Case No. D10/19

Salaries tax – discretionary bonus paid under a retirement agreement – whether the bonus was 'hush money' paid to the taxpayer or not – applicable test for testimonies of witnesses – costs imposed on the taxpayer/appellant – sections 8(1), 8(1)(a), 9(1)(a), 66(1), 66(3), 68(4), 68(9) of the Inland Revenue Ordinance (the 'IRO')

Panel: Lo Pui Yin (chairman), Robin Gregory D'Souza and Wong Pak Yan Annie.

Date of hearing: 9 January 2019.
Date of decision: 9 August 2019.

The Appellant/Taxpayer, Mr D, was employed by Company A and came under the employment of Company B. Both Companies were and are part of Group C. Mr D's employment involved him conducting activities that were subject to regulation in Hong Kong and such regulation included him obtaining the requisite licenses from the regulators. Mr D was the head of a team of individuals responsible for sales. Mr D's remuneration from the employment with Company A was provided under the terms of an employment and consisted of a basic salary, a discretionary bonus, and a guaranteed bonus. Mr D's employment with Company B was governed by a supplement to employment contract, which was subject to Company B's remuneration policy. Company B's remuneration policy classified remunerations into salary, discretionary bonus, and guaranteed bonus. Mr D received letters on or about 30 April 2013, 4 April 2014 and 30 April 2015 from Company concerning the award of the discretionary bonus component of his remuneration for 2012, 2013 and 2014. Mr D was awarded HK$7,200,000 as the discretionary bonus for 2012, HK$8,000,000 as the discretionary bonus for 2013 and HK$10,000,000 as the discretionary bonus for 2014.

Mr D wrote a letter dated 9 December 2015 to the head of the human resources division of Company A, Ms S, informing her that he had decided to take retirement with effect from 16 December 2015. A 14 December 2015 letter entitled 'retirement agreement' was issued by Company A (the 'Retirement Agreement'). Mr D signed at the end of this letter and it was dated in manuscript under the signature '14 December 2015'. Company A issued a letter signed by Ms S to Mr D dated 6 July 2016, stating that the discretionary bonus of HK$8,000,000 set out in the Retirement Agreement would be paid by autopay to him on 7 July 2016.

Mr D's former employer filed two notifications that he was about to cease to be employed. The total income reported was HK$17,498,847, including $8,000,000 as 'Other rewards, allowance or perquisites'. Mr D filed a tax return for year of assessment 2015/2016 which declared a total income of HK$17,498,847 too. Mr D objected to the Salaries Tax Assessment for the year of assessment 2015/16 (the '2015/16 Assessment'). He stated that the sum of HK$8,000,000 should be 'compensation subject to loss office'. After making

enquiries with Mr D's former employer, the Assessor of the Revenue (the 'Assessor') maintained that the sum be HK$8,000,000 should be chargeable to Salaries Tax. The Deputy Commissioner of Inland Revenue (the 'Deputy Commissioner') did not accept Mr D's claim that the sum of HK$8,000,000 was a compensation payment and endorsed the tax computation put forward by the Assessor.

Mr D lodged an appeal against the Determination of the Deputy Commissioner rejecting Mr D's objection to the 2015/16 Assessment. Mr D contended that the sum of HK$8,000,000 was not remuneration for his contribution to his former employer or his responsibilities undertaken in the course of employment and instead, it was 'hush monies' given to him in the hope that he would keep silent to all claims against Mr P and Company A. Mr P was the Chief Executive of both Company A and Company B. Ms X, one of Mr D's subordinate, had complained against Mr P of sexual harassment. Mr D, Mr Y (a qualified solicitor worked in Group C), and Ms X testified before this Board.

Held:

1. This Board had considered testimonies of Mr D, Mr Y and Ms X, testing them by reference to contemporaneous documentation where it existed, or to its absence where one could expect it to have created, as well as to inherent improbabilities, having regard to all the facts that were known. It was unable to accept Mr Y's testimony due to inconsistency, etc., and would place no weight to his testimony. However, it accepted Ms X's testimony. But it found her testimony to be of limited assistance to Mr D as her lack of knowledge of the terms by which Mr D retired in December 2015, etc. (Esquire (Electronics) Ltd v Hongkong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439 (CA)8 followed).

2. This Board was unable to accept Mr D's testimony. His assertion could not be the whole truth and nothing but the truth. More importantly, Mr D's principal claim that the Retirement Agreement was a device to require him to shut up over Ms X's sexual harassment complaint and her possible legal proceedings against Mr P and her employer(s) was not borne out when the terms and conditions of the Retirement were read objectively. Moreover, Mr D had not provided the Department of Inland Revenue (the 'Revenue') or this Board with any explanation for his departure from the position adopted in the tax return that the sum of HK$8,000,000 was part of his income received for the 2015/16 Assessment.

3. This Board considered that the Revenue was entitled to act on the basis of the representations made in Mr D's filed tax return for the 2015/16 Assessment, and the notifications of the former employer to assess the sum of HK$8,000,000 as income from his employment chargeable to Salaries Tax. Mr D had the burden to show that the Assessment was incorrect or excessive. This Board was unable to accept Mr D's testimony in support of his contention. This Board had also considered whether, in the absence of

Mr D's testimony, the evidence before it nonetheless established that the sum of HK$8,000,000 did not come from his employment. While it could be said that this sum might have been a best estimate at the material time by Mr D and the former employer of the contributions of Mr D in the year, the figure of this sum, when compared with the discretionary bonuses awarded in the several years before, appeared to be within a reasonable range of those previous discretionary bonuses. This Board concluded that this sum was an entitlement earned as a result of Mr D's past services and was paid in return for him acting or being an employee of the former employer (Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74 followed).

4. Mr D failed to discharge the burden of proof to show that the sum of HK$8,000,000 did not come from his employment with his former employer and that the Revenue was incorrect in assessing that sum as chargeable to Salaries Tax. This Board considered that Mr D's appeal was plainly without merit and frivolous and vexatious. It exercised its power under section 68(9) of the IRO to order Mr D to pay the sum of HK$10,000 as costs of the Board.

Appeal dismissed and costs order in the amount of $10,000 imposed.

Cases referred to:

Esquire (Electronics) Ltd v Hongkong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439
Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74

Appellant in person.
Cheung Ka Yung, Lau Wai Sum and Cheng Po Fung, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This Appeal was lodged by the Appellant/Taxpayer, Mr D, against the Determination of the Deputy Commissioner of Inland Revenue dated 3 July 2018 rejecting the Taxpayer's objection to the Salaries Tax Assessment for the year of assessment 2015/16 raised by the Assessor of the Revenue and reducing the Assessor's assessment for the year of assessment 2015/16 ('the Determination').

