Case No. D15/15

Salaries tax – deduction of expenses – dependent parent allowance – sections 8, 9, 12, 12A, 16E, 19C, 33, 41, 42, 61, 70A and 79 of the Inland Revenue Ordinance ('IRO')

Panel: Chow Wai Shun (chairman), Leung Wai Keung Richard and Ben K F Wong.

Date of hearing: 5 August 2015.
Date of decision: 13 October 2015.

The Appellant was employed by, among others, Company A. In his tax return, he declared his income received from Company A, and claimed, among others, deduction for professional fee for patent application in the amount of $41,269 ('the Sum'), and dependent parent allowance ('DPA').

The Appellant contended that the amount of income he declared was correct, notwithstanding that it was different from the notifications filed by Company A. He claimed that the commission/advance bonus he received might have to be returned to Company A should the relevant profit and loss account show a loss. On the other hand, he claimed that he had taken legal action against Company A for the relevant profit and loss account and for that purpose he submitted at the hearing further evidence purportedly to show that there existed sales by Company A.

Held:

1. Apart from mere assertion, the Appellant provided no documentary proof of the legal action claimed. It is no more than, to the greatest extent, a contingent amount. Should he be entitled to receive more from Company A, he would be re-assessed for more tax payment.

2. On the contrary, the Assessor relied on the amount of income reported by Company A which subsequently provided a breakdown with all payments made through bank autopay except the payment of annual leave balance upon termination of the employment. Company A also confirmed that it had decided to pay the amount already paid as advance bonus as bonus to the Appellant upon the termination of the employment. By then it was no longer an advance payment subject to any contingency. Indeed, it was included as part of the final settlement agreed between the Appellant and Company A. The Appellant never stated that he had repaid anything back to Company A.

3. On such bases, the amount of income as reported by Company A represents the correct amount of income the Appellant derived from Company A and therefore assessable under sections 8(1) and 9(1) of the IRO.

4. As to the Sum, all the documents provided by the Appellant fail to show how the Sum connected with the Appellant's duties as Position C with Company A during his employment.

5. The evidence does not show that the Sum was 'wholly, exclusively and necessarily incurred in the production of' the Appellant's income derived from Company A during his employment with it. Indeed, the Appellant could perform his employment duties and earn his income without incurring the Sum. It could not be incurred in the course of performance of the Appellant's duties during his employment with Company A. As a result, the Sum cannot be deducted from the Appellant's assessable income under section 12(1)(a) of the IRO.

6. Regarding the DPA, according to section 33(1) of the IRO, DPA should not be given to more than one person in any year of assessment in respect of the same parent. The circumstances being that the Appellant and his brother were both eligible to claim DPA in respect of their mother has given rise to the application of section 33(2) of the IRO. The Commissioner thereby was entitled not to consider any claim until he would be satisfied that the Appellant and his brother had agreed which of them would be entitled to such claim.

7. Despite the Appellant's assertion that he and his brother had reached such an agreement, it was unilateral since he did not file any written agreement between them or confirmation from his brother showing that the latter withdrew his claim; and hence insufficient for the purpose. The outcome would have been different should his brother have joined in, agreeing or confirming what the Appellant had already put forward, which would have refrained the Commissioner from exercising such power. As the facts currently stand, the Board agrees with the Commissioner's exercise of his power under section 33(2) of the IRO in not considering the Appellant's DPA claim.

Appeal dismissed.

Cases referred to:

CIR v Yau Lai Man, Agnes trading as L M Yau & Co, (2005-06) IRBRD, vol 20, 409

CIR v Humphrey 1 HKTC 451

CIR v Tong Sui Lan [2008] 5 HKLRD 781
Brown v Bullock 40 TC 1
Ricketts v Colquhoun 10 TC 118
Humbles v Brooks 40 TC 500
Lomax v Newton 34 TC 558
D50/07, (2007-08) IRBRD, vol 22, 1163
D82/06, (2007-08) IRBRD, vol 22, 71
D2/13, (2013-14) IRBRD, vol 28, 159

Appellant in person.
Chow Cheong Po, Ng Ching Man and Cheung Ka Yung for the Commissioner of Inland Revenue.

