HCIA 2/2016

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO 2 OF 2016

BETWEEN

COMMISSIONER OF INLAND REVENUE Applicant

and

PANG FAI Respondent

Before: Hon Chow J in Chambers
Date of Hearing: 2 February 2017
Date of Decision: 6 February 2017

D E C I S I O N

Introduction

1. The issue for determination in this decision is whether to grant leave to the Commissioner of Inland Revenue to appeal against the decision of the Board of Review holding that certain sum of money received by the Taxpayer from the Hong Kong Institute of Certified Public Accountants described as "honorarium" should be regarded as his assessable profits chargeable with profits tax, as opposed to assessable income chargeable with salaries tax.

Background Facts

2. For the purpose of the present leave application, the following short summary of the background facts suffices.

3. The Taxpayer is a certified public accountant. For the year of assessment 2010/11, the Taxpayer was a lecturer with the HKU School of Professional and Continuing Education ("HKU SPACE"). According to the Employer's Return filed by HKU SPACE for that year of assessment, the total income of the Taxpayer was HK$363,460.

4. In addition, the Taxpayer was engaged by the Hong Kong Institute of Certified Public Accountants ("the HKICPA") as a Workshop Facilitator and Examination Marker for its Qualification Programme. According to the Notification of Remuneration paid to persons other than employees ("IR56M Notification") filed by the HKICPA, for the period from 1 April 2010 to 31 March 2011, the Taxpayer received remuneration in the sum of HK$50,400 ("the Sum").

5. In his Tax Return – Individuals for the year of assessment 2010/11, the Taxpayer only declared the employment income of HK$363,460 from HKU SPACE. The assessor originally assessed the Taxpayer's liability to pay salaries tax in accordance with that return.

6. Subsequently, the assessor issued to the Taxpayer an Additional Salaries Tax Assessment dated 22 March 2012 in respect of the Sum, as follows:

Additional Net Chargeable Income: $50,400

Additional Salaries Tax payable: $8,568

7. The Taxpayer objected to the Additional Salaries Tax Assessment, on the ground that his arrangement with the HKICPA was not one of office or employment of profit under Section 8(1)(a) of the Inland Revenue Ordinance, Cap 112 ("the Ordinance"), and the Sum was not income arising in or derived from any "pension" under Section 8(1)(b) of the Ordinance.

8. The assessor then proposed to revise the Additional Salaries Tax Assessment by raising a profits tax assessment on the Sum and excluding it from the Taxpayer's assessable income for the purpose of salaries tax assessment. That proposal, however, was also objected to by the Taxpayer on the ground that he did not carry on any trade, profession or business within the meaning of Section 14 of the Ordinance.

9. In the absence of agreement between the assessor and the Taxpayer, the matter was eventually decided, on 22 June 2015, by the Deputy Commissioner of Inland Revenue, who confirmed that the Sum should be regarded as forming part of the Taxpayer's assessable income chargeable with salaries tax.

10. On 8 July 2015, the Taxpayer lodged a notice of appeal against the determination of the Deputy Commissioner to the Board of Review ("the Board").

11. By a written decision ("the Decision") dated 20 June 2016, the Board allowed the Taxpayer's appeal, holding that the Taxpayer was carrying on a profession in respect of his acceptance of assignments by the HKICPA as Workshop Facilitators and Examination Markers for its Qualification Programme, and the Sum arose in or was derived from such profession. Accordingly, the Sum should be regarded as the

Taxpayer's assessable profits chargeable with profits tax under Section 14 of the Ordinance.

12. By a summons dated 20 July 2016 as amended on 26 August 2016, the Commissioner seeks leave to appeal against the Decision of the Board.

Discussion

13. Under Section 69(3)(e) of the Ordinance, the Court of First Instance shall not grant leave to appeal unless it is satisfied:-

(1) that a question of law is involved in the proposed appeal; and

(2) that –

(a) the proposed appeal has a reasonable prospect of success; or

(b) there is some other reason in the interests of justice why the proposed appeal should be heard.

14. In the Commissioner's Amended Statement lodged pursuant to Section 69(3)(a)(ii) of the Ordinance, the Commissioner advances a total of 10 grounds of appeal. It is apparent, however, from the skeleton submissions of Mr Paul H M Leung (for the Commissioner of Inland Revenue) that the principal point proposed to be raised in the appeal relates to the Board's approach in determining whether the Taxpayer was as an employee of the HKICPA in relation to his work as a Workshop Facilitator and Examination Marker for its Qualification Programme (see Grounds 1 to 3 of the Commissioner's "Reasons for Leave to be Granted").

15. Mr Leung accepts that the question of whether or not a person performed certain work in his capacity as an employee or as an independent contractor is regarded by an appellate court as a "question of fact" to be determined by the trial court. Accordingly, a finding that an employer-employee relationship did or did not exist can only be interfered with on appeal if it can be shown that the trial court misdirected itself in law or came to a conclusion which no tribunal properly directing itself on the relevant facts could reasonably have reached (see *Lee Ting Sang v Chung Chi-keung* [1990] 1 HKLR 764, at 772 H *per* Lord Griffiths; *Poon Chau Nam v Yim Siu Cheung* (2007) 10 HKCFAR 156, at paragraph 22 *per* Ribeiro PJ).

16. In coming to the conclusion that the Taxpayer's assignments by the HKICPA as Workshop Facilitators and Examination Markers were separate contracts for service (in other words, the Taxpayer was an independent contractor and not an employee of the HKICPA), the Board adopted a holistic approach by evaluating what it considered to be the relevant facts and circumstances of the case (see paragraphs 110 and 131 of the Decision).

