Case No. D89/97

Penalty tax – incorrect salaries tax return – failure to complete the tax return properly – ignorant of law is not a defence – same rate of penalty should be adopted for the two years of assessments – 6.193% penalty under section 82A of Inland Revenue Ordinance.

Panel: Christopher Chan Cheuk (Chairman), Daniel Cheung Kwok Chun and Edward Chow Kam Wah.

Date of hearing: 31 October 1997.
Date of decision: 10 December 1997.

The taxpayer was a registered nurse.

As she was labouring under the misconception that it was not necessary to complete the tax return in detail, she did not complete the tax return for the years of assessment 1994/95 and 1995/96 properly in particular the part where she was required to supply all the particulars about her income, the period and the amount.

Notice of two assessments for the years of assessment 1994/95 and 1995/96 were issued to the taxpayer who did not raise any objection.

On 28 February 1997 the Revenue gave notice under section 82A(4) informing the taxpayer that she made incorrect tax returns for the years of assessment 1994/95 and 1995/96 and that she was liable to be assessed to additional tax.

The taxpayer responded to the notice and gave reasons similar to those in this appeal.

On 24 April 1997 the Commissioner gave two notices of assessment for the two years of assessment 1994/95 and 1995/96 respectively for the sums of $3,000 and $4,000.

The taxpayer did not appeal against the penalty for the first year of assessment 1994/95 but appealed against the one for the later year.

Held:

1. It is trite law that ignorance of law does not constitute a reasonable ground for defence and similarly is not a ground of appeal against either liability or quantum.

2. It is considered that the omission was due to her misconception caused by her colleague. This can hardly be a ground of appeal against liability as the ground itself is an admission of guilt. This is also not a mitigating factor but it forms the basis of fixing the penalty.

3. The period between the date of the notice of assessment (22 August 1995) and the time she filled her return for the year of assessment 1995/96 (that is, 24 May 1996) was more than nine months, during which period the taxpayer was not informed as to her mistake. The Revenue could have easily informed the taxpayer of her mistake by including an extra note in the notice of assessment giving the appropriate warning or requesting the taxpayer to contact the officer in charge who would have explained to her the mistake and the penalty clause.

4. The Revenue imposed difference rates of penalty for the two years: for the first year it was 6.193% and for the subsequent year of 1995/96 it was 7.529%. It is found that there is no reason for doing so.

5. The year of assessment 1995/96 for which penalty is being appealed is subsequent to the year of assessment, of which she had admitted liability; in theory she could be taken as a second time offender, but in reality it is not so. In fact, on 28 February 1997 the Revenue used the same notice to invite written representations under section 82A(4) for the two years of assessment for the two years respectively were given on the same date that is, 24 April 1997. Taking this factor into consideration, the taxpayer should not be taken as a second time offender.

6. It is accepted that the rate of penalty (that is, 6.193%) for the first year is a fair and reasonable rate for a first offender. The rate of penalty for the two years should be the same. Therefore, the rate of penalty of 7.529% adopted in the second year of assessment is high and excessive.

7. It is decided that the assessment of additional tax for the year of assessment 1995/96 be varied to the sum of $3,290.

Appeal allowed.

Go Min Min for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal by the Taxpayer against the assessment by Commissioner, in respect of additional tax under section 82A of the Inland Revenue Ordinance (the IRO) in the sum of $4,000 for the year of assessment 1995/96.

2. The Taxpayer appeared in person and gave evidence on oath. The proceedings were conducted in Chinese. The parties agreed to a bundle of documents for production. Both sides mainly relied on the documents for their submission.

Facts of the Case

3. The facts of the case as presented by the Taxpayer are very simple and as follows:

(a) The Taxpayer was at all material times a registered nurse.

(b) In 1995 she learnt it in a casual conversation with her colleagues that it was not necessary to complete the return in detail, particularly, the part about income. The argument was that no matter what was filled in the form, the Inland Revenue would check it and make adjustment. So, she followed this practice.

