CACV 75/2020 & CACV 366/2021
(Heard together)
[2022] HKCA 412

IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
COURT OF APPEAL
CIVIL APPEAL NOS 75 OF 2020 AND 366 OF 2021
(ON APPEAL FROM HCIA NO 4 OF 2019)

BETWEEN

HEATH BRIAN ZARIN Appellant

and

THE COMMISSIONER OF INLAND REVENUE Respondent

(Heard together)
Before: Hon Kwan VP, Yuen JA and Barma JA in Court
Date of Hearing: 25 February 2022
Date of Judgment: 16 March 2022

J U D G M E N T

Hon Kwan VP:

Introduction

1. These two appeals are brought by the Commissioner of Inland Revenue ("**CIR**") and arose in this way.

2. On 23 August 2019, the Inland Revenue Board of Review gave its decision ("**Board's Decision**") dismissing the appeal of the taxpayer, Heath Brian Zarin ("**Taxpayer**"), against the determination of the CIR confirming three additional assessments to salaries tax. The assessments were raised by the CIR under sections 8 and 9[1] of the Inland Revenue Ordinance, Cap 112 ("**IRO**") and were in respect of five sums described as "Sum A", "Sum B1", "Sum B2", "Sum C" and "Sum D". The Board found all these sums to be "income from employment" within the meaning of section 8 and so were chargeable to salaries tax.

---

[1] Section 8(1)(a) provides: "Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources – (a) any office or employment of profit; …"
Section 9(1)(a) provides: "Income from any office or employment includes – (a) any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, except – [the exceptions are not relevant to the present case]"

3. By a judgment handed down on 24 December 2019 ("**Leave Decision**"), Coleman J gave leave to appeal to the Taxpayer only in respect of Sum D and refused leave to appeal for all the other sums.

4. On 11 March 2020, Coleman J handed down his judgment ("**Sum D Judgment**")[2] allowing the Taxpayer's appeal from the Board's Decision in respect of Sum D.

5. Also on the same day, Yuen JA handed down her judgment ("**CA Leave Decision**") granting leave to the Taxpayer to appeal against the Board's Decision in respect of Sums B2 and C. The substantive appeal was dealt with by Coleman J.

6. On 29 June 2021, Coleman J handed down his judgment ("**Sums B2 and C Judgment**") allowing the Taxpayer's appeal in respect of Sums B2 and C.

7. The CIR has appealed against the Sum D Judgment (in CACV 75/2020) and the Sums B2 and C Judgment (in CACV 366/2021). The two appeals were directed to be heard together.

Factual background

8. The relevant background matters, taken primarily from one or more of the judgments mentioned above, may be stated as follows.

9. The Taxpayer was employed by HSBC Markets (Asia) Ltd ("**Company**") as Managing Director, Head of Direct Principal Investments Asia, by a letter dated 27 May 2010 and countersigned on 31 May 2010 ("**Employment Contract**"). Under the Employment Contract, amongst other things, the Taxpayer was provided with a "guaranteed bonus", participation in a "carried interest scheme" (under which he may be eligible to share in the investment profits generated from the investment activity of his team) and participation in a "discretionary bonus scheme" (under which the Company may in its discretion award a bonus which might take the form of cash, or shares, or a combination of both).

10. As part of his discretionary bonus for the performance year 2011, on 12 March 2012 the Taxpayer was granted a restricted share award of shares, defined in the Board's Decision as the "**2012 Shares**". Those shares were to vest as to 33%, 33% and 34% in March 2013, 2014 and 2015 respectively.

11. The restricted share plan ("**Plan**"), and the grant and vesting of the 2012 Shares, were governed by the Rules of the HSBC Share Plan 2011 ("**2011 Rules**"). Amongst the terms were the following: (1) participation in the Plan was governed by the rules of the Plan and did not form part of the Employment Contract (rule 8.1.2); (2) the award would vest on the vesting date specified, provided the participant remained continuously employed within the Group or fell within the scope of the "good leaver" provisions set out in the Plan (rules 3.2, 5.2 to 5.4); (3) the awards might be amended,

[2] Reported in [2020] 2 HKLRD 229.

reduced or cancelled by a relevant remuneration committee at any time before vesting of the awards, and the committee had the discretion to impose additional conditions on the awards (rule 2.4); (4) if the participant left the Group before the vesting date(s) as a good leaver, then subject to the approval of the committee and the policy of the Company, the awards would vest in full on the vesting date(s) subject to the committee's authority already mentioned (rules 5.2 to 5.3); (5) good leaver reasons included, amongst other things, redundancy (rule 5.2.1(v)); and (6) where the rule of good leaver is applied and the participant had entered into a termination agreement in connection with the cessation of employment, the awards would not vest until the participant had complied with, or was released from his obligations under, that termination agreement (rule 5.7).

