HCIA 3/2020
[2021] HKCFI 1177

**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF FIRST INSTANCE**
INLAND REVENUE APPEAL NO 3 OF 2020

IN THE MATTER OF an application for leave to appeal against the Decision of the Board of Review (Revenue) in B/R 42/18 made on 24 June 2020

and

IN THE MATTER OF Section 69(3)(a)(ii) of the Inland Revenue Ordinance (Cap. 112)

BETWEEN

DR. THE HONOURABLE LEUNG KA-LAU — Applicant (Appellant)

and

THE COMMISSIONER OF INLAND REVENUE — Respondent

Before: Hon Anthony Chan J in Court
Date of Hearing: 27 April 2021
Date of Judgment: 27 April 2021

J U D G M E N T

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1. This is the application of the Applicant ("Taxpayer") for leave to appeal against the Decision of the Board of Review in B/R 42/18 dated 24 June 2020 ("Decision") pursuant to s.69(3) of the Inland Revenue Ordinance, Cap 112 ("Ordinance").

2. By an Order of Au-Yeung J dated 6 August 2020, it was directed, *inter alia*, that there be a rolled-up disposal on paper of this application and, if leave is granted, the appeal. By an order of this court dated 3 November 2020, the parties were invited to make additional submissions and a hearing was directed.

Background

3. These matters arose from the dispute between a number of doctors employed by the Hospital Authority ("HA") over excessive working hours and denial of rest days to the doctors. There was a representative action by the former against the latter. It went all the way to the Court of Final Appeal ("CFA")[1] where it was determined that the doctors were entitled to rest days as well as statutory or public holidays ("Judgment"). In default of being granted such rest days or holidays, the doctors were entitled to damages to be assessed in an amount equivalent to a full day's wages in respect of each missed rest day or holiday.

4. The Taxpayer was award a sum of HK$1,765,821 ("Sum") pursuant to the Judgment as compensation for his loss of rest days and statutory holidays from 17 March 1996 to 1 October 2005.

5. By a Determination dated 5 December 2018, the Commissioner of Inland Revenue ("CIR") maintained that the Sum was chargeable to salaries tax under s.8 of the Ordinance for the year of assessment 2012/13. By the Decision, the Taxpayer's appeal against the Determination was dismissed.

6. The undisputed facts of this case had helpfully been set out in para 3 of the CIR's Statement in Response[2] as follows :

> "(i) Since 1 December 1990, the HA has become a statutory body under the Hospital Authority Ordinance (Cap. 113) taking over management of public hospitals and public hospital doctors.
>
> (ii) As a result, the Employment Ordinance ("EO") is applicable to the HA.
>
> (iii) On 26 June 1995, the Taxpayer was employed as Senior Medical & Health Officer ("SMO") by the HA.
>
> (iv) Up to January 2011, the Taxpayer was a SMO. From 3 February 2012, the Taxpayer was employed as part-time Consultant by the HA.
>
> (v) The Taxpayer, like his peers, was required to operate on an "on call system", whereby he would be rostered on call after normal working hours (including Sundays and public holidays).

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[1] (2009) 12 HKCFAR 924.

[2] Filed pursuant to s.69(3)(b) of the Ordinance.

(vi) The "on-call system" included "resident call" (i.e. to be on-call while remaining within the hospital's precincts) and "non-resident call" (i.e. to be on-call while away from the hospital).

(vii) It was one of the terms of employment that the Taxpayer's hours of work would be over normal working hours of 44 hours per week on operational needs and he was not eligible for overtime allowance because of his seniority.

(viii) "Rest day" (1 rest day in every period of 7 days) is a right conferred by s. 17 of the EO.

(ix) "Resident call" was clearly "work" required of the Taxpayer.

(x) "Non-resident call" entailed the Taxpayer staying within 30-minute distance of the hospital; not drinking alcohol; remaining mentally ready to respond to calls for his services. In other words, he was not entitled to abstain from working for the HA. Thus, a day rostered on-call could not qualify as a "rest-day" under the EO.

(xi) Such right takes effect as contractual terms implied into the Taxpayer's contract of employment with the HA.