17. The Board's approach is, on its face, consistent with the approach stated by Ribeiro PJ at paragraph 18 of his judgment in *Poon Chau Nam* for determining whether a person is another's employee, as follows:-

> '"The modern approach to the question whether one person is another's employee is therefore to examine all the features of their relationship against the background of the indicia developed in the abovementioned case-law with a view to deciding whether, as a matter of overall impression, the relationship is one of employment, bearing in mind the purpose for which the question is asked. It involves a nuanced and not a mechanical approach, as Mummery J emphasised in *Hall v Lorimer*[1] (in a passage approved by the English Court of Appeal[2]):
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> 'In order to decide whether a person carries on business on his own account it is necessary to consider many different aspects of that person's work activity. This is not a mechanical exercise of running through items on a check list to see whether they are present in, or absent from, a given situation. The object of the exercise is to paint a picture from the accumulation of detail. The overall effect can only be appreciated by standing back from the detailed picture which has been painted, by viewing it from a distance and by making an informed, considered, qualitative appreciation of the whole. It is a matter of evaluation of the overall effect of the detail, which is not necessarily the same as the sum total of the individual details. Not all details are of equal weight or importance in any given situation. The details may also vary in importance from one situation to another.'"

18. Mr Leung contends, however, that the "economic reality test" and the "control test" remain "*highly, if not the most, important indicia*" for determining whether an employment relationship exists notwithstanding the aforesaid approach stated by Ribeiro PJ. In support of his contention, Mr Leung refers this court to (inter alia) a subsequent decision of the Court of Appeal in *Sae-Lee Srikanya v Chung Yat Ming* [2009] 3 HKLRD 152, in particular the following statement by Cheung JA at paragraph 6 of his judgment:-

> "In the absence of an express employment contract, the question of whether an employment relationship existed has to be determined by reference to the surrounding circumstances. In *Poon Chau Nam v. Yim Siu Cheung* [2007] HKLRD 951, the Court of Final Appeal held that in determining whether a person is an 'employee' (i.e. a person working under a contract of service) or an 'independent contractor' (i.e. a person working under a contract for service), the court should refer to the fundamental test laid down in *Market Investigations Ltd v. Minister of*

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1 [1992] 1 WLR 939 at 944.

2 [1994] 1 WLR 209 at 216 (CA).

Social Security [1969] 2 QB 175 (at 184 to 185). The fundamental test is as follows:

> 'Is the person who has engaged himself to perform these services performing them as a person in business on his own account?' If the answer to that question is 'yes', then the contract is a contract for services. If the answer is 'no', then the contract is a contract of service. No exhaustive list has been compiled and perhaps no exhaustive list can be compiled of the considerations which are relevant in determining that question, nor can strict rules be laid down as to the relative weight which the various considerations should carry in particular cases. The most that can be said is that 'control' will no doubt always have to be considered, although it can no longer be regarded as the sole determining factor; and that factors which may be of importance are such matters as:
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> (1) whether the man performing the services provides his own equipment;
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> (2) whether he hires his own helpers;
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> (3) what degree of financial risk he takes;
>
> (4) what degree of responsibility for investment and management he has; and
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> (5) whether and how far he has an opportunity of profiting from sound management in the performance of his task."

19. Mr Leung further contends that the Board erred in law in brushing aside these 2 tests as being "completely unsuitable and ineffectual" and "totally inapt" (see paragraphs 115 and 117 of the Decision), thereby disregarding "*a whole host of factors which form part of the 2 tests and which are indicative of an employment relationship in the present case*".

20. Although I have some reservation on whether it is any longer necessary to resort to either the "economic reality test" or the "control test" for the purpose of determining whether an employment relationship exists, I have not had the benefit of considering any contrary submissions by the Taxpayer, understandably because he is currently acting in person. In view of the fact that I am here only dealing with an application for leave to appeal, I do not consider that this is an appropriate occasion for me to undertake a detailed examination of Mr Leung's legal submissions. All that I would say is that, having carefully considered the substance of Mr Leung's submissions, I am prepared to hold that the Commissioner's proposed appeal raises a question of law (namely, whether, for the purpose of determining whether an employment relationship

exists, it is any longer necessary to apply, or have regard to, the "economic reality test" and/or the "control test"), and the proposed appeal has a "reasonable prospect of success" under Section 69(3)(e) of the Ordinance. For this purpose, I consider that a proposed appeal has a reasonable prospect of success if it is "reasonably arguable"; it is not necessary to show that the proposed appeal will "probably" succeed.

21. Various other grounds of the Commissioner's proposed appeal (Grounds 4 to 9) relate to the Board's treatment of the evidence. On their own, I would not be minded to grant leave to appeal. However, the matters raised in those grounds could, arguably, be relevant to a holistic evaluation of the facts and circumstances in this case, and therefore relevant to Ground 10 (the so-called "catch-all" ground) to the effect that the Board came to a decision which no tribunal, properly directed, could reasonably have reached. In all the circumstances, I do not propose to limit the grounds on which leave to appeal is granted in the present application.

Disposition

22. I make an order in terms of paragraphs 1 and 2 of the Commissioner's Amended Summons dated 25 August 2016.

(Anderson Chow)
Judge of the Court of First Instance
High Court

Mr Paul Leung, instructed by Department of Justice, for the applicant

The respondent acting in person