CACV 203/2008

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL

CIVIL APPEAL NO. 203 OF 2008
(ON APPEAL FROM HCIA NO. 7 OF 2007)

Between

CHU RU YING Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Tang VP, Cheung JA and Stone J in Court
Date of Hearing: 30 October 2009
Date of Judgment: 20 November 2009

J U D G M E N T

Hon Tang VP:

Introduction

1. This is an appeal from a judgment of Burrell J dated 13 June 2008, which judgment itself was delivered upon appeal by way of case stated from a decision of the Board of Review dated 29 May 2007.

Section 59 assessments

2. For the years 1996/97, 1999/2000 and 2001/02 the taxpayer submitted tax returns on her employment income. Her liability to salaries tax was assessed under section 59 of the Inland Revenue Ordinance, Cap. 112 ("IRO"). There was no objection to these assessments ("the section 59 assessments").

Section 60 assessments

3. In early 2003 the Inland Revenue Department commenced a tax audit on the taxpayer's affairs. As a result an Additional Salaries Tax Assessment was made by an assessor under section 60 of the IRO for the year of assessment 1996/97 showing an estimated additional assessable income of $450,000. By a letter dated 8 April 2003, the taxpayer objected to the aforesaid assessment.

4. On 5 December 2003, an assessor raised Additional Salaries Tax Assessments with additional income of $484,000 and $333,000 for the years of assessment 1999/2000 and 2001/02 respectively. By letter dated 29 December 2003, the taxpayer objected to these assessments.

5. The 1996/97, 1999/2000 and 2001/02 assessments ("section 60 assessments") arose out of the income of Quality Consultancy (Information Technology) Ltd ("QCL"), a private company incorporated in Hong Kong on 13 September 1994, the issued and paid up capital of which was owned by the taxpayer and her husband equally. The taxpayer and her mother were the only directors. The section 60 assessments were made on the basis that the income derived from agreements entered into by QCL to provide consultancy services to the two named companies should be treated as the income of the taxpayer and chargeable to salaries tax under section 9A.

6. Following the taxpayer's objection to the section 60 assessments, the Deputy Commissioner, by a determination dated 3 June 2005, determined under section 64(4) that the income derived by QCL for the provision of the taxpayer's personal service to the two named companies should be treated as the taxpayer's income and chargeable to salaries tax pursuant to section 9A of IRO. The additional tax due for each year of assessment was $70,771, $82,280 and $56,610 respectively.

7. Under section 66(1), any person may give notice of appeal within:

> "(a) 1 month after the transmission to him under section 64(4) of the Commissioner's written determination together with the reasons therefor and the statement of facts;"

However the one-month period may be extended:

> "(1A) If the Board is satisfied that an appellant was prevented by illness or absence from Hong Kong or other reasonable cause from giving notice of appeal in accordance with subsection (1)(a), …"

8. On 30 June 2005 the taxpayer served a Notice of Appeal against the section 60 assessments. The notice did not comply with section 66(1) of the IRO.

9. On 31 December 2005 the taxpayer served written grounds of appeal. She was informed that the one month time limit for an appeal had passed.

10. On 27 April 2006, after a hearing, the Board refused to extend the time for appealing. The taxpayer has not appealed against this ruling. As a consequence the section 60 assessments became:

> "… final and conclusive for all purposes of (IRO) as regards the amount of such assessable income or profits or net assessable value". Section 70 of IRO.

Section 82A assessments

11. On 9 October 2006 the taxpayer was informed that the Deputy Commissioner intended to levy additional tax pursuant to section 82A(1) as a result of the incorrect returns filed for the years 1996/97, 1999/2000 and 2001/02.