2. The Taxpayer's Notice of Appeal, which he lodged with the Clerk to the Board of Review in person, refers to the objection he had raised before the Commissioner

for Inland Revenue and is accompanied by a statement of the grounds of appeal. The Taxpayer contends that a sum of $8,000,000 found by the Assessor of the Revenue to be chargeable to Salaries Tax for the year of assessment 2015/16 was not chargeable to Salaries Tax because his retirement from employment in December 2015 was a sham and was in fact an 'involuntary resignation' required by the management of his employers (Company A and Company B, both of Group C) to have him 'get rid of as soon as possible, regardless of the need to notify the board of directors; the practice to inform regulators … ; nor the procedural requirements of a three month notice for retirements'. The Taxpayer refers to several 'abnormalities' in the terms of the 'retirement agreement' and contends that the 'retirement' was 'no more than a termination without cause, and supplemented with rewards (as well as coercions) to keep silent and stay away from any and all actions against [Mr P "the Chief Executive Company A and Company B", and Company A and Company B]. And such "hush monies" have absolutely no relevancy to the works and contributions under [his] employment'. The Taxpayer refers particularly to the complaint made by Ms X, one of his subordinates, against Mr P, of sexual harassment and expresses his belief that he was 'found as a culprit in aiding or otherwise not stopping [Ms X] in her exercise of legitimate legal rights to complain and proceed against [Mr P "the Chief Executive Company A and Company B", and Company A and Company B] at the EOC and court'.

3. This Board held the hearing of this Appeal on 9 January 2019. The Taxpayer attended the hearing in person. The Revenue was represented by three Assessors of the Inland Revenue Department ('Department') and, of the three Assessors, it was Miss Cheung who conducted the Revenue's case at the hearing.

4. The Taxpayer testified under affirmation before this Board and was cross-examined by the Revenue. The Taxpayer also called Ms X to testify; she gave evidence under affirmation before this Board and was cross-examined by the Revenue. The Taxpayer also called Mr Y, a former officer in Group C's legal and compliance division, to testify; he gave evidence under affirmation before this Board and was cross-examined by the Revenue.

5. The Revenue did not call any oral evidence. The Revenue referred to documents submitted before this Board.

6. This Board notes that during the hearing, the Taxpayer took exception to the Revenue's enquiry by letter dated 10 September 2018 of Company A seeking confirmation whether the Taxpayer's retirement was related to a sexual harassment complaint lodged by an employee to the Equal Opportunities Commission ('EOC') in 2014 and whether the sum of HK$8,000,000 paid to the Taxpayer upon his retirement was paid in relation to that complaint, and asking Company A to explain in details about the relevant circumstances leading to the retirement and the payment. The Taxpayer pointed to the lack of an individual addressee in the letter and expressed his belief that in this format, the letter would have been opened by a member of the general staff and got circulated in various departments before reaching the appropriate department and the responsible individual in that department for handling, the consequence being that the contents of the letter, particularly the Taxpayer's personal information (including his identity card number) and the allegations that Company A was asked by the Revenue to confirm, would become known to Company A and taken as information supplied by the Taxpayer to the Revenue, and that

would have jeopardized his position in relation to certain terms in the 'retirement agreement' he believed were binding on him. The Taxpayer complained that the letter was issued without his consent and notwithstanding that he had explained to officers of the Department in meetings that he was subject to confidentiality requirements imposed by his former employers and that he could be sued for breach of those requirements and had been assured by them that the information he provided would be treated in confidence. The Taxpayer expressed the view that he had lost trust and confidence in the Revenue and the professionalism of its officers. Although this Board notes that the Revenue had previously sent enquiry letters to Company A in the same way without an individual addressee, this Board appreciates that the specific questions asked in the letter dated 10 September 2018 could have given rise to the concerns that the Taxpayer had raised before this Board at the hearing.

7. In the sections of this Decision that follow, this Board shall consider the Determination and the evidence placed before it by the parties to this Appeal and make findings of fact. Then this Board shall consider the submissions of the Taxpayer and the Revenue in the light of the facts found and determine this Appeal.

The Factual Background from the Taxpayer's Documents

8. The Taxpayer and Revenue have not reached agreement on a set of Agreed Facts for submission to this Board.

9. The Taxpayer has placed before this Board a set of documents relating to his employment and its termination in December 2015. Most of them are the same documents that the Deputy Commissioner had considered when he made the Determination. Others are not disputed by the Revenue. This Board find the following facts as established from this set of documents:

(1) The Taxpayer was employed by Company A in July 2010. He also came under the employment of Company B in August 2011. As mentioned above, Company A and Company B were and are part of Group C. The Taxpayer's employment involved him conducting activities that were subject to regulation in Hong Kong and such regulation included him obtaining the requisite licences from the regulators. The Taxpayer was the head of a team of individuals responsible for sales.

(2) The Taxpayer's remuneration from the employment with Company A was provided under the terms of an employment contract dated 27 July 2010 and consisted of a basic salary, a discretionary bonus and a guaranteed bonus. The Taxpayer's employment with Company B was governed by a supplement to employment contract dated 15 August 2011, which was subject to Company B's remuneration policy in respect of the relevant proportion of the Taxpayer's remuneration from the employment with Company B, and Company B's remuneration policy classified remunerations into salary,

discretionary bonus and guaranteed bonus. Both the employment contract dated 27 July 2010 with Company A and the remuneration policy of Company B contained provisions on the determination of the amount of the discretionary bonus and on the payment of the discretionary bonus (including the conditions for making payment(s) of the discretionary bonus). In this Appeal, the Revenue, based on information it received, treated the sum of $8,000,000 in question as a discretionary bonus. The Taxpayer disputed the Revenue's treatment of the sum as such.

