HCMP 1286/2014

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCCEDINGS NO. 1286 OF 2014
(On an intended appeal from Decision D38/13
dated 13 February 2014)

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BETWEEN

CHIT TZU YEN Applicant

and

COMMISSIONER OF INLAND REVENUE Respondent

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Before: Hon Lam VP and McWalters JA in Court
Dates of Applicant's Written Submissions: 28 May 2014
Date of Respondent's Written Submissions: 11 June 2014
Date of Judgment: 18 August 2014

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J U D G M E N T

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Hon McWalters JA (giving the judgment of the Court):

Introduction

1. The applicant is a taxpayer who, dissatisfied with his tax assessment by the Inland Revenue Department ("IRD") appealed to the Inland Revenue Board of Review ("the

Board"). His appeal was dismissed by the Board and so he then applied under section 69(1) of the Inland Revenue Ordinance, Cap 112 (the IRO) for the Board to state a case. After the Board had done so, the applicant applied by summons under section 69A(1) of the IRO for leave from the Court of Appeal for his Case Stated to be heard directly by the Court of Appeal. This application has been dealt with on the papers without an oral hearing. This is our judgment on the application.

The Background Facts

2. The applicant had been a long serving officer of Credit Agricole Corporate and Investment Bank and was due to retire from the Bank on 26 June 2012. However, he accepted a proposal for early retirement which involved him ceasing work on 31 October 2011 and ceasing employment on 31 December 2011. On the date he ceased employment he received a sum of $945,581.25 made up of $62,250 leave pay and $435,750 gratuity. Only the gratuity is relevant to this application.

3. The gratuity was calculated on the basis of seven months' salary by reference to the six months' remaining until the applicant reached retirement age and one additional month's salary being allowed to reflect the Bank's Provident Fund contribution.

4. The applicant contended that these amounts, insofar as they formed part of his taxable income, should be regarded as income in the 2012/2013 tax year not the 2011/2012 tax year but ultimately argued that the gratuity should not form part of his taxable income at all.

5. The Assessor of the IRD rejected the applicant's contention and the applicant objected to the assessment under section 64 of the IRO. The Deputy Commissioner of the Inland Revenue Department who adjudicated over his objection determined that the gratuity was chargeable to salaries tax and that the entire sum was assessable in the 2011/12 tax year. This Determination was issued on 27 June 2013.

6. The applicant then appealed to the Board under section 66 of the IRO. The issues that were raised on the appeal to the Board were:

> "(a) whether the gratuity in the amount of $435,750 paid to the Appellant by his former employer, the Bank, upon the Appellant's early retirement, should be chargeable to Salaries Tax at all; and
>
> (b) if the gratuity is chargeable to salaries Tax, whether it should be fully assessed in the year of assessment 2011/12 or partly in the year of assessment 2011/12 and partly in the year of assessment 2012/13." [1]

[1] Paragraph 16 of the Decision of the Board.

7. The Board answered the first question in the affirmative, holding that "the gratuity was paid to the Appellant in return for his (previously) acting, for a long period, as an employee. The gratuity, in substance was "income from employment"" [2]

8. In respect of the second question the Board found that the employment came to an end on 31 December 2011 and not June 2012 as the applicant contended. Though quantified by reference to the number of months remaining until the applicant reached retirement age, the gratuity was nonetheless a goodwill payment paid entirely at the discretion of the employer. As the gratuity was paid in December 2011 upon termination, the whole of it was income in the 2011/12 tax year.[3]

9. Having so found in respect of both issues the Board dismissed the appeal. The Board's Decision was issued on 13 February 2014.

10. On 10 March 2014 the applicant, being dissatisfied with the Decision of the Board, applied pursuant to section 69(1) of the IRO for the Board to state a case on a question of law for the opinion of the Court of First Instance. The question of law for the opinion of the Court is:

> "whether on the facts and evidence, there was no reasonable ground for the Board to decide that the whole of the gratuity in the sum of $435,750 (being calculated by the employer by reference to $62,250 x 7) was "income from employment" within section 8(1) and section 9(1) of the Ordinance." [4]

The Case Stated is dated 15 May 2014 and was sent to the applicant on the same day.

11. On 28 May 2014 the applicant filed a Summons seeking leave to appeal directly to the Court of Appeal under section 69A(1) of the IRO. The Summons, which has annexed to it the applicant's draft grounds of appeal, states:

> "The grounds of the proposed appeal will be as follows:
>
> (1) Leave to appeal should be granted under Section 69A(2) of Cap 112 as the matter is of the general or public importance and the appeal should be heard and determined by the Court of Appeal instead of the Court of First Instance."

12. The amount of tax in dispute is $74,077 being 17% of $435,750.

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[2] Paragraph 34 of the Decision of the Board.
[3] Paragraph 36 of the Decision of the Board.
[4] Paragraph 4 of the Case Stated.