Decision:

1. The two appeals involve the same taxpayer. The Appellant lodged appeals against two determinations of the Deputy Commissioner of Inland Revenue both dated 23 March 2015 ('the Determinations') dismissing the Appellant's objections against the Salaries Tax Assessments raised on him for the years of assessment 2008/09 to 2010/11 and 2011/12 to 2012/13 respectively.

2. This Board started off by confirming with the Appellant his grounds of appeal. As confirmed by the Appellant, those grounds have been listed under paragraphs 3 and 4 of his Notice and Statement of Grounds of Appeal. In summary, the Appellant sought to rely on the following statutory provisions: under the Inland Revenue Ordinance (IRO) sections 12A (*sic*), 16E, 19C, 30 (and so also section 33), 61, 70A and 79; as well as under the Magistrates Courts Ordinance sections 7 and 11, most of which we find irrelevant or erroneous as explained below.

3. In the other parts of his Notice and Statement of Grounds of Appeal, the Appellant attempted to set out the background of those assessments with various documents attached. He submitted additional documentary evidence at the hearing, saying that he had just received the document bundles from the Respondent a few days before so that he could not provide supplementary documents prior to the hearing. The Appellant also sworn to give oral evidence and made himself subject to cross-examination by the Respondent.

Facts

4. Apart from stating the background of the appeals, much has also been said in the Appellant's Notice and Statement of the Grounds of Appeal about the assessment position concerning his sole proprietorship business. Except to the extent and as a matter of fact as will be mentioned below, we agree with the Respondent that it has no bearing to the present appeals against Salaries Tax Assessments of the Appellant.

5. The Appellant swore to give oral evidence and was subject to cross-examination by the Respondent. He mainly repeated what he had written on his Notice and Statement of the Grounds of Appeal. We do not find much help has been rendered by his evidence.

6. On the submissions from both sides, the documents before us and taking into account the Appellant's oral evidence given at the hearing, we find the following facts relevant to this case:

Year of Assessment 2008/09

(a) In his Tax Return – Individuals for the year of assessment 2008/09, the Appellant –

i. declared the following income chargeable to Salaries Tax:

Name of employer	Period	Amount ($)
Company A	1 April to 31 July 2008	196,000
Company B	November 2008 to January 2009	80,000
		276,000

ii. claimed deduction of the following expenses:

	Nature	Amount ($)
(1)	Transportation and telephone expenses	30,000
(2)	Self-education expenses	15,960
(3)	Mandatory contributions to recognized retirement schemes	4,000

iii. claimed dependent parent allowance (DPA) in respect of his father and declared that his father resided with him continuously during the year (for full year) without paying full cost; and

iv. claimed deduction for elderly residential care expenses (ERCE) in respect of his father, being 'cemeteries and funeral expenses' in the amount of $25,475.

(b) Company A and Company B filed notifications in respect of the Appellant for the year of assessment 2008/09 reporting, among others, the Appellant's income from employment as follows:

Employer	Capacity	Period of employment	Nature of income	Amount ($)
Company A	Position C	01-04-2008 to 31-08-2008*	Salary	226,000
			Commission	50,000
				276,000
Company B	Position D	24-11-2008 to 18-02-2009**	Salary	97,241
				373,241

* Date of cessation of employment
** Date of cessation of employment was 19.02.2009

(c) The Assessor raised on the Appellant the following Salaries Tax Assessment for the year of assessment 2008/09 based on the income amounts reported by Company A and Company B, without deduction of outgoings and expenses:

	$	$
Total income [paragraph 6(b)]		373,241
Less: Deductions –		
Self-education expenses [paragraph 6(a)ii(2)]	15,960	
ERCE [paragraph 6(a)iv]	25,475	
Retirement scheme contributions [paragraph 6(a)ii(3)]	4,000	45,435
Net Income		327,806
Less: Basic allowance		108,000
Net Chargeable Income		219,806
Tax Payable thereon (after tax reduction)		17,367

It was stated in the notice of assessment that any deductions allowed were subject to review.

