Case No. D31/16

Salaries Tax – ex-gratia payment – sections 8(1), 9, 68(4) of the Inland Revenue Ordinance

Panel: Chow Wai Shun (chairman), Anson Wong SC and Wong Pak Yan Annie.

Date of hearing: 28 June 2016.
Date of decision: 3 January 2017.

The Appellant was employed by Company B.

When Company B's ultimate holding company, Company D and Company E entered into the Merger Agreement, the Appellant was identified as a Transition Employee by way of the Transition Letter.

During the Transition Period, in addition to current salary, the Appellant was eligible to receive an ex gratia payment.

Soon after the completion of the merger, on 31 May 2008, Company B terminated the Appellant's employment. The Appellant was paid an ex-gratia payment comprising the following:

(i) An ex-gratia severance payment of HK$491,175;

(ii) 2008 Performance Bonus of HK$14,391,000.

On 2 June 2008, the Appellant signed to accept both the Transition Letter and the Agreement of Release ('A&R').

The issue of this appeal is about the nature of the 2008 Performance Bonus of HK$14,391,000.

Held:

1. Salaries tax shall be charged on income arising in or derived from Hong Kong from, *inter alia*, any office or employment.

2. Income from any office or employment includes, *inter alia*, wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance.

3. The operative test is whether the sum, 'in light of the terms on which the taxpayer was employed and the circumstances of the termination' is 'in substance "income from employment".'

4. The '2008 Performance Bonus' was in substance 'income from employment' paid in return for the Appellant's acting as or being an employee. It was paid to the Appellant as a reward for his past services albeit not necessarily an inducement to continue to perform.

Appeal dismissed.

Cases referred to:

Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74
Hochstrasser v Mayes (1960) 38 TC 673
Shilton v Wilmshurst [1991] 1 AC 684
Mairs v Haughey [1994] 1 AC 303
EMI Group Electronics Ltd v Coldicott [1999] STC 803
Stanwell Investments Ltd v Commissioner of Inland Revenue [2004] 2 HKLRD 227
D8/13, (2013-14) IRBRD, vol 28, 270

Douglas Lam, Senior Counsel and Jason Yu, Junior Counsel, instructed by Messrs T C Foo & Co, for the Appellant.
John Brewer, Counsel, instructed by the Department of Justice, for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 2 September 2015 ('the Determination') which confirmed the Additional Salaries Tax Assessment for the year of assessment 2008/09 raised on the Appellant.

2. The Appellant has been represented by leading counsel, submitted a written statement before the hearing, and given oral evidence before this panel.

Facts

3. With reference to the facts as agreed by the Appellant and other documents made available to us, we find the following facts relevant to this case:

(a) The Appellant was employed as Position A of Company B by a letter

of employment dated 7 February 2005 ('the Employment Letter') which contained the following relevant terms:

i. Remuneration (Clause 4)

'(f) Provided you are an employee in good standing… on the bonus payday for each fiscal year after fiscal year 2006, you may be awarded a discretionary bonus based on the Company's overall performance, the Department's performance and your performance, payable in cash and forfeitable non-cash components subject to stock option plan terms and rules or similar arrangements as referred to below.'

ii. Confidentiality (Clause 8)

'(a) You shall neither during your employment… nor at any time after its termination without the prior written consent of the management of the Company directly or indirectly

(i) use for your own purposes or those of any other person, company, business entity or other organization; or

(ii) disclose to any person, company, business entity or other organization;

any trade secrets or confidential information relating or belonging to the Company or any company within C group of companies… including but not limited to any such information relating to customers, …, or any information which you have been told is confidential or which you might reasonably expect the Company would regard as confidential…'

iii. Termination (Clause 11)

'(a) Either party shall be entitled to terminate your employment by giving ninety days' notice in writing or ninety days' salary in lieu of notice to the other.'

iv. Governing Law (Clause 12)

'This letter and your employment hereunder will be governed by and construed in all respects in accordance with the laws of Hong Kong.'

v. Modification of Terms (Clause 13)

‘(a) Any terms of this letter may be modified by the mutual agreement of the parties.’