(3) The Taxpayer received letters on or about 30 April 2013, 4 April 2014 and 30 April 2015 from Company A concerning the award of the discretionary bonus component of his remuneration for 2012, 2013 and 2014. The Taxpayer was awarded HK$7,200,000 as the discretionary bonus for 2012, HK$8,000,000 as the discretionary bonus for 2013 and HK$10,000,000 as the discretionary bonus for 2014. The discretionary bonus for each of these years was paid by way of an initial payment of 60% and a deferred payment of 40% payable in three equal annual instalments on the respective December payroll dates in the ensuing 3 years. Each of these letters specified that the bonus 'will be payable on and subject to the terms and conditions set out in this letter and your employment contract … For the avoidance of doubt, [Company B and Company A] may, in their sole and absolute discretion, claw-back in whole or in part, any of the Initial Payment … and/or all or part of any of the Deferred payment … that has already been paid and/or withhold, reduce or cancel, in whole or in part any unpaid instalment … if it was discovered after the date of this letter, [the Taxpayer has] materially failed to comply with and conform to, and ensure compliance and conformity at all times by the employees (if any) under your supervision of, the policies and guidelines contained in the Employee Handbook, applicable laws, regulations, rules guidelines and relevant code of conduct issued by the relevant regulatory authorities, applicable and relating to the business of [Company B] and its operations ('Laws Rules and Regulations') or in serious and/or material breach of any such Laws Rules and Regulations which will or is likely to put [Company B] and the group in serious risks, whether in terms of the business and/or operations and/or their reputation.' Each of these letters also contained a number of 'general conditions' in relation to the entitlement to the discretionary bonus referred to in the letter. These 'general conditions' included one requiring the Taxpayer to remain in the employment of Company B or in Group C at the time of payment of any of the amounts constituting the discretionary bonus, though it was also provided that the bonus entitlement shall not be affected in the event of the Taxpayer's retirement with Company B or Group C as contemplated in the relevant employee handbook. They also included conditions stating that bonus entitlement could be affected

by completion of the financial audit of the accounts of Company B, compliance with prevailing provisions of the employment contract and employee handbook of Company B, and Company B's reservation of its right to review, modify and terminate the bonus programme from time to time.

(4) The Taxpayer wrote a letter dated 9 December 2015 to the head of the human resources division of Company A, Ms S, informing her that he had decided to take retirement with effect from 16 December 2015, with the last date of his employment being 15 December 2015.

(5) A letter entitled 'retirement agreement' and dated 14 December 2015 was issued by Company A and signed by Ms S for Company A ('the Retirement Agreement'). The Taxpayer signed at the end of this letter under the sentence stating that he had read, understood and agreed to the terms and conditions of this 'retirement agreement' and it was dated in manuscript under the signature '14 Dec. 2015'.

(6) The Retirement Agreement referred to the letter of the Taxpayer dated 9 December 2015 and confirmed that his employment with Company A would be terminated with effect from 16 December 2015; and that the reason for the termination of the Taxpayer's employment was retirement in compliance with the existing retirement policy of the company.

(7) The Retirement Agreement then set out, *inter alia*, the following terms and conditions with respect to the Taxpayer's retirement:

(a) Company A would pay the Taxpayer within 7 calendar days of 15 December 2015 the following sums: (i) any accrued unpaid wages; (ii) an amount representing unused annual leave, if any, accrued; (iii) an amount of HK$569,788.15 representing wages in lieu of notice of retirement covering the period of 16 December 2015 to 8 March 2016 (both dates inclusive); and (iv) an amount of HK$80,400 representing long service payment.

(b) Subject to the Taxpayer signing and returning a copy of the Retirement Agreement to Human Resources Division by no later than 14 December 2015, all the unpaid portions of the discretionary bonuses granted to the Taxpayer by letters dated 30 April 2013, 4 April 2014 and 30 April 2015 will be paid to the Taxpayer within 7 calendar days from 15 December 2015. The obligations required of the Taxpayer as set out in these letters (including but not limited to those under the claw-back provision) shall continue to apply despite retirement and the above arrangement for payment of the unpaid portions.

(c) Subject to the Taxpayer signing and returning a copy of the Retirement Agreement to Human Resources Division by no later than 14 December 2015, the Taxpayer would be entitled to a discretionary bonus for year 2015 fixed at the amount of HK$8,000,000. Such fixed amount will be paid to the Taxpayer according to Company A's 2015 bonus initial payment date which should be around the end of May 2016.

(d) Should the Taxpayer not sign and return a copy of the Retirement Agreement by 14 December 2015, he would receive only the minimum statutory and contractual entitlements.

(e) The Taxpayer acknowledged that as a result of his employment with Company A he had had access to 'Confidential Information'. He should not (except as authorized or required by law, or as authorized by Company A in writing) at any time, after 15 December 2015: (i) use any 'Confidential Information'; or (ii) make or use any copies of 'Confidential Information'; or (iii) disclose any 'Confidential Information' to any person, company or other organization whatsoever. This obligation was accompanied by an undertaking on the part of the Taxpayer to indemnify and keep indemnified Company A against any loss or damage suffered by it arising from the breach of this obligation. Company A also reserved its entitlement to other remedies or relief without proof of special damages. 'Confidential Information' was defined in the Retirement Agreement to mean 'development programmes and plan, inventions, copyrights, processes, ideas, developments, designs, specification methods and procedures, current business methods, services and terms of business, proposed future business methods, services, and terms of business, client lists, client requirements, pricing structures, marketing strategies and other information relating to the marketing of the Company's and/or the Group's products and services, financial information of financial plans which you may have received or contributed in the course of your employment with the Company, any information relating to the identity, characteristics or business of the Company's clients, any documents marked "confidential" or any information which you are told to be "confidential" or which you might reasonably expect to be regarded by the Company or the Group as "confidential".'

(f) Following the Taxpayer's retirement, he would be permitted to engage in any trade, business or employment notwithstanding any contrary provisions in the employment contract, though he was still required to comply with the non-solicitation clauses in the employment contract in relation to client/customer/supplier

and in relation to employee or member of Company A or Group C with whom the Taxpayer had contact during the employment.

(g) The Taxpayer agreed to several 'future ongoing obligations', including one 'not to make, or cause to be made (directly or indirectly) any derogatory or critical comments or statements (whether orally or in writing) which are untrue about the Company or any Affiliate or their respective directors, officers or employees' and one 'not to share or disclose any information that [he has] with respect to employees of the Company or any Affiliate with any third party, including but not limited to recruiting firms or individuals or any third party whatsoever'.

