CAMP 47/2021
[2021] HKCA 624

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
MISCELLANEOUS PROCEEDINGS NO 47 OF 2021
(ON AN INTENDED APPEAL FROM BOARD OF REVIEW'S DECISION D7/20
DATED 28 AUGUST 2020)

BETWEEN

CHENG HUNG KIT Appellant

and

COMMISSIONER OF INLAND REVENUE Respondent

Before: Hon Kwan VP and Yuen JA in Court
Date of the Appellant's Written Submissions: 9 February 2021
Date of the Respondent's Written Submissions: 23 February 2021
Date of Judgment: 3 May 2021

J U D G M E N T

Hon Kwan VP:

1. I agree with the judgment of Yuen JA.

Hon Yuen JA:

Introduction

2. On 28 August 2020, the Inland Revenue Board of Review ("**the Board**") gave a decision (D7/20) dismissing the appeal of Mr Cheng Hung Kit ("**Mr Cheng**") in B/R 45/19. The Board rejected his case that a sum of $23.4 million was not income received by him and was thus not chargeable to salaries tax.

3. On 25 September 2020, Mr Cheng filed HCIA4/2020 to appeal the Board's decision.

4.1. Section 69(1) Inland Revenue Ordinance Cap.112 ("**IRO**")[1] provides that appeals from the Board's decision may only be made on a ground involving a question of law.

4.2. Section 69(2) provides that the proposed appellant must first obtain leave to appeal from the Court of First Instance ("**CFI**").

4.3. Section 69(3)(e) provides that leave to appeal must not be granted unless the CFI is satisfied that:

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

(ii) (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.

5. The application for leave to appeal was considered by Au-Yeung J ("**the judge**"). On 27 January 2021, the judge gave a Decision in which she refused to give leave for the reasons stated therein.

6.1. Sections 69(2) and (4) provide that if the CFI refuses to give leave to appeal, a further application for leave may be made to the Court of Appeal. Section 69(5)(d) provides that the considerations in s.69(3)(e), set out in §4.3 above, apply in a further application to this court.

6.2. On 9 February 2021, Mr Cheng made a further application to this court in CAMP47/2021 for leave to appeal. Pursuant to s.69(5)(a)(ii), he filed a statement setting out the grounds of the appeal and the reasons why leave should be granted. The Respondent filed a statement in opposition to the application pursuant to s.69(5)(b). Pursuant to s.69(5)(c)(i), this court determined the application on the basis of written submissions only.

Background

7.1. Prior to June 2011, Mr Cheng was a director of both Hang Heung Hop Kee Investment Co Ltd ("**Hop Kee**") and a related company called Hang Heung Cake Shop Co Ltd ("**Cake Shop**"). He was also the majority shareholder of both companies.

7.2. Hop Kee's profits tax returns for the year 2009/2010 attached a Directors' Report and Financial Statements including an auditor's report for the year ended 31 March 2010 ("**the 2010 Financial Statements**"), verified by Mr Cheng's signature on 27 May 2011 as director of Hop Kee.

[1] All references to sections in this Judgment are to the IRO.

7.3. The 2010 Financial Statements (at Notes 12 and 13) showed the following:

	Balance due as at 1.4.2009 $	Maximum balance during the year $	As at 31.3.2010 $
Amount due from Mr Cheng, a director	4,121,232	4,848,436	---
Amount due from Cake Shop, a related company	18,657,059	18,657,059	---

The above indicates that during Hop Kee's financial year 2009/2010, the stated amounts due were either discharged (e.g. by payment or set-off) or written off. However, there was nothing indicating that these receivables had been regarded as bad debts or doubtful accounts[2].

7.4. At the same time, Note 9 showed directors' remuneration of $25,560,000 in salaries, and the auditors' report at p.4 showed that of that sum, $23,400,000 was paid to Mr Cheng.

7.5. In Mr Cheng's own tax returns for 2009/2010 however, he stated that he had no income chargeable to salaries tax.

8. The Commissioner of Inland Revenue subsequently raised an assessment to salaries tax against Mr Cheng in respect of the said sum of $23.4 million.

Mr Cheng's case

9.1. Mr Cheng appealed to the Board, his case being that he had not in fact received the sum of $23.4 million. He was not legally represented. He gave evidence at the hearing before the Board on 25 May 2020.

