Case No. D9/98

Additional tax – omission in tax return – reasonable excuse – mitigation factors – burden of proof – whether liable for additional tax – sections 82(1) and 82A of the Inland Revenue Ordinance.

Panel: Christopher Chan Cheuk (chairman), Edward Chow Kam Wah and Mathew Ho Chi Ming.

Date of hearing: 24 January 1998.
Date of decision: 8 April 1998.

The taxpayer in her tax return simply stated her position in Company C but did not give any particulars of her income. She also did not disclose that she had worked in another company. The Commissioner regarded that the taxpayer omitted to report the incomes from both companies in the total amount of $232,829. The taxpayer raised no objection. The additional tax was assessed on the basis of $232,829 with the amount of tax undercharged to be $22,965.

The taxpayer appealed against both liability and quantum on the grounds of reasonable excuse and the Commissioner's failure to take into consideration certain mitigation factors respectively. The grounds of appeal against liability were

a) the taxpayer had no intention to evade tax;

b) the taxpayer was in Country E and was not familiar with the formality of completing the return;

c) the taxpayer was ignorant of the law; and

d) the Revenue had suffered no loss.

Held:

(1) The fact that the taxpayer had no intention to evade tax is only one of the many factors to be considered for the question of whether the taxpayer is liable to pay the additional tax. Because of the omission in her tax return, she was in contravention of section 82(1) of the IRO. The burden of proof shifts to the taxpayer to show she had 'reasonable excuse' and that she should be exonerated from liability under that section.

(2) Absence from Hong Kong by itself does not constitute 'reasonable excuse'. To be successful on the ground of absence a taxpayer has to show that his visits away from Hong Kong are long and lengthy and such visits impede his ability to file a true, correct and complete return.

(3) Illiteracy or ignorance did not provide a reasonable excuse. The rule of law is the corner-stone of our society; ignorance should never be allowed as a defence; otherwise the society would be thrown into chaos.

(4) The Revenue suffers no loss has never been regarded as a reasonable excuse. It may be a mitigating factor.

(5) The various Boards have regarded 10% of the tax undercharged as a starting point for cases where the taxpayer is a first offender and the mistake is an unintentional slip. But in the present case, the taxpayer was fully aware of the incompleteness of the return and chose not to rectify it. It also differ from the usual cases in that there was an omission of two sources of income instead of one. For the reasons above stated having regard to all circumstances of this case the additional tax of $4,000 equivalent to 17.42% of tax undercharged is not excessive.

Appeal dismissed.

D33/89, IRBRD, vol 4, 359
D24/84, IRBRD, vol 2, 136
D50/93, IRBRD, vol 8, 369

Yue Chu Ching Yee for the Commissioner of Inland Revenue.
Taxpayer represented by her sister.

Decision:

1. This is an appeal by Miss A ('the Taxpayer') against the assessment made on 4 July 1997 by Commissioner of Inland Revenue on the Taxpayer for an additional tax of $4,000 pursuant to section 82A of the Inland Revenue Ordinance (the IRO) for the year of assessment 1995/96.

Proceedings

2. The Taxpayer acted in person and did not appear but she had authorised her sister Miss B as her tax representative ('the Tax Representative'). No witness was called and the Tax Representative relied on the bundle of documents produced by consent and marked as exhibit 'R-1'.

Appeal

3. The Taxpayer appealed against both liability and quantum on the grounds of reasonable excuse and the Commissioner's failure to take into consideration certain mitigation factors respectively.

Facts of the Case

4. The Taxpayer in the tax return for the assessment year 1995/96 simply stated that she worked as senior marketing officer in Company C. She did not give any particulars of her income, its period or amount. She also did not disclose that she had worked in Company D. The Commissioner regarded that the Taxpayer omitted to report the incomes from both companies in the sums $182,240 and $50,589 respectively making a total of $232,829. The Taxpayer raised no objection. The additional tax was assessed on the basis of a total income of $232,829 with the amount of tax undercharged to be $22,965. The additional tax was fixed at $4,000 equivalent to 14.7% of the tax undercharged.

Liability

5. The Tax Representative submitted four grounds of appeal against liability:

(a) The Taxpayer had no intention to evade tax;

(b) She was in Country E and was not familiar with the formality of completing the return;

(c) She was ignorant of the law;

and (d) The Revenue had suffered no loss.

6. The fact that the Taxpayer had no intention to evade tax is only one of the many factors we have to consider whether the Taxpayer is liable to pay the additional tax. The Taxpayer admitted that she omitted those parts of income as described in paragraph 4 above. Because of the omission she was in contravention of section 82(1) of the IRO. The burden of proof shifts to the Taxpayer to show that she had 'reasonable excuse' and that she should be exonerated from liability under that section.

7. The Tax Representative argued that she was in Country E and was not familiar with the formality. Whether the question of absence from Hong Kong constitutes reasonable excuse has been dealt with in many other cases. In D33/89, IRBRD, vol 4, 359, the Board dismissed the appeal and regarded that there was no substance whatsoever in the appeal. Absence by itself does not constitute 'reasonable excuse'. To be successful on the ground of absence a taxpayer has to show that his visits away from Hong Kong are long and lengthy and such visits impede his ability to file a true, correct and complete return. We have no reason to depart from the principle.

8. In the present case the Taxpayer did not inform us why her absence caused such omission. Mrs YUE for the Revenue rightly pointed out to us that the Taxpayer was actually in Hong Kong when the return was completed and that in case of query she could contact the Department. We find no merit in the Taxpayer's submission.

9. Ignorance of the law is never a valid defence and such principle has been adopted in D24/84, IRBRD, vol 2, 136 and D50/93, IRBRD, vol 8, 369. In the latter case the taxpayer was a Japanese and had just stayed in Hong Kong for a short period before she was required to complete the return and she was unfamiliar with the English or Chinese language. The Board ruled that illiteracy or ignorance did not provide a reasonable excuse. The rule of law is the corner-stone of our society; ignorance should never be allowed as a defence; otherwise, the society would be thrown into chaos.

10. That the Revenue suffers no loss has never been regarded as a reasonable excuse. If an offence is committed, whether the victim suffers any loss does not affect the offender's liability but it may be a mitigating factor.

Quantum

11. The total amount of income omitted was taken by the Commissioner to be $232,829 and tax undercharged $22,965. We accept such assessment for the reason that the Commissioner would not have discovered the Taxpayer's incomes unless the Revenue had taken steps to trace the sources. In respect of the income from Company C, although she had stated the name of the company, the period and the amount were omitted. We could not conclude that she had performed her duty as a law-abiding citizen.

12. As to the other income from Company D, nowhere in the return she mentioned that she had been employed by the company and had received income from it. No excuse was given. The utmost we can say is an unintentional omission.

13. Having examined the return and considered the manner by which it was completed, we find that the Taxpayer did not attempt to take any step to find out all the particulars required; she decided to take no action and to let the matter take its natural course. She did not perform her duty as a law-abiding citizen should have done.

14. The various Boards have regarded 10% of the tax undercharged as a starting point for cases where the taxpayer is a first offender and the mistake is an unintentional slip. But, in the present case the Taxpayer was fully aware of the incompleteness of the return and chose not to rectify it. It also differs from the usual cases in that there was an omission of two sources of income instead of one. For the reasons above stated having regard to all circumstances of this case we find that the additional tax of $4,000 equivalent to 17.42% of tax undercharged is not excessive.

Decision

15. The Board dismisses the Taxpayer's appeal against both liability and quantum.

INLAND REVENUE BOARD OF REVIEW DECISIONS