Case No. D31/08

Salaries tax – whether income from employment – sections 8(1) and 9(1)(a) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Colin Cohen and Horace Wong Yuk Lun SC.

Date of hearing: 12 September 2008.
Date of decision: 17 October 2008.

The appellants were medical staff employed by the employer, a statutory body established pursuant to the Hospital Authority Ordinance, Chapter 113. Under their employment contracts with the employer, they were expected to work overtime and perform on-call duties.

On 1 March 2006, Mr Justice Stone gave judgment in favour of some doctors employed by the employer that they should be given compensation if they were required by the employer to "work" on their rest days and on public holidays. The court left the quantum of compensation to the internal administrative process of the employer.

The employer subsequently offered a settlement package to all its medical staff. The appellants were individually offered a sum in settlement of their respective potential claims against the employer ("the sums") under the settlement package, which were accepted by them respectively. The stated consideration for the employer's agreement to pay the sums was:

> '... in full and final settlement of any claim, action, right, entitlement, or proceedings (including any claim for compensation, damages, money or time off in whatever form or amount) that [the appellants] might have, had or had had against the employer (including all claims in any legal proceedings [the appellants] had issued or might issue against the employer) arising out of or in connection with any rest days, statutory holidays and / or public holidays (whether not granted or not compensated or otherwise) or any extra work hours or overtime worked in respect of any period arising from [the appellants'] employment with the employer on or before the date of [their] receipt of the full [sums] of money under the [offers]'.

The appellants claimed the payments made by the employer under its settlement package were damages paid for breach of its statutory duty to grant statutory holidays and rest days pursuant to Employment Ordinance; hence the payments should not be taxable. The appellants

also claimed that their employment was not the source of the sum paid by the employer to the appellants under the settlement package and was not chargeable to tax under section 8 of the IRO.

Held:

1. The offer letters were sent only to those who had worked on their rest days and holidays. Had they not rendered services by virtue of their employments and treated patients on their rest days and holidays, they would not have been offered and paid the sums.

2. The sums were offered and paid to the appellants in return for their having acted as employees on their rest days, statutory holidays, public holidays and overtime.

3. The sums were not paid as damages. They were paid to compromise the appellants' claims which were disputed by the employer. Those claims were founded on the appellants having worked on their rest days, statutory holidays and public holidays and also overtime. Even if they were paid as damages, their employment contracts were still the source of the payments. There is no grant of statutory holidays and rest days in the abstract. The statutory duty arose only in cases of employment within the meaning of the relevant sections in the Employment Ordinance and a breach occurred because the appellants worked. Approaching the matter on this basis, the payments arose from the employments and not from 'something else'. In the Board's view, applying Hamblett v Godfrey, the appellants' employments were the source of the payments of the sums. They were referrable to the employments and to nothing else.

4. The Board disagreed with the appellants' contention that their employments were not the *causa causans* but were merely the *causa sine qua non* of the receipt of the payments. In the Board's view, the appellants' employments were the *causa causans* of the receipt of the payments of the sums.

5. The appellants also compromised any and all claims which they might have for "any extra work hours or overtime worked". The fact that no overtime compensation was specifically included in the computation of the sums did not detract from the fact that the sums were offered and paid to compromise the appellants' claims which included overtime claim. Although the Honourable Mr Justice Stone had decided against the lead plaintiffs on this point, there was a pending appeal. In the Board's view, the overtime daim was as at the times of the compromises a doubtful claim. It is trite law that the compromise of a doubtful claim is binding as a contract, see e.g. Chitty on Contract, 29th edition, volume 1, paragraph 3-051.

6. Each of the sums was income arising in or derived from Hong Kong from the source – the respective appellant's employment.

Appeal dismissed.

Cases referred to:

Wong Pui Tuen Kenny and another v Crown Motors Limited, HCLA 108 of 2003
Hochstrasser v Mayes [1960] AC 376
Shilton v Wilmshurst [1991] 1 AC 684
D80/00, IRBRD, vol 15, 715
Hamblett v Godfrey [1987] 1 WLR 357
D103/97, IRBRD, vol 12, 555
D76/98, IRBRD, vol 13, 420
D4/91, IRBRD, vol 5, 542
Carter v Wadman (1946) 28 TC 41
Pun Pabitra v Wong Kan Hing, HCLA 30/1997
Riches v Westminster Bank Ltd [1947] AC 390
London & Thames Haven Oil Wharves Ltd v Attwooll [1967] 2 All ER 124
C of T (NSW) v Meeks (1915) 19 CLR 568
Fuchs, Walter Alfred Heinx v Commissioner of Inland Revenue, HCIA 1/2008
CIR v Humphrey [1970] HKLR 447
Humphrey, Wing Tai Development Co Ltd v CIR [1979] 642
CIR v Yung Tse Kwong [2004] 3 HKLRD 192
Henley v Murray (Inspector of Taxes) 31 TC 351

Taxpayer represented by Leung Ka Lau of Hong Kong Public Doctors' Association.
Rimsky Yuen, Senior Counsel instructed by Richard Fawls, Senior Assistant Law Officer and Francis Kwan, Senior Government Counsel of the Department of Justice for the Commissioner of Inland Revenue.

Decision:

Introduction

1. 3 appeals, BR 11/08, BR 12/08 and BR 13/08 were heard together by consent of all the parties. The appellant in BR 11/08 shall be referred to as 'Appellant1'. The appellant in BR 12/08 shall be referred to as 'Appellant2' and the appellant in BR 13/08 as 'Appellant3'. They are referred to collectively as 'the appellants'.

2. In March 2002, some doctors in the employ of the employer were dissatisfied with having to work overtime and on rest days and holidays without any compensation, whether by the grant of alternative rest days or statutory holidays or monetary compensation. They commenced proceedings in the Labour Tribunal against the employer. Their claims were transferred to the Court of First Instance.

3. The appellants were not parties to the High Court Action.

4. By a consent order, directions were given for the trial involving three 'lead' plaintiffs and the remaining plaintiffs and the employer expressly agreed to be bound by 'any determinations of law or principle in the lead cases'.

5. The trial took place in January and February 2006. The trial judge handed down his judgment on 1 March 2006, upholding the rest day and holiday claims but dismissed the overtime claim.

6. By letters dated 20 June 2006 and 4 July 2006, the employer wrote to all its medical staff on its proposed settlement package. Formal offers were made to the appellants by letters dated 19 August 2006. The appellants accepted the offers.

7. Around 4,000 serving doctors and more than 500 doctors who had left the employer's employ accepted the settlement package.

8. The appellants contended that the sums paid under the settlement package was not chargeable to salaries tax. The assessor disagreed and included the sums in their assessments. The appellants objected but the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') upheld the assessments appealed against.

