HCIA7/2007

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION

COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO. 7 OF 2007

BETWEEN

CHU RU YING Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before : Hon Burrell J in Court
Date of Hearing : 3 June 2008
Date of Judgment : 13 June 2008

J U D G M E N T

---

1. This is an appeal by way of case stated pursuant to section 69 of the Inland Revenue Ordinance, Cap. 112 ("IRO") against a decision of the Board of Review dated 29 May 2007.

2. The Board has stated three succinct questions for the opinion of the court which I shall set out in full hereafter. In short they ask whether (a) an original salaries tax assessment; (b) an

additional salaries tax assessment and (c) the total assessable income are "final and conclusive" by virtue of section 70 of the IRO.

3. Before the Board however the appellant had invited the Board to state a case posing nine questions and not merely the one summarised above. The Board declined to do so and gave its reasons.

4. The respondent invites me to deal solely with the one question as posed. The appellant invites me to remit the matter to the Board pursuant to section 64(A) of the IRO and invite the Board to re-state the case incorporating all the questions that the appellant has canvassed.

5. At the hearing the appellant was assisted by a "Mackenzie friend", her husband, Mr Stanley To who has qualified as a solicitor.

6. The appellant has filed with the court a typed submission consisting of 62 pages and a typed reply to the respondent's submission of a further 10 pages. At the outset of the hearing the appellant and Mr To sensibly and helpfully agreed to adopt the procedure of "taking as read" the detailed and comprehensive document as her submission. She was given the opportunity to eloborate on, or highlight, or add to her written submission. She was content not to do so but instead addressed the court in reply after Mr Eugene Fung, on the respondent's behalf, had made oral submissions elaborating upon his 14 page written skeleton.

7. The first question for this court to decide, therefore, was whether or not to remit the case stated so as to expand the issues calling for an opinion, either wholly or partially, in accordance with the appellant's questions.

8. In outline the matters she wanted to be included in the case stated concerned (i) the finality issue (the one question that was posed by the Board); (ii) standard of proof; (iii) misinterpretation and misapplication of statutes; (iv) statutory time bars; (v) estoppel; (vi) constitutional guarantees; (vii) Articles 10, 11 and 12 of the Bill of Rights; (viii) Article 39 of the Basic Law. In addition her written argument (including the reply) referred to 27 authorities (cases, texts and statutes).

9. The factual background was not in dispute. In outline it was as follows.

10. For the years 1996/7, 1999/00 and 2001/2 the appellant submitted tax returns declaring her salary income. Her liability to salaries tax was duly calculated. There was no objection to these "original assessments".

11. For the same years a company called Quality Consultancy (Information Technology) Ltd ("QCL") of which the appellant and her husband were equal and sole shareholders submitted tax returns for profits tax.

12. In early 2003 the Revenue commenced a tax audit on the appellant's affairs which concluded (in summary) that the sums declared as company profits by QCL were in truth liable to salaries tax against the appellant. As a result the amount to be assessed for salaries tax in 1996/7 rose from $272,000 to $682,476; 1999/00 rose from $244,984 to $728,984 and 2001/2 rose from $301,507 to $634,507.

13. The determination to this effect is dated 3 June 2005. The additional tax due (the "additional assessments") for each year was $70,771, $82,280 and $56,610 respectively. Thereafter the chronology of events was as follows :

(i) On 30 June 2005 the appellant served a Notice of Appeal against the 3 June determination. The notice did not comply with section 66(1) of the IRO. Section 66(1) required that the notice be accompanied with specified documents and written grounds of appeal.

(ii) On 31 December 2005 the appellant served written grounds of appeal. She was informed that the one month time limit for an appeal had passed.

(iii) On 27 April 2006, after a hearing, the Board refused to extend the time for appealing. The appellant has not appealed against this ruling.