(xii) On the other hand, "public holidays" are rights conferred under the Taxpayer's contract of employment with the HA, read together with s. 39 of the EO.

(xiii) Deprival of "public holidays" from the Taxpayer would be treated in the same way as deprival of "rest days".

(xiv) Over the material periods, the Taxpayer was subject to "resident call" and "non-resident call" on rest days and public holidays.

(xv) As a result of the CFA Judgment, the Taxpayer's compensation (i.e. the Sum awarded) was calculated by actual reference to his daily wages. In its quantification, the components of such daily wages included his basic salary, cash allowance, fixed allowance, flexi-allowance and monthly allowance (as the case may be), but excluded fixed rate honorarium, subsidy pursuant to the Home Loan Interest Subsidy Scheme or a payment in lieu, equivalent to 5% of basic salary (as the case may be). Moreover, the daily wage was calculated by dividing the monthly remuneration by the actual number of days for the month concerned."

The Decision

7. The reasons for the rejection of the appeal by the Board were encapsulated in para 41 of the Decision :

> "Having considered both the CFA judgment and *Fuchs* (above), this Board considers that none of the Taxpayer's submissions establish that the Sum was outside the scope of section 8 of the IRO or that it was not income from employment or that it was not income from an employment contract. As Ribeiro PJ indicated in the CFA judgment, while the Rest Days Claim was based on the statutory entitlement of an employee under the Employment Ordinance (or the employee's right conferred under the Employment Ordinance) to rest days, that entitlement or right took effect as contractual terms implied by law or by modifying existing terms in the relevant contract of employment. The Holidays Claim was based in part upon the statutory entitlement of an employee under the Employment Ordinance (or the employee's right conferred under the Employment Ordinance) to statutory holidays, and in part upon the contract of employment with the HA that specifically provided for holidays that were understood to mean the public holidays under the General Holidays Ordinance. The Sum was paid to the Taxpayer by the HA as damages to put him in the position he would have been had he not been deprived by the HA of the enjoyment of the rest days and holidays, such being entitlements that came with his employment, that became part of the terms of his employment by application or operation of law, and that he was entitled to enjoy because he had worked for his employer, the HA. In the circumstances, the Taxpayer cannot possibly deny that the Sum comes, when viewed in substance, from his employment contract with the HA. He also cannot possibly deny that the Sum comes, when viewed in substance, from his employment with the HA, or from him having worked for the HA under the employment contract (that is, having rendered the services he provided as employee under the employment he had with the HA pursuant to the employment contract). This Board holds that the Sum was income from the Taxpayer's employment with the HA. This Board also holds that the Taxpayer had plainly failed to establish that the Sum was from "something else"."

Ground of Appeal

8. With respect, the formulation of the point of law in issue contained in the Statement filed by the Taxpayer pursuant to s.69(3)(2)(ii) of the Ordinance is unnecessarily cumbersome. The attempt to reformulate it in the Taxpayer's Submissions in Reply is no improvement.

9. However, there is clearly a question of law involved in this application and it can be simply stated as follows. Whether the Board erred in law in finding that the Sum was income from employment within the meanings of s.8(1) of the Ordinance.

Law

10. The applicable principles were set out by the CFA in *Fuchs v CIR* (2011) 14 HKCFAR 74. In *CIR v Poon Cho Ming* (2019) 22 HKCFAR 344, the "*Fuchs* analysis" was restated in para 14 of the judgment as follows :

> "As relevant to what we have to decide in the present case, what we held in *Fuchs v Commissioner of Inland Revenue* (2011) 14 HKCFAR 74 is as follows. Income chargeable to salaries tax under s. 8(1) of the Ordinance is not confined to income earned in the course of employment. It includes payments made in return for acting as or being an employee. In other words, it includes rewards for past services. It also includes payments made by way of inducement to enter into employment and provide future services. If a payment, viewed as a matter of substance and not merely of form and without being blinded by some formulae which the parties may have used, is found to be derived from a taxpayer's employment in the foregoing sense, it is chargeable to salaries tax. That analysis provides guidance on the operation of the relevant statutory words without supplanting or even modifying those words. Payments which are for something else do not come within the analysis, and are not chargeable to salaries tax. …"

11. Whilst these principles provide guidance for reaching the correct decision on whether a payment received by an employee, as a matter of substance, falls within the ambit of the charging provisions: s.8 of the Ordinance, the application of the principles is not necessarily a straight forward exercise. That is evident from the test formulated in different manner in the authorities over the years (*Fuchs*, §§16-18) and the examples of it application (*Fuchs*, §§19-22).