12. By a letter dated 21 January 2013, the Company terminated the Taxpayer's employment on the grounds of redundancy to take effect from 22 January 2013. Amongst other things, the letter stated that its terms would be in full and final settlement of the termination of employment, and that the Taxpayer would be treated as a good leaver, and the vesting of any un-vested shares would be conditional on his compliance with the terms in the letter, one term being that the Taxpayer would assist the Company and any group company in relation to certain litigation ("**Litigation**") regarding the Company's investment in a particular company, including attendance at court or arbitration hearings outside Hong Kong.

13. The Taxpayer did not accept those terms offered and made alternative suggestions. There then followed negotiations between solicitors appointed on behalf of the Company and the Taxpayer. Ultimately, by a letter dated 20 June 2013 from the Company's solicitors and signed by the Taxpayer on 21 June 2013, revised terms and conditions regarding the taxpayer's termination of employment were agreed ("**Termination Agreement**").

14. The terms of the Termination Agreement included:

(1) because the Taxpayer's employment was terminated by reason of redundancy, he would be treated as a good leaver so that all remaining restricted shares previously awarded to the Taxpayer would vest on the same terms as stated in the letters awarding them to the Taxpayer (clause 1.1(a));

(2) any release of the 2012 Shares would be conditional on the Taxpayer having not committed a breach of any of the terms of the Termination Agreement, including providing reasonable assistance, as set out in the Termination Agreement, in respect of the Litigation (clause 1.1(b));

(3) if the Taxpayer committed a breach of any of the terms of the Termination Agreement, any unvested 2012 Shares would be forfeited and the Taxpayer would repay the cash value of any shares vested in the period from termination of employment and the date of breach (clause 1.1(c));

(4) subject to the Taxpayer providing reasonable assistance as set out in the Termination Agreement in respect of the Litigation, the Company agreed to compensate the Taxpayer for the time he spends in relation thereto from 21 January 2013 calculated at the rate of $12,692 per day, pay reasonable travel, accommodation and legal expenses incurred by the Taxpayer in providing the assistance, and provide him with reasonable security support in India and Singapore being the relevant location of the Litigation. For the period between 22 January 2013 and the date of the Termination Agreement, it was agreed that the Taxpayer would be compensated for four days of his time spent (clauses 1.2, 2.1(c) and (d));

(5) the Taxpayer would be obliged to provide reasonable assistance in proceedings and any matter with which he was dealing during his employment and/or any matter which arose after the termination of his employment but in relation to which he has relevant knowledge, as well as specifically the Litigation until the conclusion of all evidence of the Litigation or five years from the date of the Termination Agreement whichever is earlier (clauses 2.1(a) and (b));

(6) the Taxpayer agreed to withdraw an outstanding data access request and not to issue any similar one (clause 2.2(a));

(7) except for a claim to enforce the Termination Agreement itself, the Taxpayer agreed to release and discharge the Company and related parties from all claims etc in connection with his employment or the cessation of the employment, including any claims for carried interest, bonus, restricted shares under the Plan and any payments during employment or arising from cessation of employment (clause 2.2(b)); and

(8) the Taxpayer agreed to confidentiality provisions.

15. The Company subsequently filed notifications by an employer in which it reported the Taxpayer as being in receipt of released restricted shares, as against the date of the award, date of release, number of shares released and market price, hence reportable value. The reported value included, amongst others:

(1) the sum of $1,764,805 ("**Sum B2**") released on 12 March 2014 as part of the 2012 Shares; and

(2) the sum of $1,579,820 ("**Sum C**") released on 12 March 2015 as part of the 2012 Shares.

16. The Company also paid the Taxpayer the agreed compensation for four days' work at the agreed daily rate, in the total sum of $50,768, which is "Sum D".

17. As mentioned, additional assessments to salaries tax were raised on five sums including Sums B2, C and D, to which the Taxpayer objected but the assessments were upheld by the CIR. The Taxpayer appealed against the determination of the CIR to the Board and the Board dismissed his appeal.

The Board's Decision

18. The Board found the Taxpayer's evidence to be credible, and considered his testimony as part of the body of evidence as a whole.

19. As regards Sums B2 and C, the Board noted that they were derived from the 2012 Shares as part of a discretionary bonus, which provided no guarantee of them or their value. Having referred to clause 1.1(b) of the Termination Agreement, the Board found these sums to represent the value of shares the Company released to the Taxpayer pursuant to the Termination Agreement, instead of being contractual entitlements under the Employment Contract[3].

20. Nevertheless, the Board noted that was not determinative as to whether their value was "income from employment", and went on to consider the purpose for which the employer made the payment to the employee[4]. To ascertain that purpose, the Board considered the background against which the Termination Agreement was entered into, engaging in what might be described as a "multi-factorial assessment". The Board looked at the Taxpayer's contention in a letter dated 28 January 2013 rejecting the Company's offer of arrangements in relation to the termination of employment and asserting his entitlement to the continued vesting of the restricted shares; the correspondence that followed between the solicitors for the Taxpayer and the Company (in which the Taxpayer maintained his contractual entitlement to the continued vesting of the restricted shares, and expressed willingness to continue to provide reasonable assistance subject to reasonable compensation and confirmation of legal and personal safety support); what the Board regarded as tactical and peripheral importance of the data access request; and the general confidentiality provision and withdrawal of threat of litigation in the Termination Agreement[5]. The Board held overall that the disagreement between the Taxpayer and the Company had not gone to the point that litigation was imminent or where the Company was eager to settle to avoid litigation and did not regard the matters it took into consideration as constituting a fresh bargain[6].