(iv) On 9 October 2006 the appellant was informed that the Deputy Commissioner intended to levy additional tax pursuant to section 82A(4) of the IRO as a result of the incorrect returns filed for the years 1996/7, 1999/00 and 2001/2.

(v) On 22 December 2006, after considering all representations the Deputy Commissioner demanded additional tax pursuant to section 82A in the sums of $47,000 for 1996/7, $54,000 for 1999/00 and $29,000 for 2001/2. These represented increases of 66%, 65% and 51% respectively. The maximum permissible increase under the Ordinance is 300%.

(vi) On 15 January 2007 the appellant gave Notice of Appeal against the section 82A assessments.

(vii) The Board heard the appeal on 27 April 2007 and gave its written decision on 29 May 2007.

The decision

14. The written decision is a detailed document which sets out, *inter alia*, the appellant's grounds of appeal, the relevant statutory framework and the reasons for their decision. I will only recite the appellant's "grounds of appeal" herein which were as follows :

> "(a) I have never given any incorrect return, statement or information to the Commissioner (she has not specified the specific ground). I operated under [ServiceCo] all these years and have duly reported profits tax through a qualified tax consultant every year. I was an independent contractor during the relevant periods and the Commissioner, in coming to the conclusion that I was an employee, had applied the wrong tests;
>
> (b) the commissioner has misapplied s. 9A to my case as my service was not provided to the 'relevant person or any other person'. The 'other person' should be associated (or have a control relationship) with the 'relevant person' according to the objects stated in para. 4 of DIPN 25. None of the 'relevant persons' and 'other persons' in my projects were 'associated'. They dealt with each other at arms length after proper tendering process;
>
> (c) even if I were wrong in not reporting myself as an employee (I still maintain, on professional advice, that I was never an employee during the relevant times), my view was honestly held thus constituting a reasonable excuse for so doing;
>
> (d) s. 9A was introduced in November 1995. The first of my returns was filed in 1996/97 and the Commissioner did not see fit to query it until 2003. The only Board of Review case on s. 9A was decided on 26 November 2001 (Case No. D108/01—incidentally it is precisely the type of case that s. 9A is intended for which is plainly different from mine). There was no guidance during all relevant times on how to interpret s. 9A apart from DIPN 25. If the employment/independent contractor issue was straight forward, or had the Commissioner acted promptly instead of sitting on my files for 6 years, I would have compiled with her requirement (or challenged its legality) earlier. the Commissioner is therefore estopped from asserting that my reporting was incorrect for s. 82A purposes, if not for 1996/97 then for the later years. Her acquiescence lulled me into not getting a second professional opinion on how my returns should be filed, thus amounting to a reasonable excuse for me;
>
> (e) good administration would entail Government taking reasonable measures to help citizens not to break the law unwittingly when new laws are introduced. That is why when new road signs or speed limits are introduced, the Commissioner of Police would post conspicuous advisories at 'black spots' to

> educate motorists of the change. Here the Commissioner of Inland Revenue should have known long time ago that my 1996/97 tax return did not tally with her understanding of s. 9A, yet she raised no objection until 2003. In the meantime I prepared my subsequent tax returns the same ' errant' way because I had no reason to believe that she did not agree with it. It is blatant entrapment for her now to impose surcharges of 66% to 51% on those returns;
>
> (f) on the other hand, if she had had no knowledge that my 1996/97 tax return had ' breached' the then newly introduced s. 9A until 2003, it would reflect badly on her administration. To allow her now to impose such hefty surcharges, indeed any surcharge, is to legitimise maladministration and inefficiency. There is no equity when Government can profit from its own sloppiness. If this is not unjust enrichment, what is?"