12. Section 82A of IRO provides that:

> "(1) Any person who without reasonable excuse-
>
> (a) makes an incorrect return by omitting or understating anything in respect of which he is required by this Ordinance to make a return, either on his behalf or on behalf of another person or a partnership; or
>
> (b) …
>
> shall, if no prosecution under section 80(2) or 82(1) has been instituted in respect of the same facts, be liable to be assessed under this section to additional tax of an amount not exceeding treble the amount of tax which-

(i) has been undercharged in consequence of such incorrect return, statement or information, or would have been so undercharged if the return, statement or information had been accepted as correct …;

13. On 27 October 2006, the taxpayer submitted representations to the Deputy Commissioner. On 22 December 2006, after considering the representations the Deputy Commissioner made an additional assessment pursuant to section 82A in the sums of $47,000 for 1996/97, $54,000 for 1999/2000 and $29,000 for 2001/02 ("the section 82A assessments"). These represented increases of 66%, 65% and 51% respectively. The maximum permissible increase under IRO is 300%.

Section 82B Appeal

14. On 15 January 2007, the taxpayer gave a notice of appeal to a Board of Review ("the Board") against the section 82A assessment under section 82B which provides that:

"(2) On an appeal against assessment to additional tax, it shall be open to the appellant to argue that-

(a) he is not liable to additional tax;

(b) the amount of additional tax assessed on him exceeds the amount for which he is liable under section 82A;

(c) the amount of additional tax, although not in excess of that for which he is liable under section 82A, is excessive having regard to the circumstances.

(3) Sections 66(2) and (3), 68, 69 and 70 shall, so far as they are applicable, have effect with respect to appeals against additional tax as if such appeals were against assessments to tax other than additional tax."

15. The Board by a decision dated 29 May 2007 dismissed the taxpayer' s appeal ("the Decision").

16. The grounds of appeal relied on by the taxpayer before the Board were reproduced in para. 26 of the Decision; essentially, the taxpayer argued that the section 60 assessments had been wrongly made and that notwithstanding section 82B(3), section 70 had no application.

17. That argument was rejected by the Board: See Para. 47 of the Decision.

18. The Board also found as a fact that the taxpayer had no reasonable excuse under section 82A(1): See Paras. 54-60 of the Decision. They held that there was no factual basis for the taxpayer' s contention that she had a reasonable excuse.

19. However, the question whether the section 82A assessments were excessive was not put in issue: See Para. 63 of the Decision.

Appeal to Burrell J

20. The taxpayer was dissatisfied with the Decision. Pursuant to section 69 of IRO, she required the Board:

> "… to state a case on the question requirement of law for the opinion of the Court of First Instance …."

21. The taxpayer invited the Board to state the case posing 9 questions.

> "**Question 1**
>
> Whether the Board erred in law in holding that the phrase ' ... the assessment as determined ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income ...' in s. 70 serves to bar the Appellant from arguing, as she appeared entitled under s. 82B(2)(a), that there being no employment relationship with EDS or C&T in the first place she was not liable for the additional tax penalties.
>
> **Question 2**
>
> Whether, as a matter of law, the Board erred in stating as 'salient fact' in paragraph 10 of its Decision that EDS was an employer of the Appellant when there was no evidence or no sufficient evidence, or it was contrary to evidence or law, to find that the Appellant had provided service to EDS within the meaning of s. 9A of the Ordinance which formed the basis of the salaries tax assessment and consequently that of the additional tax penalties.
>
> **Question 3**
>
> Whether the Board erred in law in stating as 'salient fact' in paragraph 11 of its Decision that C&T was an employer of the Appellant when (i) the Commissioner had misapplied 'dismissal' in s. 9A(3)(e) in her determination, and/or (ii) there was no evidence or no sufficient evidence, or it was contrary to evidence or law, to find the 'mutuality of obligation' necessary to establish an employment relationship between

C&T and the Appellant which formed the basis of the salaries tax assessments and consequently that of the additional tax penalties.

Question 4

Whether the Board erred in law in finding that either EDS or C&T, or both, were the employer of the Appellant when the Commissioner's Determination under s. 9A(4) was unlawful.

Question 5

Whether the Board erred in law in finding that s. 82A could be applied together with s. 9A to impose additional tax penalties against the Appellant when such co-joined effect was not expressly or impliedly provided for in either section of the Ordinance.

Question 6

Whether the s. 82A notice for additional tax for 1996/1997 was issued out of time and therefore void.