21. On that basis, the Board distinguished the facts from those in *Poon Cho Ming John v Commissioner of Inland Revenue* [2018] HKCA 297[7], which involved the making of a payment as "consideration to make the Taxpayer go away quietly"[8]. The

---

3 Board's Decision, §§48 to 50
4 Board's Decision, §51
5 Board's Decision, §53
6 Board's Decision, §§53(c) to (e)
7 Affirmed by the Court of Final Appeal in *Commissioner of Inland Revenue v Poon Cho Ming John* (2019) 22 HKCFAR 344.
8 Board's Decision, §§54 to 56

Board mentioned the Taxpayer's performance for the performance year of 2011,[9] which was the basis for granting the 2012 Shares, and held that the continuing release of the 2012 Shares to the Taxpayer was "in return for acting or being an employee" or as a "reward for past services" and was not "for something else"[10]. Hence, the Board considered, Sums B2 and C were "income from employment" chargeable to salaries tax.

22. In respect of Sum D, the Board considered but rejected on the evidence the Taxpayer's contention that he was acting as an "expert witness" or an "independent consultant". Instead, the Board held that both the Taxpayer and the Company had an "understanding" that he was assisting in the capacity of a former employee[11]. The Board referred to the Taxpayer's letter of 28 January 2013 in which he stated that "out of good faith, [he is] currently continuing to assist with the [Litigation]" and expressed willingness to continue doing so subject to fair terms. It referred to the reasonable assistance to be provided under clauses 2.1(a) and (b) of the Termination Agreement, which are "in relation to any matter with which [the Taxpayer] was dealing during his employment" and/or matters arising after his termination in relation to which he has "relevant knowledge". Some reliance was placed on the basis of calculation of the daily rate by reference to a specific proportion (1/260) of the Taxpayer's final fixed pay[12]. Pointing out, on the basis of *Hochstrasser (Inspector of Taxes) v Mayes* [1960] AC 376 at 388, that a payment would be taxable insofar as it is "made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future", the Board found Sum D to be "income from employment" chargeable to salaries tax[13].

Applicable principles

23. It is not in dispute that the Board had correctly identified the legal principles to be applied, as stated by Ribeiro PJ in *Fuchs v Commissioner of Inland Revenue* (2011) 14 HKCFAR 74 at §§14 to 22. Coleman J has helpfully summarised the principles relevant to these appeals as follows:

> "(1) Section 9(1)(a) makes clear that bonuses, including the vesting of restricted shares by virtue of an employment related security scheme, fall within "income" from employment for the purposes of the section 8(1) charging provision.
>
> (2) But the question regarding the chargeability to tax of any particular bonus involves the construction of section 8(1)(a) of the IRO, namely whether that payment is income "from" any office or employment of profit.

---

9 See also Agreed facts in Board's Decision, §8(2)(b).
10 Board's Decision, §§55, 57
11 Board's Decision, §59
12 Board's Decision, §§59(a) to (c)
13 Board's Decision, §60

(3) Not every payment which an employee receives from his employer is necessarily income "from his employment". It is not sufficient to qualify a payment in that way simply because the employee would not have received the sum in question if he had not been an employee.

(4) Income chargeable under section 8(1) is not confined to income earned in the course of employment, but embraces payments made "in return for acting as or being an employee", or "as a reward for past services or as an inducement to enter into employment and provide future services".

(5) 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 the taxpayer's employment in the sense mentioned above, it is assessable.

(6) The vital question is what is the "substance of the bargain" made between the employer and the taxpayer for the payments in question. Thus, even a gratuity would still be chargeable if payment is a reward from the employer (for example for past services), even though the employer was not obliged to pay it and thus the employee has no legal entitlement to it.

(7) A payment that is concluded as being "for something else" is not assessable, and does not come within the above test.

(8) Insofar as it is contended that a payment was not made in return for a taxpayer acting as or being an employee, but as consideration for "abrogating" his rights under the contract of employment, the operative test must always be the test identified above, reflecting the statutory language. The question is always: In the light of the terms on which the taxpayer was employed and the circumstances of the termination, is the sum in substance "income from employment"? Was it paid in return for his acting as or being an employee? Was it an entitlement earned as a result of past services or an entitlement accorded to him as an inducement to enter into the employment? If the answer is "Yes", the sum is taxable, and it does not matter that it might linguistically be acceptable also to refer to it as "compensation for loss of office" or something similar. On the other hand, the amount is not taxable if on a proper analysis the answer is "No".

(9) The "abrogation" examples may reach the conclusion that a payment is made in consideration of an employee agreeing to surrender or forego his pre-existing contractual rights, but "abrogation of contractual rights" is not itself the test of chargeability in every termination situation. The test is not whether the employer had

acted in breach in terminating the contract. In every case, the test remains that of the purpose of the payment at the relevant time.

