

Case No. D12/20

Salaries tax – disputed the payment of the sum – whether the assessor should not raise the additional salaries assessment after the taxpayer paid the sum in provisional tax – sections 66(3) and 68(4) of the Inland Revenue Ordinance

Panel: Lo Pui Yin (chairman), David Tai Wai Lai and Sham Che Fai Jeffrey.

Date of hearing: 6 November 2020.

Date of decision: 30 November 2020.

The Appellant was employed by Company B, The employer filed with the Revenue an Employer's Return in replacement of the Employer's Return that was filed in May 2017. This replacement Employer's Return included an additional net income described as 'bonus' in the year of assessment 2016/2017. Additional Salaries Tax Assessment for the year of assessment 2016/17 was raised for the said sum. The Appellant objected to the Additional Assessment Demanding. The Appellant disputed the payment of the said sum to him by his employer.

At the hearing, the appellant submitted that he had paid tax for the said sum in provisional tax and the Assessor should not raise the Additional Salaries Tax Assessment for the year of assessment 2016/17.

Held:

1. Section 66(3) of the IRO 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 IRO provides that the onus of proving that the assessment appealed against its excessive or incorrect shall be on the appellant.
2. The assessment of provisional tax for the next year of assessment is simply what it states a provisional assessment raised on the basis of an estimation or assumption of income of the next year. When the actual income of the next year is reported, the provisional tax paid is deducted against the final tax payable for that year, which is assessed based on the reported actual income.
3. The Board determines that the taxpayer has failed to discharge the burden of proof he has under section 68(4) of the IRO to show that the Additional

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Salaries Tax Assessment for the year of assessment 2016/17 was excessive or incorrect.

4. The 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 IRO to order that the taxpayer shall pay as costs of the Board the sum of \$10,000, which shall be added to the tax charged and recovered therewith.

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

Appellant in person.

Leung Ching Yee, Yu Wai Lim and Ching Wa Kong, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is the Appeal lodged by the Appellant/Taxpayer, Mr A, against the Determination of the Deputy Commissioner of Inland Revenue dated 3 April 2020 rejecting the Taxpayer's objection to the Additional Salaries Tax Assessment for the year of assessment 2016/17 raised by the Assessor of the Revenue and confirming the Assessor's assessment of the same ('the Determination').

2. The Additional Salaries Tax Assessment for the year of assessment 2016/17 raised by the Assessor of the Revenue came following a replacement Employer's Return the Taxpayer's Employer, Company B, filed with the Revenue. This replacement Employer's Return included an additional net income of \$1,381,500 described as 'Bonus'.

3. The Taxpayer's Notice of Appeal dated 27 April 2020 lodged by the Taxpayer was a handwritten document stating, in respect of the said \$1,381,500 'in the tax year of 16/17', the following: 'No such Payment took place As far as I remember. Pls ASK [Company B] to provide evidence to the contrary.'

4. This Board held the hearing of this Appeal on 6 November 2020. The Taxpayer attended the hearing in person. The Revenue was represented by three Assessors of the Inland Revenue Department and, of the three Assessors, it was Ms Leung who conducted the Revenue's case at the hearing.

5. This Board invited the Taxpayer to give evidence under oath or affirmation, explaining that this Board gives weight to the evidence of a witness who gives on oath or affirmation to tell the truth and whose evidence has been tested by cross-examination. The Taxpayer declined the invitation and chose to conduct this Appeal by making submissions.

Notwithstanding the Taxpayer's choice, this Board was able to ask for and received the Taxpayer's responses and comments on the documents placed before this Board, mainly by the Revenue. The Taxpayer also produced two additional documents for this Board's consideration.

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

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

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

9. From the exchanges with the Taxpayer and the Taxpayer's submissions, and upon reading the documents submitted by the parties, this Board finds the following facts as established:

- (1) The Taxpayer was employed by Company B, a company incorporated in Hong Kong, in May 2010, as Position C, Division D.
- (2) The Taxpayer's terms of employment were set out in an employment letter dated 25 May 2010 signed by him. The employment letter made provision for the Taxpayer's annual remuneration, additional fixed pay, a discretionary incentive award, and long term awards (which was payable partly in cash and partly in shares).
- (3) The Taxpayer filed with the Revenue the Tax Return for the year of assessment 2016/17 on or about 5 September 2017, stating income in the total amount of \$4,675,000.
- (4) The Taxpayer's employer filed with the Revenue in May 2017 the Employer's Return in respect of the Taxpayer's remuneration and pensions, stating that the particulars of income accruing for the year from 1 April 2016 to 31 March 2017 were salary/wages in the amount of \$1,650,000 and other awards, allowances or perquisites in the amount of \$3,025,000, i.e. a total amount of \$4,675,000.
- (5) By a Notice of Assessment and Refund of Tax for 2016/17 and Notice of Provisional Tax for 2017/18 dated 28 November 2017, the Assessor of the Revenue assessed that the net chargeable income for the year of assessment of 2016/17 was \$4,443,000, with tax payable in the amount of \$666,250. Having deducted the net provisional tax

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charged for 2016/17 (which was \$1,379,095), the balance of tax repayable was \$712,845. After a further deduction of the provisional tax assessed for the year of assessment of 2017/18, the net tax repayable was \$26,595. The Taxpayer did not object to the above assessment, which had become final and conclusive under section 70 of the Inland Revenue Ordinance (Chapter 112) ('IRO').