9. We were given to understand that the Commissioner of Inland Revenue ('the Commissioner') has deferred her determination in respect of objections by other doctors pending the outcome of these tax appeals.

10. The plaintiffs in the High Court Action appealed and in a judgment handed down on 21 January 2008, the Court of Appeal allowed the appeal in part.

The agreed facts

11. The parties agreed the facts set out in paragraph 1 of the respective Determinations under the heading of 'Facts upon which the Determination was arrived at' and we find them as facts.

12. The following account is taken from the agreed facts.

13. (a) Appellant1 has objected to the additional salaries tax assessments for the years of assessment 2003/04, 2004/05 and 2005/06 and the salaries tax assessment for the year of assessment 2006/07 raised on him. Appellant1 claims that a sum received from his employer, the employer, should not be assessable to salaries tax.

(b) Appellant2 has objected to the salaries tax assessment for the year of assessment 2006/07 raised on him. Appellant2 claims that a sum received from his employer, the employer, should not be assessable to salaries tax.

(c) Appellant3 has objected to the salaries tax assessment for the year of assessment 2006/07 raised on him. Appellant3 claims that a sum received from his employer, the employer, should not be assessable to salaries tax.

14. The employer is a statutory body established on 1 December 1990 pursuant to the Hospital Authority Ordinance, Chapter 113. With effect from 1 December 1991, it took over management and control of the 38 government and subvented hospitals and institutions and their then 37,000 staff including public hospital doctors.

15. (a) To ensure doctors are available to attend patients on a 24-hour and 7-day a week basis, the employer has been operating an 'on call system'. Under this system, doctors are rostered to be on call after normal working hours including Sundays (i.e. their weekly rest days) and other public holidays.

(b) Doctors on call are put on tiers of call according to their seniority and clinical experience. The most junior doctors are usually the first tier of call ('the first call'), whilst the more senior doctors are put on higher tiers of call ('the second call', 'the third call' and so on).

(c) A doctor on the first call has to respond at short notice and is usually expected to stay within the hospital compound. This is sometimes referred to as being on 'resident call'. A doctor on the second call may or may not be expected to stay in the hospital compound depending on the requirements of his department or hospital. Whereas, a doctor on the third call typically is not expected to stay within the hospital compound but should remain contactable, for example, via pager or mobile phone and should make himself available in the sense of staying within a reasonable distance from the hospital.

16. (a) Appellant1 was first appointed by the employer as a Medical and Health Officer and subsequently promoted to the position of Senior Medical and

Health Officer. It was stated in his employment letter, among other things, that Appellant1 might be required to work shifts to provide 24-hour coverage. Appellant1 was further promoted to be a Consultant. The terms of his employment included, among others, the following:

(i) He would be required to perform the duties associated with his post or such duties as might be assigned to him by his Department / Unit / Section.

(ii) His Head of Department / Unit / Section would advise him in advance of his work schedule. He was expected to work overtime and perform on-call duties in line with prevailing policies depending on the exigencies of his work and the operational requirements of individual specialty. At the absolute discretion of hospital management, a fixed rate honorarium might be payable to him in recognition of the additional work done. In addition, he might also be required to work shifts to provide 24-hour coverage.

(b) Appelant2 commenced his employment with the employer as a Medical Officer. It was stated in his employment letter, among other things, that due to operational needs, he might be required to work overtime or on shifts to provide 24-hour coverage. Appellant2 was promoted to be an Associate Consultant. The terms of his employment included, among others, the following:

(i) He would be required to perform the duties associated with his post or such duties as might be assigned to him by his Department / Unit / Section.

(ii) His Head of Department / Unit / Section would advise him in advance of his work schedule. He was expected to work overtime and perform on-call duties in line with prevailing policies depending on the exigencies of his work and the operational requirements of individual specialty. At the absolute discretion of hospital management, a fixed rate honorarium might be payable to him in recognition of the additional work done. In addition, he might also be required to work shifts to provide 24-hour coverage.

(c) Appellant3 commenced his employment with the employer as an Intern and was subsequent promoted to be a Resident in a public hospital. The terms of his employment included, among others, the following:

(i) He would be required to perform the duties associated with his post or such duties as might be assigned to him by his Department / Unit / Section.

(ii) His Head of Department / Unit / Section would advise him in advance of his work schedule. He was expected to work overtime and perform on-call duties in line with prevailing policies depending on the exigencies of his work and the operational requirements of individual specialty. At the absolute discretion of hospital management, a fixed rate honorarium might be payable to him in recognition of the additional work done. In addition, he might also be required to work shifts to provide 24-hour coverage.

17. In March 2002, 171 public hospital doctors who were dissatisfied with the on call system initiated proceedings against the employer in the Labour Tribunal in relation to the provision of rest days and statutory days. Six doctors subsequently abandoned their claims and the remaining 165 claims were transferred to the Court of First Instance ('the Court') and became the High Court Action of HCA 1924 of 2002 ('the Action').

18. The Action was heard before Hon Stone J on 16-19, 24-25 January and 8-9 February 2006. In the hearing, the doctors argued, among other things, that being rostered on call or otherwise required to work on Sundays (i.e. their weekly rest days) and public holidays without proper recompense, they were deprived of the rights to abstain from work on these days and that this was in breach of their employment contracts and of the Employment Ordinance, Chapter 57, ('the EO'). They sought compensation in the form of time-off in lieu with pay.

19. On 1 March 2006, Hon Stone J delivered his judgment ('the CFI Judgment'). The CFI Judgment included, among other things, the following:

'…

2. The nub of the present dispute is that the doctors claim that for many years [the employer] has required them to work long hours without proper recompense, and that this is in breach of their employment contracts and of [the EO].

…

42. In my view, this case has always been about the public doctors' fundamental dissatisfaction with the requirement that they work on their rest days and on public holidays …

…

169. It follows that I have concluded, and so find, that doctors on resident call are at their place of work, and are working, for the entire period in which they are on such resident call.

…

172. I therefore conclude that a doctor is not "at work" or "working" simply by virtue of being on call outside his hospital. Likewise the giving of brief advice by telephone, in my view, is not to be thus characterized.

173. However if a doctor on non-resident call in fact is called back to the hospital, in my view in this instance he would be returning to "work" …

…

241. The result of the foregoing is that … the claim for lost rest days and statutory holidays succeeds for the full six year period as now claimed.

…

245. … the plaintiffs have made it clear that they seek time-off in lieu with pay as against an award of damages, while [the employer] argues that any compensation should be purely in monetary form …

…

250. I have no hesitation in rejecting the plaintiffs' argument for time-off in lieu with pay instead of the remedy of purely monetary relief. Accordingly, any quantum assessment must proceed on this basis that the breaches as found against [the employer] sound in damages alone.