The Application

13. The application is governed by section 69A(2) of the IRO which provides:

> "Leave to appeal under this section may be granted on the ground that in the opinion of the Court of Appeal it is desirable that, by reason of the amount of tax in dispute or of the general or public importance of the matter or its extraordinary difficulty or for any other reason, the appeal be heard and determined by the Court of Appeal instead of the Court of Final Instance."

In his Summons the applicant makes it clear that he relies on "the general or public importance of the matter" ground in order to obtain leave. A determination of his application requires some consideration of the grounds of appeal which he relies upon in order to establish that there is general or public importance in the matter under appeal. However, the focus of our consideration of his grounds of appeal is not as to their merits but merely whether they establish that his appeal involves a matter of general or public importance.

14. The applicant has filed an affirmation in support of his summons but it is brief and adds nothing to it. The only submissions by him in support of his application are contained in his draft grounds of appeal which are annexed to the summons.

15. The first ground of appeal complains that the Board made a mistake by not including a letter dated 23 July 2013 that was written by his employer as part of the facts of the case. This letter, he says, supports his contention that the gratuity was paid as compensation for his loss of salary and pension contribution as a result of taking early retirement. He suggests that the Board may have acted unreasonably and unlawfully in not including this letter in the facts of the case as the letter had been agreed between the parties. The possibility that the Board may have acted unreasonably and unlawfully, elevates his complaint, so he argues, to the level of one of general or public importance.

16. His second complaint is that the Board did not address in its decision his argument that one of the seven months on which the gratuity was calculated was supposed to represent the employer's pension contribution and such a contribution is not taxable. He again seeks to elevate this complaint to one of general or public importance by suggesting that the Board deliberately and unreasonably refused to address this issue.

17. The applicant's third complaint is that the Board did not follow the judgment of the Court of Final Appeal in *Fuchs v Commissioner of Inland Revenue* (2011) 14 HKCFAR 74, or if it did, it not apply the judgment properly for it did not apply it in the manner suggested by the applicant. The applicant says that because the Board refused to follow the *Fuchs* judgment his complaint is one of general or public importance.

18. His final complaint is that in formulating the Case Stated the Board did not include in it other questions which he had raised in his correspondence with the Board. He

says that the issue of the appellant's right to determine the content of the Case Stated in a matter of general or public importance.

19. In response the Commissioner of Inland Revenue has, through Senior Government Counsel Ms Winnie W Y Ho, filed a Statement pursuant to Order 59 Rule 2A(4) of the Rules of the High Court, Cap 4A in which the claim by the applicant that each of his four complaints raises a matter of general or public importance is disputed.

Discussion

20. In respect of the first ground of appeal there is nothing in the Decision to suggest that the Board deliberately ignored the letter from the applicant's employer, quite the contrary the letter was in the hearing bundle and the Board made specific mention of it in its decision.

21. Whether it properly had regard to it or properly appreciated its significance are matters that can be canvassed at the hearing of the Case Stated in the Court of Final Instance. There is nothing in this complaint that raises a matter of general or public importance.

22. In respect of the applicant's second complaint there is also no evidence of the Board deliberately refusing to address the issue. Again, like the first complaint, there is positive reference to this issue in the Board's Decision from which it is clear that the Board found against the applicant on this matter. Whether the Board's analysis, reasoning and conclusion are correct are matters properly left to the Court of First Instance to decide in the course of adjudicating on the Case Stated. The second ground of appeal raises no question of general or public importance.

23. The allegation in the applicant's third complaint that the Board acted in bad faith in refusing to follow the *Fuchs* judgment is demonstrably without merit and appears to have been made solely for the purpose of the transforming an issue (whether the Board properly applied the *Fuchs* judgment) that is clearly not one of general or public importance into one that is. There is nothing in this complaint which would justify it being characterised as a matter of general or public importance.

24. The final complaint of the applicant is also without merit. If the applicant is dissatisfied with the content of the Case Stated he has a remedy available to him in section 69(4) of the IRO. This provision enables him to apply to the Court of First Instance for the Case Stated to be remitted to the Board for amendment. That is what he should have done. There is no merit in the applicant's assertion that this complaint raises a matter of general or public importance.

Conclusion

25. For the reasons we have given we are satisfied that none of the complaints of the applicant raise a matter of general or public importance and so we dismiss his summons.

We are also of the view that the application for leave is totally without merit and we make an order pursuant to Order 59 Rule 2A(8) that no party may request this determination to be reconsidered at an oral hearing *inter partes*.

Costs

26. The respondent has provided a Statement of Costs for Summary Assessment under Order 62 rule 9A in the amount of $24,410. The applicant has not filed any submission in reply to the respondent's Statement. We see no reason why the applicant should not pay the respondent's costs of the application and we therefore make an order *nisi* for the amount of $24,410 which will become absolute in 14 days from the date of this judgment.

(M H Lam)
Vice-President

(Ian McWalters)
Justice of Appeal

Written submission in the form of Grounds of Appeal by the applicant

Written submission by Ms Winnie W Y Ho SGC, instructed by the Department of Justice, for the respondent