HCIA 1/2018
[2018] HKCFI 2516

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE
INLAND REVENUE APPEAL NO. 1 OF 2018

BETWEEN

FRANCOIS NGO Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon L Chan J in Chambers
Date of Hearing: 30 October 2018
Date of Judgment: 19 November 2018

J U D G M E N T

Introduction

1. This is an application made by Mr Ngo Francois ("Mr Ngo") under s 69 of the Inland Revenue Ordinance; Cap. 112 ("**the IR Ordinance**") for leave to appeal against the decision of the Board of Review ("**the Board**") dated 19 December 2017 ("**the decision**"). The Board dismissed the appeal of Mr Ngo brought against the determination of the Deputy Commissioner of Inland Revenue ("**the Deputy Commissioner**") dated 22 September 2016 ("**the determination**").

2. The Deputy Commissioner by the determination raised additional salaries tax at HK$443,460 for the year of 2011/12 on Mr Ngo. The additional tax was raised on an additional assessable income of HK$2,715,790. Mr Ngo obtained this sum from a settlement of his claims in HCA1575 of 2012 against his former employer Cantor Fitzgerald (Hong Kong) Capital Markets Ltd ("**CFHK**") and claims he intimated against its ultimate holding company Cantor Fitzgerald, LP ("**CFLP**"), a US limited partnership.

Whether the application is filed and served out of time

3. The first point made by the Commissioner of Inland Revenue ("**CIR**") in opposition is that Mr Ngo filed the leave application out of time. S 69 (1) to (3) of the IR Ordinance provide:

> "69. (1) Where the Board of Review has made a decision on an appeal under section 68, the appellant or the Commissioner may appeal to the Court of First Instance against the Board's decision on a ground involving *only a question of law*.
>
> (2) No appeal may be made under subsection (1) *unless leave to appeal has been granted*, on the application of the appellant or the Commissioner—
>
> (a) by the Court of First Instance; or
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> (b) if a further application is made under subsection (4), by the Court of Appeal.
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> (3) For the purposes of an application to the Court of First Instance under subsection (2)(a) for leave to appeal—
>
> (a) the application—
>
> (i) must be lodged with the Registrar of the High Court, and served on the other party, *within 1 month after the following date—*
>
> (A) subject to sub-subparagraph (B), the date on which the Board's decision is made;
>
> (B) if the Board's decision is notified to the appellant or the Commissioner by notice in writing, *the date of the communication by which the decision is notified*;" (emphasis supplied)

4. The Board made the decision on 19 December 2017 and posted the same to Mr Ngo on the same day. Mr Ngo was then living overseas. The Board also sent him an email on the same day advising that a hard copy of the decision was being posted to him. But no soft copy was attached to the email as the Board did not regard it proper to send a decision by email. The email also advised Mr Ngo of s 69 of the IR Ordinance

which provided that an application for leave to appeal had to be lodged with the Registrar of the High Court and served on the other party within 1 month after the date when the decision was made or was communicated to the applicant.

5. The decision was delivered to Mr Ngo's address on 8 January 2018. He sent the CIR an email on 18 January containing his submission on appeal. The CIR replied by email on 24 January confirming receipt of his submission, but told him that the application for leave to appeal had to be made by summons under s 69(3) of the IR Ordinance. He sent the CIR on 7 February by email a copy of his summons applying for leave to appeal. He then posted a hard copy of the summons to the CIR on 14 February and the CIR received it on 23 February.

6. Mr Julian Lam, counsel for CIR identified 3 issues:

1.1. When did time start to run for the purpose of s 69(3)(a)(i) and whether Mr Ngo's application was made out of time?

1.2. If Mr Ngo's application was made out of time, does the Court have jurisdiction to extend time?

1.3. If the Court has jurisdiction to extend time, should it exercise its discretion in favour of Mr Ngo?

7. The time should not have started to run from the date on which the Board's decision was made as provided in s 69(3)(a)(i)(A) as Mr Ngo was residing overseas. The applicable provision should be as provided in s 69(3)(a)(i)(B) so that time should have started to run from "*the date of the communication by which the decision is notified*".

8. In *D30/06* (2006) 21 IRBRD 568 (Chairman: Anthony Chan SC), which concerned a previous s 69(1)[1] with the material part similar, the Board held:

"14. Bearing in mind the ordinary meaning of 'communication' and the use of the words 'date of the communication' in the context of the sub-section, it is quite plain to this Board that those words refer to the *action of communicating*. …

…

16. Ms Tsui's submission turns on what are the possible parameters of the action of communicating. Her contention is that 'the

[1] "69. (1) … Such application shall not be entertained unless it is made in writing and delivered to the clerk to the Board, …, within 1 month of the date of the Board's decision. If the decision of the Board shall be notified to the Commissioner or to the appellant in writing, the date of the decision, for the purposes of determining the period within which either of such persons may require a case to be stated, *shall be the date of the communication by which the decision is notified to him."* (emphasis supplied)

communication' was the posting of the Decision on the 13 December 2005. There is certainly force in Ms Tsui's submission. On the other hand, there is a respectable argument that an action of communicating does not simply begin and stop at, in the case of posting, the act of posting. It can be said that the action of communicating is a process which ends when the communication reaches the address to which it was sent.

17. ... In the case of D2/04, IRBRD, vol 19, 76, the Board of Review had to consider the meaning of the phrase 'after the transmission to him' under section 64(4) of the IRO and it was held, at page 80, that:

'*… unless the intention is clear, we should not impute to the legislative an intention that time begins to run even before the determination could have reached the taxpayer for him to have any chance of dealing with it. We should observe that the end of the process of transmission does not depend upon whether the determination has physically reached the recipient. The process of transmission would normally end when the determination reaches the address that it was sent to.*'

18. This Board agrees with the above *ratio* which is equally applicable to the point in issue. It should be added that this interpretation of 'the communication' has the support of the learned authors of the Encyclopaedia of Hong Kong Taxation [see vol 4, paragraph II [21065]-[21105]]. This Board holds that on a true and proper construction of section 69(1), 'the communication' is a process and it concludes when the communication reaches the intended address. ...".

