HCIA 3/2006

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE

INLAND REVENUE APPEAL NO. 3 OF 2006

BETWEEN

ROGER JESSE ROBERTSHAW Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

Before : Hon Sakhrani J in Court
Date of Hearing : 26 January 2007
Date of Judgment : 8 February 2007

J U D G M E N T

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1. This is an appeal by way of case stated by the appellant against the decision of the Board of Review ("the Board") dated 7 April 2006 in relation to Salaries Tax assessments for the years of assessment 2001/02 and 2002/03.

Background

2. The agreed facts are set out in the case stated by the Board dated 26 July 2006 ("the case stated").

3. At all relevant times the appellant was employed by Cathay Pacific Airways Limited ("Cathay") as an aircrew officer.

4. By the "Conditions of Service (1999)" effective from 1 July 1999 ("COS") applicable to aircrew officers employed by Cathay the appellant was entitled to accommodation and rental assistance as set out at paragraph 2(1) of the case stated. Paragraph 41.4 of COS provided that expatriate officers would be provided with accommodation and rental assistance "**in accordance with Company Policy**" (emphasis added).

5. On 2 July 1999 the Hong Kong Aircrew Officers' Association ("HKAOA") on behalf of its members, entered into an "Accommodation & Rental Assistance Policy Agreement" ("the Agreement") with Cathay which formed part of the appellant's conditions of service. The relevant clauses are set out at paragraph 2(2) of the case stated.

6. Clause 5 of the Agreement provided as follows :

> "5. **HOME & BOAT OWNER/OCCUPIERS - EXPATRIATE JUNIOR FIRST OFFICER AND ABOVE**
>
> 5.1 [Cathay] will provide Officers with assistance to acquire a house or boat in Hong Kong for the sole purpose of use as their family residence.
>
> 5.2 The assistance, in the form of a cash allowance, is based on the actual monthly mortgage payment of the house or boat. The maximum amount available is equivalent to the Rent Free Zone in 4.2.b. The allowance so determined will remain unchanged for a period of two (2) years .....
>
> 5.7 A receipt for the actual purchase price of the house/boat will be produced at the time of joining the scheme. Should the house/boat be purchased through a service company, proof of ownership of the company must be produced at the same time. In addition, financing arrangements and any other relevant documents, as required by [Cathay], must be produced at the start of the scheme and at review periods……"

7. The COS, the Agreement and the "Housing Policy Handbook" issued by Cathay in April 1998 set out in detail the terms and conditions of the appellant's entitlement to housing benefits which may be amended from time to time.

8. Revill Securities Limited ("Revill") was a private company incorporated in Hong Kong. At all relevant times the appellant and his spouse were its only shareholders and directors each holding one share of $1 each.

9. On 28 October 1999 Revill purchased a vessel called Shike ("the boat") for $2,200,000. The boat was registered with the Marine Department in the name of Revill as its owner and the appellant was nominated as its "licensed owner".

10. By an application dated 28 October 1999 the appellant applied for housing assistance from Cathay. The appellant also requested Cathay to deposit the "rent" into the bank account of Revill.

11. On 19 March 2001 following an internal review, Cathay informed all its non-local employees in receipt of housing allowance of the changes in tax reporting for owner occupiers by the memorandum set out at paragraph 2(6)(a) of the case stated. The appellant was notified that changes would be made to the taxation reporting in respect of the housing assistance paid to owner occupiers.

12. At paragraph 2(6)(a)(iii) of the case stated the Board reproduced the memorandum' s summary of the changes in tax reporting by Cathay as follows :

> "**The Changes in Tax Reporting by [Cathay]**
>
> In summary, in order to comply with IRD requirements, with effect from 1st April 2001, the housing allowance payable to employees who are Owner Occupiers, irrespective of whether they have service companies or not, will be reported by the company as a ' cash' allowance and will therefore by fully taxable.
>
> These changes apply equally to Owner Occupiers who are receiving a monthly benefit based on actual mortgage payments and those Owner Occupiers receiving the ' basic' allowance."

13. And at paragraph 2(6)(b), the Board stated :

> "In its "Housing Benefit Policy-Clarification" dated 19 March 2001 which was distributed to the employees concerned, Cathay explained, among other things, that : …….....
>
> (iii) An employee may not claim rental assistance (as opposed to financial assistance if the employee is a house/boat Owner Occupier) in respect of leased accommodation owned by himself, his spouse and/or a relative of either

himself or his spouse, or in which he, his spouse or any relative of himself for his spouse has an interest. ... An "interest" is defined as (a) a beneficial interest under a trust; or (b) a direct or indirect interest in; or (c) being a director or shareholder of a company (other than a company the shares of which are quoted at The Hong Kong Stock Exchange) which (i) is the registered proprietor of the leased accommodation;....