(h) The Taxpayer made a 'further agreement' that in consideration of the payments referred to in (a) and (c) above, and for other good and valuable consideration, he would: (i) 'irrevocably release the Company, any member of the Group, and any director, officer or employee of the Company or any member of the Group, from all and any Claims in relation to [his] employment with the Company, [his] retirement or [his] loss of office as director or officer of the Company or any member of the Group'; (ii) not 'institute or maintain or cause any person to institute or maintain legal proceedings (whether civil or criminal, and whether in Hong Kong or any other jurisdiction) against the Company, any member of the Group, or any director, officer or employee of the Company or any member of the Group, in relation to anything which could be the subject matter of a Claim'; (iii) 'indemnify and keep indemnify the Company, any member of the Group, or any director, officer or employee of the Company or any member of the Group, in relation to any loss or damage suffered by it or them as a result of a breach of this Agreement on [his] part'; and (iv) 'waive any rights which [he] may have against the Company in respect of any accrued Claims or liabilities whatsoever in relation to [his] employment with the Company, [his] retirement or [his] loss of office as director or officer of the Company or any member of the Group'. 'Claim' was defined in the Retirement Agreement to mean 'any cause of action, claim for damages or compensation, or any other civil remedy of any kind whatsoever and howsoever arising, which [he has] or may have against the Company, any member of the Group, in relation to [his] employment with the Company or [his] retirement (or the loss of office as director of officer of the Company or any member of the Group), whether or not the claim: i) arises or may arise under contract (including without limitation the Employment Contract), tort, equitable principles or statute (including for the avoidance of doubt and without limitation

under the Employment Ordinance, the Employees' Compensation Ordinance (Cap.282), Personal Data (Privacy) Ordinance (Cap.486), the Sex Discrimination Ordinance (Cap.480), the Disability Discrimination Ordinance (Cap.487), the Family Status Discrimination Ordinance (Cap.527), the Race Discrimination Ordinance (Cap.602) and the Trade Unions Ordinance (Cap.332)); ii) has been asserted or made the subject of legal proceedings; or iii) arises or may arise under the laws of the Hong Kong Special Administrative Region or any other law.'

(i) A provision of the Retirement Agreement states that it 'has been reached by mutual and purely voluntary agreement of the Parties, and the Parties by their signatures indicate their full agreement with, and understanding of, its terms. [The Taxpayer] acknowledge that [he has] been given a reasonable period of time to consider this Agreement, to obtain independent legal and financial advice in relation to its terms, and that [he has] freely, knowingly and voluntarily decided to accept these benefits, and that this Agreement has binding legal effect.'

(8) Company A issued a letter signed by Ms S to the Taxpayer dated 6 July 2016, stating that the discretionary bonus of HK$8,000,000 set out in the Retirement Agreement would be paid by autopay to him on 7 July 2016 after deducting HK$1,500 from that sum for the purpose of MPF. This letter also stated that this discretionary bonus was payable to him subject to his 'continuing compliance, in full, of all undertakings and ongoing obligations stated in [the Retirement Agreement], and this Bonus represents the final payment from the Company to [him] and extinguishes all claims that [he] may have on the Company' and he has not 'been in breach of the terms and conditions set out in [his] employment contract'. This letter also contained a provision for claw-back in terms similar to those stated in (3) above.

The Determination

10. The Determination referred to two notifications by an employer of an employee who is about to cease to be employed that Company A filed in respect of the Taxpayer. The sum of $8,000,000 was reported under the heading of 'Other rewards, allowances or perquisites'. The total income reported by way of the two notifications was HK$17,498,847.

11. The Deputy Commissioner also referred to the tax return the Taxpayer filed for the year of assessment 2015/16 which declared a total income of HK$17,498,847.

12. The Taxpayer objected to the Salaries Tax Assessment for the year of assessment raised by the Assessor the Revenue based on the said declared total income of HK$17,498,847. In the Notice of Objection of Assessment dated 14 September 2016, the Taxpayer stated that the HK$8,000,000 income should be 'compensation subject to loss of office' and requested 'immediate review'.

13. After making enquiries with the Taxpayer's former employer, the Assessor of the Revenue maintained that the sum of HK$8,000,000 should be chargeable to Salaries Tax but the Assessor was prepared to allow deduction of retirement scheme contributions, which were HK$1,500 per month, for the nine months from April to December 2015. The tax computation based on this consideration had been put to the Taxpayer and he refused to accept it.

14. The Deputy Commissioner referred to the Taxpayer's employment contract which made provision for payment of discretionary bonus as part of the remuneration. The Deputy Commissioner referred to the Retirement Agreement, under which the former employer agreed to pay to the Taxpayer the sum of HK$8,000,000 as a discretionary bonus for the year of 2015 and also to the letter of the former employer to the Department confirming that this sum was a bonus paid for the year 2015 after considering the Taxpayer's job nature and the business and his individual performance. The Deputy Commissioner thus considered that the sum of HK$8,000,000 was a bonus payment paid in return for the Taxpayer's acting as or being an employee of the former employer and was an entitlement earned as a result of his past services. As such, it was income from employment as defined in section 9(1)(a) of the Inland Revenue Ordinance. As it was derived from the Taxpayer's employment with the former employer in Hong Kong, it should be charged to Salaries Tax under section 8(1)(a) of the Ordinance.

15. The Deputy Commissioner did not accept the Taxpayer's claim that the sum of HK$8,000,000 was a compensation payment.

16. The Deputy Commissioner endorsed the tax computation put forward by the Assessor of the Revenue, which allowed further reduction of MPF contributions.

17. The Deputy Commissioner therefore rejected the Taxpayer's objection and revised the Salaries Tax Assessment for the year of assessment 2015/16 to that of a net income of HK$17,485,347, with Tax Payable thereon of HK$2,602,802.

The Testimonies of the Taxpayer and his Witnesses and Findings of Fact

18. The Taxpayer was the first person to testify before this Board. He confirmed and adopted the narrative in his Statement of Grounds of Appeal. He was educated in Hong Kong and had worked in the Hong Kong Government before entering the business and finance sector. He has had a career in this sector for 35 years.

19. The Taxpayer, in his testimony, referred to Mr P as the chief executive of both Company A and Company B. He also referred to Ms Q, the chairman of both Company

A and Company B and the immediate supervisor of Mr P, as well as Ms R, the chief executive of Group C, controlling both Company A and Company B.

20. The Taxpayer stated that Ms X, who worked under his supervision, filed a complaint with the EOC of sexual harassment against Mr P in 2014 after Ms Q refused to treat Ms X's internal complaint of the same seriously. According to the Taxpayer, Mr P regarded him as having failed to suppress Ms X from complaining and framed up stories against him that it was he who taught Ms X to complain to the EOC. Ms Q and Ms R supported Mr P, including supporting Mr P's move to victimize Ms X by giving her poor appraisals and poor bonus awards, which involved bypassing the Taxpayer. When Ms X did not withdraw the complaint, Ms Q and Ms R pressurized the Taxpayer to terminate the employment of Ms X. The Taxpayer refused. Then Ms Q and Ms R became more hostile against the Taxpayer and they deprived him of the right to attend meetings discussing matters that he would be held statutorily responsible. And Mr P also took control of operations of deals that the Taxpayer would be held responsible by the regulators without disclosing the matter to him.

