

Case No. D19/05

Profits tax – whether or not costs ordered by the Barristers Disciplinary Tribunal and paid by the appellant were deductible expenses – sections 16(1), 17(1) and 68(4) of the Inland Revenue Ordinance (‘the IRO’).

Panel: Anthony Ho Yiu Wah (chairman), Chow Wai Shun and Ng Ching Wo.

Date of hearing: 7 January 2005.

Date of decision: 2 June 2005.

The appellant is a practising barrister in Hong Kong. In 2000, 10 complaints, (six of which were eventually proved) were laid before the Barristers Disciplinary Tribunal (‘the Tribunal’) against the appellant, who was subsequently suspended from practice as a barrister for a total of six months and ordered to pay the costs of the Bar Council and the Tribunal in respect of the disciplinary proceedings. In the years of assessment 2000/01 and 2001/02, the appellant paid a total costs of HK\$722,244 (‘the Costs’) which, in the determination of the Deputy Commissioner of Inland Revenue dated 20 August 2004, were not deductible expenses in computing the assessable profits of the appellant.

On appeal, the appellant contended that the Costs were not expenses incurred for private purposes, but for the production of profits in pursuing his career as a barrister; hence the issue before the Board was therefore whether or not the Costs were deductible expenses under sections 16 & 17 of the IRO.

Held:

1. From the facts of the case, it was apparent that the Costs were primarily incurred by the appellant for business purposes as the appellant had to defend himself in the disciplinary proceedings to avoid the risks of being struck off or being suspended from practice. By undertaking the defence, some private purpose of the appellant might have been served as well, such as the defence of his name. But even so, such private purpose had also a business purpose as ‘name’ or ‘repute’ was an important attribute of the appellant’s professional calling as a barrister. It was not possible to distinguish between those elements of the purpose which were private and those which were business. Hence, the Board concluded that apportionment was neither necessary nor appropriate in this case.

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2. The Board also concluded that any finding on the issue of whether or not the reason for institution of the disciplinary proceedings was relevant for determining the deductibility of the expenses arising from such proceedings was unnecessary; since it was clear that the appellant was defending on the basis that his practice as a barrister at the material time did not amount to a breach of undertaking allegedly given by him to an officer of the University that he would cease to practise as a barrister upon taking up a postgraduate studentship. Hence, the Board found that the disciplinary proceedings against the appellant did have a substantial connection with his practice as a barrister (McKnight v Sheppard, The Herald and Weekly Times Limited v The Federal Commissioner of Taxation followed).
3. The Board took a view that the appellant was 'compelled' to defend the disciplinary proceedings which did have connection with his practice as a barrister. Although the right of the appellant to practise as a barrister might be regarded as a structural asset, having considered all the circumstances of this case and particularly the nature and seriousness of complaints brought against the appellant in question; the Board found that the disciplinary proceedings against the appellant in this case should be regarded as posing a risk to a peripheral or short-term damage to the appellant's right to practise rather than a risk of total loss of such right (Australian Administrative Appeals Tribunal Case 4596, Australian Administrative Appeals Tribunal Case 6258 distinguished). The appellant, in defending himself in the subject disciplinary proceedings, should be regarded as undergoing maintenance or damage control to such a structural asset. Hence the expenses (the Costs) would be on revenue, not capital, account and therefore deductible (Elberg v Federal Commissioner of Taxation applied).
4. Finally, on the issue of whether the Costs were equivalent to a fine, the Board saw no reason why the costs awarded in disciplinary proceedings should be treated differently from the costs awarded in criminal proceedings (cf section 15(a) of the Costs in Criminal Cases Ordinance). Hence, the Costs in question should not be punitive and therefore non-deductible. Everyone, guilty or not guilty, should be entitled to defend themselves and there was no policy reason justifying the prohibition of deduction of legal expenses, whether such expenses were incurred by the defendant himself or the expenses of the prosecution ordered to be paid by an unsuccessful defendant.

Appeal allowed.