9. Though the two sections are not identical, I agree with the Board in *D30/06* and hold that the same reasoning applies to the construction of s 69(3)(a)(i). I do not accept Mr Lam's argument that "communication" could mean the letter itself and not the date when the letter reached the intended address. I hold that time should have started to run from 8 January 2018 for the purpose of s 69(3)(a)(i).

10. The time limit was not merely for lodging the application with the Registrar of the High Court. It was also a time limit for service of the application on the CIR. Mr Ngo had sent the summons to the CIR by email on 7 February 2018, but service of documents by email is not recognised by O 65 r 5 of the Rules of the High Court ("**the RHC**") and hence such service is invalid. Since the hard copy of the summons was only delivered to the CIR on 23 February 2018, Mr Ngo made the application out of time.

11. The next issue is on whether this court has jurisdiction to extend the time limit for the application. Mr Lam highlighted the lack of provision in s 69 for extension of the time limit provided in s 69(3)(a)(i). He also referred to O 3 r 5 of the

RHC which provides that this court may extend or abridge the time limits provided in the RHC, or any judgment, order or direction. He submitted that s 69(3)(a)(i), which provides the time limit for an application for leave, is not a rule of the High Court or a judgment, order or direction. Hence, this court cannot extend the time limit under O 3 r 5 of the RHC.

12. In the light of the wordings of s 69(3)(a)(i) and O 3 r 5, I agree with Mr Lam that there is no power in this court to extend the time limit for Mr Ngo to make this application. This application is thus bad for having been made out of time and should be struck out.

13. In case I am wrong to hold that this court has no power to extend the time limit, I would also consider, in case I have the power to extend time, whether I should extend the time limit in favour of Mr Ngo.

14. The Board has, by its email dated 19 December 2017, advised Mr Ngo the time limit for making an application for leave under s 69 being one month. He was able to file the summons with the Registrar of the High Court on 8 February 2018 which was just within time. There was no valid reason why he should not have served a hard copy of the summons on the CIR on the same day. Even if he was not clear as to the filing process or the time limit, he could have instructed lawyers for advice. He had the resources to do so. He at one time also indicated an intention to instruct lawyers to review the decision. Hence, there is nothing unfair for him to bear the consequences of his failure to comply with the time limit in s 69. Hence, even if I should have the power to extend the time limit, I would not exercise the discretion in his favour.

15. However, in case I am wrong in holding that I have no power to extend the time limit or should not extend time for Mr Ngo to make this application, I would also proceed to consider the merit of this application.

The background

16. The background facts are set out in §§7 to 26 of the decision. They are either agreed or undisputed facts. They may be summarised as follows.

17. Mr Ngo was first employed by CFHK as a Broker on the Equity Options Desk under a Broker Commission Contract of 19 May 2004 ("**the 2004 Contract**"). CFHK is a private company incorporated in Hong Kong. Mr Ngo's status was changed to a Director on the Equity Derivatives Desk by a contract of 2 December 2009 ("**the 2009 Contract**")**.**

18. The 2004 and 2009 Contracts provided, *inter alia*, that CFHK could pay Mr Ngo part of his annual compensation by requiring him to take a Grant Award in CFLP in lieu of cash from CFHK.

19. CFHK, in consideration of Mr Ngo's employment with it, caused CFLP to award Mr Ngo various grants ("**Grant Awards**") consisting of:

(1) Grant units in CFLP ("**Grant Units**"); and

(2) Amounts in the Grant Tax Payment Account.

20. Mr Ngo and CFLP also entered into various Incentive Unit Bonus Plan Award Agreements and CFLP issued to Mr Ngo an Incentive Bonus Plan Award Notification. The Award Agreements and Award Notification provided, *inter alia*, that all awards granted thereunder would be subject to the terms of a Partnership Agreement.

21. The Partnership Agreement (i.e. the Agreement of Limited Partnership of CFLP) provided, *inter alia*, that following the termination of a holder of Grant Units, he would be paid: (i) a specified amount in respect of his Grant Units; and (ii) amounts in the Grant Tax Payment Account, over a period of 4 years, provided he did not engage in competitive activity.

22. CFHK by letter dated 16 June 2011 informed Mr Ngo that his employment with CFHK would be terminated with immediate effect.

Mr Ngo's claim against CFHK in the Labour Tribunal and the High Court and his demand against CFLP

23. On 4 November 2011, Mr Ngo requested CFLP to:

(1) repay him US$350,000 (this was an investment made by Mr Ngo voluntarily in CFLP and was not part of his employment by CFHK ("**the CFLP Capital Contribution"**); and

(2) pay him Post-termination payments with respect to his vested Grant Units and the amounts in the Grant Tax Payment Account ("**the CFLP Post-Termination Payments**").

24. On 8 March 2012, Mr Ngo filed a claim in the Labour Tribunal against CFHK. His claims ("**the LT Claims**") may be summarised as follows:

(1) Commission in Grant Units under the 2004 Contract

(1) From July 2005 to June 2009, Mr Ngo was paid a commission payment in the form of a 'discretionary bonus'.

(2) That commission was paid to him partly in cash, and partly in Grant Units. The total amount of commission partly paid as Grant Units in the 2005-2009 period amounted to US$398,613 worth. Out of this US$398,613 worth, he received US$66,433 in cash (as dividends from the Grant Units) ("**the 2004 Contract Dividends**").

(3) The Grant Units could not be sold, transferred or redeemed in cash. Mr Ngo claimed that he was entitled to be paid by CFHK in cash for the amounts purportedly paid to him as Grant Units, i.e. US$398,613 (equivalent to HK$3,101,209.14).