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(d) The Appellant objected to the above assessment and claimed for a lower net chargeable income on the following bases:

i. his reported income was correct [paragraph 6(a)i];

ii. he was entitled to deduction for professional fee for patent application in the amount of $41,269 (US$5,291 @ 7.8; 'the Sum'); and

iii. his claim for deduction of transportation expenses was $15,000 [compare paragraph 6(a)ii(1)] while his retirement scheme contribution should be $7,000 [compare paragraph 6(a)ii(3)]

(e) In relation to the Sum, the Appellant provided copies of invoices issued by Company E of Country F to him with the following particulars:

Date	Paid for	Total Amount (US$)
20-11-2008	Attorney fees and expenses regarding Country F Patent application for 'Product G' and 'Product H'	2,571
16-04-2009	Attorney fees and expenses regarding Country F Patent application for 'Product G'	1,060
10-09-2009	Attorney fees and expenses regarding Country F Patent application for 'Product H'	1,660
		5,291

(f) The Assessor considered that both the Sum and transportation expenses claimed by the Appellant [paragraph 6(d)] could not be allowed for deduction under section 12(1)(a) of the IRO. However, she considered that the Appellant should be allowed a DPA in respect of his father instead of deduction of ERCE as claimed. Thus, the Assessor proposed to revise the Salaries Tax Assessment for the year of assessment 2008/09 as follows:

	$	$
Total income		373,241
Less: Deductions –		
Self-education expenses	15,960	
Retirement scheme contributions	7,000	22,960
Net Income		350,281
Less: Allowances		
Basic allowance	108,000	
DPA	30,000	138,000
Net Chargeable Income		212,281
Tax Payable thereon (after tax reduction)		16,087

(g) The Appellant did not accept the Assessor's proposal and claimed:

i. Income – The salary paid by Company A for the period from April to August 2008 should be $40,000 plus 5% commission, which was computed by reference to the profit and loss accounts of Company A. Yet, the Appellant did not have any payment receipts showing breakdown of his income from Company A.

ii. The Sum – It was incurred by the Appellant as Position C of Company A.

iii. Self-education expenses – All payments were made to University J by electronic means. The Appellant did not have any payment receipts.

iv. DPA and funeral expense in respect of Appellant's father – The Appellant never said that he lived together with his father. His father had stayed in the hospital for almost a year before he died in December 2008. Funeral expenses of $25,475 was incurred. So the Appellant should be granted both DPA and deduction of the funeral expense.

(h) In support of his claims, the Appellant provided copies of the following documents:

i. Sample profit and loss accounts of Company A for the years ended 31 December 2003 and 2004 and schedules.

ii. A letter dated 15 September 2009 from the Appellant to a customer in relation to the alleged unauthorized use of a patented product with patent no. XXXXXXXXX.

iii. The first page of a letter dated 2 October 2009 from Company K of Country F to the Appellant confirming the engagement of the Appellant in connection with the infringement damages sustained regarding the Country F Patent XXXXXXX.

(i) In response to the Assessor's enquiries, Company A provided the following information:

i. A breakdown of the remuneration paid to the Appellant –

Month in 2008	Payment date	Salary ($)	Advance bonus ($)	Untaken annual leave ($)	MPF contribution ($)	Net payment ($)
April	28-04-2008	40,000	10,000	-	(1,000)	49,000
May	29-05-2008	40,000	10,000	-	(1,000)	49,000
June	27-06-2008	40,000	10,000	-	(1,000)	49,000
July	29-07-2008	40,000	10,000	-	(1,000)	49,000
August	29-08-2008	40,000	10,000	-	(1,000)	49,000
	06-09-2008			26,000	-	26,000
Total		200,000	50,000	26,000		

Month in 2008	Payment date	Salary ($)	Advance bonus ($)	Untaken annual leave ($)	MPF contribution ($)	Net payment ($)
		276,000 [paragraph 6(b)]				

ii. The bonus was paid at the discretion of the management. Company A would pay $10,000 advance bonus to the Appellant every month and then offset the total amount advanced against the year-end bonus to be decided at the end of the year, i.e. in December. Since the Appellant resigned on 31 August 2008, Company A decided that the total sum of $50,000 advanced was the bonus of the Appellant.

iii. The Appellant's remuneration was paid by autopay into his bank account at Bank L, except that the last payment of $26,000 was paid by cheque.

iv. The Appellant was responsible for the sales and marketing of the product line – coffee maker and fan heater, which were newly launched in April 2003.