21. The Taxpayer stated that he discussed the matter about Mr P with Ms R in December 2015. He was surprised when Ms R's response was to give him the two options of leaving employment or being 'exiled' to Country E if he could not work with Mr P. The Taxpayer regarded the conversation to have been 'one-sided' and his explanations were not listened to. He had little option but to choose to leave. Ms R then suggested that she would be willing to grant him a gratuitous payment if he would not 'cause trouble' or assist Ms X in her complaints and litigation against Mr P. And this gratuitous payment would not be tied with any undertaking to not entice away business, working with competitors, etc as it would have been in the routine and usual form of termination settlement. The Taxpayer believed that Ms R and the management were more concerned with 'silencing' him for the purpose of protecting Mr P. When the Taxpayer returned to his office after the conversation with Ms R, he received a telephone call from Ms S who asked the Taxpayer for his application for retirement and told him that he should leave Company A within a week and Company A would compensate him for the short notice. The Taxpayer stated that he was surprised by the speedy passing of information and thought that all that was probably well planned. The Taxpayer therefore prepared a written request to apply for retirement and handed it to Ms S.

22. The Taxpayer referred to the Retirement Agreement and pointed to several matters that he considered to be 'abnormalities' tending to show that his retirement and the provision in the Retirement Agreement of the payment of the sum of HK$8,000,000 were all part of a sham to cover up what the whole exercise was in truth, namely that his employment was involuntarily terminated and he was paid to keep his mouth shut over Ms X's complaint against Mr P. The Taxpayer said that this form of termination was to facilitate reporting the matter to Group C's ultimate owner's top management outside Hong Kong, as well as to make him shut up to protect Mr P (and in this connection, he pointed to provisions in the Retirement Agreement that specifically extracted an undertaking by the Taxpayer not to cause any person to maintain proceedings arising under the Sex Discrimination Ordinance against an employee or director of the Group in relation to anything that could be the subject matter of a claim). The 'abnormalities', according to the Taxpayer, included: (i) the

omission of the Taxpayer's functional or work title in the Retirement Agreement; (ii) the sentence mentioning that 'The reason for the termination of your employment is retirement in compliance with the Company's retirement policy' and several sentences mentioning the date of 14 December 2015 in a coercive manner, which all seemed to the Taxpayer be a direct English translation of the Chinese 'orders/directives' from the management; (iii) the commitment in the Retirement Agreement to pay the Taxpayer on 21 December 2015, said to be a departure from the normal way of ascertaining bonuses at the end of the fiscal year (on 31 March); (iv) the provision to pay the Taxpayer a fixed sum of discretionary bonus before the process for calculating bonus awards for 2015 could take place, meaning that the sum was provided out of the funds of Group C without any need to report back to the top management of the ultimate owner; (v) the fact that Company A shall pay the Taxpayer payment in lieu of notice even though it was the Taxpayer who gave the short notice to leave employment, bearing in mind that the notice period should have been 3 months under the retirement policy and the notice period for termination of employment under the employment contract should have been 1 month; (vi) the inclusion of a provision acknowledging 'mutual and purely voluntary agreement of the Parties' in making the Retirement Agreement and acknowledging that the Taxpayer had been given 'a reasonable period of time to consider' it, which the Taxpayer considered was a 'cut and paste' to seek protection from challenges against the 'abnormalities' in asking a 'retiring' staff to go through the lengthy Retirement Agreement in a matters of hours on 14 December 2015 without giving him time to seek independent legal advice; and (vii) the acknowledgement and agreement that the Taxpayer, a director of Company A, was permitted after retirement to engage in any trade, business or employment notwithstanding any contrary provisions in the employment contract, contrary to the usual undertaking to secure from leaving staff responsible for marketing undertakings of not enticing customers away, not to 'dive into' competitors within a short time and not to leak out trade secrets. The Taxpayer concluded that in his mind, the Retirement Agreement was in fact a settlement agreement with payment of 'hush monies' for the sexual harassment action filed by Ms X against Mr P and Company A.

23. The Taxpayer testified that he did write a statement to the EOC in early 2015 to give support to Ms X's complaint of sexual harassment by confirming some of the allegations from his personal knowledge as Ms X's supervisor. He did not provide another statement or any other assistance after his 'retirement'. He understood that Ms X sued Mr P and Company A in court but the case was settled before trial. The terms of settlement included reinstatement of Ms X and support for her to renew or continue her licences with regulators. He emphasized that he could have received more discretionary bonus had he not stood up for Ms X's pursuit of justice. Under cross-examination, the Taxpayer stated that the statement was made some time in early or mid-2015. And thereafter, he was sidelined by the management.

24. During the hearing before this Board, the Taxpayer had been reticent in his evidence and submissions. He explained that the Retirement Agreement imposed on him legal obligations of confidentiality and not causing another to make a claim against his former employer or its director/employee and that his former employer reserved the power to claw back the discretionary bonuses paid to him if it was subsequently discovered he was in breach of laws, rules, regulations, etc that put the former employer in serious risks. He

expressed his concern that he might be sued by his former employer over alleged breaches of the Retirement Agreement. He stated that after he left employment with his former employer, he experienced difficulty in finding a job because of bad references and being unable to pool ex-colleagues to join another company as a team. He emphasized that he remained scared of being sued for damaging the reputation of Company A, notwithstanding the fact that Mr P, Ms Q and Ms S had left Company A already.

25. The Revenue cross-examined the Taxpayer on the contents of a letter dated 9 December 2015 from the Taxpayer to Ms S. The letter was supplied to the Revenue by the Taxpayer's former employer in September 2018. The letter first thanked Ms S for supplying him with templates for 'retirement application and directorship resignation application' on 8 December 2015. The letter then referred to a telephone conversation that had taken place before hand and stated for attention the signed applications attached with the letter 'with date of retirement and last employment tentatively marked on 15 Dec, 2015. I hope this would satisfy the preconditions you insisted before you could let the board making a decision on my retirement'. Next, the letter reminded that his applications 'are made on the understanding that I will be given the sums set out in my email to [Ms Q] on 02 Dec, 2015 (among other terms and conditions as agreed), recapping our discussions, without which I would not have left the position prematurely with the bonus representing my contributions forgone'. Last, the letter asked Ms S to let the Taxpayer 'know of your response to the changes I suggested for the retirement agreement on 07 Dec, 2015'. The Taxpayer emphasized that he would not have left employment in December 2015 without the sums mentioned in the letter; and that a director of the board of the company would not leave in barely less than a week without the 'hush money'. The Taxpayer also emphasized that the decision was made by the management to 'sack' him before hand, the sum of HK$8,000,000 was a figure produced without any idea of the operating costs, depreciation, allocated costs and the Taxpayer's contribution to the business of Company A for calculation. Rather he was told to leave and if he did so, he would be paid in 7 days. The Taxpayer further related that he had asked for the taking out of the harsh terms in the Retirement Agreement but the management refused. Also he had asked for a change of the description of the sum of HK$8,000,000 to better reflect its nature but the management also refused. He added that the former employer simply wanted to use the company's 'pocket money' to pay him to shut up and the former employer used 'all staff' in the condition of the Retirement Agreement as cover, without specifically mentioning Ms X's name.