(b) On March 2008, Company B’s ultimate holding company, Company D and Company E entered into an agreement and plan of merger (‘the Merger Agreement’).

(c) By a letter dated 18 May 2008 (‘the Transition Letter’), the Appellant was identified as a Transition Employee. The letter offered the Appellant the opportunity to stay on with Company B and be responsible for helping with the orderly transition and integration of Company D and Company E through the ‘Transition Period’, defined as the period from 17 March 2008 to the ‘Transition End Date’, then expected to be 31 May 2008. It was stated in the preamble, *inter alia*:

i. Transition Period

‘During this Transition Period, you will continue to be an active employee of the Company, and will continue to receive the same salary you received prior to the commencement of the Transition Period.’

ii. Notice Period

‘Immediately following the completion of the Transition Period, you will begin your notice period.’

iii. Agreement of Release

‘You will be eligible to receive the following payments, upon our receipt of your executed Agreement of Release (“A&R”), a draft of which is enclosed. Please note, it is possible that certain terms of the A&R will change prior to your receipt of the final document. Note also, that you must complete the Transition Period in order to be eligible for any payment set out in this letter. You will receive a final A&R closer to your Transition End Date, but with sufficient time to carefully consider the terms. Do not return the final A&R until the Transition Period has ended.’

iv. Severance

‘Currently, you are eligible for a severance payment calculated on the basis of 1 month of your base salary per year of service with the Company or your statutory entitlement, whichever is higher. Where this payment exceeds your statutory entitlement, this severance payment is inclusive of your statutory severance payment.’

v. 2008 Performance Bonus

‘During the Transition Period, you will continue to receive your current salary. In addition, you will be eligible to receive an ex gratia payment which will be a minimum of 25% of your total 2007 bonus including any equity component, if applicable. Payment of this ex-gratia payment is conditional on your continued adherence to your employment obligations during the Transition Period and thereafter your signing and returning of the A&R.’

vi. Forfeiture

‘If your employment with the Company is terminated for Cause… or if you resign from employment with the Company before the Transition End Date, you will not be eligible for any payments described in this letter and may be subject to garden leave… for a period no longer than your Transition End Date.’

(d) Soon after the completion of the merger, effective at 11:59 p.m. EDT on 30 May 2008 (which is 11:59 a.m. HKT on 31 May 2008), by an A&R dated 31 May 2008, Company B referred to the Transition Letter and terminated the Appellant’s employment with Company B with immediate effect (‘the Last Date’) and that Company B would pay the Appellant 3 months’ salaries in lieu of notice. The A&R contained, *inter alia*, the following terms:

i. Contractual and statutory entitlements (Clause 2)

‘[Company B] and [the Appellant] agree to the following:

(i) [Company B] will make a payment to [the Appellant] representing payment of his 15 days’ accrued, unused annual leave up to and including 31 May 2008.

(ii) [Company B] will continue to pay [the Appellant] his

basic salary and provide him with his contractual benefits up to and including the Last Date.

(iii) [Company B] will make [the Appellant] a payment in lieu of notice [of $760,500].

(iv) [Company B] will pay [the Appellant] a statutory severance payment of [$49,950].'

ii. Ex-gratia payment (Clause 3)

'[Company B] will make [the Appellant] an ex-gratia payment… comprising the following:

(i) An ex-gratia severance payment of HK$491,175.00;

(ii) A performance bonus of HK$14,391,000 as referenced in [the Transition Letter];'

iii. Time for payment (Clause 5)

'5.1 The payment set forth above in [clause 2] will be made within 7 days of the Last Date irrespective of whether [the Appellant] signs this Agreement of Release. The payments and arrangements set forth in [clauses 3 and 4] will only be made if [the Appellant] executes this Agreement of Release within 5 days of the Last Date…'

iv. Release (Clause 6)