(iv) [Cathay] shall have the right and discretion to :-

.....

(e) amend, apply and interpret [Cathay's] Housing Benefits policy as appropriate except where specific conditions apply in [COS]."

14. In the 2001/02 Employer's Return filed in respect of the appellant Cathay declared the appellant's income as follows :

Salary	$1,471,483
Education benefits	$129,326
Allowance	$521,823
	$2,122,632

15. In his Tax Return for the year 2001/02 the appellant declared that the rent paid by him in respect of the boat was $660,000 while the amount of rent refunded to him by Cathay was $466,354.84. The appellant and his wife elected joint assessment in the Tax Return.

16. The assessor treated the whole of the allowance declared by Cathay as being part of the income of the appellant in his Salaries Tax assessment.

17. By letter dated 6 November 2002, the appellant objected to the assessment in the terms as set out at paragraph 2(10) of the case stated as follows :

"(a) ... it appears that the rental reimbursement given by Cathay Pacific Airways to my Landlord has been charged as full Taxable Income, and not at the 10% of rental value as has always been the past. I am not aware of any changes to Inland Revenue department tax laws, and therefore consider [Cathay] to be reporting my Income in a wholly unjust manner...

(b) During the past years that I have been filing taxes in Hong Kong, the 10% of rental value method has been applied. This year there appears to be a different reporting method used by [Cathay]. The previous years they have reported the housing allowance as "Rental Subsidy" on my pay slip, the tax

year in question as "Housing Assistance", and yet on the Remuneration Return to your office they report it as "Other Allowance" and include it as taxable earnings. Either way you look at the semantics of the wording, this "Other allowance" is actually Rental Subsidy and has always been so. It has not changed, and since the Taxation laws have not changed, this would appear to be unjust...

(c) [Cathay] are still paying my Landlord the full rental of HK$55,000 and reimbursing me HK$38,000 as housing assistance ... "

18. By letter dated 6 March 2003 to the appellant, the assessor wrote to state the matters set out at paragraph 2(12) of the case stated. He was of the opinion that the rental assistance was an allowance within the meaning of income as defined in section 9(1)(a) of the *Inland Revenue Ordinance* Cap. 112 ("the *Ordinance*") and not a refund of rent for the purposes of section 9(1A)(a) of the *Ordinance*.

19. In the 2002/03 Employer' s Return filed in respect of the appellant, Cathay declared the appellant' s income as follows :

Salary	$1,606,455
Education benefits	$267,299
Allowance	$673,725
	$2,547,479

20. In his Tax Return for the year of assessment 2002/03 the appellant declared that the rent paid by him in respect of the boat was $522,000 while the amount of rent refunded to him by Cathay was $456,000.

21. The assessor treated the whole of the allowance declared by Cathay as being part of the income of the appellant in his Salaries Tax assessment for the year of assessment 2002/03.

22. The appellant also objected to the said assessment.

23. On 17 December 2004 a determination pursuant to section 64(4) of the *Ordinance* was issued to the appellant to confirm the 2001/02 and 2002/03 Salaries Tax assessments. The reasons for the determination are set out at paragraph 2 (20) of the case stated. The Commissioner was of the view that the two sums of $466,354 and $456,000 were not refunds of rent at the time of payment but were financial assistances for acquiring a residence.

24. The appellant appealed to the Board by letter dated 17 January 2005 against the determination.

25. The above facts were agreed facts before the Board.

26. At the hearing before the Board the appellant did not give evidence nor did he call any witnesses. He was represented by his colleague Mr. Bower who made submissions on his behalf.

27. The issue before the Board was as set out at paragraph 21of the case stated as follows :

> "…….. the issue for our decision is whether the sums of $466,354 and $456,000 paid by Cathay to the Appellant respectively for the years of assessment 2001/02 and 2002/03 are allowances chargeable to Salaries Tax in terms of section 9(1)(a) or refunds of rent within the meaning of section 9(1A)(a)(ii). The Board stated that in the former case, the sums should be assessed in full. In the latter case, the Appellant should be assessed only on the rental value of the place of residence provided to him by Cathay in accordance with sections 9(1)(c), 9(1A)(c) and 9(2)."