9.2. Mr Cheng's case, in brief, was that of the disputed director's emolument of $23.4 million, the sum of $18,657,059 was used to set-off Cake Shop's debt to Hop Kee, and was thus only a "direct commercial transaction" between those two companies, which had nothing to do with him. As recorded in §IV(3) of the Board's Decision, Mr Cheng said that as Cake Shop had owed money to Hop Kee for many years, Hop Kee's auditors proposed that in the 2010 Financial Statements, the said debt (from Cake Shop to Hop Kee) should be changed to one due from Cake Shop to himself instead, and that the debt of $4.8 million from himself to Hop Kee would also be "cancelled". Mr Cheng said he agreed with this proposal, which he referred to as a "write-off" (撇賬). He said that the 2010 Financial Statements should be subject to this special arrangement between the companies internally, and that after 28 June 2011, he was excluded from management of Hop Kee and Cake Shop, and the sum had been "overturned" (推翻) and has never been paid.

[2] See §21-22 below.

The Board's Decision

10.1. The reasons for the Board's rejection of Mr Cheng's appeal can be seen at §V(1) - (12) of its Decision. Essentially, the Board placed significant weight on the fact that Mr Cheng had, at a time when he controlled Hop Kee and Cake Shop, himself signed Hop Kee's 2009/2010 profits tax returns and the 2010 Financial Statements which showed the director's emolument to him of $23.4 million[3].

10.2. The Board doubted whether Mr Cheng was a wholly honest or credible witness[4]. It noted that he was an experienced businessman, with access to accountants and lawyers, and it did not accept his allegation that he did not really understand that the arrangement, which he called a "write-off", was by way of director's emolument[5].

10.3. The Board noted that the 2010 Financial Statements showed the discharge of amounts due from Mr Cheng and Cake Shop, directors remuneration of $23.4 million, and did *not* show any sum *payable* by Hop Kee to himself, so he must have been aware when he signed the Statements that the emolument of $23.4 million from Hop Kee to himself was used to set off the debts owed by himself and Cake Shop to Hop Kee[6]. Indeed, Mr Cheng had accepted at the hearing that his pre-existing debt of $4,828,436 *was* set-off[7]. The Board rejected his argument that the treatment of the $18,657,059 should be different as a direct commercial transaction between Hop Kee and Cake Shop only, which had nothing to do with him[8].

10.4. Further, during the hearing, Mr Cheng could not satisfactorily and clearly explain how the new management had "overturned" the "write-off" arrangement, or the effect on the accounts of such "overturning"[9]. The Board noted that under s.68(4), the onus of proving that the assessment appealed against is excessive or incorrect is on the party appealing the assessment, and held that the appellant Mr Cheng had failed to discharge that onus[10].

10.5. Finally, Mr Cheng sought to rely on the judgments of the Court of Final Appeal in *Commissioner of Inland Revenue v Poon Cho Ming John* (2019) 22 HKCFAR 344 and *Fuchs and Commissioner of Inland Revenue* (2011) 14 HKCFAR 74. The Board had misgivings about the late stage at which these were introduced, but dealt with these authorities, ruling that they were not applicable as they dealt with the nature of payments made to the taxpayers in those cases *at the termination of their employment*.

3 §V(1), Board's Decision.
4 §V(2), Board's Decision.
5 §V(3), Board's Decision.
6 §V(6), Board's Decision.
7 §V(2), Board's Decision.
8 §V(7), Board's Decision.
9 §V(5), Board's Decision.
10 §V(12), Board's Decision.

Mr Cheng's grounds of appeal

11. Mr Cheng's grounds of appeal in HCIA4/2020, set out in his Statement filed on 25 September 2020, are summarized in the discussion below.

The judge's Decision

12. The judge held that none of the grounds was arguable and declined to grant leave.

Mr Cheng's grounds of appeal before Court of Appeal

13. In Mr Cheng's further application to the Court of Appeal for leave to appeal, he repeated the grounds in his application to the CFI, and added the following:

- the judge did not "go through the true focus. In reality she had not dealt with any of the true merits at all";

- the judge claimed that "some particulars of the Grounds were missing", but did not allow the same to be fully developed at an oral hearing.

Discussion

14. In Ground (1), Mr Cheng submitted that the Commissioner had acted "ultra vires" in that he had no jurisdiction to make any assessment, and the Board erred in law in applying s.68(4)[11] which applies only to the taxpayer's burden to adduce evidence of errors or mistakes in the assessment process.

15. This ground is misconceived. There is no question that the Commissioner has statutory jurisdiction to charge salaries tax on a director's emoluments. The issue before the Board in this case was whether Mr Cheng had received the said sum of $23.4 million for s.8 to apply. As for s.68(4), the 2010 Financial Statements on their face evidenced payment of such director's emoluments. It was thus for Mr Cheng to prove that, notwithstanding the evidence provided by the 2010 Financial Statements (which he himself signed), the assessment was incorrect because the emolument was not in fact received, or the transaction was subsequently "overturned".

