Case No. D24/05

Salaries tax – sign-on bonus – reward for future services – emolument arose from the employment – onus wholly on the appellant to show the assessment excessive or incorrect on appeal – section 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Brian Lo Kin Hang and Edward Shen.

Date of hearing: 4 May 2005.
Date of decision: 15 June 2005.

The appellant complained about the followings in his notice of appeal:

For the year of assessment 2001/02:

1. Leave pay;
2. Stock purchase plan;
3. Contribution to recognized retirement scheme;
4. Interest paid on mortgage loan for place of residence;

For the year of assessment 2002/03:

5. Sign-on bonus;
6. Overtime allowance
7. Actual contribution to recognizes retirement schemes
8. Home loan interest

The appellant absented himself from the hearing. His tax representative did not submit any bundles of documents or authorities and call no witnesses.

Held:

1. The appellant failed his appeal on all items above as he failed to discharge his onus of proving the assessment excessive or incorrect under section 68(4) of the IRO.

2. The sign-on bonus (item 5 above) was an emolument arose from the employment, in the nature of a reward for services past, present or future and for being or becoming

an employee and hence chargeable to salaries tax.

Appeal dismissed and costs order in the sum of $5,000 imposed.

Cases referred to:

D22/04, IRBRD, vol 19, 163
D60/97, IRBRD, vol 12, 367
Shilton v Wilmshurst (Inspector of Taxes) [1991] STC 88

Lie Han Ji of Messrs H J Lie & Company, Certified Public Accountant, for the taxpayer.
Leung Wing Chi and Go Min Min for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 31 January 2005 whereby:

(a) Salaries tax assessment for the year of assessment 2001/02 under charge number 9-0740765-02-0, dated 20 August 2002, showing net chargeable income of $579,777 with tax payable thereon of $85,062 [after giving effect to the Tax Exemption (2001 Tax Year) Order] was reduced to net chargeable income of $391,615 with tax payable thereon of $53,074 [after giving effect to the Tax Exemption (2001 Tax Year) Order].

(b) Salaries tax assessment for the year of assessment 2002/03 under charge number 9-1668551-03-2, dated 15 December 2003, showing net chargeable income of $408,294 with tax payable thereon of $58,909 was reduced to net chargeable income of $349,649 with tax payable thereon of $48,940.

2. The appeal came up for hearing on 4 May 2005.

3. The appellant absented himself from the hearing. He was represented by Mr Lie Han-ji, certified public accountant. Mr Iie Han-ji did not submit any documents bundle or authorities bundle and did not call any witness.

4. Ms Leung Wing-chi had submitted a documents and authorities bundle before the hearing. She did not call any witness.

5. In his notice of appeal dated 26 February 2005, the appellant complained about a number of items. We shall deal with each item in the order in which the items were set out in the notice of appeal.

6. Section 68(4) of the Inland Revenue Ordinance, Chapter 112, ('IRO') provides that the onus of proving that the assessment appealed against is incorrect or excessive shall be on the appellant.

Year of assessment 2001/02 – '(1) Leave pay (HK$30,920)'

7. The employment letter from the appellant's former employer is dated 22 January 1998. Clause 3 of the 'Other Terms and Conditions of Employment' provided for 15 working days of annual leave.

8. Employment by the appellant's former employer commenced on 2 July 1998. The vacation leave record cards of the former employer showed the following:

(a) For the calendar year 1998, the appellant was entitled to 7.5 days of annual leave. Only 1 day's leave had been taken. The balance to be carried forward was 6.5 days.

(b) For the calendar year 1999, with a balance brought forward of 6.5 days, the total number was 21.5 days. 9.5 days' leave had been taken in 1999 and the balance to be carried forward was 12 days.

(c) For the calendar year 2000, with a balance brought forward of 12 days (despite the mark in the box 'Forfeited' in the copy vacation leave record card for 1999), the total number was 27 days. 12 days' leave had been taken in 2000 and the balance to be carried forward was 15 days.