Assessment methodology

251. This latter finding, however, begs the further question as to the appropriate mode of quantum assessment …

…

258. I apprehend that this is a matter which ideally should be left to internal [the employer] administrative process …

> *259. Should this matter ultimately be unable to be addressed by the [the employer] in terms of administrative process … with regard both to the existing plaintiffs in these proceedings and generally, and if and in so far as the issue of quantum of these claims requires to be resolved judicially, then it seems to me … that in the circumstances there is little choice but for any fair assessment of quantum to proceed on the basis of a reasonable evidential assessment of the hours actually worked by doctors on their past rest days, and thereafter that such computation should be calculated on the premise that compensation for the total hours actually thus worked on rest days and statutory and public holidays is to be based upon the then prevailing monthly salary of the particular doctor. This is far from an attractive prospect, but in the circumstances I am unable to divine a fairer method of achieving any such quantum assessment should such an exercise ultimately prove necessary.*
>
> …'

20. The employer wrote to all its medical staff on 20 June 2006 informing that:

> ' As you would recall from previous correspondence, we have been working for some months now to find a way forward to reaching a settlement to the decision of the court in March this year. The objectives of the Doctors Working Group has been to reach agreement on the principles and details of a settlement package that the group considers should be put to all doctors …
>
> We will write to you again with full details of the proposed settlement but the most important aspects are as follows:
>
> (a) The settlement package is considered as full and final settlement to the matter surrounding public holidays / statutory holidays / rest days [PH/SH/RD] and in that regard we would be requiring each doctor to sign a document confirming their agreement.
>
> (b) The package is based on a target acceptance of at least 95% of those eligible doctors.
>
> (c) The total amount for distribution to all doctors is based on an actuarial study by an external independent consultant firm with input about key assumptions from the Doctors Working Group.

(d) A broadbanding approach has been adopted in identifying who should receive what amount. This is based mainly on frequency of specialty groups working on the PH/SH/RD and the estimated level of compensation already granted …

(e) The broadbanding approach uses averages for different specialty groups and so some exceptional cases may arise and a mechanism for assessing these cases will be developed.

(f) The total cost of this arrangement is estimated at $629M and is subject at this stage to endorsement by [the employer] Board.

(g) The payment will be an (*sic*) one off cash payment.'

21. On 4 July 2006, the employer wrote further to its medical staff concerning the proposed settlement package:

'The settlement package … is put forward as a full and final settlement in connection with the doctors' claim for rest days, statutory holidays / public holidays and overtime worked.

…

The settlement package will be offered to all relevant doctors who are now employed on permanent, contract or temporary full-time terms in [the employer] …

The relevant period for the purpose of calculating the settlement package is set from 1 January 2000 to 31 December 2005 (ie a maximum of 6 years). For serving doctors employed after 1 January 2000, the relevant period will be counted from the date of their employment with [the employer] up to and including 30 June 2006 for a maximum of 6 years, whichever is earlier.

All the years of active service of the doctors concerned in the rank of Intern, Resident, Medical Officer, Associate Consultant, Senior Medical Officer or Consultant within the relevant period will be taken into account. The settlement amount for incomplete years of service will be pro-rated according to the actual calendar days worked in that year.

Computation of the settlement amount will be in accordance with the rates stipulated for each specialty bands …

Different relative weighting will be given to different years during the relevant period as follows in view of the expected differences in compliance rate:

Total of 2000 – 2001 = 50% of total settlement amount in respect of specialty concerned
Total of 2002 – 2003 = 30% of total settlement amount in respect of specialty concerned
Total of 2004 – 2005 = 20% of total settlement amount in respect of specialty concerned

… The compensation payment aims to deal with the full findings of the Court in relation to doctors' claims …'

22. (a) On 19 August 2006, the employer issued a letter ('the Appellant1 Offer Letter' and the offer letters are referred to collectively as 'the offer letters') to Appellant1 giving him an individual offer under the settlement package. The Appellant1 Offer Letter included, among others, the following terms:

(i) Appellant1 would be paid a sum of $156,083* ('the Appellant1 Sum' and the sums are referred to collectively as 'the sums') which was calculated as follows:

Relevant period	Rank	Specialty	Total leave days in calendar year	Relevant banding for six years (A)	Year weighting (B)	Prorata period (Year) (C)	Leave ratio (D)	Calculation for each period** (A) x (B) x (C) x (D)
[Details omitted here]								
								$156,084*

Note

* There was no explanation provided in the Offer Letter for the difference between the two figures.

** It was remarked in the Offer Letter that the figures in the last column might not be exactly equal to (A) x (B) x (C) x (D) due to rounding.

(ii) The offer was in full and final settlement of any claim, action, right, entitlement, or proceedings (including any claim for compensation, damages, money or time off in whatever form or amount) that Appellant1 might have, had or had had against the employer (including

all claims in any legal proceedings Appellant1 had issued or might issue against the employer) arising out of or in connection with any rest days, statutory holidays and / or public holidays (whether not granted or not compensated or otherwise) or any extra work hours or overtime worked in respect of any period arising from Appellant1's employment with the employer on or before the date of his receipt of the full sum of money under the offer.

(iii) The offer was binding on Appellant1 if he accepted it.

(b) On 19 August 2006, the employer issued a letter ('the Appellant2 Offer Letter') to Appellant2 giving him an individual offer under the settlement package. The Appellant2 Offer Letter included, among others, the following terms:

(i) Appellant2 would be paid a sum of $174,182* ('the Appellant2 Sum') which was calculated as follows:

Relevant period	Rank	Specialty	Total leave days in calendar year	Relevant banding for six years (A)	Year weighting (B)	Prorata period (Year) (C)	Leave ratio (D)	Calculation for each period** (A) x (B) x (C) x (D)
[Details omitted here]								
								$174,183*

Note

* There was no explanation provided in the Offer Letter for the difference between the two figures.

** It was remarked in the Offer Letter that the figures in the last column might not be exactly equal to (A) x (B) x (C) x (D) due to rounding.

(ii) The offer was in full and final settlement of any claim, action, right, entitlement, or proceedings (including any claim for compensation, damages, money or time off in whatever form or amount) that Appellant2 might have, had or had had against the employer (including all claims in any legal proceedings Appellant2 had issued or might issue against the employer) arising out of or in connection with any rest days,

statutory holidays and / or public holidays (whether not granted or not compensated or otherwise) or any extra work hours or overtime worked in respect of any period arising from Appellant2' s employment with the employer on or before the date of his receipt of the full sum of money under the offer.