'In consideration of the above payments by [Company B] to [the Appellant], [the Appellant] agrees and undertakes as follows:

6.1 [The Appellant] accepts that the payments payable to him as set out above shall be in full and final settlement of all and any claims and rights of action that [the Appellant] has or may have against [Company B] or [C group of companies, including Company E, collectively referred to as "Company C"] or any of their employees or officers relating to [the Appellant's] employment, termination of [the Appellant's] employment and any other matters whatsoever (whether under statute, common law or under contract) in Hong Kong Special Administrative Region of the People's Republic of China ("Hong Kong") and any other jurisdiction in the

world, including but not limited to, remuneration, severance, redundancy, notice, annual leave, long service pay, bonus and other incentive schemes, allowances, benefits and entitlements and any and all claims arising under:

(i) the Employment Ordinance (Cap 57 of the Laws of Hong Kong); and

(ii) the Employees' Compensation Ordinance (Cap 282 of the Laws of Hong Kong); and

(iii) the Personal Data (Privacy) Ordinance (Cap 486 of the Laws of Hong Kong); and

(iv) the Sex Discrimination Ordinance (Cap 450 of the Laws of Hong Kong) and/or the Disability Discrimination Ordinance (Cap 487 of the Laws of Hong Kong) and/or the Family Status Discrimination Ordinance (Cap 527 of the Laws of Hong Kong) and any other claims of discrimination, harassment or victimization under local anti-discrimination laws and regulations, which [the Appellant] has or may have, now or in the future, against [Company B] or [Company C], arising out of or in connection with [the Appellant's] employment or its termination.

6.2 [The Appellant] undertakes not to institute a claim or issue proceeding against [Company B] or [Company C] in respect of any claim which he has or may have relating to the matters set out in paragraph 6.1 above or otherwise.

6.3 [The Appellant] acknowledges that the payments by [Company B] to [the Appellant] as set out above do not in any way indicate that [the Appellant] has any claim against or right against [Company B] or [Company C] or that [Company B] or [Company C] admits any liability to [the Appellant] whatsoever.'

(e) Both the Transition Letter and the Agreement of Release were signed by the Appellant on 2 June 2008.

(f) Company B filed a 'Notification by an employer of an employee who is about to cease to be employed' ('the Notification') in respect of the Appellant, which showed, *inter alia*, the following particulars:

Capacity in which employed	Position A
Period of employment	01-04-2008 to 31-05-2008
Income particulars	$
- Salary - Leave Pay - Other rewards, allowance or perquisite	325,000 174,161 14,573,000 15,072,161

(g) (i) In his Tax Return – Individuals for the year of assessment 2008/09, the Appellant declared the following income:

Name of Employer	Capacity	Period	Total amount $
Company B	Position A	01-04-2007-31-05-2008	499,161
Company F	Position G	01-08-2008-31-03-2009	13,777,265
			14,276,426

(ii) The Appellant claimed that an amount of $15,692,625 he received from Company B should not be taxable because the nature of the payment was 'severance / lost of employment and forfeiture of legal right to sue'.

(h) In accordance with the Appellant's tax return, the Assessor raised on the Appellant the following 2008/09 Salaries Tax Assessment:

	$
Income	14,276,426
Less: Retirement scheme contributions	12,000
Net Income	14,264,426
Less: Married person's allowance Child allowance	216,000 100,000
Net Chargeable Income	13,948,426
Tax Payable thereon (standard rate)	2,131,663

(i) In response to the Assessor's enquiry, Company E, on behalf of Company B, provided the following information:

i. The amounts of 'other rewards, allowance or perquisite' reported in the Notification included the following sums:

	$
Unclaimed housing allowance for April 2008 and May 2008 ($91,000 x2)	182,000
2008 Performance Bonus	14,391,000
	14,573,000

ii. The 2008 Performance Bonus was made with reference to the Transition Letter.

