

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D95/03

Penalty Tax – submission of incorrect tax return without reasonable excuse – attempt to claim dependent parent allowance and additional parent allowance – contradicted by facts – the claim was disallowed – imposition of additional tax assessments – claimed no intention to evade tax – merely forgot the passing away of his mother and habitually applied for dependent parent allowance – no reasonable excuse – the Revenue suffers no loss – no reasonable excuse but mitigating factor – but the mistake is just mere negligence – unlike those openly flout the rules and submit incorrect tax returns – the standard practice of imposing penalty equivalent to 100% of the tax underpaid as a starting point should not be applied – section 82A of the Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Panel: Anthony Ho Yiu Wah (chairman), Ng Ching Wo and Jason Yeung Chi Wai.

Date of hearing: 21 November 2003.

Date of decision: 5 February 2004.

This was an appeal against an assessment dated 15 August 2003 whereby the Commissioner levied additional tax in accordance with section 82A of the IRO in the sum of \$5,000 against Mr A ('the appellant') in respect of his submission of incorrect tax return for the year of assessment 2001/02. The sum so levied amounts to 49% of the tax undercharged.

The appellant submitted incorrect tax return for the year of assessment 2001/02. Even though his mother (Madam B) had passed away, the appellant still claimed for the dependent parent allowance and additional parent allowance in that year of assessment.

According to the information collected by the Revenue, the dependent parent (Madam B) in fact had passed away on 18 December 2000 (that is, in the year of assessment 2000/01). The Revenue therefore informed the appellant that such claim for the dependent parent allowance and additional parent allowance would not be granted. The appellant did not object to the relevant salaries tax assessment.

By notice dated 15 August 2003, the Commissioner levied additional tax under section 82A of the IRO in the sum of \$5,000 against the Appellant in respect of his submission of incorrect tax return for the year of assessment 2001/02, whereby he wrongly represented that the amount of dependent parent allowance and additional parent allowance was \$60,000. The sum so levied amounts to 49% of the tax underpaid.

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Mr A appealed against such assessment to the Board of Review. The grounds of appeal were as follows:

- (a) For the past 20 odd years, the appellant never ceased to claim for the dependent parent allowance. He was mistaken that his mother was still alive when he submitted the tax return for the year of assessment 2001/02. He therefore continuously applied for such dependent allowance.
- (b) The appellant never had any intention to defraud the Revenue because he was fully aware that the Births and Deaths Registry would keep track of the death of his mother. No fraud could ever be perpetuated.
- (c) The Revenue suffered no loss even though the appellant mistakenly claimed for the dependent parent allowance. This was because his mistake had been corrected in the year of assessment 2001/02.

The facts appear sufficiently in the judgment.

Held:

1. The appellant claimed that he had no intention to evade tax. He just forgot that his mother had passed away when he submitted the tax return. He just habitually claimed for such dependent parent allowance. The Board held that this was not a reasonable excuse: see D9/98, IRBRD, vol 13, 103 which said:

'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 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.'

2. The appellant asserted that his mistake did not cause the Revenue to incur any loss because the assessment concerned had not included the dependent parent allowance. The Board held that this was not a reasonable excuse. This Board had considered this factor before in D9/98:

'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.'

3. Upon considering the grounds of appeal and the submissions of the parties, the Board

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held that:

- (a) The appellant had no reasonable excuse for submitting incorrect tax return for the year of assessment 2001/02. The appellant was therefore liable for the additional tax so imposed by the Commissioner in accordance with section 82A of the IRO.
 - (b) The appellant continuously applied for the dependent parent allowance. He habitually applied the same in the first year of assessment after the passing of his mother. His mistake was no more than mere negligence. It did not belong to those categories that openly flout the rules and submitted incorrect tax returns. Thus, the standard practice of imposing penalty equivalent to 100% of the tax underpaid as a starting point should not be applied.
4. The Board therefore decided to reduce the additional tax to \$2,500 and the appeal was allowed in part.

Appeal allowed in part.

Cases referred to:

D9/98, IRBRD, vol 13, 103

D91/00, IRBRD, vol 15, 842

Yue Wai Kin for the Commissioner of Inland Revenue.

Taxpayer in person.