(10) Hence, in the context of payments made upon termination of employment, the same consideration applies: What was the substance of the bargain for the payments in question? What was the purpose of the payment? Was it a reward for services past, present or future (in which case it was from his employment or office), or was it "for some other reason" (in which case it was not)?

(11) If the employee was entitled to the payment under the contract of employment, then the purpose of the payment was in order for the employer to perform its obligations under the contract, and it follows that the payment was income "from" the employment. But if the employee was not so entitled, then one must go on to consider the purpose for which the employer made that payment."[14]

24. Whilst the decided cases provide guidance, it remains the case that it is the statutory words which are to be applied. In determining whether the payment is from employment, each case ultimately involves applying the statutory language to the facts and each case must be considered on its own particular facts.

25. It is also pertinent to bear in mind that in an appeal before the Board, the taxpayer bears the burden of proof throughout, and the CIR does not have the burden of proving anything. For that reason, an appeal before the Board may be disposed of simply on the basis of burden of proof where a taxpayer fails to discharge that burden. In this instance, the Taxpayer bore the burden of proving to the Board that Sums B2, C and D were not "from" his employment.

Sum D Judgment

26. The judge allowed the Taxpayer's appeal because he concluded that it is open to him to disturb the Board's conclusion and Sum D was "income from employment" and not "from something else", as he regarded that conclusion to be "contrary to the true and only reasonable conclusion to make"[15].

27. His reasoning may be summarised as follows:

(1) Clause 2.1 of the Termination Agreement identified that the source of the payment of Sum D was that agreement[16]. The fact that the Taxpayer was assisting in the Litigation as an ex-employee is not inconsistent with his doing so under an entirely fresh bargain[17]. One

14 Sums B2 and C Judgment, §26
15 Sum D Judgment, §56
16 Sum D Judgment, §§42, 49
17 Sum D Judgment, §44

cannot overlook the reality that the Taxpayer was only capable of assisting the Company with the Litigation precisely because he was a former employee who had been involved in the matters out of which the Litigation arose. There is a danger of reading too much into the early correspondence, not least because the negotiations continued for some time before the Termination Agreement was made. Once it is accepted that Sum D was paid pursuant to the Termination Agreement, ordinary principles of contractual construction would point against reviewing what was intended by the terms of that agreement using reference to earlier negotiations[18].

(2) The Termination Agreement was a "new, fee-earning contract" as regards Sum D. It did not require there to have been any greater breakdown in relations than that the material employment relationship had already ceased, and the Termination Agreement was to agree the terms of cessation and consequential matters. The Board's finding of primary fact that discussions between the Company and the Taxpayer never progressed to the stage where litigation was in prospect is immaterial[19].

(3) Whilst the agreed *per diem* rate was based pro rata on the Taxpayer's old salary and Sum D was paid in respect of services rendered before the making of the Termination Agreement, it was provided in clause 1.2 of the Termination Agreement that payment of any sum thereunder is conditional on providing the reasonable assistance set out in clause 2 and is therefore contingent on the Taxpayer's performance of the Termination Agreement[20].

(4) The Taxpayer had no compulsion to assist in the way he agreed under clause 2 of the Termination Agreement, such as providing reasonable assistance on matters arising after the termination of his employment, and that he might be required to do so for as long as five years from the date of the Termination Agreement. The agreement also specifically envisaged the possibility of a conflict or significant risk of conflict arising between the Company's interests and those of the Taxpayer such that the Company may cease paying any legal fees in respect of the Taxpayer's defence of the proceedings commenced against him by the defendant(s) in the Litigation[21].

(5) Sum D was potentially only a small part of a larger sum which might have been paid for significant assistance provided by the Taxpayer on many issues in many places over a number of years. The total of

18 Sum D Judgment, §44
19 Sum D Judgment, §45
20 Sum D Judgment, §§46, 47
21 Sum D Judgment, §§49, 50

such a larger sum would not reasonably be regarded as arising "from" employment. The terms of the Termination Agreement should be construed to cater for the various possibilities which might be envisaged, and ought not to be construed so that some sums as might be paid to the Taxpayer for his assistance in the Litigation, or in other litigation, might be regarded as "from" his employment, whilst other sums might not[22].

(6) Had the services been provided over more days, or over a longer period, on the facts they would almost certainly have been taxable as income in Singapore, or potentially as income chargeable to profits tax under section 14 of the IRO in Hong Kong. This also supports the conclusion that Sum D is not properly chargeable to salaries tax under section 8(1)(a)[23].

(7) Looking at the matter overall, and focusing on the statutory test, the judge concluded that the answers to the substance of the bargain and the purpose of the payment identify that Sum D was not a sum received by the Taxpayer "from" his "employment"[24].