(2) Commission in Grant Units under the 2009 Contract

25. From 1 July to 31 December 2009, CFHK paid Mr Ngo commission ("**the 2nd Commission 2009**") partly in cash and partly as Grant Units (amounting to US$37,906 worth).

26. From 1 January to 30 June 2010, CFHK paid Mr Ngo commission ("**the 1st Commission 2010**") partly in cash and partly as Grant Units (amounting to US$28,940 worth).

27. From 1 July to December 2010, Mr Ngo claimed that he was entitled to US$43,197 commission ("**the 2nd Commission 2010**") but it was not paid to him. He claimed this sum.

(3) Shortfall in payment in lieu of notice ("**PILON**") and annual leave

28. Mr Ngo claimed that CFHK, in calculating his PILON and annual leave entitlements, had failed to take into account the commissions and travelling expenses he earned. The shortfall in PILON was at HK$728,788.27 and the shortfall for annual leave was at HK$143,762.47.

29. Mr Ngo filed a statement in the Labour Tribunal explaining, among other things:

> "3. (iv) The amounts which I am claiming (including the cash value of the Grant Units 'awarded' to me by [CFHK]) are amounts: (a) earned by me in the course of my employment with [CFHK] in Hong Kong as part of my total annual compensation …
>
> …
>
> 11. Therefore, these Grant Awards were not a voluntary 'purchase' from me but rather a mandatory allocation whose amount was deducted at source from my employment wages".

30. Mr Ngo's LT Claims against CFHK were transferred to the Court of First Instance in HCA1575/2012 ("**the Action**"). He filed his statement of claim on 7 November 2012. His claims ("**the High Court Claims**") may be summarised as follows:

(1) Shortfall in commission due to Mr Ngo under the 2004 Contract

31. Mr Ngo's case was that the commission paid to him in the form of Grant Units (amounting to US$398,613) was his "wages" for the purposes of the

Employment Ordinance (Cap. 32) and should have been paid to him within 7 days of the due dates. He characterised this sum as the "**2004 Contract Deducted Sums**" and claimed CFHK for its payment. He gave credit to CFHK for the 2004 Contract Dividends at US$66,433.

32. He claimed in the alternative that he should be paid cash equivalent to the value of the Grant Units and Grant Tax Payment Account under the Award Agreements as at the date of his termination. The Grant Units and Grant Tax Payment Account represented part of his annual compensation and should have been paid to him on termination.

(2) Shortfall in commission due to Mr Ngo under the 2009 Contract

33. Mr Ngo claimed that CFHK had wrongly deducted his wages and failed to pay him his commission in full. The amounts are US$37,906, US$28,940 and US$43,197 referred to above.

(3) Shortfall in PILON and accrued annual leave

34. As in the Labour Tribunal, Mr Ngo claimed that CFHK, in calculating his PILON and annual leave entitlements, had failed to take into account the commission payments and travelling expenses he earned. The figures were revised to HK$693,186.36 for PILON and HK$136,737.32 for annual leave.

35. The Board found that Mr Ngo's LT Claims, which were later replaced by his High Court Claims, were based on the alleged breach by CFHK of the relevant payment clauses under the 2004 and 2009 Contracts or under the provisions of the Employment Ordinance.

The Settlement Agreement and Partnership Settlement Agreement

36. On 2 May 2013, Mr Ngo entered into a Settlement Agreement ("**SA**") with CFHK and CFLP. Clause 2.2 of the SA provide as follows:

> "2.2 In consideration of
>
> (i) [Mr Ngo] and CFLP executing a Partnership Separation Agreement in the form set out in Schedule A of this Agreement ("PSA"); and
>
> (ii) [Mr Ngo] agreeing to waive and discontinue his claims against CFHK in the Action; and
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> (iii) [Mr Ngo] undertaking not to apply to join CFLP as a party to the Action and to discontinue all threatened claims against CFLP in the Action; and

(iv) The Parties agreeing to the release and waiver of Claims and confirmations as set out in Clauses 3.1 and 3.2 below;

CFHK will pay [Mr Ngo], on behalf of itself and CFLP, … the following sums, totalling US$888,500 […] (the "Settlement Sum"), set out below:

(a) US$350,000 being an amount equivalent to [Mr Ngo's] original capital contribution to CFLP (net of all applicable taxes and withholdings) in respect of his investment;

(b) US$350,000 by way of compromise and abrogation of the remainder of [Mr Ngo's] claims against CFHK and in consideration of the further agreements made in this Settlement Agreement and the PSA; and

(c) US$188,500 by way of contribution to [Mr Ngo's] legal fees and expenses.

[…]"

37. The US$350,000 paid by CFHK to Mr Ngo under Clause 2.2(b) of the SA is referred to in the decision and herein as the "**First Sum**". The US$350,000 paid under Clause 2.2(a) is referred to in the decision and herein as the "**Second Sum**".

38. On the same day, Mr Ngo and CFLP also entered into a "**Partnership Separation Agreement**".

(1) Clause 2(a) provided that CFLP would repay Mr Ngo the Second Sum which was equivalent to his CFLP Capital Contribution net of all taxes and withholdings.

(2) Clause 2(c) provided that "the amounts set forth in (the Clause 2 of the PSA and the SA) represented the entire payment to be made and/or owed in any manner (i) by CFLP to Mr Ngo in connection with his interest in the CFLP partnership, including, without limitation, any capital account, income, …, Post-Termination Payment and Grant Tax Payment Account and as between Mr Ngo and CFLP the provisions regarding payment for Units in the CFLP partnership and Partner's capital account with respect thereto along with any other rights that Mr Ngo might have or obligations CFLP might have to him pursuant to the Partnership Agreement and (ii) by CFHK in relation to Mr Ngo's employment with CFHK or its termination".

(3) Pursuant to Clause 2(d), Mr Ngo waived any right he might have "(i) to be paid or be owed any money by CFLP … whether

pursuant to the terms of the Partnership Agreement or otherwise, and (ii) to be paid or owed any money by CFHK".