(iii) The offer was binding on Appellant2 if he accepted it.

(c) On 19 August 2006, the employer issued a letter to Appellant3 giving him an individual offer under the settlement package. This letter was subsequently superseded by another offer letter dated 13 October 2006 ('the Appellant3 Offer Letter'). The Appellant3 Offer Letter included, among others, the following terms:

(i) Appellant3 would be paid a sum of $81,609 ('the Appellant3 Sum') which was calculated as follows:

Relevant period	Rank	Specialty	Total leave days in calendar year	Relevant banding for six years (A)	Year weighting (B)	Prorata period (Year) (C)	Leave ratio (D)	Calculation for each period** (A) x (B) x (C) x (D)
[Details omitted here]								
								$81,609

Note

** It was remarked in the Offer Letter that the figures in the last column might not be exactly equal to (A) x (B) x (C) x (D) due to rounding.

(ii) The offer was in full and final settlement of any claim, action, right, entitlement, or proceedings (including any claim for compensation, damages, money or time off in whatever form or amount) that Appellant3 might have, had or had had against the employer (including all claims in any legal proceedings Appellant3 had issued or might issue against the employer) arising out of or in connection with any rest days, statutory holidays and / or public holidays (whether not granted or not compensated or otherwise) or any extra work hours or overtime worked in respect of any period arising from Appellant3' s employment with the employer on or before the date of his receipt of the full sum of money under the offer.

(iii) The offer was binding on Appellant3 if he accepted it.

23. (a) On 9 October 2006, Appellant1 informed the employer that he accepted the settlement offer referred to in paragraph 22(a) above.

(b) On 13 October 2006, Appellant 2 informed the employer that he accepted the settlement offer referred to in paragraph 22(b) above.

(c) On 16 October 2006, Appellant3 informed the employer that he accepted the settlement offer referred to in paragraph 22(c) above.

24. By letters dated 26 October 2006, the employer informed the appellants that:

(a) The employer Board had approved to implement the settlement package in view of the general acceptance by doctors at large.

(b) It would arrange to effect payment of the sums to the appellants via the November 2006 payroll.

25. (a) The employer filed an employer' s return for the year ended 31 March 2007 in respect of Appellant1 reporting income which included the Appellant1 Sum.

(b) The employer filed an employer' s return for the year ended 31 March 2007 in respect of Appellant2 reporting income which included the Appellant2 Sum.

(c) The employer filed an employer' s return for the year ended 31 March 2007 in respect of Appellant3 reporting income which included the Appellant3 Sum.

26. (a) In his Tax Return – Individuals for the year of assessment 2006/07, Appellant1 reported the same amount of income as that reported by the employer in the employer' s return. He applied to relate back part of the Appellant1 Sum to previous years for assessment.

(b) In his Tax Return – Individuals for the year of assessment 2006/07, Appellant2 reported the same amount of income as that reported by the employer in the employer' s return. He applied to relate back part of the Appellant2 Sum to previous years for assessment.

(c) In his Tax Return – Individuals for the year of assessment 2006/07, Appellant3 reported the same amount of income as that reported by the employer in the

employer's return. He applied to relate back part of the Appellant3 Sum to previous years for assessment.

27. (a) The assessor allocated and related back part of the Appellant1 Sum for 3 years and raised on Appellant1 additional salaries tax assessments for 2003/04 ($22,359 was related back), 2004/05 ($51,980 was related back) and 2005/06 (51,980 was related back) and salaries tax assessment for 2006/07 ($29,764, the balance of the Appellant1 Sum).

(b) As relating back would not reduce Appellant2's total tax liability, the assessor issued to Appellant2 his salaries tax assessment for 2006/07 which included the whole of the Appellant2 Sum as his income.

(c) As relating back would not reduce Appellant3's total tax liability, the assessor issued to Appellant3 his salaries tax assessment for 2006/07 which included the whole of the Appellant3 Sum as his income.

28. Appellant1 objected to the additional salaries tax assessments and salaries tax assessment referred to in paragraph 27(a) above. He claimed that the Appellant1 Sum should not be assessable to tax. He contended the following:

(a) In the Action, a group of doctors employed by the employer claimed against the employer for:

(i) Failure to grant statutory holidays / public holidays.

(ii) Failure to grant rest days.

(iii) Failure to grant time-off in lieu of overtime work.

(b) The CFI Judgment was handled down on 1 March 2006. The claims on statutory holidays, public holidays and rest days succeeded, but the claim on overtime was dismissed.

(c) The employer then started working on a package to settle the claims. It was mentioned in the employer's letter dated 4 July 2006 that the subject of overtime was not included in calculating the settlement package in view of the CFI Judgment.

(d) In August 2006, the employer sent offering letters to serving eligible doctors. At that time there were about 4,700 doctors serving the employer, and only around 4,300 doctors were considered eligible because they had been

required to work on statutory holidays, public holidays and Sundays. Finally, there were around 4,000 serving doctors and more than 500 resigned doctors accepted the settlement package. The payments were made to the serving doctors by the end of November 2006 and to the resigned doctors in about January 2007.

(e) The settlement package (i.e. the Appellant1 Sum) was in fact damages paid by the employer for its breach of statutory duty to grant statutory holidays and rest days pursuant to the EO.

(f) The Appellant1 Sum should not be taxable because:

(i) The employer offered the compensation according to the CFI Judgment.

(ii) In the Action, the doctors sued the employer, among other things, for failure to grant rest days and statutory holidays pursuant to the EO.

(iii) 'The relevant sections of [the EO] are:

Rest day

Section 17(1): … *every employee who has been employed by the same employer under a continuous contract shall be granted not less than 1 rest day in every period of 7 days.*

Section 19(1): … *no employer shall require an employee to work on any of his rest days.*

Section 21: *Any condition in a contract of employment which makes the payment of any annual bonus, or any end of year payment or any proportion thereof, subject to working on rest days granted under this Part shall be void.*

Statutory holiday

Section 39(1): … *an employee shall be granted a statutory holiday by his employer on each of the following days …*

Section 40A(1): … *no payment of holiday pay payable under section 40, or other sum, shall be made in lieu of the grant of a holiday.*

Hence [the EO] does not allow payment for work on rest day *without consent*; and does not allow any payment in lieu of the grant of a holiday.'

(iv) Judgment was given to the doctors for the rest day and statutory holiday claims, but the overtime claim was dismissed.

(v) The Court had specifically rejected the plaintiffs' (the doctors') argument for time-off in lieu with pay instead of the remedy of purely monetary relief. Accordingly, any quantum assessment must proceed on this basis that the breaches as found against the employer sound in damages alone.

