Case No. D21/17

Salaries tax – whether or not the tax liability was finalized – assessor's power to raise additional assessment – sections 60(1) and 88A(1) of the Inland Revenue Ordinance ('IRO') – ruling by the Inland Revenue Department ('IRD') on tax position – whether or not misrepresentation of the taxpayer's tax position could as a matter of law preclude further assessment by the Board

Panel: Albert T da Rosa, Jr. (chairman), Clark Douglas Stephen and Ha Suk Ling Shirley.

Dates of hearing: 28 April and 25 May 2017.
Date of decision: 22 December 2017.

On 29 May 2015, the assessor raised on the taxpayer the Additional Salaries Tax Assessment for the year of assessment 2011/2012 for the rental value of the place of residence provided to the taxpayer by company. The taxpayer objected on the grounds that in early 2014 after discussing with an officer of the IRD, his tax liability was finalized and he made the final tax payment. The taxpayer questioned the assessor's powers to issue further assessment per se after he has paid the tax under the initial assessment.

Held:

1. Section 60(1) of the IRO, an assessor may further make assessment any time within 6 years after the initial assessment.

2. The Board is satisfied that the taxpayer disclosed the rental income in the attachment to the tax return and as part of the tax return filed. Section 60(1) of the IRO empowers the assessor to raise additional assessment on any person who appears to have been assessed at less than the proper amount for a particular year of assessment. The only statutory restriction for raising the additional assessment is the time limit of 6 years after the expiration of the year of assessment (Indeed In Hossack v IRC [1974] STC 262 followed).

3. If any person wants a ruling by the IRO on his tax position, the procedure is laid down in section 88A(1) of the IRO. Under our system, if a binding agreement or ruling on a tax position is required, a specified procedure is prescribed. No application under section 88A was made or alleged to have been made at or before the meeting of early 2014. The Board finds that the 2014 meeting even as portrayed by the taxpayer was an informal affair and no binding agreement permissible under IRO concerning the taxpayer's tax position could have been made.

4. The onus lies on the taxpayer to prove what happened in the alleged 2014

meeting was at least a representation or advice by the respondent to the taxpayer that it has been so finalized rather than the meeting could potentially just amount to a representation or advice by the respondent to the taxpayer that the matter was prima facie finalized. The taxpayer does not discharge that onus. The Board find on the facts that the meeting of 2014 was such an informal affair that it was not meant to be relied on by the taxpayer. Even if there had ever been a misrepresentation of the taxpayer's tax position by the respondent and reliance by the taxpayer, such could not as a matter of law preclude further assessment by this Board which this Board is duty bound to do (Aspin v Estill (Inspector of Taxes) [1987] STC 723, D37/11, (2011-12), IRBRD, vol 26, 631, Nina TH Wang v Commissioner of Inland Revenue [1994] 2 HKLR 356 and Hossack v IRC [1974] STC 262 followed).

Appeal dismissed.

Indeed In Hossack v IRC [1974] STC 262
Aspin v Estill (Inspector of Taxes) [1987] STC 723
D37/11, (2011-12) IRBRD, vol 26, 631
Nina TH Wang v Commissioner of Inland Revenue [1994] 2 HKLR 356
Hossack v IRC [1974] STC 262

The Appellant in person.
Lee Chui Mei and To Yee Man, for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A ('the Taxpayer') objected to the Additional Salaries Tax Assessment raised on him for the year of assessment 2011/12 by the Inland Revenue Department.

2. By the determination ('the Determination') dated 19 October 2016, the Deputy Commissioner of Inland Revenue upheld the relevant additional salaries tax assessment for the year of assessment 2011/12 of HK$27,913.

Preliminary Issues Withdrawn

3. The Notice of Appeal taken out by the Taxpayer was dated 24 November 2016 and the clerk of the Board received the notice on the same day.

4. Initially the parties were in disagreement as to whether the Determination was transmitted to the Taxpayer on 20 October 2016 or 25 October 2016 under Section 66(1) of the Inland Revenue Ordinance (Chapter 112) ('the IRO') and preliminary issues

on whether the appeal was out of time and whether this Board should exercise our discretion to allow the Taxpayer's appeal out of time were engaged.

