Case No. D2/12

Salaries tax – stated case – question of law – section 69 of Inland Revenue Ordinance.

Panel: Colin Cohen (chairman), Emmanuel C C Kao and Patrick O'Neill.

Date of hearing: 5 March 2012.
Date of decision: 7 May 2012.

The Taxpayer applied for a case to be stated on a question of law for the opinion of the Court of First Instance ('CFI') in respect of his appeal against the salaries tax assessment against him for the year of assessment 2008/09, which was dismissed by the Board.

The issues before the Board concerned whether various sums (defined as Sum A and Sum B by the Board) which the Taxpayer had received from his ex-employer, Company C, upon termination of his employment should be chargeable to salaries tax. Sum A was an award made by the Labour Tribunal. Sum B was calculated by reference to the number of days of the Taxpayer's untaken leave.

The Taxpayer asserted that the two Sums were compensation for damages which he had received out of his 'wrongful dismissal'. The Board, however, concluded that both Sums represented income that arose from the Taxpayer's employment with Company C. The Board held that they were not paid as compensation for which he had surrendered any contractual or legal rights and concluded that both Sums were taxable.

Held:

1. A proper question of law is one which is a question of law, relates to the decision sought to be appealed against, is arguable and would not be an abuse of process for such a question to be submitted to CFI for determination (Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 at 283B).

2. For the Board to determine whether there is a question of law, it is the substance rather than the form of the question which matters (D26/05, (2005-06) IRBRD, vol 20, 174; Commissioner of Inland Revenue v Inland Revenue Board of Review [1989] 2 HKLR 40 at 54 A-B).

3. In respect of Sum A, the evidence was clear that the labour claim was specifically identified as a claim for a termination payment, and no

contractual rights had been abrogated. It is also not the Taxpayer's contention that the primary facts found did not admit the inference or conclusion drawn from them. Neither is his contention that there was no evidence upon which the findings of facts were based.

4. In respect of Sum B, there was clear evidence to support the Board's conclusion that the sum was clearly 'leave pay' or 'payment in lieu of leave' and hence, a reward for services, income from employment and taxable.

5. Accordingly, there is no proper question of law for the Board to state a case.

Application refused.

Cases referred to:

Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275
D26/05, (2005-06) IRBRD, vol 20, 174
Commissioner of Inland Revenue v Inland Revenue Board of Review [1989] 2 HKLR 40

Taxpayer in person.
Paul Leung Counsel instructed by Francis Kwan, Senior Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. On 5 August 2011, the Board heard and dismissed the Taxpayer's appeal against the Deputy Commissioner's Determination dated 12 April 2011 in respect of his salaries tax assessment for the year of assessment 2008/09.

2. The issues that were before the Board was whether various sums which the Taxpayer had received from his ex-employer, Company C, upon termination of his employment should be chargeable to salaries tax.

3. The two sums involved were defined as Sum A and Sum B (collectively 'the Sums'). In respect of Sum A, this was an award made by the Labour Tribunal. In respect of Sum B, this was calculated by reference to the number of days of the Taxpayer's untaken leave.

4. In short, the Taxpayer asserted that the Sums were compensation for damages which he stated he received out of his 'wrongful dismissal'.

5. The Board, however, concluded that both sums represented income that arose from the Taxpayer's employment with Company C. The Board held that they were not paid as compensation for which he had surrendered any contractual or legal rights and concluded that both Sums were taxable.

6. On 10 November 2011, the Taxpayer wrote to the Board and took issue with the Board's decision. He wrote a two-page letter to the Clerk to the Board of Review which set out in his concerns. He concluded that the decision of the Board was not 'fair, neither based on the true and legal facts'. He concluded by asking us 'to pass this case and relevant legal questions on to the Court of First Instance'.

Legal principles

7. Mr Paul H M Leung, Counsel on behalf of the Commissioner ('Mr Leung'), very helpfully set out the legal principles for our consideration.