(vi) Hours actually worked were considered by the Court as a reference to the loss of time suffered by the doctors rather than a reference to the service provided under the employment.

(vii) In summary, the view on the nature of the Appellant1 Sum, as a reward for services rendered under the employment with the employer, was not allowed by the EO and was not consistent with the Court's decision.

(g) The Inland Revenue Department failed to notice that the employment with the employer was the *causa sine qua non* of the payment but the *causa causans* was the employer's breach of its statutory duty.

29. Appellant2 objected to the salaries tax assessment referred to in paragraph 27(b) above. He claimed that the Appellant2 Sum was a compensation for damage rather than a reward for service and that it should not be assessable to tax. Appellant2's grounds of 'appeal' included:

(a) In the Action, a group of doctors employed by the employer claimed against the employer for:-

(i) Failure to grant statutory holidays / public holidays.

(ii) Failure to grant rest days.

(iii) Failure to grant time-off in lieu of overtime work.

(b) The CFI Judgment was handled down on 1 March 2006. The claims on statutory holidays, public holidays and rest days succeeded, but the claim on overtime was dismissed.

(c) The employer then started working on a package to settle the claims. It was mentioned in the employer's letter dated 4 July 2006 that the subject of overtime was not included in calculating the settlement package in view of the CFI Judgment.

(d) In August 2006, the employer sent offering letters to serving eligible doctors. At that time there were about 4,700 doctors serving the employer, and only around 4,300 doctors were considered eligible because they had been required to work on statutory holidays, public holidays and Sundays. Finally, there were around 4,000 serving doctors and more than 500 resigned doctors accepted the settlement package. The payments were made to the serving doctors by the end of November 2006 and to the resigned doctors in about January 2007.

(e) The settlement package (i.e. the Appellant2 Sum) was in fact damages paid by the employer for its breach of statutory duty to grant statutory holidays and rest days pursuant to the EO.

(f) The Appellant2 Sum should not be taxable because:

(i) The employer offered the compensation according to the CFI Judgment.

(ii) In the Action, the doctors sued the employer, among other things, for failure to grant rest days and statutory holidays pursuant to the EO.

(iii) 'The relevant sections of [the EO] are:

Rest day

Section 17(1): … *every employee who has been employed by the same employer under a continuous contract shall be granted not less than 1 rest day in every period of 7 days.*

Section 19(1): … *no employer shall require an employee to work on any of his rest days.*

Section 21: *Any condition in a contract of employment which makes the payment of any annual bonus, or any end of year payment or any proportion thereof, subject to working on rest days granted under this Part shall be void.*

Statutory holiday

Section 39(1): … *an employee shall be granted a statutory holiday by his employer on each of the following days* …

Section 40A(1): … *no payment of holiday pay payable under section 40, or other sum, shall be made in lieu of the grant of a holiday.*

Hence [the EO] does not allow payment for work on rest day *without consent*; and does not allow any payment in lieu of the grant of a holiday.'

(iv) Judgment was given to the doctors for the rest day and statutory holiday claims, but the overtime claim was dismissed.

(v) The Court had specifically rejected the plaintiffs' (the doctors') argument for time-off in lieu with pay instead of the remedy of purely monetary relief. Accordingly, any quantum assessment must proceed on this basis that the breaches as found against the employer sound in damages alone.

(vi) Hours actually worked were considered by the Court as a reference to the loss of time suffered by the doctors rather than a reference to the service provided under the employment.

(vii) In summary, the view on the nature of the Appellant2 Sum, as a reward for services rendered under the employment with the employer, was not allowed by the EO and was not consistent with the Court's decision.

(g) The Inland Revenue Department failed to notice that the employment with the employer was the *causa sine qua non* of the payment but the *causa causans* was the employer's breach of its statutory duty.

30. Appellant3 objected to the salaries tax assessment referred to in paragraph 27(c) above on the ground that the Appellant3 Sum should not be assessable to tax. His representative ('the Representative'), who also represented Appellant1 and Appellant2, contended the following on his behalf:

(a) The Appellant3 Sum was not chargeable to tax because:

(i) The employer offered the compensation according to the CFI Judgment.

(ii) In the Action, the public hospital doctors sued the employer, among other things, for failure to grant rest days and statutory holidays pursuant to the EO.

(iii) 'The relevant sections of [the EO] are:

Rest day

Section 17(1): … *every employee who has been employed by the same employer under a continuous contract shall be granted not less than 1 rest day in every period of 7 days.*

Section 19(1): … *no employer shall require an employee to work on any of his rest days.*

Section 21: *Any condition in a contract of employment which makes the payment of any annual bonus, or any end of year payment or any proportion thereof, subject to working on rest days granted under this Part shall be void.*

Statutory holiday

Section 39(1): … *an employee shall be granted a statutory holiday by his employer on each of the following days* …

Section 40A(1): … *no payment of holiday pay payable under section 40, or other sum, shall be made in lieu of the grant of a holiday.*

Hence [the EO] does not allow payment for work on rest day *without consent*; and does not allow any payment in lieu of the grant of a holiday.'

(iv) Judgment was given to the public hospital doctors for the rest day and statutory holiday claims, but the overtime claim was dismissed.

(v) The Court had specifically rejected the plaintiffs' (the public hospital doctors') argument for time-off in lieu with pay instead of the remedy of purely monetary relief. Accordingly, any quantum assessment must

proceed on this basis that the breaches as found against the employer sound in damages alone.

(vi) Hours actually worked were considered by the Court as a reference to the loss of time suffered by the public hospital doctors rather than a reference to the service provided under the employment.

(vii) In summary, the view on the nature of the Appellant3 Sum, as a reward for services rendered under the employment with the employer, was not allowed by the EO and was not consistent with the Court' s decision.

(b) The Appellant3 Sum was a specific damage paid for the employer' s breach of statutory duty, but this did not by itself make it taxable.

(c) The public hospital doctors were not entitled to claim payment for work on holidays under their employment with the employer since the contractual overtime claim was dismissed. The breach of the EO must be relevant in determining the nature of the Appellant3 Sum.

(d) The Judgment of CACV 57/2007 ('the CA Judgment'), on appeal from the Action, was handed down by the Court of Appeal on 21 January 2008. That part of the CFI Judgment with regard to the assessment of quantum of damages was set aside and varied so that the damages would be assessed by reference to 'lost day' (i.e. the service provided was not relevant).