16. In Ground (2), Mr Cheng submitted that the Board erred in finding that the only admissible evidence was Hop Kee's audited accounts, and

(i) failed to evaluate other evidence such as Mr Cheng's own tax returns and Cake Shop's audited accounts;

[11] "The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant".

(ii) disregarded or misconceived evidence in equating his intention to settle the matter[12] with knowledge, and equating the engagement of experts or professionals with personal knowledge or expertise, and

(iii) misstated the facts in that (according to Mr Cheng) he had submitted *Fuchs* and *Poon Cho Ming* earlier.

17.1. First, it appears Mr Cheng has misread the Board's Decision. The Board did not find that Hop Kee's audited accounts were the only "admissible" evidence. The Board found that they were the only "credible" evidence[13]. Admissibility and credibility are entirely different concepts. Admissible evidence may or may not be credible. Credibility is generally a matter for the tribunal which has had the advantage of seeing and hearing live witnesses. Valid reasons were given by the Board for its view of Mr Cheng's credibility. There is no error of law.

17.2. As for (i), the Board was aware of the contents of Mr Cheng's own tax returns[14]. Since Mr Cheng gave oral evidence to explain *why* he stated therein that he had no income chargeable to salaries tax, obviously it was the oral evidence which was of greater importance when the Board had to decide the appeal. By itself, his tax returns have little value other than showing that he had not changed his stance. As for Cake Shop's audited accounts, they are not before this court[15], and Mr Cheng has not asserted what point he sought to make from them. It cannot possibly be said that the Board has erred in law in not "evaluating" them.

17.3. As for (ii), again no error of law has been shown. As noted earlier, credibility is a matter for the tribunal who saw and heard the witnesses, not for appellate tribunals. In assessing a witness's credibility, the tribunal was entitled to test a witness's allegations (of ignorance, or of a proposal to settle a dispute) against the professional resources available to him. The Board did not "equate" Mr Cheng's proposal of settlement with a knowledge of liability. It was expressly to show, as he himself stated in the letter, that he would take professional accountancy and legal opinions before taking any further steps.

17.4. As for (iii), it did not matter if Mr Cheng had provided the Board with *Fuchs* and *Poon Cho Ming* earlier. The Board did consider these authorities and explained in the Decision why it did not find them applicable. This is a non-point, let alone a point of error of law.

18. In Ground (3), Mr Cheng submitted that the Board "erred in law in misapplying s.11D(a) ... by failing to have proper regard to the opening part thereof and by

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[12] Mr Cheng's letter to the Commissioner of 18 October 2017, referred to in §IV(8), Board's Decision.

[13] §V(11), Board's Decision.

[14] §I(4), Board's Decision.

[15] Or the CFI.

expanding the true meaning of the words '... has been dealt with on his behalf or according to his directions ...' in the second part thereof to a very wide ambit".

19.1. Section 11D(a) provides as follows:

> "For the purpose of section 11B -
>
> (a) income which has accrued to a person during the basis period for a year of assessment but which has not yet been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, when notwithstanding anything contained in this Ordinance, an additional assessment shall be raised in respect of such income:
>
> Provided that for the purposes of this paragraph income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person".

19.2. Clearly, it is the proviso which is relevant to the present case. Even on Mr Cheng's own case, he had agreed to the auditors' proposal which was that the debt from Cake Shop to Hop Kee would be "changed" to one *due from Cake Shop to himself*[16]. For him to acquire a debt due from Cake Shop to himself, he must have first paid Cake Shop that sum ($18,657,059). Since it is not Mr Cheng's case that he had separately paid that sum to Cake Shop, the payment could only have happened by his direction to Hop Kee to transfer that part of his emolument of $23.4 million to Cake Shop.

19.3. As for the "cancellation" of his debt to Hop Kee, Mr Cheng had accepted that it was by way of set-off against his emolument.

19.4. Under the proviso to s.11D(a), a sum which has been dealt with according to a person's directions is deemed to have been received by him. There is no error of law in the Board's application of s.11D(a).

20.1. Grounds 4 and 5 can be discussed together.

20.2. In Ground (4), Mr Cheng submitted that the Board erred in law in "failing to identify and differentiate the true nature of the 2 sums in question, namely HK$4,848,436 and HK$18,657, 059. ... The question of law is whether even [if] the sum of $4,848,436 can be deemed as 'income from employment', can the sum of $18,657,059 be deemed the same, as far as the true meaning of s.8(1)(a) of [IRO] and the guidance set out in **Poon Cho Ming John [2019] 22 HKCFAR 344** and **Fuchs [2011] 14 HKCFAR 74** are all concerned".