(j) In response to the Assessor's enquiry in respect of all the 153 employees made redundant including the Appellant, Company H, on behalf of Company B, referred to specimen transition letters and agreements of release and stated that the '2008 Performance Bonus' was paid 'for services rendered by the individuals during the performance year 2008'.

(k) In response to the Assessor's enquiry, the Appellant made certain claims and statements.[1]

(l) The Appellant's income from Company B can be summarized as follows:

Year of assessment	2004/05	2005/06	2006/07	2007/08
Period	15-02-2005-31-03-2005	01-4-2005-31-03-2006	01-04-2006-31-03-2007	01-04-2007-31-03-2008
Income particulars	$	$	$	$
- Salary	194,988	1,689,936	1,950,000	1,950,000
- Bonus		6,801,846	14,184,439	15,760,696
- Gain realized under share option scheme			1,280,804	
- Other rewards	97,494	779,952	779,952	883,968
	292,482	9,271,734	18,195,195	18,594,664

(m) The Assessor considered that both the housing allowance and the '2008 Performance Bonus' were chargeable to Salaries Tax. Accordingly, she raised on the Appellant the following additional 2008/09 Additional Salaries Tax Assessment:

	$
Additional Net Income	14,573,000
Additional Tax Payable thereon	2,185,950

(n) The Appellant, through his tax representative at that time, objected to the additional assessment on the ground that the '2008 Performance Bonus' should not be taxable. The Assessor wrote to the Appellant explaining her views and invited the Appellant to

[1] The Appellant repeated those claims and statements in his witness statement for this hearing, which we are going to deal with below.

withdraw the objection or provide further evidence to support his claim. The Appellant declined to withdraw and provided a copy of the summary of legal advice prepared by a senior counsel to address the issues and legal arguments raised by the Assessor. The Determination confirmed the additional assessment.

The issue of this appeal

4. The issue of this appeal is about the nature of the sum of HK$14,391,000 described as the '2008 Performance Bonus' paid by Company B to the Appellant ('the Sum').

The law

5. Section 8(1) of the Inland Revenue Ordinance (IRO) provides that salaries tax shall be charged on income arising in or derived from Hong Kong from, *inter alia*, any office or employment.

6. Section 9 of the IRO defines 'income from any office or employment' to include, *inter alia*, wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance.

7. It is common ground that the leading authority on the issue of this appeal is Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74. After considering the English authorities including Hochstrasser v Mayes (1960) 38 TC 673, Shilton v Wilmshurst [1991] 1 AC 684, Mairs v Haughey [1994] 1 AC 303 and EMI Group Electronics Ltd v Coldicott [1999] STC 803, Ribeiro PJ concluded that the operative test is whether the sum, 'in light of the terms on which the taxpayer was employed and the circumstances of the termination' is 'in substance "income from employment" ', no matter that 'it might linguistically be acceptable also to refer to it as "compensation for loss of office" or something similar' (at paragraph 22). Income chargeable under section 8(1) of the IRO, according to Ribeiro PJ, is 'not confined to income earned in the course of employment but embraces payments made… "in return for acting as or being an employee", or… "as a reward for past services or as an inducement to enter into employment and provide future services". 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 paragraph 17). The judge continued to emphasise that 'a payment which one concludes is "for something else" and thus not assessable, must be a payment which does not come within the test… [I]t 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 employment" ' (at paragraph 18).

8. Counsels of both sides also referred us to D8/13, (2013-14) IRBRD, vol 28, 270. While counsel for the Respondent argued that this appeal is in all material

respects nothing less than identical, leading counsel for the Appellant sought to distinguish the two. The taxpayer in D8/13 argued that a sum received and described by his employer as '2008 Performance Bonus' was a payment made so that he would not participate, or assist others to participate, in shareholder action for fraud against his employer's group of companies which was emerging with another entity. The Board of Review found that the payment was made pursuant to amended terms of the taxpayer's employment contract and constituted part of the bargain made between the taxpayer and his employer for staying on until the end of the merger. The sum in that case was accordingly held taxable.