31. By letters dated 14 March 2008, the assessor issued a statement of facts to the appellants for comment.

32. The Representative, on behalf of the appellants gave a reply to the assessor on 20 March 2008 making representations to the statement of facts and contending that the assessment methodology in the CFI Judgment was confirmed in the sealed Order of the Court as follows:

> '*The assessment of quantum of damages should proceed on the basis of a reasonable evidential assessment of the hours actually worked by the plaintiffs on their past rest days and statutory and public holidays and on the basis of the then prevailing monthly salary of the particular plaintiff in [the Action].*'

The Court of Appeal' s Order

33. By an Order dated 21 January 2008, the Court of Appeal ordered[1] that:

[1] In late September 2008, the Court of Appeal gave leave to appeal to the Court of Final Appeal.

'*1. The order of Stone J be affirmed save that the further order and directions relating to the assessment of quantum of damages and for credit be set aside and in place thereof the following be substituted:*

"And it is further ordered and directed that:-

The assessment of quantum of damages for failure to grant rest days ('lost rest day') and to provide statutory/public holidays ('lost holiday') do proceed on the following basis:

(1) Subject to (2) below, damages for each lost rest day or lost holiday be assessed by reference to a full day's wages, the applicable rate of pay being that prevailing at the time of each breach with credit being given for the whole day off granted under the Compensatory Leave Scheme.

(2) In assessing damages for any lost rest day or lost holiday

(a) a lead plaintiff placed on non-resident call on a rest day or statutory/public holiday but not called upon or required to provide patient treatment that day shall be treated as having lost that rest day or holiday but damages, if any, shall be nominal;

(b) a lead plaintiff placed on non-resident call on a rest day or statutory/public holiday who provided patient treatment as a result of having been called or contacted that day be awarded for such lost day or lost holiday as provided in (1) above."

2. There be an order nisi that the Defendant do pay 50% of the lead Plaintiffs' costs of the appeal and of the trial below.'

The grounds of appeal

34. By letters dated 2 May 2008, the Representative gave notice of appeal on behalf of the appellants on the ground that:

'The payments made by [the employer] under its settlement package were damages paid for [breach] of its statutory duty to grant statutory holidays and rest days pursuant to Employment Ordinance; hence the payments should not be taxable.'

35. At the hearing of the appeal, we gave our consent under section 66(3) of the Inland Revenue Ordinance, Chapter 112, ('the Ordinance') to the appellants to rely on the following additional ground of appeal:

> 'The appellant's employment was not the source of the sum paid by the employer to the appellant under the settlement package and was not chargeable to tax under section 8 of the Ordinance.'

The appeal hearing

36. At the hearing of the appeal, the appellants were represented by a fellow public hospital doctor ('the doctor representative') and the respondent by Mr Rimsky Yuen, SC.

37. Neither party called any witness.

38. The doctor representative cited:

(1) Wong Pui Tuen Kenny and another v Crown Motors Limited, HCLA 108 of 2003, Chu J, 30 November 2004.

39. Mr Yuen cited the following authorities:

(1) Inland Revenue Ordinance, Chapter 112: sections 8 and 9.
(2) Employment Ordinance, Chapter 57: sections 2, 17 to 21 and 39 to 42.
(3) Willoughby & Halkyard, Encyclopaedia of Hong Kong Taxation, Vol 3, [2433], [3243] to [3244], [3286], [3289] to [3289.4] & [3331].
(4) Barkoczy & Evans, Australian Taxation Law 2008 (CCH Australia), para 3-250 & 6-800.
(5) Foskett, The Law and Practice of Compromise, 6th Edn, para 8-01.
(6) Hochstrasser v Mayes [1960] AC 376.
(7) Shilton v Wilmshurst [1991] 1 AC 684.
(8) D80/00, IRBRD, vol 15, 715.
(9) Hamblett v Godfrey [1987] 1 WLR 357.
(10) D103/97, IRBRD, vol 12, 555.
(11) D76/98, IRBRD, vol 13, 420.
(12) D4/91, IRBRD, vol 5, 542.
(13) Carter v Wadman (1946) 28 TC 41.
(14) Pun Pabitra v Wong Kan Hing, HCLA 30/1997 (16/9/1997) (Mr Recorder Ronny Wong, SC)
(15) Riches v Westminster Bank Ltd [1947] AC 390.
(16) London & Thames Haven Oil Wharves Ltd v Attwooll [1967] 2 All ER 124.
(17) C of T (NSW) v Meeks (1915) 19 CLR 568.

(18) Fuchs, Walter Alfred Heinx v Commissioner of Inland Revenue, HCIA 1/2008, Burrell J, 26 June 2008.
(19) Inland Revenue Ordinance, Chapter 112, section 68 and Schedule 5.

Relevant authorities

40. Section 68(4) of the Ordinance provides that the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.

41. Section 8(1) of the Ordinance provides that:

> '*(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –*
>
> *(a) any office or employment of profit; and*
>
> *(b) any pension.'*

42. Section 9(1)(a) of the Ordinance provides that:

> '*(1) Income from any office or employment includes ... any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others ...'*

43. In CIR v Humphrey [1970] HKLR 447 at page 452, CA, Blair-Kerr J said that the following are the corresponding English provisions of our sections 8(1) and 9(1):

> '*The corresponding English statutory provisions are s. 156 of the Income Tax Act 1952 and rule 1 of the Rules applicable to Schedule E (9th Schedule to the Act). These provisions read as follows:-*
>
> *"s. 156..... Schedule E*
>
> *1. Tax under this Schedule shall be charged in respect of every public office or employment of profit.....".*
>
> *" r. 1. Tax under Schedule E. shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E..... in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom ....."."*

44. In Hochstrasser (Inspector of Taxes) v Mayes [1960] AC 376 at pages 387-388, Viscount Simonds cited section 156 of the 1952 Act and commented on Upjohn J's summary of the law:

> *'It is by section 156 of the Income Tax Act, 1952, provided as follows:*
>
> *The Schedule referred to in this Act as Schedule E is as follows –*
>
> *Schedule E*
>
> *"1. Tax under this Schedule shall be charged in respect of every public office or employment of profit. ... "*
>
> *"2. Tax under this Schedule shall also be charged in respect of any office employment or pension, the profits or gains arising or accruing from which would be chargeable to tax under Schedule D but for the proviso to paragraph 1 of that Schedule. ..."*
>
> *"5. The provisions set out in Schedule IX to this Act shall apply in relation to the tax to be charged under this Schedule."*
>
> *Schedule IX, so far as relevant, was as follows:*
>
> *"Rules Applicable To Schedule E*
>
> *' 1. Tax under Schedule E shall be annually charged on every person having or exercising an office or employment of profit mentioned in Schedule E, or to whom any annuity, pension or stipend chargeable under that Schedule is payable, in respect of all salaries, fees, wages, perquisites or profits whatsoever therefrom for the year of assessment, after deducting the amount of duties or other sums payable or chargeable on the same by virtue of any Act of Parliament, where the same have been really and bona fide paid and borne by the party to be charged.'*
>
> *...*
>
> *Upjohn J., before whom the matter first came, after a review of the relevant case law, expressed himself thus in a passage which appears to me to sum up the law in a manner which cannot be improved upon. ' In my judgment,' he said, ' the authorities show this, that it is a question to be answered in the light of the particular facts of every case whether or not a particular payment is*