28. On the facts found by the Board and for the reasons given in the case stated, the Board concluded that the sums in dispute were not exempted from Salaries Tax under section 9(1A)(a) of the *Ordinance* and dismissed the appeal.

The appeal

29. Section 69(1) of the *Ordinance* provides that the decision of the Board shall be final provided that either the appellant or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance.

30. By section 69(5), a judge of the Court of First Instance shall hear and determine any question of law arising on the stated case and "may in accordance with the decision of the court upon such question confirm, reduce, increase or annul the assessment determined by the Board, or may remit the case to the Board with the opinion of the court thereon……."

31. It is plain that the appeal is on a question of law only and not on the Board' s finding of facts.

32. The case stated for the opinion of the Court was made after consultation and agreement of the parties' legal representatives. Paragraph 33 of the case stated sets out the two questions for the opinion of the Court as follows:

> "(1) On the facts found, was the Board entitled to decide that the sums of $466,354 and $456,000 paid by Cathay to the Appellant respectively for the years of assessment 2001/02 and 2002/03 were allowances chargeable to Salaries

> Tax in terms of section 9(1)(a) and not refunds of rent within the meaning of section 9(1A)(a)(ii)?
>
> (2) Did the Board err in concluding that the test in determining whether a payment was a rental refund is to ascertain the intention of the parties as at the time of the payment by the employer and in applying this test to the facts found did the Board err in deciding that the sums described in question (1) were not refunds of rent within the meaning of section 9(1A)(a)(ii)?"

33. It is plain that the above questions are to be decided on the facts found by the Board.

34. Question (1) is framed on the premise that the facts found by the Board are accepted.

35. Question (2) is in two parts; the first dealing with whether the Board adopted the correct test and the second dealing with the application of the test "to the facts found".

36. There is no question of challenging any of the findings of fact by the Board at the hearing of this appeal.

37. Mr Leung, for the appellant, confirmed at the hearing that the appellant was not challenging any finding of fact by the Board. Thus it is clear that the appellant has accepted and is bound by the Board's findings of fact.

38. It is also important to bear in mind that the Court is not entitled to re-evaluate the evidence to see whether it might have made a different finding. As Barnett J said in *CIR v Inland Revenue Board of Review & Another* [1989] 2 HKLR 40 at page 50

> "To impugn the Board's evaluation would be to undermine the whole purpose of the Board as a fact-finding tribunal."

39. And in *Kwong Mile Services Ltd v Commissioner of Inland Revenue* [2004] 7 HKCFAR 278 Bokhary PJ said at paragraph 37 of his judgment at page 289 that :

> "In an appeal on law only the appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the fact-finding tribunal's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as the true and only reasonable one, the appellate court is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal. The correct approach for the appellate court is composed essentially of the foregoing three propositions. These propositions complement each other, although the

understandable tendency is for those attacking the fact-finding tribunal's conclusion to stress the third one while those defending that conclusion stress the first two."

The statutory provisions

40. The relevant statutory provisions are not disputed. By section 8(1) of the *Ordinance* it is provided that Salaries Tax shall be charged on income from employment.

41. By section 9(1) income from employment includes :

"(a) any wages, salary…….or allowance, whether derived from the employer or others;

(b) the rental value of any place of residence provided rent-free by the employer……;

(c) where a place of residence is provided by an employer ……at a rent less than the rental value, the excess of the rental value over such rent…."

42. Section 9(1A) provides :

"(a) Notwithstanding subsection (1)(a), where an employer …....

(i) pays all or part of the rent payable by the employee; or

(ii) refunds all or part of the rent paid by the employee, such payment or refund shall be deemed not to be income;

.....

(c) a place of residence in respect of which an employer ….. has paid or refunded part of the rent therefor shall be deemed for the purposes of subsection (1) to be provided by the employer …… for a rent equal to the difference between the rent payable or paid by the employee and the part thereof paid or refunded by the employer....."

43. Section 9(2) provides that the rental value of any place of residence shall be deemed to be 10% of the income as described in section 9(1)(a) after deducting the outgoings, expenses and allowances provided for in section 12(1)(a) and (b).

44. The only questions of law for the Court's determination are Questions (1) and (2) in the case stated.

Question (2)

45. It is convenient to deal with Question (2) first. This is divided into two parts.

46. The first is whether the Board erred in concluding that the test in determining whether a payment was a rental refund is to ascertain the intention of the parties at the time of the payment by the employer.

47. The second is in applying this test **to the facts found** whether the Board erred that the sums were not refunds of rent within the meaning of section 9(1A)(a)(ii) of the *Ordinance* (emphasis added).