9. Section 68(4) provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the Appellant. According to Stanwell Investments Ltd v Commissioner of Inland Revenue [2004] 2 HKLRD 227, this statutory burden imposes more than an evidential burden. In other words, the Respondent needs not show that the Determination was correct.

The Appellant's submission

10. In summary, the Appellant's case is that: (a) the Sum was in substance paid in consideration of the Appellant's waiver of his rights to claims against Company B, Company C or any of their employees or officers; (b) the Sum was not and could not have been a reward for past services; and (c) the Sum was not and could not have been an inducement for future services, as the Appellant's employment had already been terminated by the time of the payment of the Sum.

11. For (a), the submission was that the Appellant, as an employee shareholder, suffered significant loss (about USD 4 million) in value of his holdings in Company C caused by the latter's deteriorating financial situation and the merger deal that came to light in March 2008 and had at least a potential claim for such substantial diminution in the value of his shares against Company C. On the other hand, Company C was concerned that any such legal action taken by the Appellant and other senior executives would bring a negative effect on the merger and the financial markets. In order to avoid that to happen, therefore, Company C was keen to reach a settlement with the Appellant and eventually paid the Sum pursuant to the A&R in full and final settlement of all claims that the Appellant had or might have had against Company B or Company C as widely defined under the A&R.

12. For (b), the submission was that the Appellant had been paid bonus for his services up to 30 November 2007 and by the evening of 31 May 2008 the Appellant was no longer an employee; hence Company B was not obliged under the Employment Letter to award any bonus for the period from 1 December 2007 to his dismissal on 31 May 2008. It is also the Appellant's submission that the bonus awarded under the Employment Letter after fiscal year 2006 was discretionary and dependent on, *inter alia*, the performance of Company B which could not be sufficiently well-placed in light of the financial situation of Company C. Furthermore, it was submitted that it made no commercial sense for Company C (which was controlled by Company E) to make such a substantial bonus to a former employee like the Appellant after the termination of the

latter's employment.

13. For (c), it was submitted that the Appellant accepted and signed the Transition Letter on 2 June 2008, after the termination of his employment, and so he could not have been induced by it to work during the period up to 31 May 2008 when his employment was terminated. In other words, he just continued to work during that period under the terms of the Employment Letter. In the Appellant's submission, this would have been the case even if he knew about the terms of the Transition Letter prior to the date he signed on it because, according to the Employment Letter, any modifications or amendments to it must be 'made in writing and executed by both parties' (Clause 13(a) of the Employment Letter). It was further submitted that because the Transition Letter was only signed after the Appellant's employment with Company B was terminated the offer under the Transition Letter had expired by reason of there being nothing left under that letter for the Appellant to perform and so there was no future performance that could be induced. The ultimate fall-back position taken by the Appellant was that the Transition Letter had no legal effect and was completely redundant insofar as the entitlement to the Sum is concerned because the Sum was paid conditional upon the signing and returning of the A&R.

14. With regard to D8/13, the Appellant sought to distinguish it from this appeal on the following:

(i) The transition letter in D8/13 was signed before the dismissal.

(ii) There was no evidence or reference to evidence in D8/13 that the taxpayer expressly negotiated the waiver of shareholding claims with his superiors or complained to them about unfair practices that might form the basis of a claim.

The Appellant's evidence

15. The Appellant swore to confirm the content of his witness statement filed before the hearing, with one correction of the date of a Wealth Accumulation Statement which should be 4 February 2008 instead of 2 April 2008. As shown on that Statement, the total market value of shares and stock options held by the Appellant in Company C as of close of business on 31 January 2008 was worth about USD 5 million.