> *or is not a profit arising from the employment. Disregarding entirely contracts for full consideration in money or money's worth and personal presents, in my judgment not every payment made to an employee is necessarily made to him as a profit arising from his employment. Indeed, in my judgment, the authorities show that to be a profit arising from the employment the payment must be made in reference to the services the employee renders by virtue of his office, and it must be something in the nature of a reward for services past, present or future.' In this passage the single word 'past' may be open to question, but apart from that it appears to me to be entirely accurate."'*

Lord Radcliffe (at pages 391-392) thought that the test was whether a payment was made in return for acting as or being an employee:

> *'For my part, I think that their meaning is adequately conveyed by saying that, while it is not sufficient to render a payment assessable that an employee would not have received it unless he had been an employee, it is assessable if it has been paid to him in return for acting as or being an employee.'*

Lord Cohen (at pages 394-395) said that the court must be satisfied that the service agreement was the *causa causans* and not merely the *causa sine qua non* of the receipt of the profit:

> *'My Lords, I am prepared to accept that statement of the law but it is, I think, clear from the final conclusion of Morris L.J. in the case last cited, and from the decisions cited by Jenkins L.J. in his judgment in the present case (see especially Beak v. Robson, per Lord Simon, and Cowan v. Seymour, per Younger L.J.) that it is not enough for the Crown to establish that the employee would not have received the sum on which tax is claimed had he not been an employee. The court must be satisfied that the service agreement was the causa causans and not merely the causa sine qua non of the receipt of the profit.'*

45. Shilton v Wilmshurst (Inspector of Taxes) [1991] 1 AC 684 was a case where Nottingham Forest Football Club paid the taxpayer, a world famous goalkeeper, a lump sum of £75,000 in consideration of his agreement to sign a contract with Southampton Football Club. Thereafter the taxpayer entered into a new contract of employment with Southampton. The taxpayer was assessed to income tax under Schedule E for 1982-83 on the basis that the £75,000 was an emolument of his employment with Southampton. The tax dispute went all the way to the House of Lords. Lord Templeman, delivering the leading judgment in the House of Lords, cited sections 181 and 183 of the English Income and Corporation Taxes Act 1970, and stated what emolument 'from employment' or 'from the employment' meant (at pages 688 & 689):

> *'Section 183 of the Act of 1970, now replaced by section 131 of the Income and Corporation Taxes Act 1988, provided that:*

"(1) Tax under Case I, II or III of Schedule E shall … be chargeable on the full amount of the emoluments falling under that Case . . . and the expression 'emoluments' shall include all salaries, fees, wages, perquisites and profits whatsoever."

It is common ground that the sum of £75,000 paid by Nottingham Forest to Mr. Shilton was an emolument as defined by section 183.

Section 181(1) of the Act of 1970, as amended and now replaced, so far as material, by section 19(1) of the Act of 1988, provided that tax under Schedule E:

"shall be charged in respect of any office or employment on emoluments therefrom which fall under . . . Case I: where the person holding the office or employment is resident and ordinarily resident in the United Kingdom . . ."

...

... Section 181 is not confined to "emoluments from the employer" but embraces all "emoluments from employment"; the section must therefore [comprehend] an emolument provided by a third party, a person who is not the employer. 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, secondly, 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." The authorities are consistent with this analysis and are concerned to distinguish in each case between an emolument which is derived "from being or becoming an employee" on the one hand, and an emolument which is attributable to something else on the other hand, for example, to a desire on the part of the provider of the emolument to relieve distress or to provide assistance to a home buyer. If 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, then the emolument is not received "from the employment".'

46. Hochstrasser (Inspector of Taxes) v Mayes and Shilton v Wilmshurst have been cited and applied by our Courts, e.g. Humphrey, Wing Tai Development Co Ltd v CIR [1979] 642, CIR v Yung Tse Kwong [2004] 3 HKLRD 192 and Fuchs, Walter Alfred Heinx v Commissioner of Inland Revenue, HCIA 1/2008, Burrell J, 26 June 2008.

47. Hamblett v Godfrey [1987] 1 WLR 357 is a case where the UK Government had decided in January 1984 that for security reasons it was necessary to restrict the right of staff at Government Communications Headquarters ('G.C.H.Q.') to have recourse to an industrial tribunal and their rights also in connection with union membership and activities. The taxpayer was employed at the G.C.H.Q. All employees were offered a choice of accepting the withdrawal of their rights or of being transferred to other civil service employment elsewhere. Those employees who decided to continue their employment at G.C.H.Q. were paid the sum of £1,000 by the Government as recognition of the loss of their rights. The taxpayer chose to continue her employment and during the fiscal year 1983-84 she received the £1,000 payment. She was assessed to income tax on that payment on the basis that it constituted an emolument of her employment chargeable under Schedule E by virtue of the provisions of sections 181 and 183(1) of the Income and Corporation Taxes Act 1970. The English Court of Appeal dismissed the taxpayer's appeal.

Purchas LJ held that (pages 367 – 368):

> '*So, in my judgment, the approach that the court should take, and, indeed, that Knox J. did in fact take, is to consider the status of the payment and the context in which it was made. The payment was made to recognise the loss of rights. I am now going to paraphrase, I hope accurately, from the findings of the commissioners and the employers' letter and other records. The rights, the loss of which was being recognised, were rights under the employment protection legislation, and the right to join a union or other trade protection association. Both those rights, in my judgment, are directly connected with the fact of the taxpayer's employment. If the employment did not exist, there would be no need for the rights in the particular context in which the taxpayer found herself. So, I start from the position that those are rights directly connected with employment. Purely by way of contrast, to underline that approach, if for instance the employers had for some reason or other best known to themselves objected to some social or other activity which their employees or some of them enjoyed, such as joining a golf club or something of that sort - Lord Diplock in Tyrer v. Smart [1979] 1 W.L.R. 113, 115 mentioned payments in the hunting field - but whatever it is, activities not connected with the employment, then a payment made by an employer to recognise the voluntary or, indeed, the compulsory withdrawal if the employer had sufficient influence with the committee of the golf club concerned, then that I can readily acknowledge would be a payment made to a person who was an employee but was not made in the circumstances which would satisfy the words of section 181; that is that the payment must arise "therefrom." I only mention that analogy to emphasise the point which I seek to make.*