5. After hearing the evidence of the Taxpayer on oath on 25 May 2017, the Respondent informed this Board that he no longer wishes to dispute the point on late appeal.

Facts In The Determination

6. The facts upon which the Determination has been arrived at are as follows:

'(1) Mr A ("the Taxpayer") has objected to the Additional Salaries Tax Assessment for the year of assessment 2011/12 raised on him. The Taxpayer claims that he made the final tax payment upon retirement and should not be assessed the additional tax.

(2) (a) By a service agreement dated 1 January 2007, the Taxpayer was employed by Company B as Position C commencing on 1 January 2007.

(b) Under the rental refund scheme operated by Company B, the Taxpayer was eligible to claim refund of rents paid in respect of his residence subject to submission of tenancy agreement and monthly rental receipts for verification.

(c) The Taxpayer retired from the employment on 30 September 2013.

(3) Company B filed an employer's return for the year of assessment 2011/12 in respect of the Taxpayer ("the Employer's Return"), which contained the following particulars:

(a)	Period of employment	:	01-04-2011 – 31-03-2012
(b)	Income	:	$
	Salary		1,441,950
	Bonus		200,000
			1,641,950
(c)	Place of residence provided	:	
	Address		Flat D
	Period provided		01-04-2011 – 31-03-2012
	Rent paid to landlord by the Taxpayer		$705,000

Rent refunded to the Taxpayer $705,000

(4) The Taxpayer filed his Tax Return - Individuals for the year of assessment 2011/12 enclosing a copy of the Employer Return. In the tax return, the Taxpayer declared, among others, the following:

(a) His employment income for the year was $1,641,950 from Company B.

(b) Particulars of place of residence provided to him by Company B were as per the Employer's Return enclosed.

(5) (a) On 5 October 2012, the Assessor raised on the Taxpayer the following Salaries Tax Assessment for the year of assessment 2011/12:

	$
Income	1,641,950
Less: Total allowances	288,000
Net Chargeable Income	1,353,950
Tax Payable thereon (after tax reduction)	$206,171

(b) The Taxpayer did not object to the above assessment.

(6) Upon review of the case, the Assessor found that the rental value of the place of residence provided to the Taxpayer by Company B should be chargeable to Salaries Tax. On 29 May 2015, the Assessor raised on the Taxpayer the following additional Salaries Tax Assessment for the year of assessment 2011/12 ("the Additional Assessment"):

	$
Income	1,641,950
Add: Value of residence provided ($1,641,950 x 10%)	164,195
	1,806,145
Less: Total allowances	288,000
Net Chargeable Income	1,518,145
Less: Amount previously assessed [Fact (5)(a)]	1,353,950
Additional Net Chargeable Income	164,195
Additional Tax Payable thereon (after tax reduction)	27,913

(7) The Taxpayer objected to the Additional Assessment on the grounds that he visited the Inland Revenue Department ("the Department") in early 2014 upon retirement and after discussing with an officer,

his tax liability was finalized and he made the final tax payment. The Taxpayer requested for a detailed explanation on the grounds and legal provisions for raising the Additional Assessment.

(8) The Assessor wrote to the Taxpayer and explained to him that the Additional Assessment was issued to assess the rental value of the place of residence provided to him by Company B pursuant to sections 9(1)(b), 9(1A)(b) and 60(1) of the Inland Revenue Ordinance ("IRO"). The Assessor made apology for the issue of the Additional Assessment after his tax clearance. However, the Taxpayer declined to withdraw the objection.'

The Challenge

7. In his letter dated 24 November 2016 constituting his grounds of appeal to the Board, the Taxpayer states:

> ' I reject the so called Facts of Determination: …
>
> As stated under point 7 in the [Determination], I have visited the Inland Revenue Department to finalise any outstanding liability.
>
> That was agreed upon by then.
>
> That is up to now the basic reason for my objection, and I have repeatedly raised this question in letters and visits/interview, always asking for a plain explanation: …
>
> As if the Inland Revenue by itself confirmed that with my visit in early 2014 my tax file is closed, under what provision you [the Respondent] demand thereof later additional payments.
>
> That was and is my basic, besides other arguments whereas you are aware of, question which remains unanswered. …'

8. In essence the Taxpayer's point is that his tax position has been 'agreed upon' and 'with [his] visit in early 2014 [his] tax file [should have been] closed'.