Salaries Tax Assessment on the First Sum

39. The CIR raised an additional Salaries Tax assessment for 2011/12 ("**the Assessment**") on Mr Ngo in respect of the First Sum of HK$2,715,790 (equivalent to US$350,000). The CIR subsequently revised the Assessment by removing from the First Sum a pro rata portion of Mr Ngo's claim for shortfall in PILON[2] over the High Court Claims. The removed portion amounted to HK$443,460 (decision §26). Mr Ngo accepted this apportionment formula and the deduction of HK$443,460[3] from the First Sum for assessment. But he disagreed with the assessment for salaries tax for the balance of the First Sum.

The Board's decision

40. The issue before the Board was the chargeability of the First Sum (less PILON on pro rata basis) to Salaries Tax. The Board set out the relevant principles of law. They are summarised as follows:

(1) By s. 8(1) of the IR Ordinance, salaries tax is chargeable on every person in respect of his income arising in or derived from Hong Kong from his office or employment of profit.

(2) The Board cited the leading authority of *Fuchs v CIR* (2011) 14 HKCFAR 74 where Ribeiro PJ explained in §17 that "[i]f a payment, viewed as a matter of substance and not merely of form …, is found to be derived from the taxpayer's employment …, it is assessable."

(3) The Board then cited in §§31-33 of the decision various authorities on settlements following legal proceedings. The effect of the authorities was that the settlement sum takes its nature from the substance of the taxpayer's claims against the employer which were settled.

41. The Board concluded that Mr Ngo's LT Claims and High Court Claims were based on his claims for breach of the payment clauses in the 2004 and 2009 Contracts he made with CFHK or under the Employment Ordinance.

42. After considering the correspondence of settlement negotiation between the solicitors for Mr Ngo and CFHK and based on the terms of the SA and Partnership

[2] As recorded in §56 of the decision **[B/22/432]**, the IRD's assessing practice concerning PILON is to treat it as exempt from salaries tax if it accrued before 1 April 2012.

[3] A's Submission §83 **[B/23/471]**.

Separation Agreement, the Board concluded that the agreed settlement sum of US$888,500 comprised of:

(1) The Second Sum of US$350,000 was to return to Mr Ngo his CFLP Capital Contribution;

(2) The First Sum of US$350,000 was for settling with CFHK his High Court Claims; and

(3) The sum of US$188,500 was a contribution to Mr Ngo's legal fees and expenses and is referred to as "**the Agreed Costs**".

43. It can be gleaned from clause 2.2(a) of the Settlement Agreement and clauses 2(a), 2(c) and 2(d) of the Partnership Settlement Agreement ("**PSA**") that the Second Sum represented the return to Mr Ngo the CFLP Capital Contribution and the payment for the CFLP Post-Termination Payments. Thus, the Second Sum had already dealt with the CFLP Post-Termination Payments. The First Sum had nothing to do with CFLP but was for settling Mr Ngo's High Court Claims against CFHK in the Action only.

44. The bonuses or commission claimed by Mr Ngo were payable to him upon cessation of his employment with CFHK. They were rewards for Mr Ngo's services rendered to CFHK pursuant to his employment by CFHK.

45. If the First Sum was paid for the taxable items of bonuses or commission, PILON and annual leave payment, the disputes between Mr Ngo and CFHK over these items could not have changed the taxable nature of the First Sum. The Board applied *Fuchs* and came to the conclusion that the First Sum was paid by CFHK to Mr Ngo for his past services provided to CFHK as employee and not in consideration for his agreeing to surrender or forgo or abrogate any of his pre-existing contractual rights.

46. Mr Ngo also claimed that the First Sum included, *inter alia*: (i) loss of US tax refund at US$8,500; and (ii) interest and costs, which were not taxable.

47. On the compensation for loss of US tax refund at US$8,500, the Board considered the negotiation correspondence between the parties leading up to the inclusion in the Settlement Sum of the US$8,500 compensation for Mr Ngo's loss of tax refund[4]. The Board concluded that the US$8,500 did not form part of the First Sum. It reiterated that the First Sum was paid to Mr Ngo to settle his High Court Claims and there was no evidence or reason why the US$8,500 formed part of the First Sum.

48. Regarding interest, the Board concluded that there was no evidence that interest was recovered from CFHK, but even if it were, the interest came from the claimed amount, which was taxable in nature. Accordingly, the interest should not be deducted from the First Sum.

[4] Claim for refund was time barred.

49. As for legal costs, the Board took the view that this had already been included in the US$188,500 agreed costs which was not assessed by the CIR for salaries tax. It was illogical for Mr Ngo to seek a deduction of his legal costs from the First Sum when he paid nothing for it.

50. Mr Ngo also argued that the First Sum was paid in relation to post-termination restrictive covenants. The Board found that the First Sum was paid to settle the High Court Claims and not in consideration of the restrictive covenants in the Partnership Separation Agreement and rejected this argument. If any payment was made to Mr Ngo in exchange for the covenants, it was part of the Second Sum.

The relevant legal principles for leave application

51. The legal principles for an application for leave to appeal against a decision of the Board as summarized by Mr Lam are as follows:

(1) S 69(3)(e) of the IR Ordinance provides that:

> "(e) leave to appeal must not be granted unless the Court of First Instance is satisfied—
>
> (i) that a question of law is involved in the proposed appeal; and
>
> (ii) 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."

(2) Mr Ngo must identify and state a proper question of law for determination by the court in his statement in support of the application. The question must precisely identify the point of law involved or any specific legal error or question: §2(2) of Practice Direction 34 and *China Mobile Hong Kong Co Ltd v CIR* [2018] 2 HKLRD 146, §§27, 30(4) *per* Chow J.

