

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D91/99

Penalty Tax – repeated failure to file tax return – family circumstances – ill health of children – section 82A of the Inland Revenue Ordinance, Chapter 112.

Panel: Ronny Wong Fook Hum SC (chairman), Roger Leung Wai Man and David Wu Chung Shing.

Dates of hearing: 19 August and 7 September 1999.

Date of decision: 15 November 1999.

For the period between 31 August 1991 and 31 August 1997, the taxpayer earned a total of \$2,687,131.28 from her distributorship for Company A. She did not however file any return in respect of her earnings during this period. The taxpayer visited the Revenue on her own initiative on 20 May 1998. She explained to the officer of the Revenue that she did not carry on any business and that the products she obtained from Company A were for personal consumption. The Revenue officer pointed out to the taxpayer her duties to report her earnings to the Revenue and the penalty provisions that apply in the event of default.

On 17 June 1998, the Revenue sent to the taxpayer returns for the years of assessment 1993/94 and 1997/98. She did not complete these returns nor did she seek any extension of time for their submission. On 27 July 1998, the Revenue sent to the taxpayer returns for the years of assessment 1992/93, 1994/95, 1995/96 and 1996/97. Once again she made no effort in compliance.

The taxpayer attended a further interview with officers of the Revenue on 13 November 1998. It was explained to the taxpayer during this interview that her activities as distributor of Company A constituted trading and she could not deduct personal expenses from such earnings.

By notice dated 4 January 1999, the taxpayer was notified by the Commissioner of his intention to invoke section 82A of the Inland Revenue Ordinance. The taxpayer did not make any representation in response to this notice.

Held:

1. The Taxpayer has no reasonable excuse in respect of her failure to inform the Commissioner of her chargeability to tax for the years of assessment 1991/92 to

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1996/97. The ill health of her two children for the period between 3 March 1997 and December 1998 do not go towards mitigation of her breach for the years of assessment between 1991 and 1997.

2. The return for the year of assessment 1997/98 was given to the taxpayer on 17 June 1998. The Board accepted the evidence of the taxpayer that her whole energy was spent in looking after her son and subsequently her daughter. Both of them were critically ill. The Board accepted this as a reasonable excuse for her non compliance. The Board therefore discharged the assessment of \$30,000 for the year of assessment 1997/98.

Appeal allowed in part.

Tsoi Chi Yi for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. On 5 October 1989, the Taxpayer applied to become an official distributor of Company A, a health product company. She was successful in her distributorship raising gradually from rank '0' on 5 October 1989 to rank '9' by 1 September 1996.
2. For the period between 31 August 1991 to 31 August 1997, the Taxpayer earned a total of \$2,687,131.28 from her distributorship. She did not however file any return in respect of her earnings during this period.
3. On 30 March 1998, the Revenue sent to the Taxpayer an estimated assessment for the year of assessment 1991/92 with estimated profits at \$660,000.
4. On 27 April 1998, the Taxpayer submitted her return for the year of assessment 1991/92. She reported to the Revenue that after deducting her expenses, her earnings amounted to about \$30,000.
5. The Taxpayer visited the Revenue on her own initiative on 20 May 1998. She explained to the officer of the Revenue that she did not carry on any business and that the products she obtained from Company A were for personal consumption. The Revenue officer pointed out to the Taxpayer her duties to report her earnings to the Revenue and the penalty provisions that apply in the event of default.

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6. On 17 June 1998, the Revenue sent to the Taxpayer returns for the years of assessment 1993/94 and 1997/98. She did not complete these returns nor did she seek any extension of time for their submission.

7. On 27 July 1998, the Revenue sent to the Taxpayer returns for the years of assessment 1992/93, 1994/95, 1995/96 and 1996/97. Once again she made no effort in compliance.

8. The Taxpayer attended a further interview with officers of the Revenue on 13 November 1998. It was explained to the Taxpayer during this interview that her activities as distributor of Company A constituted trading and she could not deduct personal expenses from such earnings. By way of compromise, the Revenue and the Taxpayer agreed to a 25% deduction and arrived at the following figures as the Taxpayer's earnings for the relevant periods:

Year of assessment	Earnings \$
1991/92	357,845
1992/93	388,758
1993/94	278,932
1994/95	179,492
1995/96	163,957
1996/97	161,610
1997/98	484,754
Total	2,015,348

The Taxpayer was further warned about the penalty provisions when reaching this compromise.