- (6) The Taxpayer filed with the Revenue the Tax Return for the year of assessment 2017/18 on or about 7 April 2018, stating income in the total amount of \$19,065,101. He also appended a note with the Tax Return, and this note stated: 'Basis for tax assessment for 2018-19 should not be based on the reported income of HK\$19,065,101 of 2017-2018, because my employer withheld my bonus from 2016-2017 and only paid me the amount in 2017, together with my 2017-2018 income. Therefore, the amount of HK\$19 m above includes both years' income. For 2018-2019 assessment, my estimate for total income is approximately HK8-9 million, which in my view should be the basis for tax assessment.'
- (7) The Taxpayer's employer filed with the Revenue in May 2018 the Employer's Return in respect of the Taxpayer's remuneration and pensions, stating that the particulars of income accruing for the year from 1 April 2017 to 31 March 2018 were salary/wages in the amount of \$1,650,000, bonus in the amount of \$6,913,774, and two amounts of other awards, allowances, or perquisites of \$3,025,000 and \$7,476,327 respectively, i.e. a total amount of \$19,065,101.
- (8) By a Notice of Assessment Demanding Final Tax for 2017/18 and Notice of Provisional Tax for 2018/19 dated 15 October 2018, the Assessor of the Revenue assessed that the net chargeable income for the year of assessment of 2017/18 was \$18,823,301, with tax payable in the amount of \$2,813,295. The Assessor also assessed the provisional tax payable for the year of assessment 2018/19 based on a net chargeable income of \$8,321,974, with tax payable in the amount of \$1,268,096. The Taxpayer did not object to the above assessment, which had become final and conclusive under section 70 of the IRO.
- (9) The Taxpayer's employer filed with the Revenue in September 2018 an Employer's Return in replacement of the Employer's Return that was filed in May 2017. This replacement Employer's Return stated that the particulars of income accruing for the year from 1 April 2016 to 31 March 2017 to be salary/wages in the amount of \$1,650,000, bonus in the amount of \$1,381,500 and other awards, allowances or perquisites in the amount of \$3,025,000, i.e. a total amount of \$6,056,500.

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- (10) By an Additional Assessment Demanding Final Tax for 2016/17 dated 27 September 2019, the Assessor of the Revenue raised an additional assessment on the Taxpayer based on total amount of income of \$6,056,500, with tax payable of \$873,475. Having made provision for the net provisional tax charged for 2016/17, the provisional tax assessed for the year of assessment of 2017/18 as previously advised, and the net tax already refunded, the additional amount of tax payable was stated to be \$207,225.
- (11) The Taxpayer objected to the Additional Assessment Demanding Final Tax for 2016/17 dated 27 September 2019. In the Notice of Objection, the Taxpayer stated that the additional income of \$1,381,500 ('the Sum') was already included in the 2017/18 income of \$19,065,101.

The Determination

10. The Deputy Commissioner of Inland Revenue's Determination indicated that the issue for determination was whether the Sum should form part of the assessable income of the Taxpayer for the year of assessment 2016/17, since the Taxpayer did not dispute the chargeability of the Sum to Salaries Tax.

11. Having considered the provisions of sections 11B, 11D(a) and 11D(b) of the IRO and information provided by the Taxpayer's employer (which showed that the Sum, though paid in October 2017, accrued to the Taxpayer in the year of assessment 2016/17), the Deputy Commissioner held that the Sum should form part of the Taxpayer's assessable income for the year of assessment 2016/17 pursuant to section 11D(a). The Deputy Commissioner also held that there was no evidence to show that the Sum, which was cash bonus granted for the year 2016, had been included as part of the Taxpayer's income charged to tax for the year of assessment 2017/18. Rather, the income reported by the Taxpayer and his employer for the year of assessment 2017/18 included the cash bonus granted for the year 2017 only.

12. The Deputy Commissioner therefore rejected the Taxpayer's objection and confirmed the Additional Salaries Tax Assessment for the year of assessment 2016/17.

The Relevant Charging Provisions

13. Section 8(1) of the IRO 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) an 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 ...’.

14. Section 11B of the IRO provides that:

‘The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment.’

15. Section 11D of the IRO provides that:

‘(a) income which has accrued to a person during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, when notwithstanding anything contained in this Ordinance, an additional assessment shall be raised in respect of such income:

Provided that for the purposes of this paragraph income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person;

(b) income accrues to a person when he becomes entitled to claim payment thereof:

...’.