16. In his statement, the Appellant said that he shared a similar grievance felt by many of his co-workers who were entitled under their employment letters to receive a substantial number of shares and stock options in Company C from time to time and would suffer a significant reduction in value of those shares and stock options being diluted upon completion of the acquisition of Company C by Company E via merger. He said that he was aware of various class actions brought and being brought on behalf of the employees of Company C in respect of the mismanagement and misrepresentations during the period leading up to the merger. The Appellant also indicated that he had been participating in discussion among his colleagues concerning the bringing of class actions

or individual lawsuits against Company C, by way of conference calls between himself and colleagues whom he was friendly with and have been in close contact with US lawyers, sometimes joined by those lawyers. In his statement, the Appellant referred to such class action lawsuits as stated in the Definitive Proxy Statement which runs for about 100 pages, together with two other class action complaints (apparently filed in March 2008 and in June 2008 respectively), and an internet article published by a US law firm in May 2008.

17. The Appellant also said in his statement that his intention to bring or participate in legal actions against Company C and other parties was expressly communicated to the senior management of Company C while he also considered the possibility of a private settlement. According to the Appellant, Company C was keen to reach a settlement with him and so he engaged in verbal negotiation on the amount of payment in exchange for the waiver of claims, during which he had indicated that he would not walk away unless he received at least a couple million US dollars. The understanding was, in his statement, that he would accept a sum of more or less around USD 2 million to meet half way and split the pain of the drop in value of his portfolio of shares and stock options in Company C.

18. According to his statement, the Appellant was informed in an evening in May 2008, while the announcement of the completion of the acquisition of Company C came out earlier around noon on the same day, that, *inter alia*, his employment with Company B was terminated. He then returned to the offices of Company B on Monday, 2 June 2008 and was given the A&R and other documents including the Transition Letter.

19. The cross examination on the Appellant focused on two aspects. First, it was the lack, if not absence, of corroborative evidence since none of the conversation and negotiation mentioned above had been taken in the way of any kind of recording. The Appellant's response was that because of the practical matter of it, such conversation happened on the phone or video conference and there had not been any email. Even if there had been any email, said the Appellant, he would not have been able to take it away when he left Company B.

20. Second, it was about whether the Appellant had seen, or even been given, the Transition Letter before 2 June 2008. Counsel for the Respondent referred us to the Appellant's letter to the Respondent via his tax adviser dated 28 September 2011, almost 5 years prior to the witness statement prepared for this appeal but closer to the time of the event. In that letter, the Appellant stated, *inter alia*:

(i) The merger discussion date of XX March 2008 was 'about 2 months prior to this letter being issued to me';

(ii) 'The document was issued to me on May 18, 2008';

(iii) 'At the time the letter was issued, it was already two months into the transition period';

(iv) 'The document only stated the proposed employment terms for all the Transition Employee during the Transition Period';

(v) 'The exact terms of the Agreement of Release were not finalized when the Merger Agreement was presented to me on May 18, 2008';

(vi) '[The Agreement of Release] was presented to me on May 31, 2008'.

21. During cross examination, the Appellant was asked why he had used the words 'issued to me' a few times, His response was that he was simply referring to the date of that letter. After he was asked to recite (v) above, the Appellant maintained the position that he had not seen the Transition Letter prior to June 2, 2008. He explained that the letter was written three years after the event and his memory failed him back then. When Counsel for the Respondent pointed out that it was rather closer to the event than the date of the Appellant's witness statement, the Appellant elaborated that at that time he was trying to address the details to the Respondent and was not paying attention to the dates as there was no question asking him for the dates. After reciting (vi) above, the Appellant said that he had made a mistake on the date and that when he was looking at the whole event now after so many years he did not work at all nor go into the office that weekend. He said he got fired that Saturday night by his manager from City M on a phone call.

Discussion

22. As reminded by Riberio PJ in Fuchs, we ask ourselves these questions: In the light of the terms on which the Appellant was employed and the circumstances of the termination, was the '2008 Performance Bonus' in substance 'income from employment'? Was it paid in return for his acting as or being an employee? Was it paid as a reward for past services or as an inducement to continue to perform services? Our answer is yes.