Cases referred to:

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CIR v Lo & Lo [1983] 2 HKTC 34 [PC]
CIR v Swire Pacific Limited [1979] 1 HKTC 1162 [CA]
McKnight (Inspector of Taxes) v Sheppard [1999] 3 All ER 491 [HL]
The Herald and Weekly Times Ltd v The Federal Commissioner of Taxation [1932] 48 CLR 113
MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co (a firm) [1988] 2 All ER 1
Southern (HM Inspector of Taxes) v Borax Consolidated Limited [1941] 1 KB 111
Morgan (Inspector of Taxes) v Tate & Lyle Ltd [1954] 2 All ER 413
Golder (Inspector of Taxes) v Great Boulder Proprietary Gold Mines Ltd [1952] 1 All ER 360
Income Tax Commissioner v Singh [1942] 1 All ER 362 [PC]
Anthony Patrick Fahy trading as AP Fahy Co v CIR 2 HKTC 695
CIR v Cosmotron Manufacturing Company Limited 4 HKTC 562
Strong & Co of Romsey Limited v Woodfield [1906] 5 TC 215
Australian Administrative Appeals Tribunal Case 4596 [1988] 19 ATR 3859
Australian Administrative Appeals Tribunal Case 6258 [1990] 21 ATR 3721
Elberg v Federal Commissioner of Taxation [1988] 38 ATR 623
D60/91, IRBRD, vol 6, 450
D99/01, IRBRD, vol 16, 816
D46/02, IRBRD, vol 17, 725

Taxpayer in person.

Go Min Min and Austin Grady for the Commissioner of Inland Revenue.

Decision:

Background

1. This is an appeal against the determination of the Deputy Commissioner of Inland Revenue dated 20 August 2004. In that determination, the Deputy Commissioner decided that costs ordered by the Barristers Disciplinary Tribunal ('the Disciplinary Tribunal') and paid by the Appellant in the years of assessment 2000/01 and 2001/02 respectively were not deductible expenses in computing the assessable profits of the Appellant.

2. It is the contention of the Appellant that the said costs paid by the Appellant were not expenses incurred for private purposes. The Appellant further contended that the said costs were expended for the production of profits in pursuing his career as a barrister and were deductible pursuant to sections 16 and 17 of the Inland Revenue Ordinance (Chapter 112) ('IRO').

The facts

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3. The following facts were not disputed by the parties and we find them as facts.
4. The Appellant has been practising as a barrister in Hong Kong since 19xx. He was called to the Hong Kong Bar in 19yy.
5. In the years of assessment 2000/01 and 2001/02, the Appellant paid to the Bar Association the following sums being the costs of The Bar Council and the Disciplinary Tribunal in relation to the proceedings brought against the Appellant (the 'Disciplinary Proceedings') before the Disciplinary Tribunal in year 2000:

2000/01	\$342,122
2001/02	\$380,122
2002/03	\$ 32,000

6. Out of the 10 complaints laid before the Disciplinary Tribunal, six complaints were proved. The gist of the said six proven complaints against the defendant was:
- (a) He had breached an oral undertaking given to an officer of the University A that he would cease practice as a barrister in Hong Kong upon taking up a postgraduate studentship in the Faculty of Law, University A, which studentship he took up with effect from 1 September 1997.
 - (b) He signed a Confirmation of Eligibility for Award of Postgraduate Studentship on or about 18 October 1997 confirming that as a full-time research postgraduate student he was not engaging in paid employment outside the University despite the fact that he was actually in practice as a barrister in Hong Kong at the material time.
 - (c) He had been dishonest by falsely misrepresenting in his application documents submitted to the University A that his BA Degree awarded by the University B in 1982 was a first class honours degree.

7. Pursuant to section 37(f) of the Legal Practitioners Ordinance, the Disciplinary Tribunal ordered the Appellant to pay the costs of The Bar Council and the Disciplinary Tribunal in respect of the Disciplinary Proceedings. The total costs amounted to \$754,245.05 and was paid by the Appellant on the respective dates as described in paragraph 5 above.

8. Pursuant to section 37(b) of the Legal Practitioners Ordinance, the Appellant was suspended from practice as a barrister for a total of six months commencing on 1 February 2000.

