

Case No. D12/06

Salaries tax – whether the assessment appealed against is excessive or incorrect – the onus of proof is on the appellant – section 68(4), (8)(a) of the Inland Revenue Ordinance (‘the IRO’).

Panel: Benjamin Yu SC (chairman), Patrick Ho Pak Tai and Wan Ho Yan.

Dates of hearing: 20 September, 10 October, 10 and 11 November 2005.

Date of decision: 26 April 2006.

Mr A (the appellant) was a general worker employed in construction sites during the years of assessment 2001/02 and 2002/03 (‘the relevant years of assessment’). The appellant contended that notwithstanding the reductions of the assessments of taxable income to \$249,631 for 2001/02 and \$111,290 for 2002/03 by the Deputy Commissioner in the Determination dated 30 May 2005, the assessments were still excessive. The appellant claimed that in 2001/02, he earned an average income of \$13,800 per month or \$165,600 per year. He further claimed that the employment condition worsened in 2002/03 and he only had work between four to five days a week, thereby earning only \$10,000 per month or \$120,000 during the year.

On the other hand, the Commissioner relied on information provided by Company B and Company C, both of which were the putative employers of the appellant. According to such information, the appellant’s income for 2001/02 was \$417,092 (from Company B) and his income for 2002/03 was \$285,992 (\$144,250 from Company B and \$141,642 from Company C). The appellant admitted that he was employed by Company B but denied of having worked for Company C.

The issue was whether the appellant had discharged the burden on him in showing that the relevant years of assessments appealed against were excessive or incorrect.

Held:

1. In spite of the challenge on the authenticity and reliability of the records compiled by Company B and Company C (the appellant was able to point out a number of apparent discrepancies in the records produced by the employers), the Board was satisfied that a lot of these apparent discrepancies were explicable, and that those matters relied on by the appellant did not either individually or cumulatively cast serious doubt on the overall reliability of the materials.

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2. The Board found that the witness, Mr E, who was the 'foreman' responsible for liaising between the employers and workers as well as paying wages to the workers, called by the Commissioner, an honest witness and the records he produced were entirely reliable and authentic. On the other hand, the Board found that the appellant's own memory of his income (he received payment of his wages in cash and had kept no record of those payments) during the relevant years of assessment was unreliable.
3. The returns by the employers were supported by three different forms of proof: firstly, the documents kept by the employers; secondly, the amounts of mandatory provident fund contributions made by the employers set out in the monthly statements produced by the trustee of the fund; and thirdly, Mr E's personal records. Accordingly, the Board was satisfied that over different periods within the relevant years of assessment, the appellant did receive wages from Company B and from Company C, and that the amounts he received exceeded those he was prepared to admit.
4. As the evidence adduced by the Commissioner during the hearing suggested that the appellant's income for the year of assessment 2001/02 was \$436,367 (instead of \$417,092), the Board was satisfied that the appellant's income for 2001/02 was \$436,367 and exercised its power under section 68(8)(a) of the IRO to increase the assessment to \$268,906 and the tax payable thereon to \$32,214.

Appeal dismissed.

Taxpayer in person.

Leung Wing Chi and Go Min Min for the Commissioner of Inland Revenue.

Decision:

Introduction

1. During the years of assessment 2001/02 and 2002/03 (the relevant years of assessment) Mr A ('the taxpayer') was a general worker employed in construction sites.
2. The taxpayer appeals against the determination of the Deputy Commissioner of Inland Revenue dated 30 May 2005. In that determination, the Deputy Commissioner reduced

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- (1) the assessment of the taxable income of the taxpayer for the year of assessment 2001/02 from \$309,092 to \$249,631 and the tax payable from \$42,045 to \$28,937 and
- (2) the assessment of the taxable income of the taxpayer for the year of assessment 2002/03 from \$123,940 to \$111,290 and the tax payable from \$10,569 to \$8,419.

3. The taxpayer's case is that notwithstanding the reductions, the assessments were still excessive. In his notice of appeal, he claimed that in 2001/02, his daily wage was \$600 per day and he worked about 22 to 25 days each month, with an average income of \$13,800 per month or \$165,600 per year. He further claimed that the employment condition worsened in 2002/03 and that his daily wage was \$500 to \$600 per day and he only had work between four to five days a week, thereby earning only \$10,000 per month or \$120,000 during the year.

4. The assessments were made on the basis of information provided by two firms who were the putative employers of the taxpayer. We say 'putative' because the taxpayer denied he was employed by one of them. The Commissioner relies on information provided by two firms: a company called Company B and another firm called Company C. The taxpayer admitted he was employed by Company B but claimed that he never worked for Company C. According to such information, the taxpayer's income for the year of assessment 2001/02 was \$417,092 (from Company B) and his income for the year of assessment 2002/03 was \$144,350 (from Company B) + \$141,642 (from Company C) = \$285,992.