Sums B2 and C Judgment

28. The judge acknowledged that he had earlier refused leave to appeal in respect of Sums B2 and C, taking the view that the proposed appeal was not reasonably arguable. The Taxpayer's case had since been articulated in a slightly different way in his renewed leave application before Yuen JA and in the substantive appeal heard by the judge.

29. The judge considered this is very much a borderline case, but was ultimately persuaded that the terms of the Termination Agreement identify that the purpose for releasing the 2012 Shares was, amongst other things, to procure the Taxpayer to provide potentially long-term assistance in the Litigation (where another, but separate part of the consideration – Sum D – was to compensate the Taxpayer for time actually spent and expenses incurred when providing that assistance). On that basis, he concluded that Sums B2 and C were not "from" the Taxpayer's "employment" and were "from something else"[25].

30. His reasoning may be summarised as follows:

(1) By the CA Leave Decision, leave to appeal was granted on a point of law. The appeal turns on whether the Board had made an error of law in deciding that the particular facts triggered chargeability to tax on the proper interpretation of section 8(1)[26].

---

22 Sum D Judgment, §51
23 Sum D Judgment, §52
24 Sum D Judgment, §55
25 Sums B2 and C Judgment, §47
26 Sums B2 and C Judgment, §§36, 38

(2) By the CA Leave Decision, Yuen JA had placed weight on these matters. It can reasonably be argued that the Taxpayer's undertaking to assist in the Litigation was good consideration for a fresh bargain between himself and the Company, and that his undertaking to perform future acts of assistance to the Company in the Litigation, pursuant to the Termination Agreement, was extraneous to previous service as an employee, and in a different capacity, and that the obligation to perform those acts was the *quid pro quo* for the release of the 2012 Shares in the Termination Agreement[27].

(3) The mere fact that the release of the 2012 Shares was made pursuant to the Termination Agreement is not determinative as to whether their value paid to the Taxpayer was income from employment. It remained necessary to consider the purpose for which the Company made that payment[28].

(4) The Board made a finding of fact that the 2012 Shares were not released for the purpose of settling potential litigation, because it did not accept there was in fact sufficient prospect of litigation. On the other hand, that finding does not necessarily lead to the conclusion that the purpose of the release of the 2012 Shares was "in return for acting or being an employee" or as a "reward for past service" – if there might be another purpose[29].

(5) The terms of the Plan specifically envisaged that if, as became the fact, the Taxpayer left as a good leaver his awards would vest so long as, albeit not until, he complied with any termination agreement entered into. At the time any employee became a participant in and subject to the Plan, it would not be known under what circumstances the employee might cease employment. Nor would it be known, even if the participant were to be a good leaver, whether the participant might enter into a termination agreement and if so what those terms might encompass. So the Plan envisaged that a participant might have to provide fresh consideration to become entitled to vesting, and such fresh consideration might have nothing to do with the employment[30].

27 Sums B2 and C Judgment, §41
28 Sums B2 and C Judgment, §43
29 Sums B2 and C Judgment, §44
30 Sums B2 and C Judgment, §46

Appeal on question of law

31. Under section 69(1) of the IRO, appeals from the Board lie only on a question of law. It is not the task of the appellate court to "re-decide or second guess the primary facts" (*Kuehne + Nagel Drinks Logistics Ltd v Revenue and Customs Commissioners* [2012] STC 840 at §34).

32. As to challenges made to findings of fact said to amount to an error of law, guidance can be found in *Kwong Mile Services Ltd v Commissioner of Inland Revenue* (2004) 7 HKCFAR 275 at §§31 to 37. Such challenges can only be made if (1) the decision was based on a finding of fact or inference from the facts which was perverse or irrational; (2) there was no evidence to support the decision; (3) the decision was made by reference to irrelevant factors; or (4) the decision was made without regard to relevant factors. The appellate court must bear in mind what scope the circumstances provide for reasonable minds to differ as to the conclusion to be drawn from the primary facts found. If the Board's conclusion is a reasonable one, the appellate court cannot disturb that conclusion even if its own preference is for a contrary conclusion. But if the appellate court regards the contrary conclusion as "the true and only reasonable one", it is duty-bound to substitute the contrary conclusion for the one reached by the fact-finding tribunal.

33. Hence, the appellate court will interfere with an inference drawn from primary facts, or with a conclusion drawn from a combination of primary fact and inference, if the true and only reasonable inference or conclusion was not the one reached by the fact-finding tribunal (*KWP Quarry Co Ltd v Inland Revenue Board of Review & Anr* [2021] HKCA 1627 at §§54 to 56, quoting from *Commissioner of Inland Revenue v Inland Revenue Board of Review & Anr ("Aspiration")* [1989] 2 HKLR 40 at 56D to J). Where the conclusion or inference was drawn from the assessment of numerous facts, appellate courts are reluctant to interfere with the conclusion or inference of the fact-finding tribunal because judges and tribunals can reasonably differ as to on what side of the line any particular case falls[31].

34. Ms Kay Seto, who appeared for the CIR in these appeals[32], submitted that the judge applied the correct test only in the Sum D Judgment, but not in the Sums B2 and C Judgment. I do not accept this submission.