15. The Board concluded that by virtue of section 70 of the IRO, as there had been no valid appeal against the Deputy Commissioner' s determination dated 3 June 2005, the additional assessments were final and conclusive for all purposes. It was not open, therefore, for the appellant to re-open the issues and argue that the unappealed determination was wrong. Section 70 provides that :

> "Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under section 68(1A)(a) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3), or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal, the assessment as made or agreed to or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value : …"

The case stated

16. The appellant applied for a case to be stated pursuant to section 69 of the IRO. Her original application was a 14 page document posing eight "points of law". She was invited to "re-formulate the questions" and also submit written argument as to why they were proper questions for this section 69 case stated. She responded with a longer document which contained nine questions. I do not propose to recite them herein because (a) they appear at paragraph 12 of the Board' s case stated; and (b) broadly speaking, they are convoluted and do not arise from the Board' s decision.

17. Of the nine questions the Board decided that only Question 1 formed the basis of a proper question for a case stated. At paragraphs 20 to 27 inclusive they give their reasons for not stating a case in relation to Questions 2 to 9 inclusive.

18. At this hearing the appellant submits that this court should remit the case to the Board to amend its case stated so as to include all the questions posed by her.

19. In my judgment the Board' s reasons for not stating a case on Questions 2 to 9 cannot be faulted. Section 70 is the sole issue. The appellant could have applied for a judicial review of the Board' s decision not to state a case in accordance with the appellant' s request. She did not do so. This court' s jurisdiction is limited to either answering the question as posed by the Board or remitting it to invite the Board to amend its stated case. I am satisfied there are no valid grounds to adopt the latter course. It is not permissible for the court to entertain submissions outside the case stated at this hearing. To do so would be an abuse of process.

The questions posed

20. Paragraph 28 of the Stated Case reads :

"The Question of Law for the opinion of the Court of First Instance is :

' Whether having regard to all the facts as found by the Board and on the true construction of the Ordinance, the Board erred in law in holding that :

(a) the assessments as made by the original salaries tax assessments are final and conclusive for all purposes of the Ordinance as regards the amounts of such assessment income by virtue of section 70;

Year of assessment	Original assessable income ($)
1996/97	272,000
1999/2000	244,984
2001/02	301,507

[paragraphs 8 and 44 of the Decision]

(b) the amounts of the assessable income assessed by the Additional Salaries Tax Assessments, as determined on objection, are final and conclusive for all purposes of the Ordinance as regards the amounts of such assessable income by virtue of section 70; and

Year of assessment	Additional assessable income ($)
1996/97	390,476
1999/2000	484,000
2001/02	333,000

[paragraphs 15, 17, 18 and 45 of the Decision]

(c) the following amounts of total assessable income are final and conclusive by virtue of section 70 :

Year of assessment	Total assessable income ($)
1996/97	722,000[(1)]
1999/2000	728,984
2001/02	634,507

[(1)] In the course of preparing this Stated Case, the Board discovered that the total assessable income for 1996/97 should be $662,476 [i.e. $272,000 (paragraph 8 of the Decision) + $390,476 (paragraph 17 of the Decision)] instead of $722,000 as stated in paragraphs 45 and 46 of the Decision. The error arose from not taking into account the reduction by the Deputy Commissioner of the amount of additional assessable income from $450,000 to $390,476, see paragraph 17 of the Decision."

The court's opinion

21. Section 70 of the IRO is common to all three parts of the questions posed. It has already been cited earlier in this decision.

22. Question (a) concerns the original salaries tax assessment, Question (b) the additional salaries tax assessment and Question (c) the total assessable income.

23. In this case no objection has been raised concerning the original assessments; the appeal against the additional assessment was ruled invalid and no consequential appeal was launched against that ruling; accordingly Questions (a) and (b) must be answered in the negative.

Question (c) arises purely as a matter of simple arithmetic. Question (c) results from adding Questions (a) and (b). The answer to question (c) must therefore also be in the negative.

24. The appeal by way of case stated is accordingly dismissed together with an order *nisi* that the costs of the appeal are paid by the appellant.

(M.P. Burrell)
Judge of the Court of First Instance
High Court

Mr Eugene Fung, instructed by the Department of Justice, for Commissioner of Inland Revenue

Appellant in person, present