26. The Revenue also asked the Taxpayer why it was that the discretionary bonus referred to in the Retirement Agreement was paid in July 2016, bearing in mind that Ms X filed her claim in court presumably in May 2016 against Mr P and Company A. The Taxpayer's reply was that the management could have paid him on the date of signature of the Retirement Agreement but they kept him under surveillance to see if he behaved as 'a good boy'.

27. The Taxpayer next called Mr Y. He confirmed and adopted his witness statement as his evidence before this Board. Mr Y was a law graduate of University F and a qualified solicitor. His evidence was that when he joined Group C, the Taxpayer was the person who kept day to day and hands-on management of marketing teams for Company A and Company B and between 2011 and 2016, almost all the final decisions on marketing

matters of the two companies were made by the Taxpayer. Mr Y would approach the Taxpayer for determination whenever issues arise relating to products or marketing. Mr Y related that in 2015, after Company A received Ms X's complaint of sexual harassment against Mr P, he was asked by Mr P to advise on his personal position and to accompany him for consultation at an external law firm. Mr Y understood that Mr P blamed the Taxpayer for failing to stop Ms X from launching or continuing the complaint and also blamed the Taxpayer for supporting Ms X when complaints were made against Ms X for losses allegedly caused by her assistants and her hostility to her assistants. Mr Y took leave in May 2015 to take care of his ailing wife and later on, upon her passing, to attend to her funeral arrangements. When Mr Y returned to work, he came to know that the Taxpayer was generally isolated from all marketing meetings. That appeared to him to be surprising because the Taxpayer had knowledge of the relevant clients and the details of the related transactions. Also, he was repeatedly told by his immediate supervisor to stay away from the Taxpayer because Mr P disliked him, and, as a result, he tried to avoid contact with the Taxpayer to the fullest extent possible. Mr Y also recalled an event in February 2016 when the then chief operations officer of Company A, a close colleague of Mr P, offered him financial assistance over dinner to persuade him to join Mr P or his team. Although Mr Y declined the offer, he was told not to join the Taxpayer's camp. A month later, Mr Y's immediate supervisor also told him not to chat with the Taxpayer. After Ms X's employment was terminated in March 2016, the office environment deteriorated and Mr Y said that even though the Taxpayer was in the office, he was not called for meetings. Later, Mr Y's office was moved to Sheung Wan in November 2017 and he no longer met with the Taxpayer since then. He noticed that the Taxpayer had retired thereafter from an official notice. He was surprised by the Taxpayer's retirement because the company had to advise regulators on the Taxpayer's departure. On the other hand, he understood that it was the conflicts between the Taxpayer and Mr P that led him being forced to retire. Mr Y stated that he was asked by the Taxpayer in August 2018 to provide this statement on his working relationship with the management of Company A in support of the Taxpayer's appeal before this Board. By that time, he had left employment with Company A and is at present working with another company. During cross-examination, Mr Y explained that he was in fact sidelined by his immediate supervisor after the conversation they had in about April 2016; he was not called back for meetings and notices were first channeled to the immediate supervisor, who was not legally trained, before further dispersal. Mr Y also confirmed that he had no knowledge of the terms under which the Taxpayer retired and during his time with Group C, he had not worked on a case involving the retirement of a member of staff.

28. The Taxpayer lastly called Ms X. She confirmed and adopted her witness statement as her evidence before this Board. Ms X joined Company A as one of its marketing team heads and all marketing teams worked under the supervision of the Taxpayer. Ms X recalled that between 2010 and 2014, Company A's business flourished owing to the performance of the Taxpayer and he was as a result promoted to deputy division head and alternative chief executive. Ms X stated that she was sexually harassed by Mr P between August 2012 and February 2015 and she followed the company's internal guidelines and lodged a complaint with Ms Q and Ms R, the supervisors of Mr P, but that led to her being victimized in different ways. Although the company was supposed to be handling such complaints in confidence, all staff of the company somehow came to know about it and their attitude towards her changed. Ms X lodged a formal complaint with the

EOC in February 2015. The EOC conducted an investigation and asked Ms X to produce witnesses. Co-workers in the company noted how Ms X was victimized and did not provide assistance as they did not want to lose their jobs. But the Taxpayer helped her. Nevertheless, because of the victimisation and the lack of resources to face both Mr P and the company, she informed the EOC that she would withdraw the complaint. Having found out that no one could do a proper investigation to do her justice, Ms X engaged solicitors in January 2016 and the solicitors wrote letters on her behalf requiring the company to investigate into her complaint. But the company terminated her employment on the day before the deadline stated in the solicitors' letters. In fact, the company asked her to resign, withdraw the solicitors' letters and undertake not to take legal action so that she could have her 2015 discretionary bonus. After taking legal advice, Ms X did not accept the deal put to her by the company and so she was given a letter of termination with no entitlement to bonus. Ms X then commenced an Equal Opportunities Claim against Mr P and Company A in the District Court. This claim was settled on 24 November 2017 and the terms of settlement included re-employment, reinstatement, assistance in the re-application of licences with regulators, and a lump sum payment. Ms X's understanding was that the Taxpayer led certain investigations into complaints against her and those investigations vindicated her. Thereafter the Taxpayer was deliberately isolated from meetings that he was required to attend; on some occasions, even though the Taxpayer was in the office, Mr P and others did not invite him to attend meetings and claimed that he was absent from work. Ms X received a telephone call from the Taxpayer in August 2018 requesting her to help with this Appeal. Ms X stated that she did not know of the terms under which the Taxpayer retired and the Taxpayer did not provide her with much information as well because he stated that he was bound by confidentiality obligations not to disclose. Nevertheless, the Taxpayer asked Ms X to verify on how he was victimized despite his good performance for the company and the cause of such victimization being his doing justice to her by holding investigations on allegations against her made by Mr P that were proved to be groundless and made in bad faith.

29. This Board has considered testimonies of the Taxpayer, Mr Y and Ms X carefully, testing them by reference to contemporaneous documentation where it exists, or to its absence where one could expect it to have created, as well as to inherent improbabilities, having regard to all the facts that are known; see Esquire (Electronics) Ltd v Hongkong and Shanghai Banking Corp Ltd [2007] 3 HKLRD 439 (CA) at 481.