35. Whilst it is correct that the judge did mention in his conclusion of the Sum D Judgment it is open to him to disturb the Board's conclusion as he regarded it contrary to the true and only reasonable conclusion and did not use this form of words in his concluding paragraphs in the Sums B2 and C Judgment, the judge was clearly mindful of the test for interfering with a conclusion drawn from a finding of primary facts, having referred to it a number of times in the Leave Decision[33], the Sum D Judgment[34] and the Sums B2 and C

---

31 Leave Decision, §§8, 9; Sum D Judgment, §§30, 31
32 With Ms Carmen Siu
33 Leave Decision, §§8, 9
34 Sum D Judgment, §§30, 31, 54, 56

Judgment[35]. It seems far-fetched to suggest that the judge had somehow lost sight of the correct test in allowing the appeal in the Sums B2 and C Judgment.

36. Ms Seto seized on the judge's statement in his conclusion of the Sums B2 and C Judgment that he thought this "very much a borderline case". She submitted that he ought not to have disturbed the Board's conclusion whilst acknowledging this to be "very much a borderline case", as the high threshold for appellate interference would not be reached.

37. There is nothing wrong with the judge's statement in describing his thought process that the matter is "very much a borderline case" but continuing to say that he was "ultimately … persuaded" as to the terms of the Termination Agreement that identify the purpose for releasing the 2012 Shares. In *Hochstrasser (Inspector of Taxes) v Mayes* at 390 to 391 and 392 to 393, both Viscount Simonds and Lord Radcliffe acknowledged that whilst the case concerned is "near the line" or "near the borderline", "there is little doubt on which side of the line the present case falls" and that acknowledging the case is near the line does not imply "any particular difficulty in deciding upon which side of the line [the case] lies". What matters is that the judge had clearly come to the conclusion he arrived at in the Sums B2 and C Judgment, and he did not appear to have any "doubt on which side of the line the present case falls".

Application to amend the notice of appeal

38. The CIR sought leave to amend the notice of appeal relating to the Sums B2 and C Judgment. We allowed the application at the outset of the hearing of the appeal and these are the reasons for doing so.

39. The notice of appeal was filed on 27 July 2021. A consent summons was filed on 2 September 2021 that this appeal be heard together with the appeal relating to Sum D. Pursuant to Practice Direction 4.1, a joint checklist for the application to fix the date for the hearing of the appeals was filed on 6 October 2021, stating that all necessary interlocutory applications have been taken out. The notice of hearing of the appeals was issued on 3 November 2021. It was only on 21 January 2022 that the present summons was issued seeking leave to amend the notice of appeal.

40. The amendments relate to two broad matters. The first group seeks to add to the evidence in support of the contention that there was sufficient evidence to enable the Board to arrive at the conclusion that Sums B2 and C were released in return for the Taxpayer acting as or being an employee or as a reward for past services. The amendments made to §§8 and 9 of the notice of appeal refer to terms of the Plan and the Taxpayer's testimony. The second group adds a new §12 to raise the contention that the judge failed to ask what constitutes the dominant purpose or substantial cause of the payment of Sums B2 and C.

[35] Sums B2 and C Judgment, §§36 to 38

41. Mr Stefano Mariani, who appeared for the Taxpayer throughout, opposed the application to amend the notice of appeal. He pointed out that no reason for the delay was given and the delay is not justifiable given the full resources of the Government at the disposal of the CIR. More importantly, the amendments would introduce irrelevant matters and are of no consequence.

42. We do not think the arguments sought to be introduced by the amendments are wholly unarguable such that it would be in vain to grant leave to amend. Nor do we think the Taxpayer would suffer any prejudice that could not be compensated by costs. We therefore exercised our discretion to allow the amendments but ordered the CIR to pay the Taxpayer's costs of this application, instead of providing that such costs be in the cause of the appeal as sought in the summons.

These appeals

43. Given that the issues concerning Sums B2, C and D have been thoroughly debated before the Board, in the leave applications before the judge and the Court of Appeal, and in the substantive appeals heard by the judge, Ms Seto's arguments on appeal are essentially along the same lines advanced by the former counsel of the CIR, with some slight changes and shifts in emphasis. The same goes for the submissions of Mr Mariani, which he has made and repeated before different tribunals. I will focus on the slight changes and differences in emphasis of counsel for both sides on appeal.

44. To support the contention that Sums B2 and C were in substance "in return for [the Taxpayer] acting or being an employee" or as a "reward for past services", Ms Seto submitted that the Termination Agreement did not change the nature of the continued vesting of the 2012 Shares, and where there are multiple purposes for which the 2012 Shares were vested, it was open to the Board to find that the dominant purpose of the vesting was to reward the Taxpayer for his past services. She contended as the Taxpayer had also received other payments and benefits under the Termination Agreement (being an enhanced severance payment, reimbursement of expenses and security support from the Company), the Board was entitled to conclude that only some, but not all of the payments and benefits, were provided to procure the Taxpayer's undertaking to assist in the Litigation.