Question 7

Whether the Board erred in law in not considering whether, owing to the Commissioner choosing to carrying out the 1996/1997 and subsequent assessments all in one exercise in 2003 instead of year by year 'within the year of assessment ...' as stipulated in s. 60 thereby depriving the Appellant of her right to make timely objection and appeal against each invocation of s. 9A, the Commissioner ought to be estopped from applying s. 9A to the 1999/2000 and 2001/2002 tax assessments, and/or be estopped from levying additional tax penalties for these two years.

Question 8

Whether the Appellant was denied her constitutional right to a fair hearing guaranteed under Article 39 of the Basic Law and Articles 10, 11 and 12 of the Hong Kong Bill of Rights when:

a. section 70 allegedly restricted her right to have the merits of her defence heard by a competent, independent and impartial tribunal;

b. A reverse burden was place on her to prove that she was not liable for the additional tax penalties;

c. The proof required of her was so imprecise as not being prescribed by law;

d. she suffered undue delay as the Commissioner started the additional tax penalty proceedings in October 2006 which was nine years after the event;

e. The Commissioner imposed retrospective penalty against her;

f. The Commissioner denied her equality of treatment in not investigating or sanctioning EDS or C&T.

Question 9

Whether the Appellant was denied the freedom of choice of occupation guaranteed under Article 33 of the Basic Law."

22. In the end the Board was willing to state only one question in three parts, formulated as follows:

"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 assessable 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 & 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
1999/2000	728,984
2001/02	634,507

[paragraphs 45 - 47 of the Decision]"

23. In relation to other questions, the Board declined to do so and gave reasons. I have quoted these questions in full for their flavour. I do not intend to deal with them in any detail.

24. Before Burrell J, the taxpayer invited the learned judge to remit the matter to the Board pursuant to section 64A of IRO and to reinstate the case incorporating *all* the questions that the taxpayer has canvassed. In relation to the other questions, the learned judge said:

> "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)."

25. The learned judge refused to do so and said:

> "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."

26. The learned judge then answered the question posed in the negative and against the taxpayer.

The Appeal

27. The taxpayer appealed to us. She was assisted by her husband, as a "McKenzie friend". She has supplied us with, inter alia, 78 pages of written submissions together with an 8-page "Summary of Legal Issues-sources".

28. As noted section 82A imposed a liability to an additional tax on a:

> "(2) … person who without reasonable excuse-
>
> (a) makes an incorrect return …"

And that on appeal under section 82B, section 82B(3) applied sections 68 and 70, insofar as they are applicable to such appeal.

29. Section 68(4) provides:

> "(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant."

30. It was common ground that section 82A involves a criminal charge for human rights purposes. It was so held in case No D17/08, a decision of a Board of Review, (2008) 23 IRBRD 301, which followed the reasoning in the decision of the Court of Final Appeal in *Koon Wing Yee v Insider Dealing Tribunal and Anor* [2008] 11 HKCFAR 170. With respect, I find the decision of the Board (Kenneth Kwok Hing Wai, SC (Chairman), James Julius Bertram and Albert T da Rosa Jr) highly persuasive. I will proceed on the basis that section 82A does involve a criminal charge for human rights purposes. However, as I have heard insufficient submission on the issue and it is not necessary for us to decide the issue, I would not do so.

31. The taxpayer submitted that section 68(4) which provides that:

> "(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.",

when read together with section 82A(1) is unconstitutional unless the Commissioner can justify the reverse persuasive burden with compelling reasons, relying on the decision of the Court of Final Appeal in *HKSAR v Ng Po On and Anor* [2008] 11 HKCFAR 91.

32. In Case No. D17/08, the Board had to considered a similar argument. It held that:

> "193. Sections 82B(3) and 68(4) read together impose on the taxpayer a reverse persuasive burden and derogate from the presumption of innocence under Article 87 of the Basic Law and Article 11(1) of BOR, given constitutional effect by Article 39 of the Basic Law."

33. However the Board was of the view that such reverse burden satisfied both the rationality test and the proportionality test. It said:

> "211. There is no contention that the burden of proving that the penalty tax assessment is incorrect is difficult to rebut. Even if it is, the relevant rules of penalty tax provide certain means of defence based on subjective elements (for example, under the element of 'reasonable excuse') and it is open to the taxpayer to put forward grounds for a reduction under the excessiveness element. An efficient system of taxation is important, if not crucial, to HKSAR's financial interests. We consider that the presumption under sections 68(4) and 82B(3) is confined within reasonable limits. The appellant's right to be presumed innocent has not been violated in the present case."

