

Case No. D12/10

Salaries tax – subscription of more than one professional association – extra-statutory concession – sections 12(1) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Chan Miu Lan Anita and Mak Wai Piu Paul.

Date of hearing: 28 April 2010.

Date of decision: 28 May 2010.

The Taxpayer claimed for deduction of membership fees paid to two professional societies, Institute B and Institute C, for the maintenance of her qualification in Country D to be recognized and accepted in Hong Kong, a pre-requisite of her employment in Hong Kong. Membership of both organizations must be held together for the Taxpayer to maintain her professional qualification and she felt that the payment she made was in respect of one global professional body. The Assessor made an extra-statutory concession and allowed the Taxpayer deduction of the higher sum of the two professional societies only.

Held:

Deduction of subscriptions of professional associations is not allowable under the strict interpretation of the wording of the IRO. However, a practice has arisen where the IRD by way of concession would allow a taxpayer to deduct a subscription to one professional association subject to the holding of the professional qualification being a pre-requisite of employment and where the retention of membership and the keeping abreast of current developments in that particular profession are regularly used and benefited in the performance of their duties. The issue before us to consider is whether or not Institute B and Institute C are one association. Although it is quite clear that Institute B and Institute C are working in partnership together and have a common interest in governing and maintaining one professional designation in Country D, it does not mean that they are one organization and one professional body. The fact that the IRD does not dispute that membership of both organizations must be held together for the Taxpayer to maintain her professional qualification does not have an impact upon the extra-statutory concession by the IRD to allow the deduction of only one membership subscription to a particular professional association.

Appeal dismissed.

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Cases referred to:

CIR v Humphrey 1 HKTC 451
CIR v Robert P Burns 1 HKTC 1181
CIR v Franco Tong Sui Lun (2006-07) IRBRD, vol 21, 947
Simpson v Tate 9 TC 314
D19/73, IRBRD, vol 1, 121
D24/87, IRBRD, vol 2, 398
D72/90, IRBRD, vol 5, 503
D3/93, IRBRD, vol 8, 96

Taxpayer in person.

Yip Chi Yuen, Tsui Nin Mei and Ong Wai Man for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Ms A ('the Taxpayer') in respect of a Determination by the Deputy Commissioner of Inland Revenue dated 26 November 2009 in respect of a salaries tax assessment for the year of assessment 2007/08. The issue for the Board to consider is whether the Taxpayer having been granted a deduction of a membership fee of CAD\$503.50 (HK\$3,587) should be allowed a further deduction of a membership fee of CAD\$471.70 (HK\$3,360) for the relevant year of assessment.

Agreed facts

2. The following facts were agreed by the parties and we find them as facts:
- (1) The Taxpayer has since then claimed deduction of outgoings and expenses of CAD975.20 together with the following documents:
- (a) A copy of 2007-08 annual membership fees notice and invoice dated 4 April 2007 issued by Institute B showing the following fees payable by the Taxpayer prior to 1 June 2007:

<u>Particulars</u>	<u>CAD</u>
Institute B	475.00
Institute C	445.00
GST	<u>55.20</u>
Total Fee	<u>975.20</u>

- (b) A copy of confirmation issued by Institute B in respect of the Taxpayer's payment of annual fees of CAD975.20 on 17 May 2007.
- (c) In response to the Taxpayer's request for confirming that Institute B and Institute C are part of one professional society, Institute B made a reply by email dated 13 January 2009 that:

'... Although you do remit both fees to [Institute B], we send the [Institute C] fee to [Institute C].

You are required to pay both fees in order to maintain your membership in good standing. [Institute B] and [Institute C] are independent companies, but both represent Chartered Accountant's ...

... I can also add something to the confirmation saying that it is necessary to remit both fees in order to maintain your membership.'