(3) A proposed appeal has a reasonable prospect of success if it is reasonably arguable, not that it will probably succeed: *China Mobile*, §16 *per* Chow J.

(4) A finding of fact may be challenged as an error of law if:

(a) The decision was based on a finding of fact or inference from the facts which was perverse or irrational;

(b) There was no evidence to support the decision;

(c) The decision was made by reference to irrelevant factors; or

(d) The decision was made without regard to relevant factors.

(See: *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275, §§31-34 *per* Bokhary PJ.)

(5) The appellate court should not disturb the Board's conclusion unless it regards that the conclusion is contrary to the true and only reasonable one: *Kwong Mile*, §37 *per* Bokhary PJ.

(6) See also *CIR v Right Margin Ltd* [2017] 5 HKLRD 398, §10 *per* G Lam J:

"It is well-established that attacks on findings of fact only raise questions of law in very limited circumstances, such as where it is said there is no evidence at all to support the finding. The extent to which a particular piece of evidence should be accepted or rejected, and the weight to be given to it, are matters for the Board and not the court: *Aust-Key Co Ltd v Commissioner of Inland Revenue* [2001] 2 HKLRD 275, 281H; *Runa Begum v Tower Hamlets London Borough Council* [2003] 2 AC 430, §99."

Preliminary Matters raised by the CIR

52. Mr Lam raised two preliminary matters before analysing Mr Ngo's proposed grounds of appeal.

53. The first matter is Mr Ngo's attempt to introduce fresh evidence in this application. The fresh evidence is some documents attached to his submission **[Bundle C/24/483-532]**. Mr Ngo relied on §3 of Practice Direction No 34 in §§7-8 of his supplementary submission to adduce new evidence.

54. If leave to appeal should be granted under s 69 of the IR Ordinance, the appeal should be on a question or questions of law. S 69AA(1)(b)(i) of the IR Ordinance provides that when the Court of First Instance on hearing the appeal on a question or questions of law, it must not receive any further evidence.

55. §3 of Practice Direction No. 34 states:

> "3. Any additional document considered necessary for the application for leave to appeal should be exhibited to an affidavit filed by the applicant at the same time as the summons and statement required under section 69(3)(a)(ii). Only documents that are necessary should be so included."

This paragraph deals with additional documents necessary for the application for leave to appeal, but it is not a permission to the applicant to adduce new evidence which was not before the Board.

56. I am of the view that if the Court of First Instance on hearing the appeal cannot receive fresh evidence, it is futile for the court to receive and hear such evidence when considering whether to grant leave to appeal as such evidence will in any event not be available on hearing of the appeal. Therefore, I agree with Mr Lam that I should not consider the aforesaid new documents.

57. The second preliminary matter is Mr Ngo's reliance on *Poon Cho-Ming John v CIR* [2018] HKCA 297 and *Hunter v Dewhurst* (1931) 16 TC 605 in §§15 to 30 of his supplementary submission and suggested that the Board had erred in law.

58. The Court of Appeal in *Poon Cho-Ming John* (at §§24, 25 and 27) reiterated the principle in *Fuchs* that the question to ask is the substance of the bargain between the employer and the taxpayer for the payments in question or what was the purpose of the payments. If the taxpayer was entitled to the payments under the contract of employment, then the purpose of the payments was for the taxpayer to perform his obligations under the contract and the payments taxable. But if the taxpayer was not so entitled from the employment and the purpose of the payments was in consideration of his agreeing to surrender or forgo his pre-existing contractual rights, then the payments were not taxable. *Hunter v Dewhurst* was no different.

59. Mr Ngo submitted in his supplementary submission that if the Board should have construed the SA and PSA properly, considered the circumstances of his termination and the totality of the evidence and supporting documents produced by him and applied the principle in *Poon Cho-Ming John*, it would have come to the conclusion that the First Sum was not taxable. But he said the board had failed to do so and had instead adopted an unduly narrow focus by just concentrating their analysis on the contract of employment and the High Court Claims and omitted the equally important discussion of whether the SA and PSA might have an independent vitality by way of exchange of fresh consideration between employer and employee.

60. Mr Lam disagreed with Mr Ngo on his application of the principle in *Poon Cho-Ming* John. But I do not think it necessary to argue whether Mr Ngo was correct in his application of *Poon Cho-Ming John*. The important thing is whether he has raised proper questions of law that are fit for leave to appeal to be given.

Mr Ngo's Grounds of Appeal

61. Mr Ngo has filed a lengthy submission and a lengthy supplementary submission on 18 January and 8 October 2018 respectively. The grounds can be boiled down into three as summarized by Mr Lam:

(1) The First Ground: Part of the First Sum was attributable to a payment in satisfaction of Mr Ngo's partnership rights.

(2) The Second Ground: The First Sum should be further apportioned to remove US$8,500 for loss of US tax refunds and interest. In the 2nd Submission, Mr Ngo further claims that costs should be removed too.

(3) The Third Ground: Part of the First Sum was payment for the restrictive covenants in the Partnership Settlement Agreement.

First Ground

62. Mr Ngo argued that the First Sum was partly compensation for his claim against CFLP for the CFLP Post-Termination Payments under the Partnership Agreement. That claim was of a partnership nature and not employment. He made this claim against CFLP under the Partnership Agreement, not CFHK. He further said in his 2nd Submission that the First Sum was paid to him because of the litigation and it was paid in abrogation of his rights under the Partnership Agreement. The Second Sum was paid exclusively to return the CFLP Capital Contribution (part of his partnership claims) to him. He also said in §37 of his supplemental submission that CFLP had offered him US$621,353 on 13 January 2012 and US$634,130 on 28 May 2012 as compensation for both his CFLP Capital Contribution and all the Grant Units (all his partnership claims). But CFHK was only offering HK$550,000 to settle the employment claims. Therefore, he could not have agreed to settle all his partnership claims for only the Second Sum of US$350,000. He thus said the Board erred in finding that the Second Sum also settled his other partnership claims under the Partnership Agreement.