34. In her submissions, the taxpayer appeared also to contend as an alternative submission that she had not "without reasonable excuse" made an incorrect return. As I understand her submission she appeared to contend that, both at the stage of the section 82A assessment and that even if the section 60 assessment was final and conclusive, because of section 70, on her section 82B appeal, it was nevertheless open to her to contend that the incorrect return was not made "without reasonable excuse". Moreover, she also seemed to contend that on the section 82B appeal it was open to her to submit that, not only had the Deputy Commissioner wrongly concluded that she was "without reasonable excuse", and hence the additional assessment was incorrect, but that the additional assessment was also excessive.

35. I believe, in a suitable case on a section 82A assessment, it would be open to a taxpayer to contend that there was a reasonable excuse for the incorrect assessment, and that on a subsequent section 82B appeal, it would be open to a taxpayer to contend, for example, that the section 82A assessment was wrong because she had a reasonable excuse for the incorrect assessment and/or that the section 82A assessment was excessive.

36. The grounds of appeal relied on by the taxpayer in her s. 82B appeal were set out in para. 26 of the Decision. I will not repeat them. Suffice to say that she had not taken the point that section 82A(1) had wrongly imposed a reverse persuasive burden on the taxpayer and was unconstitutional. So this is not a point which is open to her, and it is unnecessary for me to express a concluded view on this issue, although, as I have said, I find the judgment in Case No. D17/08 highly persuasive.

37. Nor is it necessary for us to consider whether the additional assessment was excessive as noted in para. 19？？, no issue having been taken before the Board on that issue.

38. As for whether the taxpayer had reasonable excuse, the Board dealt with this in paras. 54-62 of the Decision. They held that:

> "… the (taxpayer) has not begun to prove the factual basis of any of her accusations. Without proving the factual basis, the ' reasonable excuse' contention does not get off the ground."

39. I will return to the single question stated by the Board.

40. We are concerned with a narrow question, namely, whether on the section 82B appeal, the taxpayer was entitled to reopen the section 60 assessment. As noted, section 82B(3) provided expressly that section 70 shall so far as it is applicable have effect with respect of such an appeal. Section 70 provides:

> "**70. Assessments or amended assessments to be final**
>
> 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:
>
> Provided that nothing in this Part shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does

> not involve re-opening any matter which has been determined on objection or appeal for the year."

41. It is clear section 70 covers situations where a taxpayer has already availed his/herself of all the channels of appeal, including appealing to the courts. In such cases, it is difficult to see why, on a section 82B appeal, section 70 should be inapplicable. In our present case, there was no effective appeal. But I believe the principle to be the same. So I agree with the learned judge below that each part of the question posed should receive a negative answer.

42. The taxpayer also by summons dated 19 October 2009, sought leave to submit a supplemental bundle of documents.

43. It is not entirely clear what she seeks to achieve by this supplemental bundle of documents.

44. I believe it is important that a taxpayer who has appealed by means of a case stated should be kept within the confines of this procedure. Nor would I permit the taxpayer to stray outside the question posed. I have already said I agree with the learned judge that no case for amendment under section 69(4) has been made out.

45. The taxpayer has sought to ask this court to quash the section 82A(4) notice. I confess I have difficulty understanding the basis upon which the taxpayer seeks to do so. In any event, had there been any basis to quash the section 82A notice, the taxpayer should have applied to do so by judicial review.

46. For the above reasons, I would dismiss the appeal with costs, such costs to be taxed unless agreed.

Hon Cheung JA:

47. I agree.

Hon Stone J:

48. I agree with the judgment of Tang VP and have nothing to add.

(Robert Tang)	(Peter Cheung)	(William Stone)
Vice-President	Justice of Appeal	Judge of the Court of First Instance

The Appellant / Taxpayer, in person, present

Mr Eugene Fung, instructed by the Secretary for Justice, for the Respondent / Commissioner