Analysis

12. Firstly, in view of the Judgment it is not open to dispute that the Sum was paid to the Taxpayer as compensation for the deprivation of rest days and public holidays to him. Equally, there can be no controversy that the Taxpayer was required to be on "resident call" or on "non-resident call", and that the Taxpayer had performed "work" under his contract of employment with the HA regardless of the type of call he was on.

13. It may therefore be seen that the Sum had assumed dual characteristics: (a) compensation or damages for HA's breach of contract; and (b) payment to the Taxpayer for having performed work under the employment contract.

14. What then is the substance of the payment? It appears to me that the contention of the CIR that the payment was in substance for the work performed under the Taxpayer's employment contract may be tested against the scenario whereby he was not asked by the HA to perform any duties contemplated under his contract. Instead, he was asked to, eg, attend a charity soccer match organised by the HA as a spectator. In that scenario, the Taxpayer would still be entitled to compensation for the deprivation of rest day but it would be wrong to characterise the compensation as payment for his work.

15. The forgoing analysis may shed light on the real substance of the Sum. It would not matter whether the Taxpayer was required to work. It may be said to be incidental whether he had or had not worked. Indeed, the employee who was required to attend the soccer match might be an avid soccer fan, but it cannot be the case that he would not be compensated for having been deprived of his rest day.

16. It would be ironic, and wrong, if the Taxpayer was to receive reduced compensation because of the need to pay tax for having worked during a rest day as opposed to, eg, attending a soccer match. The substance of the Sum, in truth, was to compensate the Taxpayer for the loss of rest days and public holidays.

17. In my view, para 85 of the Judgment, which dealt with the HA's arguments on nominal damage where the doctors were not in fact called upon to work, is supportive of the above analysis :

> "That argument is, with respect, plainly fallacious. The doctor's loss in such a case is the loss of a rest day, that is, of a day when he should have been entitled to abstain from working for the HA over a continuous 24-hour period. His complaint is that he was not granted such a day, being placed on-call instead. The fact that he may or may not actually have been required to treat any patient during that on-call day is beside the point. Missing a rest day involves a real and substantial loss. Nominal damages, which are awarded where there has been a breach but no actual loss, are therefore quite inappropriate. The damages awarded should aim to place the doctor in the position he would have been in if the HA had duly granted him a rest day in accordance with its obligations under s. 17. He should therefore, if practicable, be granted an alternative day off. Where this is impracticable, he is entitled to damages designed to compensate him for the entire day lost."

18. The CIR contends that even if the Taxpayer was attending a soccer match, the compensation was still chargeable under s.8 as income from employment. I am unable to agree. Firstly, not every payment which an employee received from his employer was necessarily income "from his employment" (*Fuchs*, §16).

19. Secondly, the contention does not withstand scrutiny when the CIR accepts that if the HA had given the Taxpayer alternative days off as compensation (see §85 of the Judgment), no tax would be payable for such entitlement.

20. In my view, the substance of the compensation would not change whether it took the form of money or alternative day off.

21. Further, the CIR also accepts that under his contract of employment the Taxpayer had earned his day off entitlement and had paid tax on it indirectly because he was taxed on his remuneration package. That being the case, I fail to see why, having been deprived of his rest days, the Taxpayer would have to pay tax again (or twice) on the compensation which was the substitution for his rest days.

22. For these reasons, I answer, with respect, the question of law identified in para 9 above affirmatively in favour of the Taxpayer. Consequently, I give leave to appeal and determine the same in favour of the Taxpayer. The parties have agreed that costs should follow the event. I make an order that the costs of and occasioned by these applications be to the Taxpayer, to be taxed if not agreed.

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

Mr Godwin Ng, instructed by Wong & Co., for the Applicant (Appellant)

Mr Mark Chan, Government Counsel, of the Department of Justice, for the Respondent