v. In 2004, another new product, toaster oven of model no. XXXXXXX, was launched by the Appellant to customers introduced by him.

vi. The Appellant had to deal with customers, negotiate selling prices and quantity of sale orders and follow up the confirmed sale orders.

vii. No new product was launched by the Appellant during the period from 1 April to 31 August 2008.

viii. Expenses incurred in the invention of the products were paid by Company A directly to the external suppliers. There was no reimbursement of such kind of expenses to the Appellant by Company A.

ix. Company A would not use the new products invented by the Appellant personally. Company A had not paid for the products used. After new products were launched, Company A sold the products to customers introduced by the Appellant.

x. The Appellant was required to incur travelling expenses and telephone expenses in discharge of his duties. Company A would reimburse taxi fares and train fares incurred in travelling to the

Mainland factory, IDD calling charges related to work and ticket fee and accommodation for business trips to the Appellant on actual basis. The total amount of expenses reimbursed by Company A to the Appellant during the period from 1 April to 31 August 2008 was $2,059.80.

(j) In response to the Assessor's enquiries, Company B provided the following information and documents:

i. Details of the remuneration paid to the Appellant were as follows –

Period	Salary ($)	Deduction due to absence ($)	Net income ($)
24-11-2008 – 30-11-2008	8,166	-	
01-12-2008 – 31-12-2008	35,000	(1,166)	42,000
01-01-2009 – 31-01-2009	35,000	-	35,000
01-02-2009 – 18-02-2009	22,500	(2,259)	20,241
			97,241

[paragraph 6(b)]

ii. The Appellant's remuneration was paid by autopay.

Years of Assessment 2009/10 and 2010/11

(k) In the Tax Returns – Individuals filed for these two years of assessment, the Appellant –

i. declared that the total employment income he derived from Company M for the years of assessment 2009/10 and 2010/11 were $489,000 and $540,000 respectively;

ii. claimed deduction of the following expenses:

	Nature	2009/10 ($)	2010/11 ($)
(1)	Outgoings and expenses, including telephone	20,000	-
(2)	Self-education expenses	17,000	-
(3)	Mandatory contributions to recognized retirement schemes	12,000	12,000

iii. claimed DPA in respect of his mother for both years of assessment;

iv. declared that the adjusted loss sustained in his sole proprietorship business, Company N, was $240,000 for the year of assessment 2010/11; and

v. did not elect for Personal Assessment for the year of assessment 2010/11.

(l) The Appellant's brother also claimed DPA in respect of his mother, and was so granted, for both years of assessment.

(m) Company M filed Employer's Returns of Remuneration and Pensions for the two years of assessment in respect of the Appellant reporting that the total income accruing for the years were $504,971 and $575,000 respectively.

(n) The Assessor raised on the Appellant the following Salaries Tax Assessments for the two years of assessment based on the income amounts reported by Company M, without deduction of outgoings and expenses and granting of DPA:

	2009/10 $	2010/11 $
Total income [paragraph 6(m)]	504,971	575,000
Less: Deductions –		
Self-education expenses [paragraph 6(k)ii(2)]	17,000	-
Retirement scheme contributions [paragraph 6(k)ii(3)]	12,000	12,000
Net Income	475,971	563,000
Less: Allowances		
Basic allowance	108,000	108,000
Net Chargeable Income	367,971	455,000
Tax Payable thereon (after tax reduction)	44,555	59,350

The Assessor also issued to the Appellant a Profits Tax statement of loss for the year of assessment 2010/11 in respect of Company N showing that the loss for the year was $240,000.

(o) The Appellant objected to the assessments, arguing that he should be granted DPA in respect of his mother for the two years of assessment and the loss of Company N should be taken into account in computing his Salaries Tax liability for the year of assessment 2010/11.

(p) On diver dates, the Assessor wrote to the Appellant and attempted to explain to him:

i. that DPA should not be given to more than one person in any year of assessment in respect of the same parent and so the Appellant had to agree with his brother as to who should claim the DPA in

respect of his mother and submit a written agreement;

ii. that the loss of Company N was not a deductible expense under Salaries Tax except that the Appellant and his spouse elected for Personal Assessment for that relevant year of assessment.