8. Section 69 of the Inland Revenue Ordinance ('IRO') provides inter alia that either the Taxpayer or the Commissioner may make an application requiring the Board to state a case on a question of law for the opinion of the Court of First Instance ('CFI'). The stated case shall set forth the facts and decision of the Board.

9. However, we accept that the Board should decline a request to state a case if no proper question of law can be identified by the Taxpayer. In Aust-Key Co Ltd v Commissioner of Inland Revenue [2001] 2 HKLRD 275 at 283B, a proper question of law is one which:

(1) is a question of law:

(2) relates to the decision sought to be appealed against;

(3) is arguable: and

(4) would not be an abuse of process for such a question to be submitted to CFI for determination.

10. Our attention was also drawn to D26/05, (2005-06) IRBRD, vol 20, 174. Hence, for the Board to determine whether there is a question of law, it is the substance rather than the form of the question which matters. In particular, we refer to Commissioner of Inland Revenue v Inland Revenue Board of Review [1989] 2 HKLR 40 at 54 A-B, Hon Barnett J stated as follows:

> '*The Board can, and should, decline to state a case where the only question raised is, in substance, a question of fact and not a question of law.*'

Discussion

11. At the hearing before the Board, the Taxpayer repeated to us that he took the view that the Board had come to the wrong decision and we had little regard to the facts nor the authorities.

12. We now deal with each of the Sums:

Sum A

13. We concluded in our decision that Sum A was an amount which Company C was liable to pay under terms of the Taxpayer contract of employment. We had no difficulties in concluding therefore Sum A was taxable. However, the Taxpayer disagreed. He contended that the Labour Tribunal award did not specify the amount awarded to him was outstanding salaries only, nor did it specify the nature of the award.

14. We accept Mr Leung's submissions that the Taxpayer is not contending that the Board has misinterpreted sections 8 and 9 of the IRO or wrongly applied the law to the facts found.

15. The Taxpayer is also not contending that the primary facts found do not admit the inference or conclusion drawn from them. Indeed, he did not contend there was no evidence upon which the findings of facts were based.

16. Again, we repeat what we said in our decision. The evidence was clear. In our view, the labour claim was specifically identified as a claim for a **termination payment**. No contractual rights had been abrogated.

17. Therefore, the Taxpayer in his letter and his subsequent submissions before the Board, there are, in our view, no proper questions of law for a case to be stated.

Sum B

18. In our decision, we found quite clearly that Sum B was paid with regard to untaken leave. In our decision, we concluded that the sum was clearly 'leave pay' or 'payment in lieu of leave' and hence, a reward for services, income from employment and taxable.

19. In our decisions, we also relied on the fact that there was clear evidence namely an email from Ms D dated 23 December 2010 and a further letter to the Inland Revenue Department ('IRD') dated 23 March 2011 to suggest that the Taxpayer had taken five days leave already. In short, the Taxpayer's proposition before us was that Ms D did not work for Company C and could never have been in a position to represent their position and he also asserted that the letter from Ms E on behalf of Company C was wrong.

20. Indeed, he drew to our attention a letter that he had written to the Board on 21 January 2012 where he attached an email bearing the date of 23 January 2012 requesting Ms E to correct her statements. Clearly, this is something which we cannot give any consideration to.

21. We also agree with Mr Leung's submissions that there is clearly no question of the Board having over-ruled any decision or finding of the courts in Country F. The issues before the respective forums, in our view, were totally different.

22. Therefore, in our view, in so far as Sum B is concerned, none of the Taxpayer's contentions set out in his letter or his submissions before us amount to proper questions of law for a case to be stated.

Conclusion

23. Therefore, having considered very carefully all the correspondence that has been sent to the Board by the Taxpayer, having reviewed all the written submissions received and having heard the parties, we come to the conclusion that there is no proper question of law for us to state a case and hence, we refuse to do so.