9. When the Taxpayer gave evidence before this Board, he did not provide any particulars of 'other arguments' which he alleged the Respondent was aware of.

10. Apart from the letter dealt with in paragraph 41 herein, he did not produce any document in any attempt to substantiate his stance.

Further Power To Assess Within 6 Years

11. Under Hong Kong's simple tax system, the following features should be noted:

11.1. The Department is charged with the duty to levy different types of taxes under the IRO, namely

(a) Property Tax under Part 2 of the IRO in respect of income from property;

(b) Salaries Tax under Part 3 of the IRO in respect of income from employment; and

(c) Profits Tax under Part 4 of the IRO in respect of income from trade or business.

11.2. Under section 41 in Part 7 of the IRO one can elect for Personal Assessment to deal with one's total income from all three sources in a single assessment.

11.3. Under Section 59 in Part 10 of the IRO, an assessor makes 'assessment' of tax i.e. assessment of the tax referred to in paragraphs 11.1 and 11.2 herein and then issues notice of assessment under section 62 of the IRO.

11.4. Once a notice of assessment has been issued, section 71 of IRO provides

'*(1) Tax charged under the provisions of this Ordinance shall be paid in the manner directed in the notice of assessment on or before a date specified in such notice. ....*

(2) Tax shall be paid notwithstanding any notice of objection or appeal, unless the Commissioner orders that payment of tax or any part thereof be held over pending the result of such objection or appeal …'

12. Under section 60(1) of IRO, an assessor may further make assessment any time within 6 years after the initial assessment as the section provides

'*Where it appears to an assessor that for any year of assessment any person chargeable with* ***tax*** *has not been assessed or* ***has been assessed at less than the proper amount****, the* ***assessor may****, within the year of assessment or* ***within 6 years after the expiration thereof****,* ***assess*** *such person at the amount or additional amount at which according to his judgment such person ought to have been assessed, and the provisions of*

> [the IRO] *as to notice of assessment, appeal and other proceedings shall apply to such assessment or additional assessment and to the tax charged thereunder*.' [Emphasis added.]

13. Thus, to the extent that the Taxpayer is just questioning the assessor's powers to issue further assessment *per se* after he has paid the tax under the initial assessment, section 60(1) is the short answer.

Agreed Finalisation?

14. The gist of the Taxpayer's position is effectively that the Taxpayer filed a correct tax return; and then the assessor based on that tax return issued a final assessment; and then the Taxpayer paid that; and then the Taxpayer went to the Department in 2014 when the Taxpayer again tried to confirm the tax had been paid and that was confirmed to the Taxpayer; and then the Taxpayer received a refund. So, the Taxpayer says in such circumstances the Taxpayer should not have to be paying the extra tax.

Correct Tax Return

15. The Respondent submitted

15.1. that 'The [Taxpayer] enclosed a copy of the employer's return filed by his ex-employer, [Company B] in respect of him with the Tax Return. In Part 4.2 of the Tax Return, the Appellant declared "AS ENCLOSED" [R1/13] without entering the required details and rental value of the place of residence provided to him by [Company B] in accordance with the "Guide to Tax Return – Individual" [R1/91]. It followed that no rental value was assessed when raising the 2011/12 Salaries Tax Assessment on the [Taxpayer] on 5 October 2012 [R1/19]'; and

15.2. that 'It is not in dispute that the Appellant received full rental refund of $705,000 from [Company B] for the period from 1 April 2011 to 31 March 2012 [R1/51-89]. Subsequently, the Assessor found that the Appellant had not been assessed at the rental value of the place of residence provided to him by [Company B] for the year of assessment 2011/12, which is chargeable to Salaries Tax under sections 8(1)(a), 9(1)(b) and 9(2) of the IRO. The Assessor is duty-bound to review the assessment in order to determine the right amount of tax. On 29 May 2015, the Additional Assessment was raised on the Appellant to assess the rental value within the 6-year time limit stipulated under section 60(1) of the IRO [R1/22].'