> *There is no doubt in this case that the employment protection legislation goes directly to the employment of the taxpayer with the employer. The right to join a union, in my judgment, also falls directly to be considered as in connection with that employment, because without the employment there is no purpose in joining the union except for esoteric or personal reasons which are not relevant in this case. But I can again see a situation in which persons involved in particularly sensitive areas of government service might be required to abandon their right of freedom of speech. In such a case, it would clearly have to be considered on the facts involved in the individual case to see whether the abandonment of that fundamental right was in fact connected and arose upon the employment or not, and it would clearly differ from case to case.'*

Neill LJ approached the matter thus (pages 370 – 371):

> '*Though one must never lose sight of the fact that these explanations cannot provide a substitute for the statutory words, they are valuable and authoritative. Thus these passages, as well as those to which Purchas L.J. has already referred in greater detail, demonstrate to my mind that emoluments from employment are not restricted to payments made in return for the performance of services.*
>
> *With this introduction, I return to the facts of the instant case. It is plain that the taxpayer received her payment as a recognition of the fact that she had lost certain rights as an employee, and by reason of the further fact that she had elected to remain in her employment at G.C.H.Q. Accordingly, if I may adopt the language of Lord Radcliffe in the passage I have referred to, the payment to the taxpayer was made in return for her being and continuing to be an employee at G.C.H.Q., or to use the words of Viscount Simonds, "the payment accrued to the taxpayer by virtue of her employment." But in the end I think it is right to base my decision on the wording of the statute. It is clearly not enough that the payment was received from the employer. The question is, was the payment an emolument from the employment? In other words, was the employment the source of the emolument? It was argued by Mr. Mathew in the course of his cogent submissions that the rights lost by the taxpayer were mere personal rights, and that indeed, this was a stronger case from the taxpayer's point of view than Hochstrasser v. Mayes, since the rights given to the employee in that case were part of a composite contract. With respect, I find it impossible to accept this argument. As the commissioners held, the rights had been enjoyed within the employer/employee relationship. The removal of the rights involved changes in the conditions of service. The payment was in recognition of the changes in the conditions of service.*

> *I have been driven to the conclusion that the source of the payment was the employment. It was paid because of the employment and because of the changes in the conditions of employment and for no other reason. It was referrable to the employment and to nothing else.'*

48. In Shilton v Wilmshurst, Lord Templeman opined at page 695 that Hamblett v Godfrey only decided that the payment in that case arose from the employment and not from 'something else'.

49. The tax appeals before us are not cases where 'the contract [of employment] itself goes altogether and some sum becomes payable for the consideration of the total abandonment of all the contractual rights which the other party had under the contract'. Thus, the Henley v Murray (Inspector of Taxes) 31 TC 351 line of cases does not apply.

Application of relevant principles to this case

50. The stated consideration for the employer's agreement to pay the sums was:

> '... in full and final settlement of any claim, action, right, entitlement, or proceedings (including any claim for compensation, damages, money or time off in whatever form or amount) that [the appellants] might have, had or had had against the employer (including all claims in any legal proceedings [the appellants] had issued or might issue against the employer) arising out of or in connection with any rest days, statutory holidays and / or public holidays (whether not granted or not compensated or otherwise) or any extra work hours or overtime worked in respect of any period arising from [the appellants'] employment with the employer on or before the date of [their] receipt of the full [sums] of money under the [offers]'.

51. As Appellant1 and Appellant2 pointed out[2], the offer letters were sent only to those who had worked on their rest days and holidays. Had they not rendered services by virtue of their employments and treated patients on their rest days and holidays, they would not have been offered and paid the sums.

52. In our view, the sums were offered and paid to the appellants in return for their having acted as employees on their rest days, statutory holidays, public holidays and overtime.

53. Contrary to what the appellants contended, the sums were not paid as damages. They were paid to compromise the appellants' claims which were disputed by the employer. Those claims were founded on the appellants having worked on their rest days, statutory holidays and public holidays and also overtime. Even if they were paid as damages, their employment contracts were still the source of the payments. There is no grant of statutory holidays and rest days

[2] See paragraphs 28(d) and 29(d) above.

in the abstract. The statutory duty arose only in cases of employment within the meaning of the relevant sections in the Employment Ordinance and a breach occurred because the appellants worked. Approaching the matter on this basis, the payments arose from the employments and not from 'something else'. In our view, applying Hamblett v Godfrey, the appellants' employments were the source of the payments of the sums. They were referrable to the employments and to nothing else.

54. The appellants also contended that their employments were not the *causa causans* but were merely the *causa sine qua non* of the receipt of the payments. We disagree. In our view, the appellants' employments were the *causa causans* of the receipt of the payments of the sums.

55. Contrary to what the appellants asserted in argument, the appellants also compromised any and all claims which they might have for 'any extra work hours or overtime worked'. The fact that no overtime compensation was specifically included in the computation of the sums did not detract from the fact that the sums were offered and paid to compromise the appellants' claims which included overtime claim. True, the Honourable Mr Justice Stone had decided against the lead plaintiffs on this point but there was a pending appeal. In our view, the overtime claim was as at the times of the compromises a doubtful claim. It is trite law that the compromise of a doubtful claim is binding as a contract, see e.g. Chitty on Contract, 29th edition, volume 1, paragraph 3–051.

Conclusion

56. Each of the sums was income arising in or derived from Hong Kong from the source – the respective appellant's employment.

57. All 3 appeals fail and are to be dismissed and all assessments appealed against, as confirmed by the Deputy Commissioner, are to be confirmed.

Disposition

58. Appellant1's appeal is dismissed and the following assessments appealed against, as confirmed by the Deputy Commissioner, are confirmed:

(a) Additional salaries tax assessment for the year of assessment 2003/04 under charge number X-XXXXXXX-XX-X, dated 21 November 2007, showing additional assessable income of $22,359 with additional tax payable thereon of $3,466.

(b) Additional salaries tax assessment for the year of assessment 2004/05 under charge number X-XXXXXXX-XX-X, dated 21 November 2007, showing

additional assessable income of $51,980 with additional tax payable thereon of $8,317.

(c) Additional salaries tax assessment for the year of assessment 2005/06 under charge number X-XXXXXXX-XX-X, dated 21 November 2007, showing additional assessable income of $51,980 with additional tax payable thereon of $8,317.

(d) Salaries tax assessment for the year of assessment 2006/07 under charge number X-XXXXXXX-XX-X, dated 21 November 2007, showing assessable income of $1,884,422 with tax payable thereon of $286,507 (after deducting tax rebate).