(d) For the calendar year 2001, with a balance brought forward of 15 days, the total number was 30 days. 17 days' leave had been taken by the end of the calendar year (in addition to 7.5 days of 'compensation leave' or 'compensation'). The balance to be carried forward was 13 days.

(e) For the calendar year 2002, with a balance brought forward of 13 days, the total number for the whole year would have been 28 days. As the appellant's employment terminated on 28 March 2002, the 15 days' annual leave for 2002 was pro-rated to 3.75 days. Adding 3.75 days to the balance brought forward of 13 days, and deducting 3 days' leave taken by the appellant by the time of the termination of his employment, the accrued leave due to him at the time of termination of his employment was 13.75 days.

9. It is clear from the vacation leave record cards that unused annual leave had without fail all been carried forward. At the end of 2001, the appellant had earned his 13 days of unused annual leave which were carried forward to 2002. By 28 March 2002, the appellant had earned his pro-rata annual leave of 3.75 days. As he had taken only 3 days' leave, annual leave of 13.75 days was due to him. By virtue of section 41D of the Employment Ordinance, Chapter 57, he was entitled to payment to him in respect of annual leave compensation.

10. Leave pay of $30,920 was income arising in or derived from the appellant's employment by his former employer and is chargeable to salaries tax. The appellant has not begun to discharge his onus under section 68(4) of the IRO and his appeal on this item fails.

Year of assessment 2001/02 – '(2) Stock Purchase Plan (HK$28,503)'

11. In his notice of appeal dated 26 February 2005, the appellant appealed against 'Stock Purchase Plan (HK$28,503)'.

12. If the appellant had cared to read the Determination, he would have known that the figure adopted by the Deputy Commissioner under this item was only $13,830, not $28,503, see paragraphs 1(10), 1(14)(d), 1(25)(a) and 2(1) of the Determination.

13. What Mr Lie Han-ji wrote on this item was that (written exactly as it stands in the original):

> 'one share grant should be treated as gift as not related to performance'.

14. If Mr Lie Han-ji had cared to read the papers before appearing before us as the representative of the absent appellant, he would have realised that the purchase of the one share was made on 20 September 1999 and had nothing to do with the $13,830 item in the assessment for 2001/02.

15. Again, the appellant has not begun to discharge his onus under section 68(4) and his appeal on this item fails.

Year of assessment 2001/02 – '(3) Contribution to Recognized retirement scheme (HK$27,660)'

16. The Deputy Commission quoted the relevant provisions in his Determination.

17. Mr Lie Han-ji conceded that deductions on contributions to a mandatory provident fund were capped at $1,000 per month.

18. We asked him to draw our attention to provisions in the IRO which allowed deductions of more than $1,000 per month on account of contributions to recognised retirement schemes.

19. Mr Lie Han-ji referred us to section 26G(3). He was asked to read section 26G(2) and schedule 3B. These were the provisions which capped the amounts of deductions at $1,000 per month. We told him that unless he could point to a provision which allowed deductions of more than $1,000 a month, he was wasting our time. Mr Lie Han-ji made no attempt to point to any provision or authority and rattled on.

20. The appeal on this item fails.

Year of assessment 2001/02 – '(4) The interest paid on mortgage loan for my place of residence (HK10,216)'

21. The appellant's parents are registered as joint tenant owners of the subject dwelling.

22. There is no evidence that the appellant has ever been the beneficial owner of the subject dwelling.

23. The appellant has not proved that he is an owner of the subject dwelling, whether legal or beneficial, and his appeal on this item fails.

24. It is thus not necessary for us to consider whether section 26E applies in respect of beneficial, as opposed to legal, owners. Suffice it to say that we are inclined to agree with the reasoning and decision in D22/04, IRBRD, vol 19, 163, by a panel chaired by a leading property lawyer, Mr Patrick Fung Pak-tung, SC, sitting with two experienced lawyers.