63. Mr Ngo further said that Clause 2 of the PSA supports his argument that the First Sum settled his claim for the CFLP Post-Termination Payments.

64. I however note that the Board has recorded in §20(a) of the decision that Mr Ngo had initially made two partnership claims on CFLP. He asked CFLP to repay him the CFLP Capital Contribution of US$350,000. He also asked CFLP to pay him Post Termination Payments with respect to his Grant Units and Grant Tax Payment Account. CFLP then offered him US$621,353 on 13 January 2012 and US$634,130 on 28 May 2012 as compensation for these two partnership claims.

65. When he made his claims in the Labour Tribunal and later in this court, he instead pleaded that it was wrong for CFHK to have paid him the Grant Units as part of his wages in lieu of cash. He thus claimed in the Action against CFHK for wages in cash

in lieu of the Post Termination Payments with respect to his Grant Units and Grant Tax Payment Account. Hence, he had elected in the Action to claim the cash equivalent for one of the partnership claims in the Grant Units and the Grant Tax Payment Account. He claimed these items as unpaid wages. His alternative claim in the Action against CFHK for payment of an amount equivalent to the value of the Grant Units and Grant Tax Payment Account under the Award Agreements as at the date of termination confirms the election. He also claimed in the Action the shortfall in PILON and annual leave payment.

66. It is thus clear that Mr Ngo had included part of the partnership claims of the Post Termination Payments with respect to his Grant Units and Grant Tax Payment Account in the High Court Claims against CFHK. But he could not have included his claim against CFLP for the repayment of CFLP Capital Contribution of US$350,000 as that was a partnership claim that had nothing to do with CFHK.

67. When Mr Ngo settled the employment dispute with CFHK, he also settled the remaining partnership dispute with CFLP. In the settlement, part of the original partnership claims was changed to an employment claim in the Action. Hence, there are two parts of the settlement of claims; one for the employment claim and the other for the remaining partnership claim for the CFLP Capital Contribution of US$350,000. This is spelt out in clause 2 of the PSA which refers to the SA as well. I have already set out this clause above. The settlement for the remaining partnership claim is at a smaller sum of US$350,000 and not the original offers of US$621,353 or US$634,130, because the claims for the Post Termination Payments with respect to his Grant Units and Grant Tax Payment Account, being part of the original partnership claims, have been made separately as an employment claim in the Action and settled in the First Sum of US$350,000.

68. The question is what is the nature of the High Court Claims – partnership or employment. Mr Ngo reiterated repeatedly at the hearing of the application that he had a partnership claim against CFLP but it was difficult for him to sue it in Hong Kong as CFLP is a company domiciled in Delaware of the USA. He could also not get his partnership rights from CFLP because the Partnership Agreement provided, *inter alia*, that the holder of Grant Units, after termination, would be paid: (i) a specified amount in respect of his Grant Units; and (ii) amounts in the Grant Tax Payment Account over a period of 4 years, provided he did not engage in competitive activity. Mr Ngo said he could not wait to collect his due from the Grant Tax Payment Account as he had to make a living and could not refrain from engaging in competitive activity for four years. He therefore dressed up his partnership claim under the Grant Units and Grant Tax Payment Account as an employment claim so that he could sue CFHK for it. To bring a partnership claim in the form of an employment claim against CFHK in Hong Kong instead of as a partnership claim against CFLP in Delaware was his strategy of claim.

69. The first point I note is that Mr Ngo has not suggested any error of law committed by the board. His complaint is that the Board should have accepted his hidden intention or strategy of claim and ruled in his favour. I do not think this is a question of law.

70. In any case, Mr Ngo had indeed brought an employment claim in the Labour Tribunal which has exclusive jurisdiction over such claim, and his High Court Claims in the Action are indeed employment claims. He was seeking wages for his past employment service and also shortfall in PILON and annual leave. The SA and PSA also showed that the First Sum was paid to settle the High Court Claims in the Action rather than any partnership claim.

71. Mr Ngo submitted that if the Board should have construed the SA and PSA properly, considered the circumstances of his termination and the totality of the evidence and supporting documents produced by him and applied the principle in *Poon Cho-Ming John*, it would have concluded that the First Sum was not taxable. However, I am of the view that the Board has indeed construed the SA and PSA properly, considered the circumstances of his termination and the totality of the evidence and supporting documents produced by him. The Board has also applied the principles in *Poon Cho-Ming John*. But the Board cannot make a decision based on his hidden strategy of claim. In fact, CFHK would not have been liable to him for his partnership claim and he was suing CFHK for employment claims. The First Sum was for settlement of the employment claims as brought against CFHK. In the circumstances, I cannot see how the board can be said to have erred in law in holding that the First Sum was for settling the employment claims. The question is whether on the application of the principles in *Poon Cho-Ming John*, the employment claims as settled are taxable.

72. There is no dispute that part of the First Sum attributable to the alleged shortfall in PILON was not taxable. The question is what is the purpose of the payment (except PILON) sought by Mr Ngo from CFHK in his High Court Claims. He was seeking payment of his past wages and shortfall in annual leave in the form of commission. He pleaded that the commission paid to him in the form of Grant Units (amounting to US$398,613) was his "wages" for the purposes of the Employment Ordinance and should have been paid to him within 7 days of the due dates. He characterised the wages claim as the "2004 Contract Deducted Sums" and claimed CFHK for its payment. He was thus claiming past wages in lieu of the Grant Units. He gave credit to CFHK for the 2004 Contract Dividends at US$66,433. Wages (and annual leave shortfall) are of course taxable as he was entitled to them in return for the service he rendered under the contract of employment with CFHK. He was not seeking any payment in consideration of his agreeing to surrender or forgo any of his pre-existing contractual rights. He was also not seeking any payment for his partnership rights which should have been directed to CFLP. Since the part of the First Sum (except the portion attributable to PILON) was paid to him to settle his claim for wages and annual leave shortfall, that part of the First Sum is taxable. I again cannot see any error of law in this finding of the Board. Mr Ngo, having made an employment claim, cannot turn around and require the Commissioner and the Board to treat it as a partnership claim.