23. On the whole of the evidence before us, we are not persuaded that the Appellant had only seen the Transition Letter for the first time on 2 June 2008. It is our view that he must have at least seen it beforehand, during the period leading to the termination of his employment on 31 May 2008. Indeed we also hold the view that the Appellant had sight of the A&R before 2 June 2008. In this regard, we attach more weight to the Appellant's representation made in his letter to the Respondent via his tax adviser dated 28 September 2011 than his statement made for this appeal. His responses during cross examination did not assist him.

24. Leading counsel for the Appellant sought to argue that there had been no acceptance of those terms until 2 June 2008 when the Appellant signed on both the Transition Letter and the A&R after the termination of the employment. In other words, the Appellant's case was that his employment continued on the basis of the Employment Letter until it was terminated on 31 May 2008. We tested it with a hypothetical but not

necessarily unusual situation where an employer before or just on termination told the employee that a bonus was included in the leaving package with nothing in writing. While it may well be correct on a contractual analysis that it does not vary the original employment contract it is not determinative as to whether the bonus in substance derives from the employment. In the case before us, in other words, whether or not the Employment Letter has been effectively varied is just a red herring. After all, the issue is for what the Sum was paid.

25. The Sum was identified in the A&R as '2008 Performance Bonus'. This description has been corroborated by Company B's tax representatives. This '2008 Performance Bonus' was referred to in the Transition Letter as being a sum not less than 25% of the Appellant's total 2007 bonus including any equity component. It was ex-gratia and was made conditional on the Appellant's continued adherence to his employment obligations during the Transition Period and thereafter his signing and returning of the A&R.

26. On the basis that the Employment Letter had not been varied, leading counsel suggested that the Sum could not have been paid as bonus since under the Employment Letter payment of any bonus after fiscal year 2006 was discretionary based on the overall performance of Company B, the department in which the Appellant worked and the Appellant himself. He argued, therefore, it made no sense for Company B to pay any bonus in such an amount as the Sum represents for just 5 months in 2008 to the Appellant given its financial situation at the relevant time. We have expressed our view on the basis which leading counsel sought to rely upon. We do not find those criteria set out in the Employment Letter for payment of bonus relevant to be considered in determining whether the Sum should have been paid or its amount.

27. Indeed, the calculation of the Sum was in accordance with what was provided in the Transition Letter. In this regard, counsel for the Respondent assisted us with an addendum to his closing submissions.

(i) The '2008 Performance Bonus' was expressed to be a minimum of 25% of that for 2007 including any equity component.

(ii) The Appellant's bonus in 2007 comprised:

(a) Cash of HK$15,760,696.

(b) CAP award of 45,832,469 shares with market value of US$4,138,672 (or HK$32,281,642).

(c) Total bonus of 2007 was HK$48,042,338.

(d) 25% of HK$48,042,338 computes as HK$12,010,584.

28. Leading counsel for the Appellant also argued that the Sum was paid

conditional upon the Appellant's signing and returning of the A&R in which the Appellant waived all his rights to sue Company B and any related parties for the loss in value of his shares in Company B. Both A&R in this appeal and that in D8/13 were dated May 2008 and signed and accepted on June 2008. Clauses 2, 3, 4, 6, 7 and 8 of the agreement of release described at paragraph 15 to paragraph 20 in D8/13 recite clause numbering and content identical to equivalent clauses found in the A&R of this appeal. Emphasis was put on to Clause 6. In this regard, the Board of Review in D8/13 held that the clause aimed 'no more than to procure a clean break with the [taxpayer] with no outstanding employment related liability'. We respectfully follow that view and agree with the detailed analysis of the Board in D8/13. We also accept the submission of the counsel for the Respondent that the alleged global reach of Clause 6 cannot override certain statutory provisions under, including but not limited to, the Control of Exemption Clauses Ordinance and the Employment Ordinance.

29. Leading counsel for the Appellant sought to distinguish the present appeal from D8/13 that the Appellant negotiated the waiver of shareholding claims with his managers and complained to them about unfair practices that might form the basis of a claim for breach of trust and confidence.

