Case No. D93/98

Penalty tax – penalty – 15% of the amount of tax – excessive – mitigation – genuine oversight and remorseful.

Panel: Christopher Chan Cheuk (chairman), Joseph Cheung Wang Ngai and Tse Tak Yin.

Date of hearing: 10 August 1998.
Date of decision: 29 September 1998.

An additional tax in the sum of $6,000 for the year of assessment 1996/97 was imposed on the taxpayer as penalty for his failure to disclose that part of his income relating to Company Y, his former employer, amounting to a sum of $218,500 for the period from 1 April 1996 to 5 November 1996 when he filed his tax return for individual on 28 July 1997.

The taxpayer did not deny liability put pleaded for leniency. He thought that the penalty was excessive on the ground that (1) the mistake was unintentional; (2) during the material times he changed jobs and moved house and (3) he did not receive a copy of the employer's return from Company Y.

Held:

1. The Board accepted the Revenue's argument that the duty to complete a true and correct return falls solely on the taxpayer and that the taxpayer should realise the consequence of failure to make correct return. The Taxpayer had omitted a significant part of the year's income; it amounted to an omission of 65.3% of his total income. (D27/97, IRBRD considered and distinguished.)

2. The starting point is 10% of the tax undercharged or which have been undercharged.

3. This is a case of exceptional circumstance. The Board took into account the following factors and allow the appeal to the extent that the additional tax be reduced from the sum of $6,000 to that of $2,000 about half of the normal tariff:-

   (1) The taxpayer was truly sorry for the mistake he committed and that the mistake was caused by an honest oversight by a foreign national who was not proficient in the language he had to use in completing the form;

(2) The Board accepted that the taxpayer never received a copy of the employer's return which was dated 28 October 1996, a week earlier than the termination of his employ. It was not unusual that the employer did not release a copy to the taxpayer until the employment was terminated. The employer might have overlooked and did not offer him a copy when the taxpayer left;

(3) The taxpayer was fully co-operative and showed great remorse for what he had done.

Appeal allowed.

Case referred to:

D27/97, IRBRD, vol 12, 210

Yip Sham Yin Har for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The Appeal

1. This is an appeal by Mr X against the assessment made on him by the Commissioner of Inland Revenue in respect of additional tax in the sum of $6,000 for the year of assessment 1996/97 as contained in the notice of assessment dated 27 May 1998.

Proceedings

2. Parties relied on the bundle of documents prepared for the appeal which was produced by consent and marked as exhibit 'A-1'. The facts of the case were not in dispute. Appearing together with the Taxpayer was his wife, who made submission on his behalf because the Taxpayer was not proficient in English. The Taxpayer gave oral evidence in English but we find that he had difficulty in expressing himself in that language.

Facts of the Case

3. The Taxpayer is a foreign national who came to Hong Kong about three years ago. He first worked in Company Y up to 5 November 1996. About two weeks later he started to work in another company, Company Z. When he filed his tax return for individuals on 28 July 1997 he failed to disclose that part of income relating to Company Y amounting to a sum of $218,500 for the period from 1 April 1996 to 5 November 1996.

The Taxpayer's Case

4. The Taxpayer did not deny liability but pleaded for leniency. He thought that the penalty of $6,000 equivalent to 15% of the amount of tax which would have been undercharged was excessive. He gave us several reasons for us to consider:

(a) That the mistake was unintentional.

(b) That during the material times he changed job and moved house.

and (c) That he did not receive a copy of the employer's return from Company Y.

The Revenue's Case

5. We accept the Revenue's arguments without reserve that the duty to complete a true and correct return falls solely on the taxpayer and that the taxpayer should realise the consequence of failure to make correct return. The Taxpayer had omitted a significant part of the year's income; it amounted to an omission of 65.3% of his total income. It was in this aspect very similar to another case, namely, the Board of Review D27/97, IRBRD, vol 12, 210 in which a rate 25% of the undercharged tax was imposed as penalty. Mrs YIP urged us to dismiss this appeal on the above grounds.

D27/97

6. In D27/97 the taxpayer was not co-operative and found every excuse to try to exonerate his own culpability. The omission was not due to an accidental slip or oversight. The taxpayer in that case was the director of the companies in which he was employer. He knew full well what he was doing.

Evidence

7. In the present case we find that the Taxpayer was truly sorry for the mistake he had committed. He was very sincere and apologised for all that had been caused to all parties concerned. He was a foreign national and was not proficient in English. He could hardly give evidence in English and could not express himself well.

8. In the tax return he gave full details of his second employment with Company Z to the meticulous detail of the exact date of his resignation on 24 March 1997. He completed it with the help of the employer's return. But, for the earlier employment with Company Y he claimed that he never received a copy of the employer's return which was dated 28 October 1996, a week earlier than the termination of his employ. We have no hesitation to accept the Taxpayer's claim. It was not unusual that the employer did not release a copy to the Taxpayer until the employment was terminated. The employer might have overlooked and did not offer him a copy when the Taxpayer left. From the manner he answered the question and the anxiety he showed when this subject was raised we find that the Taxpayer truly overlooked to report the part of income relating to Company Y.

Conclusion

9. He was a truthful and an honest witness. We accept that the mistake was caused by an honest oversight by a foreign national who was not proficient in the language he had to use in completing the form. He was fully co-operative and showed great remorse for what he had done. Every case has to be decided on its own merits. There is no doubt in our mind that in view of the circumstances of this case the amount of $6,000 is excessive. The starting point is 10% of the tax undercharged or which would have been undercharged. This is a case of exceptional circumstances. We have never found a person who is so sincere and frank and so prepared and ready to accept his responsibility. Taking all the factors into consideration we conclude that half of the normal tariff is appropriate in this case that is, about 5% of the tax which would have been charged. Accordingly, we allow the appeal to the extent that the additional tax be reduced from the sum of $6,000 to that of $2,000.