73. Mr Ngo also referred to the cases of *Cantor Fitzgerald Europe v Boyer* (HCA 1160/2011, 29 February 2012) and *CIR v Elliott* [2007] 1 HKLRD 297. In *Cantor Fitzgerald Europe v Boyer* (at §§164 to 169), there was a dispute (issue 5(d) on whether an employee had agreed to payment to him by CFHK of 10% of his commission by way of Grant Units. The employee concerned Mr McGonegal had signed two Incentive Unit

Bonus Plan Award Agreements on 2 October 2008 and 26 August 2009 agreeing to receiving some of his commission payable at those times by way of Grant Units. Reyes J held that Mr McGonegal was bound by his signatures on the two Award Agreements. However, CFHK continued to pay Mr McGonegal some of his commission in Grant Units. The learned Judge held that CFHK was not entitled to do so.

74. Mr Ngo had elected in his High Court Claims to claim his commission in cash in lieu of the Grant Units he had received. CFHK did not put forward any argument that he was bound to keep the Grant Units and could not claim cash in lieu. I do not think the *Boyer* case is relevant to this application.

75. In *CIR v Elliott*, the facts as summarized in the headnote are that an employer agreed to award to an employee: (a) 5,000,000 non-transferable "incentive compensation plan" (ICP) units (initial units); and (b) for two years thereafter, 500,000 additional units (additional units) each time a project became operational. Each 500,000 unit block entitled the employee to an annual payment, computed under a formula partly based upon the employer's profitability. Alternatively, with the employer's agreement, the employee could elect to receive a lump sum in lieu of the units granted to him.

76. Within eight months of signing the employment agreement and after the employee had been awarded the initial units but before he had received any annual payments in relation thereto, the parties terminated the employment. Under the termination agreement, the employee agreed to cancel all his ICP units for a payment of US$11,000,000 (the Sum). The CIR assessed the Sum to salaries tax on the basis that it amounted to income from employment, since it was received in substitution for certain taxable payments which would in the normal course of employment have been received by the employee. On appeal, the Board found that the Sum was made in exchange for both the initial units and the additional units. The Board held that the initial units were an inducement to the employee to enter into the employment contract and that the portion of the Sum attributable thereto was taxable; however, the portion attributable to the additional units, being future units, was a non-taxable payment for abrogation of the employee's contractual rights. The Board, adopting a "rough and ready" method, considered that 50% of the Sum should be apportioned to each of the taxable and non-taxable components.

77. The Court of Appeal reiterated that payment made as an inducement to enter into an employment was taxable, whether paid before, during or on termination of the employment. However, payment as consideration for the abrogation of a contract of employment or as damages for it was not taxable (*Henley v Murray (Inspector of Taxes)* [1950] 1 All ER 908, *Comptroller-General of Inland Revenue v Knight* [1973] AC 428 applied) (at p 785F-G).

78. The Court of Appeal further held that the portion of the Sum attributed to the cancellation of the initial units covered both a sum representing the value of the inducement, which was taxable and a sum representing compensation for abrogating the employee's rights under his contract of employment, which was not taxable. The Board therefore erred in concluding that the entire portion attributable to the cancellation of the

initial units was taxable. The case was remitted to the Board to reconsider the apportionment so as to only tax the value of the inducement (*CIR v Yung Tse Kwong* [2004] 3 HKLRD 192 applied) (See pp 787D-H, 787J-788D, 788G).

79. I again do not see how *CIR v Elliott* can assist Mr Ngo in this application. His High Court Claims (save PILON) were for wages and annual leave shortfall that he had earned by providing service under his employment contract and not for abrogating his rights under the contract.

80. In the premises, I rule against Mr Ngo on the First Ground.

Second Ground – the US$8,500.

81. The First Sum should be further apportioned to remove US$8,500 for loss of US tax refunds and interest. In the 2nd Submission Mr Ngo further claims that costs should be removed too.

82. The US$8,500 was paid by CFHK for certain error committed by its staff which barred Mr Ngo's right to claim refund of US tax at US$8,500. Mr Ngo's solicitors raised this item after the parties had agreed the settlement sum at US$880,000. The solicitors for CFHK and CFLP then agreed to include this sum in the settlement sum which was increased to US$888,500. There is no indication that the US$8,500 was added to the First or Second Sum each at US$350,000.

83. The burden of proof is on Mr Ngo. He tried to argue that he had incurred legal fees at US$188,670[5]. Hence, the US$188,850 was a settlement of reimbursement of almost his full legal fees which did not include the compensation for lost US tax at US$8,500. The Second Sum of US$350,000 was for return of his partnership investment. This sum of US$8,500 should therefore be in the First Sum.

84. However, that was not how the negotiation was carried on. Mr Ngo had written to CFHK on 18 July 2012 offering to settle at US$950,000 plus reimbursement of his legal fees and removal of anti-poaching clauses from the PSA. He explained that the sum of US$950,000 was made up of US$350,000 partnership investment plus money in lieu of the Grant Units shortfall of PILON/employment matters **[Bundle C/24/503]**.