(q) As no written agreement was evidently concluded between the Appellant and his brother, additional Salaries Tax Assessment were raised on his brother due to withdrawal of the DPA previously granted.

(r) The Appellant did not file any application to elect for Personal Assessment for the year of assessment 2010/11.

For all three Years of Assessment 2008/09, 2009/10 and 2010/11

(s) In response to the Assessor's enquiries, University J provided details of the tuition fees paid by the Appellant as follows:

Year of Assessment	Payment date	Course title	Tuition fee ($)
2008/09	16-09-2008	Management Policy and Strategy	4,700
	16-09-2008	International Marketing and Strategy	10,150
	03-03-2009	Consumer Behaviour	4,900
			19,750
2009/10	30-08-2009	Marketing Communications	4,900
	21-02-2010	Introduction to the Internet	8,100
			13,000
2010/11	30-08-2010	Microcomputing for Learning	4,250

(t) In light of the information above, the Assessor considered that the Salaries Tax Assessments for the three years of assessment should be revised:

	2008/09 $	2009/10 $	2010/11 $
Total income	373,241	504,971	575,000
Less: Deductions –			
Self-education expenses [paragraph 6(s)]	19,750	13,000	4,250
Retirement scheme contributions	7,000	12,000	12,000
Net Income	26,750	479,971	558,750
Less: Allowances			
Basic allowance	108,000	108,000	108,000
DPA – the Appellant's father	30,000	-	-
	138,000	108,000	108,000

	2008/09 $	2009/10 $	2010/11 $
Net Chargeable Income	208,491	371,971	450,750
Tax Payable thereon (after tax reduction)	15,443	45,235	58,627

Years of Assessment 2011/12 and 2012/13

(u) At the relevant time, the Appellant was the sole proprietor of Company N.

(v) In his Tax Returns – Individuals for the two years of assessment, the Appellant declared, among others:

i. Income chargeable to Salaries Tax –

Year of Assessment	Name of employer	Period	Total amount ($)
2011/12	Company M	01-04-2011 – 31-03-2012	575,000
2012/13	Company M	01-04-2012 – 31-03-2013	769,500

ii. Losses of $180,000 and $320,000 sustained in Company N for the two years of assessment respectively.

iii. He did not wish to elect for Personal Assessment.

(w) Company M filed Employers' Returns for Remuneration and Pensions for the two years of assessment in respect of the Appellant reporting total income of $660,500 and $769,500 respectively.

(x) In response to the request of the Assessor, the Appellant filed statements of account 2011 and 2012 of Company N together with supporting schedules, which showed losses of $182,129 and $468,076 respectively.

(y) The Assessor raised on the Appellant the following Salaries Tax Assessments for the two years of assessment based on the Employer's Returns filed by Company M:

	2011/12 $	2012/13 $
Income [paragraph 6(w)]	660,500	769,500
Less: Retirement scheme contributions	12,000	14,500
Net Income	648,500	755,000
Less: Basic allowance	108,000	120,000
Net Chargeable Income	540,500	635,000

	2011/12 $	2012/13 $
Tax Payable thereon (after tax reduction)	67,885	85,950

(z) The Assessor also issued to the Appellant the Taxpayer Profits Tax statements of loss for the two years of assessment showing that the following losses were computed in respect of Company N:

	2011/12	2012/13
Loss	$182,129	$446,916

(aa) The Appellant objected to the Salaries Tax Assessments [paragraph 6(y)] on the grounds that the business losses of Company N should be taken into account in computing his Salaries Tax liabilities.

(bb) The Assessor invited the Appellant to elect for Personal Assessment so that the losses of Company N could be set off against his assessable income. In response, the Appellant and his spouse elected to be personally assessed for the two years of assessment.

(cc) The Appellant filed a revised statement of account 2012 together with supporting schedules and documents showing a revised loss of $881,076.

(dd) The Assessor disagreed, recomputed the losses of Company N and issued to the Appellant statements of loss for the two years of assessment:

	2011/12	2012/13
Loss	$173,969	$150,116

(ee) The Assessor raised on the Appellant and his spouse Personal Assessments for the two years of assessment, in which the losses of Company N [paragraph 6(dd)] were deducted from the income from employment. The total tax liabilities of the Appellant and his spouse were reduced.