(c) In the return for the year of assessment 1994/95, she completed all the particulars except Item D where she was required to supply all the particulars about her income including the description of her income, the period and the amount. The Taxpayer only gave the information of her employer and that the capacity in which she was employed was registered nurse. She gave no other information about her employment. The return was dated 15 May 1995 and was sent back to the Revenue.

(d) On 22 August 1995 the Revenue issued the notice of assessment where among other things it was stated: the assessable income of the Taxpayer to be $353,208 and the tax payable for the tax thereon $48,441. Under the column Assessor's Notes two code numbers were written: 17 & 01. The Taxpayer was asked to read the explanation overleaf.

(e) On 24 May 1996 the Taxpayer completed the return for the year of assessment 1995/96 in the same manner as before. She filled in every part except Item D; this time the situation was even worse than before in that she did not mention that she was a registered nurse.

(f) About three months later, on 19 August 1996 she received the notice of assessment for the year that the total assessable income was $383,635. The tax thereon was $53,127. The Taxpayer did not raise any objection to the two assessments for the years of assessment 1994/95 and 1995/96.

(g) On 28 February 1997 the Revenue gave notice under section 82A(4) informing the Taxpayer that she made incorrect tax returns for the above two years of assessment and that she was liable to be assessed to additional tax.

(h) The Taxpayer responded to the notice and gave reasons similar to those we will set out later as the grounds of her appeal.

(i) On 24 April 1997 the Commissioner gave two notices of assessment for the two years of assessment 1994/95 and 1995/96 respectively for the sums of $3,000 and $4,000.

(j) The Taxpayer did not appeal against the penalty for the first year of assessment 1994/95 but appealed against the one for the later year.

Grounds of Appeal

4. The Taxpayer gave four grounds of appeal; she did not specify whether she was appealing against liability or the amount. We take it that she appealed against both and will deal with her grounds of appeal as if they were for both.

5. The first ground was that she was not aware of the law and she was led to believe by her colleagues that the way of completing the return by leaving the particulars of her income blank was acceptable to the Revenue as in any event the Revenue could and would get her income information from other source, that is, her employer. The reason she gave, even if we accepted, did not amount to a defence or a ground for appeal. It is trite law that ignorance of the law does not constitute a reasonable ground for defence and similarly is not a ground for appeal. The rule of law is the corner stone of our whole society; if we allowed the plea of ignorance it would throw our whole legal system into disarray. The Taxpayer is a registered nurse; from our observation at the hearing she is a very intelligent person and she should know how much additional work that the Revenue had to undertake for tracing the source and computing the income for her. We dismiss this ground of appeal and neither do we find that this is a mitigating factor.

6. The second ground of her appeal was that she was not aware of section 82A: had she known what it was she would have completed the return fully. It was no more than a further elaboration of the first ground. Section 82A states: 'Any person who without reasonable excuse makes an incorrect return by omitting or understating anything in respect of which he is required by this IRO to make a return ... shall ... be liable to additional tax.' As stated earlier ignorance of the law is not a ground of appeal against either liability or quantum. We do not intend to repeat our reasons thereon.

7. The Taxpayer claimed that the omission was not intended to defraud the Revenue. The Revenue argued very strongly against this point and even produced the Taxpayer's return for the year of assessment 1996/97 to demonstrate that the Taxpayer had also failed to give full information as required: she had left out a sum of $33,726. The Taxpayer's reply was that it was an oversight and she had no intention of evading tax payment. The Revenue did not want us to decide on the tax liability for that year of assessment 1996/97; neither does the Board have sufficient information to make such decision. Without full investigation we did not intend to put too much weight on this piece of evidence. After hearing the Taxpayer's testimony and seeing her demeanour before the

Board we are prepared to give her the benefit of the doubt and accept her explanation that she believed in what her colleague told her and completed the forms without supplying any particulars in Item D of the return. We consider that the omission was due to her misconception caused by her colleague. This can hardly be a ground of appeal against liability as the ground itself is an admission of guilt. This is also not a mitigating factor but it forms the basis of fixing the penalty.