16. Section 66(3) of the IRO 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 IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

Discussion

17. The Taxpayer’s Statement of the Grounds of Appeal is that in respect of the Sum, ‘No such Payment took place As far as I remember. Pls ASK [Company B] to provide evidence to the contrary.’. In other words, the Taxpayer disputed the payment of the Sum to him by his employer.

18. During the hearing of this Appeal, the Taxpayer was shown the payment advice provided by the Taxpayer’s employer for the month of October 2017, which breaks

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down a sum of \$4,978,008.33 paid to the Taxpayer for the pay period of October 2017 to include a sum of \$1,381,500 described as 'Variable Pay Component' and marked as 'back pay adjustment'. The Taxpayer was also shown a letter of his employer dated 9 October 2017 informing him that a compensation suspension had been lifted and his 2016 discretionary incentive award had been confirmed to him and would be paid to him in the October 2017 payroll. The Taxpayer was further shown copies of his bank account which included for the month of October 2017, a deposit of \$4,978,008.33 from Company B on 18 October 2017. The Taxpayer acknowledged the truth of the matters stated in each of these documents; he confirmed receipt of the Sum.

19. As a result, the Taxpayer's ground of appeal in this Appeal plainly has no merit, and this is sufficient to dismiss this Appeal.

20. This Board notes that the Taxpayer in fact submitted at the hearing of this Appeal that he had paid tax for the Sum (namely, the bonus for 2016 that his employer had withheld from him until October 2017) in provisional tax and the Assessor should not raise the Additional Salaries Tax Assessment for the year of assessment 2016/17. The Taxpayer produced in support the Assessment Demanding Final Tax for 2014/15 and Notice for Payment of Provisional Tax for 2015/16 dated 6 October 2015 and a Confirmation of Payment of the total tax payable under the said Assessment Demanding Final Tax for 2014/15 and Notice for Payment of Provisional Tax for 2015/16.

21. Although the Taxpayer had not sought the consent of this Board for this submission to be treated as a ground of appeal, this Board shall comment on the merits of this submission for the sake of completeness.

22. This Board rejects this submission without any hesitation. The assessment of provisional tax for the next year of assessment is simply what it states, a provisional assessment raised on the basis of an estimation or assumption of income of the next year. When the actual income of the next year is reported, the provisional tax paid is deducted against the final tax payable for that year, which is assessed based on the reported actual income. In the Taxpayer's case, on the basis of the Tax Return for the year of assessment 2016/17 and the Employer's Return filed with the Revenue in May 2017, the Taxpayer's Salaries Tax finally payable for the year of assessment 2016/17 was assessed on the stated income of \$4,675,000 and this final tax payable for the year of assessment 2016/17 was deducted against the net provisional tax charged for 2016/17 (and paid in the previous year). It was only after the Taxpayer's Employer lifted the compensation suspension, paid the Taxpayer the Sum, and filed with the Revenue the replacement Employer's Return stating the particulars of income *accruing* for the year from 1 April 2016 to 31 March 2017 included the additional item of the Sum that the Assessor of the Revenue raised the Additional Salaries Tax Assessment for the year of assessment 2016/17, which in fact was raised only in respect of the Sum; the additional amount of tax payable of \$207,225 represents the taxation of the Sum at standard rate ($\$1,381,500 \times 15\% = \$207,225$). The Taxpayer's claim that he had paid tax for the Sum in the provisional tax of the previous year of assessment, be it of 2015/16 or 2016/2017, has no substance whatsoever.

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23. Lastly, in relation to the Taxpayer's claim in his objection to the Additional Salaries Tax Assessment for the year of assessment 2016/17 that the Sum was included in the 2017/18 income of \$19,065,101, the Revenue has produced two tables from the payment advices and the bank records that show that the Sum was not part of the total income of \$19,065,101 that the Taxpayer's Employer stated to the Revenue in the particulars of income accruing for the year from 1 April 2017 to 31 March 2018 in the Employer's Return filed in May 2018. This Board has reviewed these tables and agrees with the Revenue's submission on the basis of these two tables, which is that the Sum was not part of the Taxpayer's income accruing for the year from 1 April 2017 to 31 March 2018 in the total amount of \$19,065,101.

Decision

24. This Board determines that the Taxpayer has failed to discharge the burden of proof he has under section 68(4) of the IRO to show that the Additional Salaries Tax Assessment for the year of assessment 2016/17 was excessive or incorrect. The Taxpayer's appeal is dismissed. The Additional Salaries Tax Assessment for the year of assessment 2016/17 that the Deputy Commissioner of Inland Revenue, by his Determination dated 3 April 2020, confirmed, is affirmed.

25. 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 IRO to order that the Taxpayer shall pay as costs of the Board the sum of \$10,000, which shall be added to the tax charged and recovered therewith.