(ff) The Appellant and his spouse did not accept the Personal Assessments and stated that they did not agree their income to be jointly assessed in a single assessment. The Appellant claimed that losses of $180,000 [paragraph 6(v)ii] and $881,076 [paragraph 6(cc)] should be deducted from his assessable income for the two years of assessment respectively.

(gg) The Assessor withdrew the Personal Assessments for the two years of

assessment accordingly and issued notices demanding the amounts of Salaries Tax previously reduced due to Personal Assessments.

(hh) On diver dates, the Assessor wrote to the Appellant and attempted to explain to him the relevance of electing Personal Assessment in setting off the business losses of Company N against his employment income, the requirement to make a single assessment under Personal Assessment and the effect of the Appellant's withdrawal of his elections for Personal Assessments on the dispute over the amount of losses of Company N. Despite these attempts, the Appellant did not elect for Personal Assessments for those years of assessment but reiterated that the losses of Company N should be used to set off against his assessable income.

The issues

7. We agree with the Respondent's submission that the issues for us to decide are whether:

(a) for the year of assessment 2008/09 –

i. the amount of income derived from Company A assessed to Salaries tax is correct; and

ii. the Sum is deductible expense;

(b) for the years of assessment 2009/10 and 2010/11, DPA in respect of the Appllent's mother should be given to the Appellant; and

(c) for the years of assessment 2010/11, 2011/12 and 2012/13, losses sustained in the Appellant's business can be set off against his assessable income.

The statutory provisions

8. Among the statutory provisions cited by the Appellant in his Notice and Statement of the Grounds of Appeal, we find the following provisions of the IRO not relevant to this appeal.

(a) Section 12A should have been section 12(1)(a) which provides for deduction of certain expenses from the assessable income.

(b) Section 16E is a special deduction provision for the purposes of Profits Tax, not Salaries Tax.

(c) Section 61 has never been invoked in any of those Salaries Tax

assessments in dispute.

(d) The statutory appeal mechanism has yet to be exhausted. The assessments are not final and conclusive under section 70 and so section 70A has no role to play.

(e) Section 79, and those provisions of the Magistrates Ordinance, do not relate to any of the issues of this appeal.

9. We find the following provisions of the IRO relevant to the issues as identified of this appeal.

(a) Section 8 provides:

‘ *(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…’

(b) Section 9 provides:

‘ *(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…’

(c) Section 12 provides:

‘ *(1) In ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person –*

(a) all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income…’

(d) Section 19C provides:

‘ *(1) … where in any year of assessment –*

(a) an individual sustains a loss in any trade, profession or business carried on by him; and

(b) … in the case of a husband and wife, not being a wife living apart from her husband, the husband or wife does not elect for personal assessment under section 41 for that year of assessment,

the amount of that loss shall be carried forward and set off against the amount of his assessable profits from that trade, profession or business for subsequent years of assessment.

…

(3) … where in any year of assessment an individual has sustained a loss… and –

…

(b) in the case of a husband and wife, not being a wife living apart from her husband, the husband or wife is personally assessed under Part 7,

the amount of the loss… shall be dealt with in accordance with that Part.'

(e) Section 33 provides:

' *(1) … a dependent parent allowance… shall not be given to more than one person in any year of assessment in respect of the same parent…*

(2) … where the Commissioner has reason to believe that 2 or more persons are eligible to claim such an allowance in respect of the same parent… for the same year of assessment, the Commissioner shall not consider any claim until he is satisfied that the claimants have agreed which of them shall be entitled to claim in that year.'

(f) Section 41 provides:

' *(1) Subject to subsection (1A), an individual –*

(a) of or above the age of 18 years, or under that age if both his or her parents are dead; and

(b) who is or, if he or she is married, whose spouse is either a permanent or temporary resident,

may elect for personal assessment on his or her total income in accordance with this Part.

(1A) Where –

(a) an individual is married and not living apart from his or her spouse; and

(b) both that individual and his or her spouse –

(i) have income assessable under this Ordinance; and

(ii) are eligible to make an election under subsection (1),

then that individual may not make such an election unless his or her spouse does so too.'

