Case No. D37/09

Salaries tax – whether reimbursement of health care insurance from the employer should be chargeable to tax – sections 9(1), 12(1)(a) and 68(4) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Ho Chi Wai and Kelvin T Y Wong.

Date of hearing: 23 September 2009.
Date of decision: 16 November 2009.

The Taxpayer objected to the salaries tax assessment raised on him. The Taxpayer claimed that a reimbursement of health care insurance from his employer should not be chargeable to tax. The issue for the Board to decide was whether the reimbursement of an insurance premium which was received by the Taxpayer from his ex-employer, Company B, should be assessable to salaries tax. The Taxpayer has contended that the Sum was not chargeable to salaries tax. Firstly, he asserted that the Sum was neither an 'allowance' nor a 'perquisite' under section 9(1)(a) of the IRO; and he took the view that the sum was paid to cover liability of Company B. He asserted that he only acted as a trustee to purchase the insurance policy for Company B.

Held:

1. The burden of proof is set out in section 68(4) of the IRO and the burden is on the Taxpayer to prove that any assessment being appealed against is excessive or incorrect.

2. Having considered the evidence, the Board found that none of the submissions put forward by the Taxpayer can be made out. The insurance policy was executed by the Taxpayer in his personal name and was signed by the Taxpayer and the insurance agency, Company D. It is clear that by entering into an insurance policy with an insurance agency, the Taxpayer incurred a liability to pay the premium. He was legally obliged to discharge that debt to Company D. Hence, the contract for payment of the insurance premium was between the Taxpayer and Company D and not between Company B and Company D. Although there was a reimbursement by Company B, this did not result in Company B having the sole or primary liability in respect of the discharge of the insurance premium. The fact that there was reimbursement does not shift the responsibility to Company B. Hence, there can be no deduction of the Sum pursuant to section 12(1)(a).

Appeal dismissed.

Cases referred to:

D19/92, IRBRD, vol 7, 156
David Hardy Glynn v CIR 3 HKTC 245
D56/86, IRBRD, vol 2, 323
CIR v Humphrey 1 HKTC 451

Taxpayer in person.
Leung To Shan and Fung Chi Keung for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') in respect of the Determination dated 21 April 2009 ('the Determination') by the Deputy Commissioner of Inland Revenue ('the Deputy Commissioner') in respect of his salaries tax assessment for the year of assessment 2006/07 in respect of a chargeable income of $202,787 with tax payable thereon in the sum of $14,014.

2. The issue for the Board to decide is whether the reimbursement of an insurance premium in the sum of $55,847 ('the Sum') which was received by the Taxpayer from his ex-employer, Company B should be assessable to salaries tax.

The facts

3. The facts in this case are not in dispute. The Taxpayer has accepted the facts set out in the Determination. Hence, we find them as facts and now set them out:

'(1) [Mr A] has objected to the salaries tax assessment for the year of assessment 2006/07 raised on him. The Taxpayer claims that a reimbursement of health care insurance from his employer should not be chargeable to tax.

(2) [Company C] filed an employer's return in respect of the Taxpayer reporting, among others, the following particulars:

Period of employment:	1/4/2006 to 31/3/2007
Particulars of income:	
Salary/Wages	$662,308
Commission	109,581

Health care allowance	55,847 ["the Sum"]
	$827,736

(3) The Assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2006/07:

		$	$
Income [Fact (2)]			827,736
Less:	Self education expenses	31,500	
	Home loan interest	78,689	
	Retirement scheme contributions	12,000	122,189
			705,547
Less:	Married person's allowance	200,000	
	Child allowance	80,000	
	Dependant parent allowance	30,000	310,000
Net chargeable income			395,547
Tax payable (after deducting tax rebate)			49,653

(4) The Taxpayer objected against the above assessment on the following grounds:

(a) "… [the Sum] was the amount of health care insurance paid for me and my family. [The Sum] was never paid to me as an allowance and should not be subject to income tax."