85. The solicitors for CFHK and CFLP offered on 18 February 2013 a sum of US$750,000 inclusive of costs and interest to settle the claims against CFHK and CFLP **[Bundle C/24/504]**. Mr Ngo, when giving instructions to his solicitors to counter-offer, said that his initial claim was US$970,000 plus interest. The difference between US$970,000 and US$750,000 was US$220,000. He was willing to settle at the middle or US$860,000 exclusive of his legal costs at about US$120,000 **[Bundle C/24/506]**. His solicitors then offered to settle on 25 February 2013 at US$800,000 inclusive of interest plus costs **[Bundle C/24/426 - 427]**. The other side then came back with the figure of US$800,000 inclusive of costs of US$150,000 and interest. Mr Ngo's solicitors then

[5] §32 of Submissions.

replied a figure of US$880,000 inclusive of costs and interest. They did not advise the other side that the actual amount of legal costs was at about US$188,500. This latest figure was accepted by CFHK and CFLP. As I have said above, the sum of US$880,000 was later increased to US$888,500 by adding the lost US tax of US$8,500. There is really nothing to show that this US$8,500 had gone into the First Sum. If that were the case, the First Sum would have been at US$341,500 before the addition of US$8,500 to it. I do not think there is any evidence showing that the First Sum would have been this odd figure of US$341,500 before the addition of US$8,500 to it. Accordingly, I rule against Mr Ngo on his claim that the sum of US$8,500 should be excluded from the First Sum. In any case, I cannot detect any question of law as raised by this part of the Second Ground.

Second Ground – interest

86. I now deal with the question of whether interest and costs should be deducted from the First Sum before it is taxed.

87. Mr Ngo claims that interest on his claim for the Grant Units, even if it was an employment claim, should have been deducted from the First Sum because such interest was not paid pursuant to his employment contract. I think it is certainly arguable that interest, if any, paid to Mr Ngo to compensate the delay in the payment to him of the cash in lieu of the Grant Units was not paid in respect of his performance of his obligations under the contract. It was paid to cover Mr Ngo's loss in not getting his wages when due. There is therefore an arguable question of law of whether interest on wages paid by the employer to compensate the employee's loss because of the employer's delay in paying wages is taxable income.

88. However, the first thing to ascertain is whether any interest, and if so, how much was paid to him as part of the First Sum. The negotiation correspondence does not show any discussion or quantification of interest as a particular item. Interest was just mentioned as one of the claims to be included in the settlement. Though it cannot be said that interest was not part of the settlement, it is also impossible to say how much, if any, was paid by CFHK to cover it. It appeared as part of the give and take by the parties in settling their disputes. Hence, even if Mr Ngo has shown an arguable question of law, he has failed to discharge his burden of proof that "a particular sum" should be deducted from the First Sum to represent the amount of untaxable interest paid by CFHK to him. Hence, regardless of whether he has framed a question of law, such question does not arise from and is irrelevant to the facts of his case. I therefore reject this part of the second ground of appeal.

Second Ground –costs

89. The Board rightly pointed out that there was no evidence on the actual amount of legal costs incurred by Mr Ngo. The part of the settlement sum at US$188,500 was the agreed costs for settlement of Mr Ngo's legal costs. CIR did not tax this sum for income tax. The Board assumed that the actual legal costs he incurred were equal to US$188,500 and held that he had not suffered any loss in legal costs.

90. Mr Ngo in this application tried to adduce fresh documentary evidence to show that he had actually paid US$188,670 legal costs. I have already rejected his attempt to adduce fresh evidence. It appeared that the sum initially agreed for agreed costs was only US$180,000. It was later increased to US$188,500 by the addition of the irrecoverable US tax of US$8,500.

91. However, regardless of whether Mr Ngo had incurred legal costs at US$180,000 or US$188,670 or more, the sum of US$180,000 was agreed as a settlement of his legal costs. It is common to have some give and take in a settlement. Mr Ngo has not established any basis to say that the First Sum had included a settlement of his legal costs. I also cannot see what question of law he has shown in this part of the Second Ground. I therefore dismiss this part of the Second Ground.

Third Ground

92. Mr Ngo argued that part of the First Sum was payment in consideration for the restrictive covenants he had entered into in the PSA and such payment was not taxable.

93. He referred to clause 4(g) of the PSA which contained a non-poaching clause **[A/17/243]** which would last for 24 months from 2 May 2013. There were other restrictive covenants in Clause 4 of the PSA. He also referred to clause 4.2 of the SA **[A/17/235]** and clause 4(e) of the PSA **[A/17/242]** which contained a non-disparagement clause. He submitted that the SA and PSA are interrelated documents and part of the First Sum was paid in return for these covenants and not of employment nature. Hence, this part of the first Sum was not taxable.

94. The CIR's first argument is that this ground does not contained any question of law. I agree with the CIR.

95. Furthermore, Mr Ngo's argument cannot overcome the Board's conclusion that the First Sum was paid to Mr Ngo to settle his High Court Claims and not for the restrictive covenants in the PSA. This is a finding of fact. The restrictive covenants are matters of the partnership and are contained in the PSA. I have also explained above that the First Sum was to settle the High Court Claims which are employment claims in the Action. They have nothing to do with the partnership or the partnership claims. Mr Ngo says that the Second Sum was for the return of his partnership investment of US$350,000 and there was nothing in it to pay for the said covenants. I disagree. The fact that no particular sum was allocated or attributed to the said covenants does not mean that nothing was paid to Mr Ngo for his entering into the covenants. I repeat that there is always some give and take in a settlement. The Second Sum of US$350,000 was paid for the settlement of all the partnership disputes as well as Mr Ngo's covenants contained in the PSA and SA. There is nothing in the First Sum that is a consideration for the restrictive covenants.

96. In the premises, I also dismiss the Third Ground.

Order

97. Since I have dismissed all Mr Ngo's grounds of appeal, I would also dismiss the application for leave.

Costs order

98. I also make a costs order *nisi* that Mr Ngo do pay the CIR the costs of this application including any reserved costs to be taxed. The costs will be summarily by me. The CIR should file and serve a bill of costs within 14 days from the date hereof. Mr Ngo should file and serve a list of objections, if any, within 14 days thereafter. I will proceed to assess the costs on paper.

(Louis Chan)
Judge of the Court of First Instance
High Court

The appellant appeared in person

Mr Julian Lam, instructed by Department of Justice, for the respondent