16. What was 'AS ENCLOSED' in the tax return appeared at R1/18 as part of the 'Annual Remuneration for the Tax Year: 2011-04/2012-03' and actually disclosed a sum of '$705,000.00' as 'Rental Refund (deduct from Salary)'.

17. We are satisfied that the Taxpayer disclosed the rental income in the attachment to the tax return and as part of the tax return filed.

18. On such disclosure, as submitted by the Respondent's representative in paragraphs 2 (a) to (d) of her submission on 'Substantive Issue', the following summarised effects of the statutory provisions are relevant:

> 18.1. 'Section 8(1)(a) provides that Salaries Tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from any office or employment of profit.'
>
> 18.2. 'Section 9(1)(a) defines income from any employment to include any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance. Section 9(1)(b) further provides that income from employment includes the rental value of any place of residence provided rent-free by the employer.'
>
> 18.3. 'Section 9(1A)(a)(ii) provides that notwithstanding section 9(1)(a), where an employer refunds all or part of the rent paid by the employee, such refund shall be deemed not to be income. Section 9(1A)(b) further provides that a place of residence in respect of which an employer has refunded all the rent therefor shall be deemed for the purposes of section 9(1) to be provided rent free by the employer.'
>
> 18.4. 'Section 9(2) provides that the rental value of any place of residence provided by the employer shall be deemed to be 10% of the income as described in section 9(1)(a) derived from the employer for the period during which a place of residence is provided.'

Section 60 Assessment

19. Section 60(1) has been set out in paragraph 12 herein and empowers the Assessor to raise additional assessment on any person who appears to have been assessed at less than the proper amount for a particular year of assessment. The only statutory restriction for raising the additional assessment is the time limit of 6 years after the expiration of the year of assessment.

20. Indeed In Hossack v IRC [1974] STC 262 pages 265 c-d Pennycuick stated

> '*... where a return is made and the inspector or the surtax office subsequently discover that facts have been omitted from the return. There have been a number of judicial decisions on this point ... those cases show that even where the officer of the Inland Revenue concerned omits to note some circumstance which would give rise to a liability or an additional liability to tax, notwithstanding that he had all the material for*

> *so noticing, yet if on a subsequent date the Inland Revenue do so notice, they may go back and make an assessment covering the permitted period of six years.*'

21. Thus, subject to any impact which the meetings (if any) in 2014 and 2015 respectively described below between the Taxpayer and the officers of the IRD may have, there is power in the Respondent to issue the assessment for the year of assessment 2011/12 on 29 May 2015 which was within the 6 year period allowed under Section 60(1).

2014 Meeting

22. In his evidence concerning the 2014 meeting, the Taxpayer said:

> 'I went to the Inland Revenue in 2014 after my retirement with a clear mind to clean up my tax because I was retired and I don't know even at that time I don't know that I would still live in Hong Kong. .... So I went to that lady, explained my case and then I was sitting there waiting a little bit, and then she made a computation; and then gets final, gets final because it was my question: please finalize my obligation. So then, because from me it was finalized here as I understand this because this is my question and she also said finalized, thank you for coming here and take your time.'
>
> 'I mean, this **I can understand that the lady did not make a minutes of meeting** because it was on the other floor, 20th floor ..., I was invited to sit in a room and then to say your case, she was looking in the files, I was waiting for a moment and then here, thank you very much for your kind cooperation, finalized. So, that is why for me finalized.'

23. The Taxpayer could not remember with whom he met on that occasion nor did he take any contemporaneous notes. No details were given as to how he '*explained his case*' nor which shade of finalisation was explained and articulated on that occasion.

24. As disclosed by the Respondent, a search in the Taxpayer's tax file and the IRD's records has failed to locate any notes of interview between the Taxpayer and any IRD's officer in 2014 and thus, there is no information about the exact date of the interview, the name and rank of the interviewing officer, and the relevant matters discussed between the officer and the Taxpayer.