48. As to the first part, Mr Leung conceded that the Board applied the correct test. Mr Leung was right to make that concession in the light of *CIR v. Peter Leslie Page* [2002] 5 HKTC 683 where it was held that the real test for determining the true nature of the payments is the intention of the parties at the time of the payment of the money by the employer.

49. In my opinion the answer to the first part of Question (2) must be "No".

50. As to the second part of Question (2), it is important to examine the facts found by the Board.

51. It is plain that the Board made relevant findings of fact.

52. As the Board stated at paragraph 25 of the case stated it found that it was common ground that :

> "[Cathay] had full control of the Scheme. The Appellant had no input to the daily running of the Scheme, its interpretation, or his classification within the Scheme."

53. The Board also found that in an interview the appellant attended with Cathay's Employee Services Manager, the appellant was informed that he was denied rental assistance and as far as Cathay was concerned, he was unable to effect any change to the situation or the circumstances.

54. The Board also found that during subsequent negotiations between Cathay and the HKAOA, Cathay refused to discuss any review of its requirement to impose changes in the Scheme's categorization or reporting (paragraph 25 of the case stated).

55. At paragraph 26 the Board made findings that :

> "In our view, Mr Bower's statements as well as his detailed submissions…….showed the reality of this case very clearly. That is, on 19 March 2001 – a date just prior to the commencement of the year of assessment 2001/2002 – Cathay unilaterally changed the conditions of employment relating to the Appellant's entitlement to housing benefits, essentially on a take it or leave it basis. On that date, Cathay notified relevant employees, including the Appellant, that they could not claim rental assistance in respect of leased property owned by a company in which they had an interest (fact 6 refers). Hence, it is clear that from the year of assessment 2001/2002 onwards, Cathay's explicit intention was that it would only provide financial assistance and not rental assistance to those employees who occupied a boat or property owned through a company in which they had an interest as director or shareholder. This was a clear change from the previous position and practice adopted by Cathay and affected the Appellant's rights in an unambiguous manner."

56. And at paragraph 27 the Board found as follows :

> "…….on the basis of the facts found and the documents produced to us, we find that there is ample evidence to conclude that with effect from 1 April 2001 only those employees who had no relevant interest in his or her corporate landlord were intended and treated by Cathay as being entitled to rental assistance. The Appellant did not fall into this rental assistance category."

57. It is also important to consider the facts found by the Board as contained in paragraphs 28 to 30 of the case stated.

58. At paragraph 28 the Board said :

> "In conclusion…….the issue before us narrowed to a small compass. Specifically, it is necessary and sufficient to decide this appeal simply by finding the intention of the parties when the amounts in dispute were paid. On the basis of the facts found, it is clear that Cathay's intention during the period 1 April 2001 to 31 March 2003 was to pay the sums in dispute not as rent refunds but as financial assistance to subsidize the mortgage payments for purchase of the boat through a private company. The fact that the Appellant continued to pay rent to Revill under a stamped lease produced to Cathay does not alter this conclusion...."

59. The Board also considered that there was some inconsistency in Cathay's internal documentation when describing the appellant's housing benefits relevant to the said two years of assessment. This is addressed in paragraph 27 of the case stated. However, the Board emphatically found at paragraph 28 that :

> "..... the inconsistency in Cathay's nomenclature referred to in the previous paragraph does not persuade us to alter our finding that the nature of the amounts in dispute determined at the time the payments were made, was financial assistance to purchase a boat as distinct from rental refund."

This was a clear finding of fact by the Board that the nature of the amounts in dispute determined at the time the payments were made was financial assistance to purchase a boat and not rental refund.

60. At paragraph 29 the Board recorded its sympathies with the appellant by saying :

> "It may not be of great comfort to the Appellant, but when considering our deliberations in this case we record that our sympathies were with him vis-à-vis the nature of his relevant contractual relations with Cathay. Cathay's 19 March 2001 memorandum and clarification of its housing benefit policy affected the Appellant's (and many of his colleagues') entitlement in a significant and substantive way, and yet he was hardly given any time to consider its implications. As Mr. Bower intimated – it really was a case of "take it or leave (it)".

61. It seems to me that it is plain that by accepting the payments during the years of assessment 2001/02 and 2002/03 the appellant "took it" rather than "left it".