5. We should note that during the hearing, the evidence adduced by the Commissioner suggests that the taxpayer's income for the year of assessment 2001/02 was \$436,367 (instead of \$417,092) and the Commissioner asked this Board to exercise its power under section 68(8)(a) of the **Inland Revenue Ordinance** to increase the assessment.

The Evidence

6. The taxpayer gave evidence before us. He told the Board that he was a general worker paid on a daily basis. Mr D was the proprietor of Company B, initially an unincorporated business, and later became a limited liability company. He gave evidence that if he worked for a day (8 hours), he would earn \$600 - \$700; and if he worked over 8 hours, he would get \$100-\$200 per hour. His wages were paid to him at site by the foreman, surnamed XX.

7. During the course of his evidence, the taxpayer challenged the authenticity and reliability of the records compiled by Company B and Company C, which records were submitted to the Commissioner and relied on by him in support of the assessment. Whilst he was able to point out a number of apparent discrepancies in the records produced by the employers, we are satisfied that a lot of these apparent discrepancies are explicable, and that those matters relied on by the

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taxpayer do not either individually or cumulatively cast serious doubt on the overall reliability of the materials.

8. The taxpayer maintained he did not know of Company C, but admitted that he did receive monthly statements from the trustee of mandatory provident fund recording contribution paid by Company C for his credit.

9. The Commissioner called Mr E to give evidence. Mr E was the 'foreman' responsible for liaising between the employers and workers, as well as paying wages to the workers (including the taxpayer). Mr E made a statement confirming that during the relevant years of assessment, he recruited the taxpayer and others to work for Company B and Company C on a daily basis. The nature of the taxpayer's work was that of a concrete worker. Mr E kept daily records of the work and payments he made to workers. As explained by him, it was important that he kept those records as he was accountable to the employers and must be able, when asked, to prove to the employers the amount of work done or payments made to workers on any given day. During the hearing of the appeal, Mr E made available to the Commissioner (who in turn produced to the Board) some of his records which relate to the year of assessment 2001/02.

10. To the extent that they are available, the records Mr E kept are evidently more complete than those which the Commissioner obtained from the employers. They were kept by the day and recorded fully the site in question, the amount and nature of work, and the amount paid to each name worker. These records show that from time to time, the taxpayer worked significantly more than eight hours a day for the year of assessment 2001/02, and consequently received wages far in excess of the amount he claimed to have received at the time. The statements by the trustee of the mandatory provident fund as well as Mr E's records further show that the taxpayer had, on numerous occasions, worked on Sundays or public holidays, contrary to the taxpayer's assertion that he only worked five or six days a week.

11. Mr E was subjected to cross-examination by the taxpayer. We have no doubt, having considered the challenge made on his evidence against the records he produced, that Mr E was an honest witness and that the records he produced are entirely reliable and authentic.

Findings

12. The taxpayer received payment of his wages in cash, and has, himself, kept no record of those payments. Perhaps understandably, he was unable to produce to the Board any real or cogent evidence that the returns by the employers were inaccurate. We further find that the taxpayer's own memory of his income during the relevant years of assessment was unreliable.

13. The returns by the employers are, on the other hand, supported by three different forms of proof: firstly, the documents kept by the employers; secondly, the amounts of mandatory provident fund contributions made by the employers set out in the monthly statements produced by

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the trustee of the fund; and thirdly, Mr E's personal records. We are satisfied that over different periods within the relevant years of assessment, the taxpayer did receive wages from Company B and from Company C, and that the amounts he received exceed those he was prepared to admit.

Dismissal of appeal

14. In the circumstances, the taxpayer has failed to discharge the burden on him in showing that the assessments appealed against are incorrect. We must accordingly dismiss the appeal.

Increase of assessment

15. As noted above, the Commissioner has asked the Board to increase the amount of assessment for the year of assessment 2001/02 from \$249,631 to \$268,906 with tax payable thereon increased from \$28,937 to \$32,214.

16. The Commissioner contended, and we accept, that Mr E's note shows that the taxpayer's income for the year of assessment 2001/02 was \$436,367 (and not the figure of \$417,092 as per the employer's return). Consequently, the assessable income (after deduction) and the tax payable required to be adjusted upwards as shown in the calculations below:

Income of taxpayer		\$436,367
Income of spouse		\$120,195
		\$556,562
<u>Less</u>		
expenses for advance education	\$10,000	
home loan allowance	\$22,236	
contribution to recognised pension scheme	\$ 9,420	
		\$41,656
		\$514,906
<u>Less</u>		
Married person allowance	\$216,000	
Children allowance	\$30,000	
		\$246,000
Assessable income		\$268,906
Tax payable thereon		\$32,214

17. We are satisfied that Mr A's income for the year of assessment 2001/02 was \$436,367, and accordingly would increase the assessment to \$268,906 and the tax payable thereon to \$32,214.