30. This Board is unable to accept the testimony of the Taxpayer. His assertions in his testimony as to how he ended up applying for retirement, when tested against the contemporaneous documents, cannot possibly be the whole truth and nothing but the truth. The Taxpayer was cross-examined in respect of the contents of the letter dated 9 December 2015 from the Taxpayer to Ms S (which are reproduced in paragraph 25 above). The Taxpayer did not challenge the authenticity and provenance of this letter and did at some stage of the cross-examination sought to rely on it to illustrate a few of his contentions. However, this letter supports a rather different story: (i) The discussion between the top management and the Taxpayer over his continued employment began at least as early as 2 December 2015; (ii) The Taxpayer put forward terms under which he would leave employment, including terms that would result in him being given specified sums instead of the bonus that represented his contribution to the business of his employer(s); (iii) The

Taxpayer underlined that he applied for retirement and resignation from directorship only on the understanding that he would be paid the sums he specified; (iv) The Taxpayer dealt with Ms Q in the matter of his leaving employment on 2 December 2015; (v) The Taxpayer had probably read a draft of the Retirement Agreement on or before 7 December 2015 and had suggested changes to the draft; (vi) The Taxpayer asked for and was provided with templates of the retirement application by the Human Resources Division on 8 December 2015; (vii) The Taxpayer provided the signed applications to the Human Resources Division on 9 December 2015 stating that the last employment date or the retirement date was tentatively marked 15 December 2015. All these observations coming from this letter challenge substantively and materially the Taxpayer's claim that he was forced by Ms R to leave employment by applying for retirement and to undertake to keep silent over Ms X's sexual harassment claim (so that he would receive a lump sum payment), in an abrupt manner (or at 'lightning speed') on 9 December 2015; that this exercise was pre-planned, one-sided and coercive, leaving him without option(s) and reasonable opportunities for advice. In the light of this letter, the provisions in the Retirement Agreement that appear to be more advantageous to the Taxpayer can reasonably be regarded more as the result of a process of active bargaining between the former employer's top management and the Taxpayer than 'abnormalities' tending to show that his application for retirement was a sham.

31. More importantly, the Taxpayer's principal claim that the Retirement Agreement was a device to require him to shut up over Ms X's sexual harassment complaint and her possible legal proceedings against Mr P and her employer(s) is not borne out when the terms and conditions of the Retirement Agreement are read objectively. Firstly, the confidentiality provision reproduced in paragraph 9(7)(e) above requires the maintenance of the confidentiality (by not using, not copying and not disclosing) of 'Confidential Information', which is defined in the Retirement Agreement to mean 'development programmes and plan, inventions, copyrights, processes, ideas, developments, designs, specification methods and procedures, current business methods, services and terms of business, proposed future business methods, services, and terms of business, client lists, client requirements, pricing structures, marketing strategies and other information relating to the marketing of the Company's and/or the Group's products and services, financial information of financial plans which you may have received or contributed in the course of your employment with the Company, any information relating to the identity, characteristics or business of the Company's clients, any documents marked "confidential" or any information which you are told to be "confidential" or which you might reasonably expect to be regarded by the Company or the Group as "confidential".' This definition is by and large concerned with the business programme, plan, knowhow and information of the former employer. In fact it is the same definition of 'Confidential Information' used in the employment contract the Taxpayer signed on 30 July 2010. There is nothing unusual about this requirement. It is hard, if not impossible, to see how this provision tends to suggest that the Retirement Agreement and the payments made under it were sham. Secondly, the Taxpayer's further agreement to irrevocably release the former employer, Group C and any director, officer or employee of the former employer or any member of Group C from all and any 'Claim' in relation to his employment with the former employer, his retirement or his loss of office as director or officer of the former employer or any member of Group C is focused on and confined to a claim the Taxpayer might have 'in relation to his employment,

his retirement or his loss of office'. This has got nothing to do with any other person, or any other person's cause of action or claim against his former employer or a director, officer or member of his former employer. Thirdly, the Taxpayer's further agreement not to institute or maintain or cause any person to institute or maintain legal proceedings against the former employer, any member of Group C, or any director, officer or employee of the former employer or any member of Group C, in relation to anything which could be the subject matter of a 'Claim', should be read in the context of the definition of 'Claim' as reproduced in paragraph 9(7)(h) above. This definition is also focused on and confined to an action or claim the Taxpayer has or may have against the former employer, any member of Group C, or any director, officer or employee of the former employer or any member of Group C, 'in relation to [his] employment with the Company or [his] retirement (or the loss of office as director or officer of the Company or any member of the Group)'. Again, this has got nothing to do with any other person, or any other person's cause of action or claim against his former employer or a director, officer or member of his former employer.

32. This Board also notes that the Taxpayer filed his tax return for the year of assessment of 2015/16 declaring an income of HK$17,498,847, that is, including the sum of HK$8,000,000. This Board notes that the Taxpayer signed the tax return declaring that the information provided in the tax return was correct and without any omission. This Board has confirmed with the Taxpayer the terms of the tax return in the course of the hearing. The Taxpayer has not provided the Revenue or this Board with any explanation for his departure from the position presumably adopted in the tax return that the sum of HK$8,000,000 was part of his income received for the year of assessment of 2015/16.

33. This Board is unable to accept the testimony of Mr Y. His testimony is inconsistent with the chronology of events that this Board has understood from the documents the Taxpayer produced. His testimony of events allegedly taking place in 2016, in which he was told not to join the Taxpayer's camp and not to chat with the Taxpayer, is plainly inconsistent with the fact that the Taxpayer left the employment of Company A, Company B and Group C in December 2015. Also, his testimony has left out unrecollected a certain part of 2015 beginning in May 2015 (when he apparently took leave of absence from work to take care of his ailing wife, such leave becoming prolonged thereafter due to her deteriorating health, her passing and her funeral arrangements). This Board, in any event, will place no weight to his testimony.

34. This Board accepts the testimony of Ms X. However, this Board finds her testimony to be of limited assistance to the Taxpayer. Although Ms X was able to inform this Board of what can properly be described as a hostile working environment she and the Taxpayer had faced in 2015, she had no knowledge of the terms by which the Taxpayer retired in December 2015 and how those terms were agreed between the former employer and the Taxpayer. Also, by December 2015, Ms X had already caused the EOC to close the investigation of her complaint against the former employer. And her own private legal action by way of solicitors' letters only took place in the later time of January 2016.

The Relevant Charging Provisions

35. Section 8(1) of the Inland Revenue Ordinance provides that:

'*(1) 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 …'.

Relevantly, section 9(1)(a) defines that:

'*(1) 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 …*'.