The issue

9. The issue to be decided by the Board in the present case is whether the costs ordered by the Barristers Disciplinary Tribunal and paid by the Appellant in the years of assessment 2000/01 and 2001/02 respectively ('the Relevant Costs') were deductible expenses in computing his assessable profits.

The relevant statutory provisions

10.1 Inland Revenue Ordinance (Chapter 112) ['IRO']

10.1.1 Section 16(1)

'In ascertaining the profits in respect of which a person is chargeable to tax under this Part for any year of assessment there shall be deducted all outgoings and expenses to the extent to which they are incurred during the basis period for that year of assessment by such person in the production of profits in respect of which he is chargeable to tax under this Part of any period...'

10.1.2 Section 17(1)

'For the purpose of ascertaining profits in respect of which a person is chargeable to tax under this Part no deduction shall be allowed in respect of –

(a) domestic or private expenses, including –

(i) the cost of traveling between the person's residence and place of business; and

(ii) subject to section 16AA, contributions made to a mandatory provident fund scheme in the person's capacity as a member of the scheme;

(b) subject to section 16AA, any disbursements or expenses not being money expended for the purpose of producing such profits;

(c) any expenditure of a capital nature or any loss or withdrawal of capital;'

10.1.3 Section 68(4)

Section 68(4) places the burden of proof on the Appellant as follows:

‘The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.’

10.2 Legal Practitioners Ordinance (Chapter 159)

10.2.1 Section 37

‘37. Disciplinary powers of Barristers Disciplinary Tribunal

On completion of its inquiry, the Barristers Disciplinary Tribunal may do one or more of the following –

- (a) censure the barrister;*
- (b) suspend the barrister from practicing for a period it specifies;*
- (c) order that the barrister’s name be struck off the roll of barristers;*
- (d) order the barrister to pay to the complainant an amount not exceeding the amount or amounts paid or payable to the barrister in relation to the complaint’s matters in dispute;*
- (e) order the barrister to pay a penalty not exceeding \$500,000, which shall be paid into the general revenue;*
- (f) order the barrister to pay the costs of and incidental to the proceedings of the Tribunal and the costs of any prior inquiry or investigation in relation to the matters before the Tribunal, to be taxed by a Master of the High Court on a full indemnity basis, or an amount that the Tribunal considers to be a reasonable contribution towards those costs;*
- (e) make any other order it thinks fit.’*

Authorities cited

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11.1 The following cases were cited to us by the parties:

- (1) CIR v Lo & Lo [1983] 2 HKTC 34 [PC]
- (2) CIR v Swire Pacific Ltd [1979] 1 HKTC 1162 [CA]
- (3) McKnight (Inspector of Taxes) v Sheppard [1999] 3 All ER 491 [HL]
- (4) The Herald and Weekly Times Ltd v The Federal Commissioner of Taxation [1932] 48 CLR 113
- (5) MacKinlay (Inspector of Taxes) v Arthur Young McClelland Moores & Co (a firm) [1988] 2 All ER 1
- (6) Southern (HM Inspector of Taxes) v Borax Consolidated, Limited [1941] 1 KB 111
- (7) Morgan (Inspector of Taxes) v Tate & Lyle, Ltd [1954] 2 All ER 413
- (8) Golder (Inspector of Taxes) v Great Boulder Proprietary Gold Mines, Ltd [1952] 1 All ER 360
- (9) Income Tax Commissioner v Singh [1942] 1 All ER 362 [PC]
- (10) Anthony Patrick Fahy trading as AP Fahy Co v CIR 2 HKTC 695
- (11) CIR v Cosmotron Manufacturing Company Limited 4 HKTC 562
- (12) Strong & Co of Romsey Limited v Woodfield [1906] 5 TC 215
- (13) Australian Administrative Appeals Tribunal Case 4596 [1988] 19 ATR 3859
- (14) Australian Administrative Appeals Tribunal Case 6258 [1990] 21 ATR 3721
- (15) Elberg v Federal Commissioner of Taxation [1998] 38 ATR 623