- (2) In relation to her claim of expenses of CAD975.20, the Taxpayer provided the following information and documents:

- (a) '... CA membership ... is part of my job requirement.'
- (b) '... refer to [Institute B] bylaw 325 ([Institute C] charges) showing that members are required to pay the [Institute C] charges as part of annual membership fee (bylaw 323). Please also refer to [Institute B] bylaw 334 (Suspension for non-payment of fees and other charges) showing that membership is suspended for non-payment of the [Institute C] charges. Hope this is sufficient to prove that both the [Institute B] and [Institute C] fees must be paid to maintain the [Country D] CA membership (one professional designation).'
- (c) Copies of the extracts of Institute B bylaws 321 to 335 showing, among others, the following information:

'FEE AND OTHER CHARGES

321 Payment of fees

Every member, student, applicant, firm and professional corporation shall pay such fees as are prescribed by the Council [of Institute B].

...

323 Annual membership fee

The annual membership fee shall be set at such amount as the Council may by resolution determine and shall be payable on such date as may be determined by the Council from time to time,...

...

325 [Institute C] charges

To the fee payable by each member pursuant to Bylaws 323 and 324 there shall be added the amount charged to [Institute B] by [Institute C] in respect of such member.

...

334 Suspension for non-payment of fees and other charges

(1) When a member's annual membership fee, the charge for [Institute C] membership or any special assessment ... is not paid within four (4) calendar months from the date such fee, charge or assessment first became due, all rights and privileges as a member...shall be suspended as of the final date for payment, and such suspension shall be reported to the membership committee.

...'

(3) The Taxpayer put forth the following contentions:

- (a) 'In [Country D], Chartered Accountants must be members of [Institute C] ... However, [Institute C] membership must be held alongside membership of at least one CA institute (or ordre in French) of a [Country D] province or territory. It is not possible to join [Institute C] directly. [Institute B] is the provincial CA institute. GST is the goods and sales tax (6% at the time of payment) that must be paid in conjunction with the fees. Therefore, I am required to pay **both** [Institute B] and [Institute C] fees **including** GST as a CA member, and that **[Institute B] and [Institute C] are part of one professional society (Chartered Accountant) and not two different societies**. I do not understand why the assessment only allows for the deduction of CAD 475 ([Institute B] portion of the fees) and disallowing the [Institute C] and GST portion.

...

The deduction should be CAD 975.20.'

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- (b) ‘... an email from [Institute B] confirming that **it is necessary to remit both [Institute B] and [Institute C] fees in order to maintain my CA membership in good standing.** The membership is for **one** professional qualification (Chartered Accountant) that is a pre-requisite of my employment.’
- (4) By letter dated 31 July 2009, the Assessor explained to the Taxpayer that the deductibility of expenses under salaries tax is governed by section 12(1) of the Inland Revenue Ordinance (‘the IRO’) and that the types of expenditure which satisfy the tests as laid down by section 12(1) are very limited. Strictly speaking, no part of the outgoings and expenses claimed by the Taxpayer is allowable. However, as an extra-statutory concession, a taxpayer’s payment of membership fee to one professional society is allowed by concession where the holding of such professional qualification is a prerequisite of his employment and that the retention of membership and the keeping abreast of current developments in the particular profession are of regular use and benefit in the performance of his duties. The Assessor considered that Institute B and Institute C are two professional societies and that the Taxpayer should be allowed deduction of membership fees paid to one of them. The Assessor agreed to allow the Taxpayer deduction of the higher sum of CAD475 paid to Institute B together with the corresponding GST at 6%, total being CAD503.50 (that is, CAD475 x 1.06). He proposed to revise the 2007/08 salaries tax assessment as follows:

Income		\$321,799
<u>Less: Home loan interest</u> ²	\$45,897	
Self-education expenses	4,351	
Outgoings and expenses ³	<u>3,587</u>	<u>53,835</u>
		267,964
<u>Less: Basic allowance</u>	100,000	
Dependent parent allowance	<u>30,000</u>	<u>130,000</u>
Net chargeable income		<u>\$137,964</u>
Tax payable thereon		<u>\$3,238</u>

² Interest payments in respect of Loan 1

³ HK\$ equivalent of CAD503.5=\$3,587 (CAD1=\$7.1246)

- (5) The Taxpayer declined to accept the above proposal and contended that:
- ‘... I understand the allowance is restricted to one professional society only. However, the full payment of CAD 945.20 was made payable to only one professional society, specifically [Institute B]. As previously mentioned, members are required to pay the [Institute C] charges as part

of the [Institute B] annual membership fee ([Institute B] bylaw 323). Therefore, the charges were part of the [Institute B] membership fees and should not be viewed as a separate charge.’