9. By notice dated 4 January 1999, the Taxpayer was notified by the Commissioner of his intention to invoke section 82A of the Inland Revenue Ordinance. The Commissioner pointed out that the amount of tax undercharged in consequence of the Taxpayer's failure to submit her returns amounted as follows:

Year of assessment	Amount \$
1991/92	53,676
1992/93	58,313
1993/94	41,839
1994/95	13,698
1995/96	9,191
1996/97	7,032
1997/98	66,150

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Total	249,899
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10. The Taxpayer did not make any representation in response to this notice.
11. By notices dated 23 April 1999, the Commissioner imposed the following amount of additional tax on the Taxpayer:

Year of assessment	Tax undercharged \$	Additional tax \$	% of additional tax over tax undercharged
1991/92	53,676	40,000	74.52%
1992/93	58,313	44,000	75.45%
1993/94	41,839	31,000	74.09%
1994/95	13,698	10,000	73%
1995/96	9,191	6,000	65.28%
1996/97	7,032	4,000	56.88%
1997/98	66,150	30,000	45.35%
Total	249,899	165,000	66.03%

12. The Taxpayer is a lady aged about 66. She was accompanied by her two daughters Ms B and Ms C at the hearing before us. It is clear that the Taxpayer is not a lady blessed with business acumen. Two of her children were suffering from very poor health. She became part of the pyramid selling structure of Company A in order to purchase its health products for her children. Her son Mr D first attended a clinic on 3 March 1997. Anti-tuberculous treatment was given to him during the period between 17 March 1997 to 11 February 1999. The last X-ray taken of him was on 17 December 1998. It showed no sign of relapse. Ms B was admitted into the hospital in September 1998. X-ray of her chest revealed a large soft tissue density at the right lower zone. She had to undergo treatments in Hong Kong and Country E right up to December 1998. The Taxpayer had to take care of Mr D, Ms B and the child of Ms B. She had to make regular journeys between Hong Kong and Country E. It was during this very hectic period that she had to come to terms with her tax liability.

13. We are moved by a very eloquent plea made by Ms C on behalf of the Taxpayer. She submitted that the Taxpayer had made reasonable efforts to discharge her fiscal responsibilities. The Taxpayer took the initiative of visiting the Revenue on 20 May 1998 and 13 November 1998. The Taxpayer readily agreed to the assessments for the years of assessment 1991 to 1998 on 13 November 1998. The Taxpayer appointed a professional tax representative on 7 January 1999 to assist her in her affairs. No proper advice was given to the Taxpayer despite payment of a sizeable fee. Ms C further submitted that the authorities cited by the Revenue are distinguishable. Most of them relate to traditional trading activities with maintenance of proper records. They do not apply to the loose activities of the Taxpayer.

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14. Ms Tsoi for the Revenue had very properly reminded us that we should not be swayed by the personal circumstances of the Taxpayer. She adverted to the continued failure on the part of the Taxpayer to file her return for the year of assessment 1998/99. She pointed out that the Revenue had given due weight to the factors urged upon us by the Taxpayer.

15. We agree with the Revenue that the Taxpayer has no reasonable excuse in respect of her failure to inform the Commissioner of her chargeability to tax for the years of assessment 1991/92 to 1996/97. The brochure given to the Taxpayer by Company A dated November 1992 should have awakened her to her responsibility. The ill health of her two children for the period between 3 March 1997 to December 1998 do not go towards mitigation of her breach for the years of assessment between 1991 to 1997. Generous allowance had been made by the Revenue in respect of those years. It would be wrong for us to interfere.

16. The return for the year of assessment 1997/98 was given to the Taxpayer on 17 June 1998. We accept the evidence of the Taxpayer that her whole energy was spent in looking after her son and subsequently her daughter. Both of them were critically ill. We are prepared to accept this as a reasonable excuse for her non compliance. We would therefore discharge the assessment of \$30,000 for the year of assessment 1997/98.