25. We accept the Taxpayer's evidence that a meeting did take place sometime in 2014 between the Taxpayer and an IRD officer.

26. What transpired in the meeting in 2014 could potentially amount to

> 26.1. an agreement, by the officer representing the Respondent, with the Taxpayer that everything has been settled; or

26.2. at least, a representation or advice by the Respondent to the Taxpayer that it has been so finalised;

and therefore, the Taxpayer contends, further assessment is precluded.

27. The 2014 meeting could also potentially just amount to a representation or advice by the Respondent to the Taxpayer that the matter was *prima facie* finalised.

Agreement?

28. If any person wants a ruling by the Inland Revenue Department on his tax position, the procedure is laid down in section 88A(1) of the IRO, subsection (1) of which provides:

> '*(1) The Commissioner may, on an application made by a person in accordance with Part 1 of Schedule 10, make a ruling on any of the matters specified in that Part in accordance with that Part.*'

29. Two paragraphs in Part 1 of Schedule 10 are germane:

29.1. Paragraph 1: '*On an application made by a person in accordance with this Part, the Commissioner may make a ruling on how any provision of this Ordinance, other than that relating to ..., applies to the applicant or to the arrangement described in the application, whether or not reference is made to that provision in the application.*'

29.2. Paragraph 8 lays down details which must be specified in such application, including the requirement to a draft ruling to accompany the application for ruling.

30. Under our system, if a binding agreement or ruling on a tax position is required, a specified procedure is prescribed.

31. No application under section 88A was made or alleged to have been made at or before the meeting of early 2014.

32. We find that the 2014 meeting even as portrayed by the Taxpayer was an informal affair and no binding agreement permissible under IRO concerning the Taxpayer's tax position could have been made.

Wrong Advice?

33. The Respondent submitted that even assuming that what transpired in the 2014 meeting amounted to wrong advice by the officer concerned to the effect that the Taxpayer's position has been finalised, it could not in law prevent a further assessment.

34. The Respondent points to Aspin v Estill (Inspector of Taxes) [1987] STC 723 and made the following submissions as to what the Court of Appeal held:

34.1. The function of General Commissioners (an independent tax appeal hearing tribunal similar to the Board of Review in Hong Kong) was to look at the facts and decide whether the assessment had been properly prepared in accordance with the law. The following passage in the judgement of Sir John Donaldson MR with whom the other Lord Justices agreed was cited:

'*The functions of General Commissioners is to look at the facts and statutes and see whether the assessment has been properly prepared in accordance with those statutes. As I have already indicated, in my view it was. The taxpayer was properly assessed, leaving aside this question of alleged erroneous advice. So I ask myself, "what difference would it make if the General Commissioners found that he had been advised exactly as the taxpayer alleges?" '*

34.2. The General Commissioners were right to confine themselves solely to the question of whether this income was in principle taxable. The following passage in the judgement of Sir John Donaldson MR with whom the other Lord Justices agreed was cited:

'*As far as this appeal is concerned, in my judgment the General Commissioners were right to confine themselves to the sole question of whether this income was in principle taxable, the learned judge was right to dismiss the appeal from the General Commissioners, and I would dismiss the appeal from the learned judge.*'

34.3. Even if the General Commissioners were to find these facts as alleged by the taxpayer, they could not found their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. Whether there was an abuse of power in raising the assessment was a matter for which the only remedy available was by way of judicial review. The following passages in the judgement of Sir John Donaldson MR with whom the other Lord Justices agreed were cited:

'*In other words, the question of the lawfulness of the inspector making the assessment, whether in judicial review terms it was an abuse of power was one thing, and a matter only to be considered by the High Court. Whether, if he was right to make such an assessment, that was correct in terms of the statute was another and a matter for the Special Commissioners.*

That is made even clearer by a passage from the speech of Lord Scarman where he said ([1985] STC 282 at 299, [1985] AC 835 at

852):