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案件编号 D95/03

补加税 – 没有合理辩解而提交填报不正确的报税表 – 意图申索供养父母免税额和供养父母额外免税额 – 与事实不符 – 有关免税额的申索不获批准 – 税务局向上诉人发出补加税评税 – 声称没有意图逃税 – 只是忘记其母亲已去世而惯性地继续申请供养父母免税额 – 非合理辩解 – 税收没有损失 – 非合理辩解但可作为求情因素 – 所犯的错误只是一般疏忽 – 并不属于明目张胆的错报 – 不应以少徵收税款的100%作为考虑罚款水平的起点 – 《税务条例》第82A条

委员会：何耀华（主席）、吴正和及杨志威

聆讯日期：2003年11月21日

裁决日期：2004年2月5日

甲先生(「上诉人」)就税务局局长于 2003 年 8 月 15 日根据《税务条例》第 82A 条向其作出的 2001/02 课税年度补加税评税(款额为 5,000 元, 相等于少徵收税款的 49%) 向本委员会提出上诉。

上诉人就 2001/02 课税年度提交填报不正确的个别人士报税表。纵使其母(乙女士)已去世, 上诉人在该课税年度报税表申索供养父母免税额和供养父母额外免税额。

根据税务局获得的资料, 受供养的母亲(乙女士)其实已于 2000 年 12 月 18 日(即 2000/01 课税年度内)逝世。因此, 税务局通知上诉人有关免税额的申索不获批准。上诉人没有就有关薪俸税评税提出反对。

就上诉人于其 2001/02 课税年度个别人士报税表内作出错误陈述申索供养父母免税额(包括额外免税额)共 60,000 元一事, 税务局局长于 2003 年 8 月 15 日根据《税务条例》第 82A 条向上诉人发出 2001/02 课税年度补加税评税, 款额为 5,000 元, 相等于少徵收税款的 49%。

甲先生针对该评税向委员会提出上诉, 理由如下:

- (a) 上诉人在过去二十多年来都一直申请供养父母免税额。在填写 2001/02 年度的报税表时, 他误以为母亲仍未去世, 因此继续申请供养父母的免税额。

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- (b) 上诉人绝对没有欺诈意图，因为他很清楚生死注册处存有母亲的死亡纪录，所以欺诈是不会成功的。
- (c) 税务局并没有因为上诉人错误申索供养父母免税额而少收任何税款，因为他的错误已在 2001/02 课税年度内更正过来。

本案情详细列于下述判决书中。

裁 ：

1. 上诉人声称他并没有意图逃税，只是在填写报税表时忘记了母亲已去世而惯性地继续申请供养父母免税额。委员会认为这并不是一个合理的辩解，见个案编号 D9/98, IRBRD, vol 13, 103：

「纳税人事实上没有意图去逃税，只是我们要考虑纳税人应否缴付补加税罚款的多个因素中的其中一个。... .. 纳税人仍须举证她有合理辩解而她应该免除于该条例下的责任。」

2. 上诉人申述其错误并没有导致税务局少收税款，原因是税务局所作出的评税经已没有将任何供养父母免税额计算在内。委员会认为这并不是一个合理的辩解。委员会曾在个案编号 D9/98 考虑过此因素：

「至于税收没有损失从来未有被认为是一个合理的辩解。假如触犯了法例，无论受害人有没有损失也不会影响触犯法例者的责任，但可以作为求情的因素。」

3. 在考虑过上诉人提出的上诉理由及双方的申述后，委员会认为：
 - (a) 上诉人没有合理辩解就 2001/02 课税年度提交填报不正确的报税表。因此，根据《税务条例》第 82A 条，上诉人有法律责任被评定补加税。
 - (b) 上诉人连续二十多年申请供养父母免税额，在母亲去世后的第一个课税年度惯性地继续申索。他所犯的错误只是一般疏忽，并不属于明目张胆的错报，因此不应以少徵收税款的 100% 作为考虑罚款水平的起点。
4. 委员会因此裁定上诉人的上诉部分得直，并把有关的补加税评税调低至 2,500 元。

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上诉部分得直。

参考案例：

D91/98, IRBRD, vol 13, 103

D91/00, IRBRD, vol 15, 842

余伟坚代表税务局局长出席聆讯。
纳税人亲自出席聆讯。

裁 决 书：

背景

1. 甲先生(以下简称「上诉人」)就税务局根据《税务条例》(第112章)(以下简称「税例」)第82A条向他徵收的2001/02课税年度补加税罚款提出上诉。税务局作出上述评税是因为上诉人就2001/02课税年度提交填报不正确的个别人士报税表。
2. 在上诉聆讯上，上诉人选择在宣誓后作供，并接受税务局代表的盘问。

案情事实

3. 税务局于2002年5月2日向上诉人发出2001/02课税年度的个别人士报税表(BIR表格第60号)。
4. 税务局于2002年6月6日收到上诉人填妥的2001/02课税年度个别人士报税表(BIR表格第60号)。上诉人在该报税表第8.4部就申索供养父母免税额和供养父母额外免税额提供资料如下：

(甲) 父/母姓名 : 乙女士
 香港身份证号码 : BXXXXXX(X)
 出生日期 : 1913年4月
 与上诉人或上诉人
 配偶的关系 : 父母

(乙) (一) 受养人在本年度内连续与上诉人全年同住而并无付出十足费用；

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(二) 上诉人就受养人的供养详情在以下问题中提供了「是」的回答：