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- (16) Board of Review Decision Case No D60/91 IRBRD, vol 6, 450
- (17) Board of Review Decision Case No D99/01 IRBRD, vol 16, 816
- (18) Board of Review Decision Case No D46/02 IRBRD, vol 17, 725

Analysis of the case

12. From the authorities cited to us, it is apparent that the following factors have to be considered when determining whether the Relevant Costs are deductible:

- (a) The nexus of the Relevant Costs with the earning of profits by the Appellant in his practice as a barrister.
- (b) Was the Relevant Costs an outgoing of capital or of a capital nature?
- (c) Did the Relevant Costs amount to a fine or a monetary punishment imposed by the law?

Nexus between the Relevant Costs and the Appellant's business

13. Forceful and convincing submissions have been made by the Respondent that as a starting point the Appellant has to prove that the Relevant Costs were incurred in the production of profits chargeable to tax and that the Relevant Costs were not incurred for domestic or private purposes.

14. From the facts of the case, it is apparent that the Relevant Costs were primarily incurred by the Appellant for business purposes as the Appellant had to defend himself in the Disciplinary Proceedings to avoid the risks of being struck off or being suspended from practice. By undertaking the defence, some private purpose of the Appellant might have been served as well, such as the defence of his name. But even so, such private purpose has also a business purpose as 'name' or 'repute' is an important attribute of the Appellant's professional calling as a barrister. For this reason and because in this case it is not possible to distinguish between those elements of the purpose which were private and those which were business, we are of the view that apportionment is neither necessary nor appropriate.

15. It was further submitted by the Respondent that it is not sufficient for the Appellant to argue that he would not have been able to stay in his profession as a barrister without incurring the expenditure. It would also be necessary for the Appellant to establish a close connection between incurring of the liability and the carrying on of his practice as a barrister. According to the Respondent, the Appellant has failed to establish such a connection in the present case as the

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Disciplinary Proceedings were brought against the Appellant not because of his day-to-day activities as a barrister but because of his alleged misconduct in his applications to the University to pursue further studies. The Respondent therefore distinguished the Appellant's case from the case of McKnight v Sheppard (1999) 3 All ER 491 where the taxpayer who was a stockbroker incurred legal costs in relation to an allegation of breaching the rules and practice directions of a stock exchange on the ground that in McKnight, the legal costs were incurred by the taxpayer to defend his conduct in carrying out his business as a stockbroker. The Respondent also distinguished the Appellant's case from the Australian case of The Herald and Weekly Times Limited v The Federal Commissioner of Taxation (1932) 48 CLR 113 where the taxpayer sought to deduct legal expenses arising out of an action in which he had been sued for defamation on the ground in the said case, the expenses were incurred to defend the publication of an article in the taxpayer's newspaper and there was therefore a strong connection between the expenses and the business.

16. On the subject of whether it is necessary for the complaints leading to the Disciplinary Proceedings to have a close connection with the Appellant's business as barrister, the Appellant took a diametrically opposite position to that of the Respondent. It was submitted by the Appellant that the Bar Code has a wide ambit of governance on the conduct of its members. As example, the Appellant quoted the incident of a barrister found carrying a gun some years ago who was struck off the register on the ground that the profession was brought into disrepute although the said incident did not result in any civil proceedings or criminal proceedings. The Appellant further suggested that if he hit someone in the Hong Kong Club under the influence of alcohol, he could be subject to disciplinary proceedings even if such incident did not result in any civil proceedings or criminal proceedings. It is the position of the Appellant that so long as the expenses incurred by the barrister in defending such disciplinary proceedings are for the purposes of enabling him to earn income, such expenses would be deductible. Neither the effects of the expenditure nor the reason why the disciplinary proceedings were instituted were relevant.

17. When asked whether he had any authority to support his aforesaid proposition, the Appellant quoted McKnight v Sheppard. In our view, McKnight v Sheppard only addressed the issue that the purpose of the taxpayer in making an expenditure could be distinguished from the effect of the expenditure. It did not and did not have to deal with the underlying reasons why the disciplinary proceedings were instituted because it was obviously a case where the taxpayer, who was a stockbroker, incurred legal costs to defend his conduct in carrying out his business as a stock broker.