> *"But cases for judicial review can arise even where appeal procedures are provided by Parliament. The present case illustrates the circumstances in which it would be appropriate to subject a decision of the commissioners to judicial review. I accept that the court cannot* ***in the absence of special circumstances*** *decide by way of judicial review to be unfair that which the commissioners by taking action against the taxpayer have determined to be fair. But circumstances can arise when it would be unjust, because it would be unfair to the taxpayer, even to initiate action under Part XVII of the 1970 Act. For instance, as my noble and learned friend points out, judicial review should in principle be available where the conduct of the commissioners in initiating such action would have been equivalent, had they not been a public authority, to a breach of contract or a breach of a representation giving rise to an estoppel. Such a decision could be an abuse of power: whether it was or not and whether in the circumstances the court would in its discretion intervene would, of course, be questions for the court to decide."* [Original emphasis.]

Note "for the court to decide", not "for the special or general commissioners to decide".

My conclusion therefore is that, even if the General Commissioners were to find these facts, they could not found their decision upon them. That being so, they were right to set the evidence relating to those facts on one side and make no finding. If the taxpayer has a remedy - I am bound to say that at this time it is perhaps unlikely that he has, and at all events I would not be encouraging him to take such proceedings - it must lie in the judicial review route, subject to his getting leave, and, of course, subject to any facts which might emerge on an investigation of the facts if leave were granted.'

35. The Respondent further referred to the cases of D37/11, (2011-12) IRBRD, vol 26, 631, Nina TH Wang v CIR [1994] 2 HKLR 356 and Hossack v IRC [1974] STC 262 in support of Aspin v Estill (Inspector of Taxes) [1987] STC 723 and submitted short of any capricious and dishonest conducts, the mere delays or flaws in administration are insufficient to affect the validity of the Additional Assessment.

36. The onus lies on the Taxpayer to prove that what happened in the alleged 2014 meeting was a situation depicted in paragraph 26.2 herein rather than one depicted in paragraph 27 herein. The Taxpayer did not discharge that onus.

37. In any event, we find on the facts that the meeting of 2014 was such an informal affair that it was not meant to be relied on by the Taxpayer.

38. Even if there had ever been a misrepresentation of the Taxpayer's tax position by the Respondent and reliance by the Taxpayer, such would not as a matter of law preclude further assessment by this Board which this Board is duty bound to do.

2015 Meeting

39. The Taxpayer also relies on what transpired at his meeting with Mrs E of the Respondent 25 September 2015.

40. The most contemporaneous account of what happened on that occasion from the Taxpayer is his letter dated 29 September 2015.

41. There the Taxpayer wrote

> 'I refer to my visit to our office at September 25, discussion 11.45 pm onwards.
>
> The reason of my visit to you was, as surprisingly receive a letter stating "unpaid" taxes.
>
> **You explained to me** that there have been a mistake made by IRD departments with regards to the 2012 assessment. [Emphasis added.]
>
> I would like to repeat my statement given to you:
>
> 1.) ...
>
> 2.) In early 2014 I have visited the same office at the same floor as above, and after discussion with one of your collegue, my tax file was finalized, final payments have been made.
>
> Therefore it was not reasonable for me, as since then I am retired, to inform you about a address change.
>
> 3.) **I have learned from you**, that you have send unsuccessful send a payment request to my old address, and "tried your luck" using the new address, do think you copy that from my wives [sic wife's] tax file..... [Emphasis added.]
>
> Conclusion
>
> I object as per moment to accept your assessment. I would like to have a detailed written information from your department, on what grounds you demand payment.

> After receiving of that statement **I will look for legal advice first.**' [Emphasis added.]

42. There was no allegation of any representation from Mrs E regarding any 'finalisation' of the Taxpayer's tax position.

43. If anything, what Mrs E had told the Taxpayer as recorded in Taxpayer's most cotemporaneous record in the letter dated 29 September 2015 could only amount to saying that the Respondent was still after the Taxpayer for tax; so much so that as a result of that meeting the Taxpayer wanted to look for legal advice.

44. We find that there has been neither a settlement nor any misrepresentation by the Respondent in the 25 September 2015 meeting.

Disposition

45. The Taxpayer's appeal is dismissed and the additional tax assessment is confirmed. There is no order as to costs.