62. And at paragraph 30 the Board found that :

> "It does not matter, in our view, that this communication of Cathay's changed conditions of employment took the form of a memorandum and that this was, as Mr. Bower put it, the lowest form of contractual dealings. According to the Appellant's COS (1999), which are agreed to govern the Appellant's terms of service, Cathay committed to providing "Accommodation and Rental Assistance *in accordance with the company policy*" (emphasis added) and this was reflected by the very terms of the documents issued on 19 March 2001 (see particularly fact 6(b)(iv)(e)). In the result, Cathay announced and then implemented a clear contractual change affecting the Appellant's entitlement to housing benefits. And, as we have found, that essentially was the end of the matter. At the end of the day it is for the employer to decide how to remunerate its staff and for the employee to decide what to do if he feels that his contractual rights have been interfered with."

63. Mr Leung submitted that the Board erred by failing to consider the objections of the appellant and the HKAOA to the changes in tax reporting for owner occupiers as announced by Cathay in the memorandum of 19 March 2001. This is essentially a complaint that the Board failed to make a further finding of fact.

64. I am unable to accept Mr Leung' s submission for two reasons. First, it is important to bear in mind that where a party complains of a lack of finding of fact by the Board and that the case stated should incorporate such a finding, procedurally he should apply to the Court of First Instance for the case stated to be remitted to incorporate further findings of fact. This was made clear in the decision of the Court of Appeal (Tang VP, Le Pichon JA and Sakhrani J) in *Yau Wah Yau v. CIR*, CACV 97/2006, 8 December 2006).

65. At paragraph 11 of the decision, Le Pichon JA said :

> 'Where a party considers that a case stated should incorporate further findings, procedurally, he would have to apply to the Court of First Instance for the case stated to be remitted to the Commissioner to incorporate further findings of fact. In this regard, section 69(4) is similar to section 56(7) of the Taxes Management Act 1970 which was considered by Scott J (as he then was) in *Consolidated Goldfields PLC v Inland Revenue Commissioners* [1990] 2 All ER 398. It was held (at 402 g-h) that the applicant must show that the desired findings were (a) material to some tenable argument, (b) at least reasonably open on the evidence that had been adduced and (c) not inconsistent with the findings already made. It was therefore open to the taxpayer to take such a course had he seen fit to do so prior to the matter being heard by the judge below. As already noted, in the present case, not only did the taxpayer not adopt such a course, it asked the Board to state the question on the basis that the Board' s findings of fact were accepted."

66. Ms Chung, for the respondent, pointed out that where a party considers that a case stated should incorporate further findings of fact, the case stated should be remitted to the Board and not to the Commissioner to incorporate further findings of fact.

67. As the appellant has failed to adopt such a course prior to the hearing it seems to me that it is not open to the appellant to complain that the Board failed to make the further finding of fact.

68. Secondly, there is no merit in the submission. It is plain that the Board considered and accepted the agreed facts before it. The Board considered the relevant statutory provisions and the authorities cited. It considered the detailed submissions of the appellant and the Commissioner. And the Board made findings of fact in coming to its decision which it was entitled to make.

69. The Board clearly considered that the appellant and HKAOA had objected to the changes announced by Cathay. This is apparent from paragraphs 25, 26, 29 and 30 of the case stated.

70. It is clear in my judgment that the Board had well in mind that the appropriate test was that as set out in *Page* and applied it. The Board made findings of fact as to the intention of the parties at the time of the payments of the amounts in dispute.

71. The answer to the second part of Question (2) in my opinion is also "No".

Question (1)

72. As regards Question (1), it is also premised "on the facts found". It follows from my opinion on Question (2) that the answer in my opinion to Question (1) is "Yes".

73. The way in which the appellant had been assessed to Salaries Tax prior to the year of assessment 2001/02 was irrelevant to the issues before the Board. As a matter of law, the Commissioner is not bound by the tax treatment to the appellant in the previous years as tax liability for one year is always to be treated as a different issue from that of liability for another year (*Nam Tai Trading Company Ltd v CIR* [2006] 2 HKLRD 459). In any event, as the Board found, there was a marked change in Cathay's policy in giving and reporting the housing assistance to the appellant for the years of assessment 2001/02 and 2002/03 from the policy in prior years. The tax treatment in prior years is of no assistance to the appellant.

74. I dismiss the appeal. I also make an order *nisi* for costs of the appeal to the respondent.

(Arjan H. Sakhrani)
Judge of the Court of First Instance,
High Court

Mr Richard Leung, instructed by Messrs Robertsons, for the Appellant

Ms Ada Chung, PGC, of the Department of Justice, for the Respondent

(2006-07) VOLUME 21 INLAND REVENUE BOARD OF REVIEW DECISIONS