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[16] §IV(3), Board's Decision.

20.3. In Ground (5), Mr Cheng submitted that the Board erred in law in "purporting to distinguish the present case from the Poon Cho Ming case and the Fuchs case in an artificial manner when the key question for the present case is whether the 2 sums in question was 'paid' to the Appellant as 'income from employment' and is therefore indistinguishable from Poon Cho Ming and Fuchs".

20.4. As I understand those grounds, Mr Cheng's submission is that one must look at the true nature of the sum in question, and that in his case, the director's emolument was simply a device whereby the longstanding debt due from Cake Shop to Hop Kee could be eliminated from Hop Kee's books. Therefore, his submission is that the true nature of the sum was not an emolument to himself as director.

21.1. As the 2010 Financial Statements which had been placed before the Board were not included in the application bundle, the Court asked both parties for them. The Respondent sent an incomplete version (in which several pages were excluded and which contained redacted parts). Mr Cheng sent the complete version without any parts redacted. However, as the Board was only given the version which the Respondent provided to this Court, we have only considered that version. Having considered the Financial Statements, I do not consider that the Board has erred in law. First, there is no indication therein of any "bad debts" or "doubtful accounts" of Mr Cheng and/or Cake Shop which were written-off. But more importantly, on his own case the sum was derived from a source (Hop Kee) in which he held the office of director, the Financial Statements showed the sum was paid to him by Hop Kee as a salary, and the emolument (far from being a sham) provided a real benefit to him. As discussed earlier, the benefit he received in the transaction was first, his own debt to Hop Kee of $4,848,436 was discharged by way of set-off, and secondly, (without his having paid any cash to Cake Shop), he became its creditor in the sum of $18,657,059[17].

21.2. According to Mr Cheng, he lost control of Hop Kee and Cake Shop afterwards and the transaction was "overturned". This is an allegation which may mean different things. It is noted that the auditors had given as a basis for disclaimer of opinion (p.4 of the 2010 Financial Statements) that, although the directors' remuneration was approved by a meeting of the board of directors, the directors "could not produce proper minutes of shareholders' meeting for approving the directors' remuneration for our examination, which violating section 161 Companies Ordinance. We are unable to form opinion that the figure was fairly stated because of the lack of sufficient document evidence. Any adjustment to the figure may have a consequential significant effect on the loss for the year ended 31 March 2010". Unfortunately, despite the Board's request for evidence to support the allegation of "overturning" and its effect on the accounts (eg whether the original accounts receivables from himself and Cake Shop were reinstated in Hop Kee's accounts at a later time[18]), Mr Cheng failed to provide any evidence to show the Board what in fact happened. The Board was correct in law to apply s.68(4) in the absence of such evidence, but even without that statutory stipulation, the evidential burden would have been on Mr Cheng to prove his allegation.

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[17] §IV(3), Board's Decision.

[18] §V(5), Board's Decision.

22. On the evidence before it, the Board was right in law to find that the true nature of the sum was an emolument. Hop Kee was Mr Cheng's employer and it paid that sum to him as an emolument (and not, for instance, as a loan). The *motive* behind the award of that emolument (so that he could set-off his own debt to it, and Cake Shop would become his debtor rather than Hop Kee's debtor) does not alter the *nature* of the payment.

23. For the above reasons, I can see no errors of law in the Board's Decision; the proposed appeal has no reasonable prospect of success; nor is there any other reason in the interests of justice why the proposed appeal should be heard[19].

24. As for Mr Cheng's two additional grounds based on the judge's Decision, the application before the Court of Appeal is a further application for leave to appeal the Board's Decision, rather than an appeal from the judge's Decision[20]. In any event, nothing is added to Mr Cheng's case by the two additional grounds, as first, the judge had dealt with his submissions on the merits, and secondly, nowhere in the Decision had the judge "claimed that some particulars of the Grounds were missing".

Order

25. The further application for leave to appeal is dismissed with costs to the Respondent summarily assessed at $9,533 which is entirely reasonable. Since the application is totally without merit, an order is made pursuant to s.69(5)(f) that no party may make a request the Court of Appeal to reconsider this determination at a hearing inter partes.

(Susan Kwan) Vice President	(Maria Yuen) Justice of Appeal

The appellant was not represented

Mr Jesse Yu GC, of the Department of Justice, for the respondent

[19] Section 69(3)(e)(ii) and s.69(5)(d).

[20] Section 69(4).