The evidence

3. The Taxpayer gave evidence before us. She was employed at Company E as an auditor and worked in the audited department as an assistant manager. She was admitted as a Country D chartered accountant and a pre-requisite of her employment in Hong Kong was that she needed to maintain her Country D registration in order for her qualification in Country D to be recognized and accepted here in Hong Kong.

4. She drew our attention to an email dated 4 April 2007 which she received in respect of her 2007-08 annual membership data renewal and fees notice and invoice. This email set out various requirements that she needed to complete to ensure that she paid her fees and updated her data to Institute B – the provincial regulatory body and in turn, she also needed to make payment to the federal body – Institute C. She drew to our attention the fact that Institute B was responsible for collecting fees on behalf of Institute C. The email stated as follows:

‘According to our records, the fees for your category of membership are as follows:

\$475.00	[Institute B]
\$445.00	[Institute C]
\$55.20	GST (GST#107508525RT0001)
\$975.20	Total Fee (prior to June 1, 2007)
\$1,075.20	Total Fee (includes late fee after June 1, 2007)’

5. She made it clear to us that she was making one payment online to Institute B and in turn, they then dealt with any payments that were needed to be onward paid to Institute C. She was of the view that to be a member in good standing and in order to carry out her professional duties, she had to be a member both of Institute B and Institute C.

6. She drew to our attention the relevant mission statements of both Institute B and Institute C and she took the view that these were very similar in nature.

7. In short, her evidence was that she felt that the payment she made was in respect of one global professional body.

8. She also drew to our attention that she was designated the same membership identity numbers for both Institute B and Institute C. She contended that although they were clearly independent organizations, both Institute B and Institute C worked in collaboration to support the profession.

9. During the course of her evidence, her attention was drawn to Institute B bylaws and in particular, bylaw 325 which states as follows:

‘325 [Institute C] charges

To the fee payable by each member pursuant to bylaws 323 and 324 there shall be added the amount charged to the Institute by [Institute C] in respect of such member.’

10. This again illustrated that the bylaws enabled Institute B to collect and deal with any charges that may be raised by Institute C.

The relevant legislation

11. Deduction of expenses for salaries tax is governed by section 12(1)(a) of the IRO which reads as follows:

‘(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person –

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income;’

12. Section 68(4) of the IRO provides as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

13. The relevant case law in respect of this matter is settled and our attention was drawn to:

- CIR v Humphrey 1 HKTC 451;
- CIR v Robert P Burns 1 HKTC 1181;
- CIR v Franco Tong Sui Lun (2006-07) IRBRD, vol 21, 947;
- Simpson v Tate 9 TC 314;
- Board of Review Decision D19/73, IRBRD, vol 1, 121;
- Board of Review Decision D24/87, IRBRD, vol 2, 398;
- Board of Review Decision D72/90, IRBRD, vol 5, 503; and
- Board of Review Decision D3/93, IRBRD, vol 8, 96.

14. The authorities clearly show that the strictness of section 12(1)(a) of the IRO and such deductions are only allowable in the production of assessable income.

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15. In CIR v Franco Tong Sui Lun (2006-07) IRBRD, vol 21, 947, Deputy High Court Judge Carlson at page 955 said as follows:

‘..... The expenses contemplated by the section are strictly and only those referable to the activity of the employment itself as opposed to other personal contractual obligations which, although referable to the earning of his salary by the taxpayer and, as in this case, its very computation, are not expenses incurred in the performance of the taxpayers duty in doing the work required of that employment.’