(g) Section 42 provides:

' *(2) There shall be deducted from the total income of an individual for any year of assessment –*

……

(b) the amount of the individual's loss… for that year of assessment computed in accordance with Part 4.'

(h) Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant.

The Appellant's submission

10. Apart from referring us to his Notice and Statement of the Grounds of Appeal, the Appellant also submitted a copy of the judgment of the Court of First Instance in CIR v Yau Lai Man, Agnes trading as L M Yau & Co, (2005-06) IRBRD, vol 20, 409, arguing that the facts are similar to his.

11. We do not agree with the Appellant. The case cited is about profits tax assessment on a business. The assessment was made largely on the basis of section 61 of the IRO. While the Board set aside the Commissioner's Determination, the Court allowed the appeal of the Commissioner.

The Respondent's submission

12. The Respondent submitted, in relation to the issues identified, that:

(a) the amount of income derived from Company A assessed to Salaries Tax for the year of assessment 2008/09 is correct;

(b) the Sum is not deductible expense;

(c) for the years of assessment 2009/10 and 2010/11, the Appellant's DPA claim should fail; and

(d) for the years of assessment 2010/11, 2011/12 and 2012/13, losses sustained in the Appellant's business cannot be set off against his assessable income.

13. In support of 12(b) above, the Respondent relied on the following authorities:

(a) CIR v Humphrey 1 HKTC 451;

(b) CIR v Tong Sui Lan [2008] 5 HKLRD 781;

(c) Brown v Bullock 40 TC 1;

(d) Ricketts v Colquhoun 10 TC 118;

(e) Humbles v Brooks 40 TC 500; and

(f) Lomax v Newton 34 TC 558.

We were also referred to D50/07, (2007-08) IRBRD, vol 22, 1163, an earlier decision of this Board which is the Appellant's own case decided in 2008.

14. In support of 12(c) above, the Respondent relied on the following decisions of this Board:

(a) D82/06, (2007-08) IRBRD, vol 22, 71; and

(b) D2/13, (2013-14) IRBRD, vol 28 159.

Our analysis

The amount of income derived from Company A

15. The Appellant contended that the amount of income he declared was correct.

He also claimed that the commission / advance bonus (paragraphs 6(b) and 6(i)i) might have to be returned to Company A should the relevant profit and loss account show a loss. On the other hand, he claimed that he had taken legal action against Company A for the relevant profit and loss account and for that purpose he submitted at the hearing further evidence purportedly to show that there existed sales by Company A.

16. Apart from mere assertion, the Appellant provided no documentary proof of the legal action claimed. When asked by us, the Appellant said that the action took place in Country F and it was not a personal action of his. In our view, it is no more than, to the greatest extent, a contingent amount. Should he be entitled to receive more from Company A, he would be re-assessed for more tax payment.

17. On the contrary, the Assessor relied on the amount of income reported by Company A which subsequently provided a breakdown (paragraph 6(i)i), with all payments made through bank autopay except the payment of annual leave balance upon termination of the employment. Company A also confirmed that it had decided to pay the amount already paid as advance bonus as bonus to the Appellant upon the termination of the employment. We agree with the Respondent's submission that by then it was no longer an advance payment subject to any contingency. Indeed, it was included as part of the final settlement agreed between the Appellant and Company A. The Appellant never stated that he had repaid anything back to Company A.

18. On such bases, we find that the amount of income as reported by Company A represents the correct amount of income the Appellant derived from Company A for the year of assessment 2008/09 and therefore assessable under sections 8(1) and 9(1) of the IRO.

Deduction of the Sum

19. In support of this claim, the Appellant provided copies of three invoices issued by Country F law offices for attorney fees and expenses in connection with Country F patent application for a 'Product G' and a 'Product H'. Those invoices are dated 20 November 2008, 16 April 2009 and 10 September 2009 and included Country F Patent Office's 'fee for Petition to Revive' and 'Issue fees'. It is the Appellant's case that the Sum related to his duties as Position C with Company A. The Appellant also provided copies of accounts of Company A and letters showing his complaints against Company A which has infringed his Country F patent by selling his invented or patented products to its customers.

20. However, all those documents fail to show how the Sum connected with the Appellant's duties as Position C with Company A during his employment.