18. Apart from taking the position that the purpose for defending the Disciplinary Proceedings determines the deductibility of the expenses incurred rather than the reason why the Disciplinary Proceedings were instituted, the Appellant also put forward arguments in support of his contention that in this case, there was in fact connection between his practice as a barrister and those actions taken by him which led to the complaints. In particular, the Appellant submitted that the oral undertaking held by the Disciplinary Tribunal to have been given by him and later breached

by him was in fact embodied in the telephone conversation held between the officer of the University (at the University) and the Appellant (at his chambers).

19. As neither the Appellant nor the Respondent had provided us with convincing arguments in support of their respective positions on the issue whether the reason for institution of the disciplinary proceedings (particularly whether the complaints leading to such proceedings were connected to the Appellant's business practice) is relevant for determining the deductibility of the expenses arising from such proceedings, we consider it useful to briefly review the background circumstances as set out in the Statement of Findings of the Disciplinary Tribunal. We note that the main complaint was the alleged breach of an oral undertaking given by the Appellant to an officer of the University that he would cease to practise as a barrister upon taking up a postgraduate studentship as from 1 September 1997. In relation to this complaint, the Appellant did not admit that he had given an undertaking, let alone an undertaking of ceasing to practice. He only admitted having a telephone conversation in which subject of not accepting new cases and new briefs was discussed. So, in a way, the Appellant was defending on the basis that his practice as a barrister at the material time (that is, after 1 September 1997) did not amount to a breach of undertaking, if any. This, in our view, showed that the Disciplinary Proceedings against the Appellant did have a substantial connection with his practice as a barrister and it is not necessary for us to rule whether the events leading to the Disciplinary Proceedings were relevant when determining the deductibility of the expenses arising from such Proceedings.

Were the Relevant Costs outgoing of a capital nature?

20. The deductibility of legal fees was the issue in dispute in the Australian Administrative Appeals Tribunal Case 4596. This was a case where the taxpayer, a solicitor, sought to personally deduct the taxed costs of the Law Society following an inquiry by the Statutory Committee of the Law Society of New South Wales into allegations concerning the trust account of a partnership firm the taxpayer had previously been a partner. As a result of the Statutory Committee's deliberations, the taxpayer was suspended for a period of 12 months and he and his partner were ordered to pay the taxed costs of the Law Society. In dismissing the taxpayer's appeal, the Tribunal decided that the costs incurred were in respect of a right of practice which was not a peripheral or incidental obligation of the taxpayer's practice. The costs were in respect of the taxpayer's continuing right to derive his income through the practice of his profession. That right was considered a structural asset and, accordingly, the costs of defending or acquiring it were regarded as capital expense. More particularly, the Tribunal said at page 102:

'In the present application, the costs are not those of the defendant. Furthermore, the obligation to pay the Law Society's costs was fundamental to the applicant's continuing right to derive his principal source of income through the practice of his profession. It was not a peripheral or incidental obligation of his practice. That right or privilege to earn money through certain activities, prohibited to those not similarly licensed, can be regarded as

a profit-yielding subject or a structural asset. Expenses of defending or acquiring structural assets are capital expenses.'

21. The deductibility of legal fees was also the issue in dispute in the Australian Administrative Appeals Tribunal Case 6258. The Tribunal decided that legal expenses incurred by a medical practitioner in defending his right to practice medicine were not deductible. The Tribunal said at page 3726, paragraph 11:

'... Indeed, when considering legal expenses, I think it is absolutely necessary to view the nature of the proceedings in respect of which the expenses were incurred, to determine whether the likely outcome threatened the existence of a structural asset. As Brennan J. pointed out in Magna Alloys at (ATC) 4550 it is necessary to establish the objective purpose of the expenditure incurred. The taxpayer's state of mind is not necessarily a sufficient indication. To establish the purpose, one must look at the facts behind the expenditure and analyse them.'