16. However, it has always been the practice of the Inland Revenue Department (‘IRD’) to allow, as an extra-statutory concession, a taxpayer’s payment of membership fee to one professional association where the holding of a professional qualification is a pre-requisite of employment and where the retention of membership and the keeping abreast of current developments in that particular profession are regularly used and benefited in the performance of the duties of the taxpayer. Hence, it can be seen from the relevant authorities that these deductions are restricted to the subscription to one professional association.

Discussion

17. It is accepted that deduction of subscriptions of professional associations is not allowable under the strict interpretation of the wording of the IRO. However, a practice has arisen where the IRD by way of concession would allow a taxpayer to deduct a subscription to one professional association subject to the holding of the professional qualification being a pre-requisite of employment and where the retention of membership and the keeping abreast of current developments in that particular profession are regularly used and benefited in the performance of their duties.

18. Here, as can be seen, the Taxpayer has been allowed one deduction of a membership fee of CAD503.50 which was payable to Institute B as a concession.

19. As stated above, we have specifically drawn the attention of the Taxpayer to the wording of bylaw 325 of Institute B, which provides that the amount ‘*charged to [Institute B] by [Institute C] in respect of such member*’ shall be added to the fee payable to Institute B by each member. The Taxpayer did not however contend or advance any argument to the effect that the whole sum of CAD975.20 was paid as one single membership fee by the Taxpayer to Institute B only (being an amount determined as payable by Institute B pursuant to the combined effect of its bylaws 323, 324 and 325), but accept that it was merely an administrative arrangement of Institute B to utilize part thereof to settle the amount charged to it by Institute C.

20. In the premises, the sole argument put forward by the Taxpayer in this appeal was that Institute B and Institute C are in essence part of one association and therefore, the total membership fees of CAD975.20 should be deductible.

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21. Therefore, the issue for us to consider is whether or not Institute B and Institute C are one association. The submissions put to us by Mr Yip on behalf of the IRD were unequivocal, he asserts that Institute B and Institute C are two different independent entities and associations. It is clear that Institute B was formed in 1879 and is governed by a Council. Institute C was incorporated by a Special Act of the Country D Parliament in 1902. It is therefore clear that Institute B and Institute C were formed in different years and are managed by their own council members. It is clear that they issued their own annual reports and prepared their own financial statements. The Taxpayer herself also makes it clear that Institute B and Institute C are two different societies of the accounting profession but she asserts that she has to join both in order to maintain her Country D qualification. Although Institute B bylaw 325 (as set out in paragraph 9 above) requires the Taxpayer to pay to Institute B annual membership fees which include those fees due to Institute C, in our view it is quite clear that all that Institute B is doing is through its bylaws collecting fees on behalf of Institute C. Indeed, in the email which we set out and referred to in paragraph 4 above, the fees in respect of each particular organization is differentiated. Institute B is collecting fees on behalf of Institute C.

22. Our attention was also drawn to the Institute C annual report 2007-08 where member fees were collected as revenue income. In that annual report, it is made clear that Institute C's fees are invoiced and collected by the various provincial institutes on behalf of Institute C.

23. Although it is quite clear that Institute B and Institute C are clearly working in partnership together and have a common interest in governing and maintaining one professional designation in Country D, it does not mean that they are one organization and one professional body.

24. It is also clear that Mr Yip on behalf of the IRD does not dispute that membership of both organizations must be held together for the Taxpayer to maintain her professional qualification. This does not have an impact upon the extra-statutory concession by the IRD to allow the deduction of only one membership subscription to a particular professional association.

25. Therefore, having considered carefully all the submissions put to us and having reviewed the relevant documents, we have come to the conclusion that Institute C and Institute B are two separate professional associations and as such, as a concession, the Taxpayer was allowed a deduction of the higher membership fee, that is, CAD503.50 which was paid to Institute B. Therefore, we dismiss the appeal.