Year of assessment 2002/03 – '(1) Sign-on bonus (HK$58,500)'

25. The letter dated 26 March 2002 offering the appellant employment contained the following paragraph:

> 'You will receive a sign-on bonus of HK$58,500 upon your commencement with our Company. If you resign from the Company within one year, you are liable to fully reimburse the bonus payment of HK$58,500 ...'

26. The appellant accepted the offer.

27. The sum of $58,500 accrued in full to the appellant at the commencement of the appellant's employment.

28. In D60/97, IRBRD, vol 12, 367 at page 374, a decision of a panel chaired by Professor Andrew Halkyard, the Board quoted sections 8(1) and 9(1)(a) of the IRO and summarised the law succinctly as follows:

> *'On the basis of various authorities brought to our attention, including Hochstrasser v Mayes (1959) 38 TC 673 per Viscount Simonds at 705, to be liable to salaries tax the Sum must arise from the employment, be referable to the services the Taxpayer rendered by virtue of his office and must be something in the nature of a reward for services past, present or future.'*

29. Professor Halkyard then went on to quote from Shilton v Wilmshurst (Inspector of Taxes) [1991] STC 88.

30. Shilton v Wilmshurst (Inspector of Taxes) was a case in which the taxpayer was paid 75,000 GBP by Nottingham Forrest Football Club for consenting to the transfer to Southampton Football Club. Section 181(1) of the Income and Corporation Taxes Act 1970 provided that tax under schedule E 'shall be charged in respect of any office or employment on emoluments'. The litigation between the taxpayer and the revenue went all the way to the House of Lords. In his judgment, Lord Templeman (with whose reasons all the other law lords agreed) said (at page 91):

> *'Section 181 is not limited to emoluments provided in the course of employment; the section must therefore apply first to an emolument which is paid as a reward for past services and as an inducement to continue to perform services and second, to an emolument which is paid as an inducement to enter into a contract of employment and to perform services in the future. The result is that an emolument "from employment" means an emolument "from being or becoming an employee".'*

31. The sign-on bonus was an emolument for being or becoming an employee. It was an inducement to enter into a contract of employment, an inducement to continue to perform services and an inducement to perform services in the future. In our Decision, the appellant was liable to salaries tax in respect of this item.

32. The contingent liability to refund did not in fact arise. Mr Lie Han-ji cited no authority on how this contingent liability could have affected the charge under section 8.

33. The appeal on this item fails.

Year of assessment 2002/03 – '(2) Overtime allowance HK$3,200'

34. What Mr Lie Han-ji wrote on this item was:

'**F Meal allowance**

Expense should be allowed if such is assessed.'

35. The onus is on the appellant to show that this item was not chargeable income. The appellant has not begun to do so.

36. There is no evidence on any meal expense. Any claim for deduction must therefore fail.

37. In any event, Mr Lie Han-ji has cited no authority to support his bare assertion that meal expense was a deductible expense.

38. The appeal on this item fails.

Year of assessment 2002/03 – '(3) Actual contribution to recognized retirement schemes HK$25,612'

39. For reasons given above under the section *Year of assessment 2001/02 – '(3) Contribution to Recognized retirement scheme (HK$27,660)'*, this item fails.

Year of assessment 2002/03 – '(4) Home Loan interest HK37,274'

40. For reasons given above under the section *Year of assessment 2001/02 – Year of assessment 2001/02 – '(4) The interest paid on mortgage loan for my place of residence (HK10,216)'*, this item fails.

Disposition

41. The appellant has not discharged the onus under section 68(4). We dismiss the appeal and confirm the assessments as reduced by the Deputy Commissioner.

Costs order

42. We are of the opinion that this appeal is frivolous and vexatious and an abuse of the process. Pursuant to section 68(9), we order the appellant to pay the sum of $5,000 as costs of the Board, which $5,000 shall be added to the tax charged and recovered therewith.

Postscript

43. Before we part with this case, we would like to record our thanks to Ms Leung Wing-chi for her helpful assistance. Had she included Shilton v Wilmshurst (Inspector of Taxes) and D60/97, her submission would have been impeccable.