22. In Elberg v Federal Commissioner of Taxation [1998] 38 ATR 623, however, it was held that when a taxpayer is driven to undertake the costs of legal proceedings to defend the day-to-day activities by which he earns his income, the expenses may be of a revenue nature and deductible. Merkel J, said at page 635:

'... when regard is had to the situation which impelled the taxpayer to undertake the costs of the legal proceedings, being the defence by the taxpayer of the day-to-day activities by which she earned her income, the expenses are on revenue, not capital, account.'

23. Following our analysis in paragraph 19 above, it does appear that the Appellant was 'compelled' to defend the Disciplinary Proceedings which did have connection with his practice as a barrister. As such, the expenses would be on revenue, not capital, account following the decision of Elberg v Federal Commissioner of Taxation. But how can such a proposition be reconciled with or distinguished from the two Australian cases quoted in paragraphs 20 and 21 above? We note that in the case referred to in paragraph 20 above (that is, AAT Case 4596) the taxpayer was a solicitor and the complaint against him was improper operation of the law firm's trust account. In the case referred to in paragraph 21 above (that is, AAT Case 6258), the taxpayer was a medical practitioner who was de-registered in New South Wales for various drug-related and fraudulent offences. He then moved to South Australia, where proceedings for de-registration were again commenced against him. Without going into the details of the complaints against the Appellant in the Disciplinary Proceedings and those against the respective taxpayers in AAT Case 4596 and ATT Case 6258, it is quite obvious that the nature of the complaints against the Appellant were nowhere near as serious as the nature of the complaints against the respective taxpayers in the two Australian cases.

24. It has been suggested that when determining what is the objective purpose of the taxpayer when defending the disciplinary proceedings brought against him, we should not speculate on the likely and indeed hypothetical outcome of the disciplinary proceedings. Following this line of reasoning, so long as the Disciplinary Tribunal had the power to order de-registration, expenses incurred in the proceedings by the taxpayer should be regarded as expenses to defend his fundamental right to practise which is a structural asset and should be distinguished from cases where the complaints were peripheral to the taxpayer's business or profession, the conviction of which would not have affected the existence of the taxpayer's business.

25. We do not agree entirely with the aforesaid proposition. Although the right to practise might well be a structural asset of a professional, we think it is necessary to take into account the nature and seriousness of the offence(s) or complaint(s) in question because it is important to distinguish between defending the existence of a structural asset and defending peripheral damage to or short-term disability of such structural asset.

26. Having considered all the circumstances of this case and particularly the nature of the complaint(s) brought against the Appellant in the Disciplinary Proceedings, we are of the view that although the Disciplinary Tribunal did have power under section 37(c) of the Legal Practitioners Ordinance to order the Appellant's name be struck off the roll of barristers, the Disciplinary Proceedings against the Appellant in this case should be regarded as posing a risk to a peripheral or short-term damage to the Appellant's right to practise rather than a risk of total loss of such right. In other words, although the right of the Appellant to practise as a barrister might be regarded as a structural asset, when defending the subject Disciplinary Proceedings, the Appellant should be regarded as undergoing maintenance or damage control to such a structural asset and as such, the expenses arising therefrom would be on revenue, not capital, account.

Did the Relevant Costs amount to fines?

27. In D99/01, IRBRD, vol 16, 816, the taxpayer has incurred fines as a result of breaches of the Noise Control Ordinance and the Factories and Industrial Undertakings Ordinance. The Board found that as a matter of law, fines were not deductible under section 16 of the IRO. The Board said at page 831:

'In deciding whether fines can, as a matter of law, be regarded as outgoings or expenses one has to look for the intention of the legislature. As advocated by the courts in England, Australia and New Zealand, we agree that one should start with the presumption that the legislature would not normally sanction deductions as to do so would undermine the intention of the legislative provision which imposes the statutory obligation and the levying of the fines. To allow fines to be deducted as business expenses would no doubt encourage business traders into believing wrongly that they could regard the fines merely

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as a business expense item. On the other hand, disallowing deduction would have the merit that business traders are treated in the same manner as all other members of the community who break the law and incur the penalty of a fine.'