8. The last ground of her appeal is that she should have been informed of her mistake earlier. She filed the return for the year of assessment 1994/95 on or about 15 May 1995 and the notice of assessment was issued by the Revenue on 22 August 1995 wherein through a code number of 01 referring to the back page she was informed: 'Your income for the year is assessed in accordance with the information supplied by the employer.' In other words if a taxpayer is careful enough she will know that the assessment made is based on her employer's information; in such case it seems to confirm the Taxpayer's misconception that a taxpayer does not have to trouble herself to fill in all the particulars because the Revenue will be able in any event to trace what one has earned during the year. We do not think that the Taxpayer was aware of the code and the explanatory note. However she argued that she should have been informed of the mistake and should have been warned of the penalty during the interviewing period from the day of the day of the notice of assessment and the time for filing the tax return for the subsequent year so that she had the chance of correcting herself.

9. Ms Go tried to demonstrate to us that the Taxpayer would not correct the mistake even if she were warned, by referring us to the omission mentioned in paragraph 7 above in respect of the return for the year of assessment 1996/97. The Taxpayer said that there had been an improvement in completing the return and the reason for the omission was due to oversight. We maintain our former position that we did not intend to put too much weight on that piece of evidence. Our main concern is that the Taxpayer felt very aggrieved because she was not informed of the mistake earlier. Whether she would or would not correct the manner of completing the return is a matter of speculation which the Board should not trouble itself with. The period between the date of the notice of assessment (22 August 1995) and the time she filed her return for the year of assessment 1995/96 (that is, 24 May 1996) was more than nine months, during which period the Revenue should have informed her of the mistake. The notice under section 82A(4) was not given until 28 February 1997, another nine months later. We tried to seek an explanation from Ms GO why there was such long period of inaction. She thought that it was due to workload of that section of the Inland Revenue Department that the Taxpayer had not been informed earlier. Such reason is acceptable to the Board but may be construed quite differently by a taxpayer: either the Inland Revenue Department is badly under staffed or its efficiency is in doubt. The Revenue could have easily informed the Taxpayer of her mistake by including an extra note in the notice of assessment giving the appropriate warning or requesting the Taxpayer to contact the officer in charge who would have then explained to her the mistake and the penalty clause.

10. The Taxpayer only appealed against the assessment for the second year of assessment 1995/96 and not against the penalty for the first year of assessment 1994/95. It

can be implied from this that the Taxpayer admitted liability and the amount of the penalty for the first year but felt aggrieved about the assessment for the year of assessment 1995/96. The Revenue imposed different rates of penalty for the two years: for the first year it was 6.193% and for the year of assessment 1995/96 it was 7.529%. We find no reason for doing so. The year of assessment 1995/96 for which the penalty is being appealed is subsequent to the year of assessment, of which she had admitted liability; in theory she could be taken as a second time offender, but in realty it is not so. In fact, on 28 February 1997 the Revenue used the same notice to invite written representations under section 82A (4) for the two years of assessments 1994/95 and 1995/96 and as a result two notices of assessment for the two years respectively were given on the same day (that is, 24 April 1997). The Taxpayer complained that she was not given any warning or chance to correct herself in the second year; she wanted us not to impose any penalty. We think that it is wrong in principle not to impose any penalty; for reasons given earlier we have found that she is liable for additional tax. The only point we find that there is any merit in this appeal is that the Taxpayer should not be taken as a second time offender. We accept the rate of penalty (that is, 6.193%) for the first year is a fair and reasonable rate for a first offender which has also been accepted by the parties. The rate of penalty for the two years should be the same. Therefore the rate of penalty of 7.529% is high and excessive. Based on 6.193% the penalty for the year of assessment 1995/96 should be 6.193% × $53,127.00 which is equivalent to $3,290.

Decision

11. For reasons given above we find that the assessment of additional tax is excessive and high. Therefore we allow the appeal and direct that the assessment of additional tax for the year of assessment 1995/96 be varied to the sum of $3,290.