45. As stated by Lord Diplock in *Tyrer v Smart (Inspector of Taxes)* [1979] 1 WLR 113 at 115B: "The employer's motives in conferring the benefit may be mixed and the determination of what constitutes his dominant purpose is a question of fact for the commissioners to determine. Their finding on this matter is therefore one with which a court whose jurisdiction on appeal is limited to correcting errors of law by the commissioners should be slow to interfere." And Patten LJ said in *Kuehne + Nagel Drinks Logistics Ltd* at §56: "Employment does not have to be the sole cause but it does have to be sufficiently substantial as to characterise the payment as one from employment."

46. Ms Seto submitted that it would be taking too narrow and piecemeal an approach to focus on the vesting of the shares, which is just the second step of the process. The first step, being the award of the shares, is the prerequisite to vesting and is important for ascertaining the dominant purpose. As mentioned by the Board, the 2012 Shares were

granted as part of the bonus for the Taxpayer's performance in the performance year of 2011. It is fair to say that the base salary in the Taxpayer's remuneration package was the "sauce", whereas the bonus shares were the "meat". The average amount of discretionary bonus he received in 2010 and 2011 was more than three times his annual base salary, and the reportable value of the 2012 Shares was more than 1.5 times his annual base salary. The Taxpayer acknowledged this in his testimony before the Board stating that he would not have accepted the job if what he would receive was merely the base salary and the signing bonus. And as discretionary bonus was awarded to the Taxpayer year after year, he must have come to expect it as a regular payment which went with his service. Mr Mariani accepted before the Board that the vesting provisions usually existed to ensure loyalty of the employee in relation to remaining in employment and leaving employment on good terms. So Ms Seto argued that all this should justify a conclusion that the 2012 Shares were prima facie "from" employment.

47. Turning to the Termination Agreement, Ms Seto contended that this did not amount to a "fresh bargain" which has displaced the Plan and the nature of the shares awarded under the Plan as "from" employment. She repeated the arguments of former counsel of the CIR made before the Board and the judge[36]. In gist, she relied on the provisions relating to "good leaver" in the Plan regarding the vesting of shares, and that the imposition of additional conditions to vesting was envisaged in and done in accordance with the Plan. She also prayed in aid the correspondence when the parties were in negotiation as indicating that the Taxpayer was willing in principle to give reasonable assistance to the Company with the Litigation, and his undertakings were not uncharacteristic of post-termination undertakings or covenants that a highly paid employee, with first-hand knowledge of the litigation, might be required to give. Besides, the four-day assistance, for which Sum D was paid, had been provided by the Taxpayer of his own accord before the parties reached an agreement on the terms of payment.

48. She relied on this statement of the Upper Tribunal in *Charles Tyrwhitt LLP v Revenue and Customs Commissioner* [2021] STC 1426 at §72: "There was no right to receive any payments under the Schemes until the relevant conditions had been satisfied, but once those conditions were shown to have been satisfied then any payments made would derive from the employment of the Individuals, whether the payments were received whilst they were still employees or after they had left their employment." Further, as in that case, payments can be taxed as employment income notwithstanding that they were received after employment had ceased or that they were received in the individual's capacity as a former employee (see §§51, 67).

49. I am not persuaded by Ms Seto's submissions. I agree with the judge, for the reasons he gave, that the conclusions of the Board on Sums B2, C and D cannot be supported as they are contrary to the true and only reasonable conclusion to make on the primary facts and inferences found by the Board.

---

[36] Board's Decision, §§35(d) to (e); Leave Decision, §55; Sum D Judgment, §43; Sums B2 and C Judgment, §§35, 45

50. I do not think the employment can be regarded as a substantial cause for the payment of Sums B2 and C. Whilst the eligibility to be considered for discretionary bonus under the Employment Contract and that the 2012 Shares granted as part of the bonus for the Taxpayer's performance in the performance year of 2011 formed the background to the payment, things have moved on with the Termination Agreement. It was specifically provided in clause 1.1(b) that any release of those shares would be conditional on the Taxpayer having not committed a breach of any of the terms of the Termination Agreement. Sums B2 and C were not in substance "in return for [the Taxpayer] acting or being an employee" or as a "reward for past services".

51. The Taxpayer had plainly taken up new obligations after the termination of his employment under the Termination Agreement, over and above his obligations under the Employment Contract before its termination. I am unable to see how it could be said there was no fresh consideration in respect of the new obligations undertaken by the Taxpayer or that no fresh bargain was made. That these new obligations might be regarded as customary or characteristic of post-termination undertakings or covenants that a highly paid employee, with first-hand knowledge of the matters he was previously responsible for, might be required to undertake is beside the point. Likewise, the willingness of the Taxpayer to render some form of assistance before the Termination Agreement was reached is immaterial, so is the Taxpayer's stance in negotiations that he was contractually entitled to the continued vesting of the shares.