36. Section 66(3) of the Inland Revenue Ordinance provides that save with the consent of the Board of Review and on such terms as the Board of Review may determine, an appellant may not at the hearing of his appeal rely on any grounds of appeal other than the grounds contained in his statement of grounds of appeal given to the Board of Review in accordance with section 66(1). Section 68(4) of the Ordinance provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

Discussion

37. The Taxpayer's Statement of the Grounds of Appeal seeks to establish the proposition that the sum of HK$8,000,000 was not remuneration for his contribution to his former employer or his responsibilities undertaken in the course of his employment and instead, it was 'hush monies' given to him 'in the hope that [he] would keep silent to all claims against [Mr P] and [Company A]'.

38. The Revenue assessed the sum of HK$8,000,000 as chargeable to Salaries Tax based on the notifications of the Taxpayer's former employer and the Taxpayer's own tax return for the year of assessment 2015/16.

39. The Revenue had made further enquiries of the Taxpayer's former employer after he raised objection to the Revenue's assessment. The Taxpayer's former employer replied by letter dated 26 October 2016 stating that the sum of HK$8,000,000 was the 2015 discretionary bonus. The Taxpayer's former employer also replied by letter dated 5 January 2018 stating the basis for the calculation of the sum of the discretionary bonus of HK$8,000,000. The Taxpayer's former employer further replied by letter dated 28 September 2018 that the Taxpayer's entitlement to payment of a discretionary bonus was not affected by his retirement and again stated the basis for the calculation of the sum of the discretionary bonus of HK$8,000,000.

40. The Court of Final Appeal considered the question of whether a payment received by an employee on termination of his employment is chargeable under section 8(1) of the Inland Revenue Ordinance in Fuchs v Commissioner of Inland Revenue (2011) 14

HKCFAR 74. Whether income is 'from the taxpayer's employment' (*per* the language of section 8(1)) is to be approached in the following manner:

> '*Income chargeable under that section is likewise 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". 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 abovementioned sense, it is assessable*' (at [17]).
>
> And –
>
> '*a payment which one concludes is "for something else" and thus not assessable, must be a payment which does not come within the test. … [It] is only where "an emolument is not paid as a reward for past services or as an inducement to enter into employment and provide future services but is paid for some other reason, [that] the emolument is not received 'from the employment'." Thus, where a payment falls within the test, it is assessable and the fact that, as a matter of language, it may also be possible to describe the purpose of that payment in some other terms, eg, as "compensation for loss of office", does not displace liability to tax. The applicable test gives effect to the statutory language and other possible characterisations of the payment are beside the point if, applying the test, the payment is "from employment"*' (at [18]).
>
> Further, there may be cases where the employee asserts that his employment rights have been 'abrogated' and argue for an exemption from tax. The Court of Final Appeal reiterated at [22] that the same test applies, reflecting the statutory language –
>
> '*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 matters not 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". As the "abrogation" examples referred to above show, such a conclusion may be reached where the payment is not made pursuant to any entitlement under the employment contract but is made in consideration of the employee agreeing to surrender or forgo his pre-existing contractual rights.*'

41. This Board considers that the Revenue was entitled to act on the basis of the representations made in the Taxpayer's filed tax return for the year of assessment 2015/16 and the notifications of the former employer to assess the sum of HK$8,000,000 paid to the Taxpayer by his former employer following termination of employment as income from his employment chargeable to Salaries Tax.

42. The Taxpayer has the burden to show that the assessment was incorrect or excessive. His principal contention was that the sum of HK$8,000,000 was paid by his former employer to him as 'hush money'. For the reasons set out above, this Board is unable to accept the Taxpayer's testimony in support of this contention. This Board has also read the Retirement Agreement and does not agree with the Taxpayer's claim that the terms therein concerning 'Confidentiality' and 'Claims' were inserted there specifically to silence him in relation to Ms X's complaint or legal claim against Mr P and the former employer.

43. This Board adds that the terms in the Retirement Agreement concerning 'Confidentiality' and 'Claims' do not involve any 'abrogation' of any employment rights that the Taxpayer had and might wish to exercise following the termination of his employment with the former employer. The Taxpayer's case throughout this Appeal has been concerned with Ms X's complaint or legal claim against Mr P and the former employer and not with any claim the Taxpayer had against the former employer or any of its directors, officers or members, or Group C, or any claim the Taxpayer had raised with any director or officer of the former employer.

44. This Board has considered whether, in the absence of the Taxpayer's testimony, the evidence before it nonetheless establishes that the sum of HK$8,000,000 did not come from his employment in the sense that the Court of Final Appeal referred in Fuchs. It is true that the figure of the sum of HK$8,000,000 was not reached following the usual annual process of the former employer for determining the discretionary bonus to be awarded to each employee. On the other hand, the Taxpayer had apparently put on the record on 9 December 2015 that he would not leave his position prematurely with the bonus representing his contributions forgone. The Court of Final Appeal advises that the matter must be looked at substantively, in relation to whether the sum was paid in return for the Taxpayer acting as or being an employee and whether it was an entitlement earned as a result of past services or an entitlement accorded to him as an inducement to enter into the employment. While it can be said that this sum might have been a best estimate at the material time by the Taxpayer and the former employer of the contributions of the Taxpayer in the year, the figure of this sum, when compared with the discretionary bonuses awarded in the several years before, appears to be within a reasonable range of those previous discretionary bonuses. Therefore, this Board has no difficulty to conclude and does conclude that this sum was an entitlement earned as a result of the Taxpayer's past services and was paid in return for him acting or being an employee of the former employee.

45. Having considered the evidence before it, this Board holds that the Taxpayer has failed to discharge the burden of proof to show that the sum of HK$8,000,000 did not come from his employment with his former employer and that the Revenue was incorrect in assessing that sum as chargeable to Salaries Tax.

Decision

46. This Board determines that the Taxpayer has failed to discharge the burden of proof he has under section 68(4) of the Inland Revenue Ordinance to show that the Salaries Tax Assessment for the year of assessment 2015/16 imposed on him was excessive or incorrect. The Taxpayer's appeal is dismissed. The Salaries Tax Assessment for the year of assessment 2015/16 that the Deputy Commissioner of Inland Revenue, by his Determination dated 3 July 2018, had revised to the net income of HK$17,485,347 with tax payable thereon of HK$2,602,802, is affirmed.

47. This Board considers that the Taxpayer's present Appeal is plainly without merit and frivolous and vexatious. This Board exercises its power under section 68(9) of the Inland Revenue Ordinance to order that the Taxpayer shall pay as costs of the Board the sum of HK$10,000, which shall be added to the tax charged and recovered therewith.