- (a) 上诉人或上诉人配偶在本年度内给予受养人不少于\$12,000的金钱作生活费；
- (b) 受养人在本年度内有资格申请政府伤残津贴。

上诉人声明在该报税表内所填报的资料均属真确，并无遗漏，并于该表上签署作实，日期为2002年5月30日。

5. 根据税务局获得的资料，受供养的母亲乙女士其实已于2000年12月18日（即2000/01课税年度内）逝世。

6. 评税主任于2002年9月10日向上诉人发出2001/02课税年度薪俸税评税，其中并无批准上诉人申索供养父母免税额和供养父母额外免税额。此外，评税主任在评税通知书内通知上诉人有关免税额的申索不获批准，理由是据税务局取得的资料，上诉人和他的配偶都没有在有关的课税年度内供养父母/祖父母。

7. 上诉人并没有就2002年9月10日税务局发出的薪俸税评税提出反对。

8. 就上诉人于其2001/02课税年度个别人士报税表内作出错误陈述申索乙女士的供养父母免税额(包括额外免税额)共60,000元一事，税务局局长于2003年8月15日根据税例第82A条向上诉人发出2001/02课税年度补加税评税及缴税通知书，款额为5,000元，相等于少徵收税款的49%。

9. 上诉人就有关的补加税评税于2003年8月22日向本委员会提出上诉，理由如下：

- (a) 上诉人在过去二十多年来都是不间断地申请供养母亲的免税额。在填写2001/02年度的报税表时，他误以为在有关年度母亲仍未去世，因此继续申请了供养母亲的免税额。
- (b) 上诉人绝对没有欺诈意图，因为他很清楚生死注册处存有母亲的死亡纪录，所以欺诈是不会成功的。
- (c) 上诉人并没有因为他在填写报税表时所犯的的错误而少交任何税款，因为他的错误已在2001/02课税年度的评税通知书内更正过来。

案情分析

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10. 上诉人声称他不是意图逃税，只是在填写报税表时没有记起母亲已在上一个课税年度去世而惯性地继续申请了供养母亲的免税额。我们认为这并不是一个合理的辩解。税务上诉委员会在个案编号D9/98, IRBRD, vol 13, 103中表达了以下意见：

「纳税人事实上没有意图去逃税，只是我们要考虑纳税人应否缴付补加税罚款的多个因素中的其中一个。……纳税人仍须举证她有合理辩解而她应该免除于该条例下的责任。」

以下是所节录的判词的英文原文：

‘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 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.’

11. 上诉人申述他在填写报税表时所犯的错误并没有导致少收税款，原因是税务局所作出的评税经已没有将任何供养父母免税额计算在内。我们认为这并不是一个合理的辩解。税务上诉委员会曾在个案编号D9/98中表达了以下意见：

「至于税收没有损失从来未有被认为是一个合理的辩解。假如触犯了法例，无论受害人有没有损失也不会影响触犯法例者的责任，但可以作为求情的因素。」

以下是所节录的判词的英文原文：

‘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.’

12. 至于罚款水平方面，税务局代表向我们提出以下观点：

- (a) 税务局有关薪俸税的罚款政策特别指出申请已去世父母的供养父母免税额属明目张胆的个案，故一般的罚则是少徵收税款的100%。
- (b) 税务上诉委员会个案编号D91/00, IRBRD, vol 15, 842亦是因为纳税人申索已去世父亲的供养父母免税额而引起。在该个案中，上诉委员会认为纳税人失去至亲的伤感和纳税人自己当时的健康状况欠佳是两个很有力的求情因素，因此将该个案的罚款减为少徵收税款的24.8%。

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- (c) 个案编号D91/00的案情较为特殊，因此本案的补加税罚款水平不应与该个案看齐，而本案所评定的5,000元补加税罚款相等于少徵收税款的49%，罚则并不过高。

案情总结及裁决

13. 在考虑过上诉人提出的上诉理由及双方的申述后，我们认为：
 - (a) 上诉人就2001/02课税年度提交填报不正确的报税表没有合理的辩解。因此，根据税例第82A条，上诉人有法律责任被评定补加税。
 - (b) 上诉人连续二十多年申请供养母亲的免税额，惯性在母亲去世后的第一个课税年度错误地继续申报。他所犯的错误只是一般疏忽，并不属于明目张胆的错报，因此不应以少徵收税款的100%作为考虑罚款水平的起步点。在此情形下，税务局所评定相等于税款49%的5,000元补加税罚款实属过高。
14. 我们因此裁定上诉人的上诉部分得直，并把有关的补加税评税调低至2,500元。