28. The Respondent submitted that the Relevant Costs was equivalent to a fine paid by the Appellant. In support of its contention, the Respondent drew our attention that on the completion of an inquiry, the Disciplinary Tribunal can take any of the disciplinary powers conferred under section 37 of the Legal Practitioners Ordinance (Chapter 159) [see paragraph 10.2.1 above] and such powers include an order of costs. The Respondent therefore submitted that in effect the Relevant Costs amounted to a monetary punishment imposed under the law and should not qualify for deduction under section 16 of the IRO.

29. The Appellant, however, submitted that penalty and costs are in two different arenas. In McKnight v Sheppard (1999) 3 ALL ER 491 (House of Lords), it was held unanimously that a stockbroker is entitled to deduct his legal costs and expenses incurred in defending disciplinary proceedings. The learned Hoffman LJ opined that unlike the non-deductibility of the penalty itself, there is no policy reason justifying the prohibition of deduction of legal expenses incurred as a result of penal or disciplinary proceedings. He further said at pages 496-497:

'What would have been the position if the allegations had proved to be groundless and the taxpayer had been acquitted? It would have seemed unfair not to allow any deduction for the taxpayer's legal expense. In principle, however, the purpose of the payment will be the same whether the taxpayer's defence turns out to be successful or not. Can there be a distinction between the costs of a successful and an unsuccessful defence? It might be argued that, as a matter of policy, the unsuccessful defendant should have to bear his legal costs personally in the same way as the penalty itself. But I think there would be great difficulties about giving effect to such a rule. It might not be easy to tell which costs had been expended successfully and which unsuccessfully. The taxpayer may, as in this case, have been convicted on some counts and acquitted on others. He may have had substantial success in mitigation of the penalty. More important, it is fundamental that everyone, guilty or not guilty, should be entitled to defend themselves. I do not see that any clear policy would be infringed by allowing the deduction of the legal expenses incurred in resisting the disciplinary proceedings. On the contrary, I think that non-deductibility would be in effect an additional fine or penalty for which the regulatory scheme does not provide.'

30. In this case, we noted that the Relevant Costs were not legal expenses incurred by the Appellant in defending the Disciplinary Proceedings. They were actually the costs of the prosecution and the Disciplinary Tribunal ordered to be paid by the Appellant. In response to our

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aforesaid observation, the Appellant submitted that the distinction between cost and penalty enunciated by Hoffman LJ in McKnight v Sheppard would still be applicable and further submitted that legislative intent for this distinction between cost and penalty is evident since the order for penalty and the order for costs are expressly provided in two different sub-sections, namely, sub-sections (e) and (f) of section 37 of the Legal Practitioners Ordinance. We are not convinced by the aforesaid submission by the Appellant. In our view, section 37 only sets out or enumerates seven items of what the Disciplinary Tribunal can order. This can hardly be regarded as evidence of legislative intent that costs and penalty should be treated differently. We are of the view, however, that we need not look into the legislative intent behind the costs provisions in the Legal Practitioners Ordinance. Instead, when considering whether the costs awarded by a disciplinary tribunal has or should have a punitive element, we should draw a comparison with the costs awarded by a criminal court.

31. Section 15(a) of the Costs in Criminal Cases Ordinance (Chapter 492) provides as follows:

‘In any criminal proceeding, the costs that may be awarded by virtue of an order shall not be punitive but shall be such sums as appear to a court or a judge reasonably sufficient to compensate any party to the proceedings for any expenses properly incurred by him in the course of those proceedings, including any proceedings preliminary or incidental thereto.’

We have no reason to believe that costs awarded in disciplinary proceedings should be treated differently from the costs awarded in criminal proceedings. Therefore, we do not accept the contention of the Respondent that the Relevant Costs was equivalent to a fine. We are of the view that everyone, guilty or not guilty, should be entitled to defend themselves and there is no policy reason justifying the prohibition of deduction of legal expenses, whether such expenses are incurred by the defendant himself or the expenses of the prosecution ordered to be paid by an unsuccessful defendant.

Conculsion

32. For the reasons set out in the body of this decision, we allow the appeal and set aside the assessments against the Appellant for the years 2000/01 and 2001/02.