52. Insofar as the Board had taken into account that negotiations between the Taxpayer and the Company had not progressed to the stage where litigation was in prospect such that Sums B2 and C were not payments made to "make the Taxpayer go away quietly", this is an irrelevant consideration. As explained by the judge, it is not required that the parties should have a greater breakdown in relations than that the employment relationship had already ceased, and the Termination Agreement was made to agree on the terms of cessation and consequential matters.

53. The statement in §72 of *Charles Tyrwhitt LLP v Revenue and Customs Commissioner* must be read in context, as the factual situation is distinguishable. The employees in that case were contractually entitled to receive a bonus provided they remained employees on a particular date. They were later promoted to become members of the LLP and by amendment letters to the bonus scheme it was made clear that the change in status from employees to members would not affect the eligibility under the scheme and they could still qualify to receive payment if they were at the time of payment members of the LLP (at §§10(6), (7) and 70). The pre-existing right to payment was derived from the employment, notwithstanding that the right crystallised at a time when the individuals ceased to be employees.

54. In contrast, the Taxpayer was not contractually entitled to the vesting of the 2012 Shares even though a grant was made, as, under the Plan, the remuneration committee had absolute discretion at any time to reduce or cancel an award or impose additional conditions before the vesting of the awards; and where a "good leaver" had entered into a termination agreement, the award would not vest until he had complied with or was released from his obligations under the termination agreement.

55. As rightly observed by the judge, at the time an employee became a participant in the Plan, it would not be known under what circumstances he might cease employment, whether he might enter into a termination agreement as a good leaver, and what such an agreement might encompass. Yet the Plan identified that the award would not vest unless and until the participant had complied with or was released from his obligations under the termination agreement. So it was envisaged in the Plan that the participant might have to provide fresh consideration in entering into a termination agreement to become entitled to vesting of the award, and such fresh consideration might have nothing to do with the employment.

56. As for the contention that some other payments and benefits under the Termination Agreement (being an enhanced severance payment, reimbursement of expenses and security support from the Company) could provide the consideration to procure the Taxpayer's undertaking to assist in the Litigation, the Board did not draw any inference or conclusion to that effect.

57. The holding in *Charles Tyrwhitt LLP* that the payment of bonus was taxable as derived from employment notwithstanding that payment was received after employment had ceased and that the individuals had ceased to be employees does not assist the CIR in the contention as regards Sum D. The present fact situation is very different. A fresh bargain was made in the Termination Agreement by which both parties assumed new obligations, the Taxpayer undertook to render reasonable assistance in the Litigation for the period specified and the Company undertook to pay him compensation for the time spent, reimburse his travel, accommodation and legal expenses, and provide reasonable security support. As part of the new bargain, they also agreed on the time spent by the Taxpayer in providing assistance prior to the agreement albeit he was not obliged to do so. The judge is correct in holding that Sum D was not in substance derived "from" employment.

58. Ms Seto took issue with Mr Mariani's submission that for payment to be chargeable to salaries tax, it requires the payment to be in some causal sense a reward for services "in employment", or otherwise for acting as employee. It is quite unnecessary to put a gloss on the statutory language of "from" employment. As Lord Radcliffe said in *Hochstrasser (Inspector of Taxes) v Mayes* at 391, judicial glosses are of value as illustrating the idea which is expressed by the words of the statute, but it is important to note that they do not displace those words. I have no quarrel with the proposition that a sufficient causal link is required to be established between the payment and the employment (*Kuehne + Nagel Drinks Logistics Ltd* at §50).

59. Looking at the matter overall, there should be no difference in the characterisation of Sums B2, C and D, as the causes of the payment of all three sums flowed from the new bargain in the Termination Agreement, for which fresh consideration was provided by the Taxpayer, and the parties to that agreement had undertaken new obligations.

Conclusion and costs

60. For the above reasons, I would dismiss the appeals of the CIR in respect of Sums B2, C and D.

61. As there is no dispute that costs of the appeals should follow the event, I would order the CIR to pay the Taxpayer's costs of both appeals.

62. Mr Mariani sought an order to vary the costs order of the judge when he refused leave to appeal as to Sums B2 and C. The judge awarded 75% of the costs of the leave application to the CIR. This costs order was not varied when the Court of Appeal granted leave to appeal or when the judge allowed the substantive appeal. Ms Seto accepted that on principle it ought to be varied if the Taxpayer is successful in overturning the Board's Decision on Sums B2 and C.

63. Mr Mariani sought 75% or two-thirds of the costs of the leave application in that of the five sums challenged by the Taxpayer, leave to appeal should have been granted in respect of three of them, namely, Sums B2, C and D. I would make an order *nisi* that two-thirds of the costs of the leave application should be awarded to the Taxpayer, such order to be made absolute if no application to vary is taken out within 14 days of the handing down of this judgment.

Hon Yuen JA:

64. I agree.

Hon Barma JA:

65. I agree with the judgment of Kwan VP and with the orders she proposes.

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

Mr Stefano Mariani, Solicitor Advocate of Deacons, for the Appellant (Respondent)

Ms Kay Seto and Ms Carmen Siu, Senior Government Counsel, instructed by the Department of Justice, for the Respondent (Appellant)