She said that following the issuing of the additional assessment of penalty tax she had taken the matter up with the Inland Revenue Department but had been informed that it was necessary to appeal to the Board of Review which she had done. She then said that she wished to give evidence and proceeded to do so.

As the Taxpayer was unrepresented the Board asked her to confirm that what she had said in her submission was factually true and correct which she did. The Board then asked her to confirm that it was herself who had spoken to the Inland Revenue Department immediately following the alleged accidental filing of the tax return. The reason for asking this confirmation was because the papers previously filed with the Board clearly stated that it was the husband of the Taxpayer and not the Taxpayer herself who had contacted the Inland Revenue Department. It was also apparent from the papers that the Inland Revenue Department had no record of any such telephone call. The Taxpayer then said that she had made a mistake and that it was her husband and not herself who had made the telephone call. She explained that she and her husband were very close to each other and that she used the expressions 'I', 'he' and 'we' interchangeably.

The representative for the Commissioner cross examined the witness with regard to when the tax returns of herself and her husband were filed. The evidence being given by the Taxpayer was far from satisfactory and the way in which she answered questions under cross examination was likewise far from satisfactory. It appeared that she could not understand the proceedings of the tribunal or the nature of her obligations under the IRO and the ambit of section 82A of the IRO. Before concluding the evidence which she was giving but after the cross examination had ended the Board invited her to leave the stand temporarily so that the nature of the proceedings and the procedure of the Board could be explained to her. This was done and the appeal was adjourned for a short while to enable the Taxpayer to consider whether or not she wished to give any further evidence relating to matters which had arisen under cross examination.

When the Board resumed a few minutes later the Taxpayer informed the Board that she wished to call her brother to give evidence and he was duly called. His evidence was also far from satisfactory and much of what he said was either hearsay or legal

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submissions and arguments. He said that he and his sister were very close to each other and met frequently every week. He said that he was a solicitor and his sister was a qualified accountant as was his sister's husband.

From his evidence it would appear that the brother had become actively involved in this matter in August 1995 when the assessment for additional tax which is the subject matter of this appeal was issued. It would appear that there were then numerous telephone calls between the witness and various members of the staff of the Inland Revenue Department, but with due respect to the Taxpayer and her brother, none of this evidence is material to what we have now to decide. The witness was cross examined as to whether or not there were any telephone calls prior to the receipt of the notice of assessment to additional tax. The witness said that there had been but he could not say when nor did he give any details. After the end of the cross examination the witness went on to say that in fact he had not made any phone calls before the assessment to additional tax had been received.

Having given evidence the brother then informed the Board that he was instructed to represent the Taxpayer and this was confirmed by the Taxpayer. The Board agreed to allow the Taxpayer to be represented by her brother. The Board now places on record that it is unusual for a solicitor representing a client to give evidence on behalf of his client.

The representative for the Commissioner referred to the grounds of appeal lodged by the Taxpayer and addressed the Board with regard thereto. She confirmed that it was the Commissioner's position that the Taxpayer had made a mistake but she pointed out that there was no reasonable excuse. In support of the quantum of the penalty the representative for the Commissioner referred to D62/90, IRBRD, vol 5, 454.

This matter which should be simple has become unduly complicated. First it is necessary to remove the extraneous facts and the emotions which clearly became part of the case.

The IRO places an obligation upon all salaries taxpayers to file with the Inland Revenue Department salary tax returns in which each taxpayer must provide true, correct and complete information with regard to their taxable emoluments. In accordance with the provisions of the Inland Revenue Ordinance the Commissioner is authorised to require taxpayers to complete, sign and return this information in the form of a tax return which he issues to taxpayers. In the present case on 28 July 1994 the Commissioner did issue to the Taxpayer such a tax return form which required full information with regard to the taxable emoluments of the Taxpayer. With commendable speed the Taxpayer signed this tax return dated 2 August 1994 and on or about 8 August 1994 the tax return was received by the Inland Revenue Department. Unfortunately for the Taxpayer she failed to complete any information as to the amount of her taxable emoluments other than to state that she had not received any commission.

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The Taxpayer said that this was an unfortunate mistake which arose because her husband had by mistake sent in her tax return form believing that it was his own and that she took to her office her husband's tax return form believing it was her own and intending to complete the figures prior to her returning it to the Inland Revenue Department. She said that as soon as this unfortunate mistake was found out she or her husband notified the Inland Revenue Department by telephone and was told that it was not necessary for her to take any further action.

So far as the Inland Revenue Department are concerned they only have a record of receiving the tax return without the information and have no record of having received any telephone call from the brother of the Taxpayer or the Taxpayer herself.

In due course a number of events took place culminating in a penalty tax assessment being raised in an amount equal to approximately 25% of the tax involved. Thereafter there were numerous telephone calls and ultimately an appeal lodged with this Board of Review and the matter came before the Board for hearing on 14 February 1996.

It is clear that the Taxpayer was in default of her obligations under the IRO. We do not find that she had any reasonable excuse which would exonerate her from her obligation or failure to fulfil her obligation. We accept that the Taxpayer did not deliberately try to evade paying salaries tax. We accept that a mistake was made. It is not material other than in considering the quantum of the penalty whether she herself omitted to include the amount of her emoluments and sent the tax return to the Commissioner or as she would like us to believe, mistakenly took her tax return form to the office and then her husband sent in her incomplete tax return believing it was his own. Either way a mistake was made.

If we are required to find as a fact whether or not the Taxpayer or her husband telephoned someone in the Inland Revenue Department immediately that she found out about the mistake then we would be obliged to find that no such phone call has been proved to our satisfaction. The evidence given by the Taxpayer and her brother left much to be desired. The onus of proof is clearly placed upon the Taxpayer and the evidence before us falls far short of discharging that onus of proof. However we do not consider this to be material other than possibly in relation to the quantum of the penalty. The Taxpayer and her husband are both qualified accountants. Being qualified accountants they should have knowledge of their obligations under the IRO. The brother of the Taxpayer is a qualified solicitor who according to what he said to the Board was close to his sister and brother-in-law, met them frequently, and ultimately if not from the beginning of the matter was their legal advisor.

As the Taxpayer had no reasonable excuse, the Commissioner was empowered by the IRO under section 82A to impose a penalty if he thought fit. This Board has no power to review the decision of the Commissioner. In deciding whether or not to impose a penalty he must take into account many factors. He has decided to exercise his discretion and impose a penalty. That is an end of the matter so far as she, the Taxpayer, and indeed this Board is concerned.

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The function of this Board is then to consider the quantum of the penalty. Many previous Boards have indicated that where a Taxpayer makes a genuine mistake in fulfilling obligations under the IRO and there are no aggravating circumstances an appropriate penalty would be 10% of the tax involved. Boards have pointed out that failure to make payment of duly assessed tax on time merits a 5% surcharge. Failure to file a correct tax return must be more serious.

In the present case for reasons which we do not know the Commissioner has decided that the facts are more serious than the simple failure to perform an obligation under the IRO and that they are of such seriousness and magnitude as to merit increasing the penalty from the norm of 10% to an amount of approximately 25%. On the facts before us we can see no justification for such a decision. As we have said above this is a simple case. The Taxpayer made a genuine mistake and it seems to us that the norm of 10% is appropriate.

For the reasons given we reduce the penalty from \$15,700 to \$6,000.