(a) The invoices are dated post his employment with Company A.

(b) The accounts shows the position in 2004.

(c) His letters are also dated post his employment with Company A.

21. On the evidence made available to us, we are not satisfied that the Sum were 'wholly, exclusively and necessarily incurred in the production of' the Appellant's income derived from Company A during his employment with it. Indeed, the Appellant could perform his employment duties and earn his income without incurring the Sum. It is also clear to us that the Sum could not be incurred in the course of performance of the Appellant's duties during his employment with Company A. As a result, the Sum cannot be deducted from the Appellant's assessable income under section 12(1)(a) of the IRO.

22. Even if such documents were dated within the period of the Appellant's employment with Company A, the Sum would remain not deductible. The deductibility of fees of a similar nature was made an issue in D50/07, the Appellant's previous case. The Appellant incurred professional fees in registering the patents for two products of his own invention when he was employed by the same employer to the same position but in different years of assessment. The claim for deduction was rejected by the Board hearing the appeal.

> ' *84. … The Appellant was not employed… as an engineer. His duties were in sales and marketing. It is true that he introduced customers to his employer and was paid commission on the sale of the products that he invented, but that would not make the expenses that he incurred in inventing, developing and patenting the products expenses deductible from his assessable income. These expenses were not incurred in the course of the performance of his duties as an employee…, and it can hardly be said that he could not perform his duties without incurring these expenses.*
>
> *85. The same applies to the professional fees incurred for the registration of the patents. The patent applications were made for the registration of the Appellant as the inventor and holder of the patents. The patent applications were not made for the benefit of [Company A], and had absolutely nothing to do with the Appellant's duties as the employee of [Company A]. In this connection, we would again refer to the judgment of Deputy High Court Judge Carlson in CIR v Franco Tong Sui Lun… The amount of commissioner payable to the Appellant may depend on, or be referable to, the sale of the products; but that does not mean that the expenses incurred for the invention and patent registration of the products, which are the personal inventions of the Appellant, were incurred by him in the course of the performance of his duties as the employee…*'

23. We respectfully agree, and see no reason why the same analysis does not apply to the Sum. Therefore, we deny deduction of the Sum.

DPA

24. The Assessor accepted the Appellant's eligibility to claim the DPA but the Appellant's brother also claimed the same allowance and was so granted. According to section 33(1) of the IRO, DPA should not be given to more than one person in any year of assessment in respect of the same parent. The circumstances being that the Appellant and his brother were both eligible to claim DPA in respect of their mother has given rise to the application of section 33(2) of the IRO. The Commissioner thereby was entitled not to consider any claim until he would be satisfied that the Appellant and his brother had agreed which of them would be entitled to such claim. The same happened in D82/06 and D2/13 in which the Commissioner exercised his power not to consider any DPA claim. Despite the Appellant's assertion that he and his brother had reached such an agreement, it was unilateral since he did not file any written agreement between them or confirmation from his brother showing that the latter withdrew his claim; and hence insufficient for the purpose. The outcome would have been different should his brother have joined in, agreeing or confirming what the Appellant had already put forward, which would have refrained the Commissioner from exercising such power. As the facts currently stand, we agree to the Commissioner's exercise of his power under section 33(2) of the IRO in not considering the Appellant's DPA claim.

Set off of business losses

25. The assessments under the current appeals are Salaries Tax Assessments. Except for personal assessment under Part 7 of the IRO, there is no provision for deduction or set-off of any business losses against one's employment income: see sections 19C(3) and 42(2) of the IRO. Any business loss, however, will be carried forward to set off against the amount of one's assessable profits from the same business for subsequent years of assessment as provided under section 19C(1) of the IRO.

26. The Appellant and his wife did, at one point, elect for Personal Assessment. But for their subsequent withdrawal, the reason for which we find irrelevant, the Appellant would have been entitled to Personal Assessment and allowed the set-off. As the fact currently stands, the Appellant is not entitled to Personal Assessment and so his business losses cannot be used to set off his employment income.

Conclusion

27. On the basis of the above, we dismiss these appeals and confirm the assessments for the relevant years of assessment as set out in paragraphs 6(t) and 6(y) above.