30. With respect, we do not agree. The Appellant has failed to produce any cogent evidence in corroboration of his self-serving statement that he had lodged such complaint and threatened to sue Company B, not a single email, not a single contemporaneous telephone note, not a single record of any telephone conversation, not a single statement in any form from any manager or any other employee to whom the Appellant said to have spoken. This has been the case since his correspondence with the IRD back in March 2010 and remained to be the case when this appeal was being heard.

31. The Appellant did include a few documentary evidence as exhibits to his statement. We did ask about the contemporaneity of those exhibits and how the Appellant came across them. For example, regarding the internet article published by Institution J via Website K in May 2008, the Appellant responded that it was his colleagues who drew his attention to the article. When asked if he was sent through the article by email or a link, the Appellant said he probably had the link but he also said that he was searching the article himself too at that time. As to why he did not ask his colleagues to send him the article straightaway the Appellant said he probably had access to it already. The same line of replies was given when he was asked about the couple of class complaints. We went further to ask how he came to know how to conduct a search of those complaints. The Appellant responded that there was no need for anybody to teach him how to do it but just typed a few keywords: 'Company C litigation, class actions' searching on the Internet himself. While he admitted that he did not keep any of those documents in the form of a physical copy, he claimed that they were on his file in his computer. Not surprisingly, he did not produce any record of his endeavours of such navigation and search over the Internet. The exhibits do not show when they were first accessed, browsed or printed. The Appellant had not included any of these documents in his earlier correspondence with the IRD. The explanation given by the Appellant when he was asked about this was that he was not very familiar with the process and he was simply answering the questions that the

IRD was asking him: they did not ask him for any class action document and so he did not include any of them.

32. Further, the release clause in Clause 6 of the A&R was couched in such terms which sought to release Company B or C from liabilities arising out of or in connection with the Appellant's employment or its termination. The class action or action which the Appellant had allegedly threatened to bring was a shareholder's action, which was quite different in nature from such claims which might be brought by the Appellant in his capacity as employee. Hence, it was, to say the least, highly doubtful whether the said release clause was sufficient to release Company B or C from such shareholder's claim. Had the Sum been paid to the Appellant in consideration of his waiving his rights to bring such shareholder's claim, Company B or C would have made it clear in the release clause that the payment of the Sum would also release them from liabilities owing to the Appellant *qua* shareholder, and that it would have been highly implausible for Company B or C to use such wording in the said release clause. When the Leading Counsel for the Appellant was asked about this, he sought to explain it (in the absence any supporting evidence) by suggesting that Company B or C might want to word the said release clause in such way in order to keep the matter concerning the potential shareholder's claim in confidence. We find such explanation unconvincing. There is no evidence suggesting that the A&R would be disclosed to the public. In any event, there was nothing to stop Company B or C to insist on the signing of a confidential side letter between the parties which made it clear that the payment of the Sum also released Company B or C for all liabilities owing to the Appellant in his capacity as shareholder. The contemporaneous documents, as well as the lack of them, militate strongly against the credibility of the Appellant's case.

33. Again, on the whole of the evidence given, we are not convinced that the Appellant has done what he claimed. There is just insufficient cogent and corroborative evidence to distinguish this appeal from D8/13.

Conclusion

34. As a result, we find that the Sum is in substance 'income from employment'; it was paid in return for the Appellant acting as or being an employee; and it was an entitlement earned as a result of his past services albeit not necessarily an inducement to continue to perform. On the other hand, we are not convinced that the nature of the Sum does not accord with its description as bonus which is chargeable to salaries tax in Hong Kong. Accordingly, we dismiss this appeal.

Cost order

35. Both sides made submissions as to costs under section 68(9) of the IRO. After careful deliberation and consideration, we find that this is a borderline case despite of its similar factual matrix with D8/13 and therefore decide not to make such an order against the Appellant.