(b) He was eligible to claim partial exemption of his income in Hong Kong. He also supplied details of his employment, including the negotiation of the contract, the nature of his work as well as the payment of his remuneration.

(5) The Taxpayer asserted the following:

(a) "There is no express mention of health insurance in my employment contract as it is an implied practice in the US to provide employee health insurance. My employer paid for the cost of my health insurance, but it was reported as health cost allowance. By definition, health cost allowance would allow me to keep the money without purchasing any health insurance. In my case, they purchased an insurance plan for me in Hong Kong equivalent in benefits to all other US employee because their company insurance plan in the US do not cover overseas employee."

(b) "The majority of [the Sum] was for my family health insurance,

but it also includes my (me only) term life, disability, as well as my travel insurance (travel for work)."

(6) In response to the Assessor's enquiries, [Company C] stated the following information:

(a) The Sum was reimbursed through the expense claim procedure to the Taxpayer pursuant to an insurance policy executed by the Taxpayer in his own name.

(b) The medical insurance policy was signed between the Taxpayer and insurance agent. The insurance was paid initially by the Taxpayer and the company reimbursed the Sum to the Taxpayer later.

(7) The Assessor accepted that the Taxpayer's employment was located outside Hong Kong and that only a portion of the Taxpayer's income attributable to his services rendered in Hong Kong should be chargeable to tax. However, the Assessor maintained his view that the Sum should be assessable to tax. He proposed to the Taxpayer that the salaries tax assessment for the year of assessment 2006/07 was to be revised as follows:

	$	$
Income [Fact (2)]		827,736
Less: Income attributable to services rendered outside Hong Kong [$827,736 x 85/365] [Note]		192,760
		634,976
Less: Other deductions [Fact (3)]	122,189	
Total allowances [Fact (3)]	310,000	432,189
Net chargeable income		202,787
Tax payable (after deducting tax rebate)		14,014

Note: The excluded income was calculated by reference to the number of days the Taxpayer spent outside of Hong Kong.

(8) The Taxpayer agreed to the adjustment on income apportionment but maintained his view that the Sum should not be chargeable to tax. He put forward the following contentions:

(a) "[The Sum] does not qualify as capable of being converted into money by me. In fact I am claiming that it was a misrepresentation for the employer to declare it as allowance ... An allowance should be an amount provided for my free will to choose a plan with a

possibility of purchasing a plan that may cost more or less than the amount given. In our situation, it was a pre-approved insurance plan, authorization given by the HR department, purchased by the company credit card if applicable, and reimbursed to cover the credit card payment. It is by no means an allowance. While almost everything may carry a cash value, to say that the insurance benefit is convertible into cash, it will amount to a fraudulent act. The insurance was provided to support our ability to perform our work. A withdrawal from the insurance plan and taking the residue refund personally will amount to fraud. A good example will be to sell the laptop computer purchased for our work and keeping the money from the sale. If your test is valid, the money used to purchase the laptop computer for our work is also taxable. We also paid for it in advance and the money was reimbursed to us."

(b) "I attached a copy of the email from the employer … back in 2006 ['Appendix A']. This was sent from the Director of Human Resources at the time. It indicates the company treats all employees equal worldwide and will all benefit from company provided health insurance. This email is concerning an improvement in disability coverage that when the benefit of a certain employee policy in some countries does not cover 100% of their income during disability, the company will make up the rest of it. This is a proof that the employer provides coverage of health insurance for all employees worldwide. It is thus prima facie my employer takes responsibility (bears the liability) for every employee's health insurance, must also bears liability for my health insurance."

(c) The Sum was paid by [Company C] for the benefit of the Taxpayer pursuant to the contract of service.

(d) "In a policy consideration, it is unreasonable to tax an individual for health insurance. In Hong Kong, the government provides free health care for all residents. Individuals purchasing health insurance will reduce the government's financial burdens on this social welfare system. I understand Hong Kong had only recently adopted a tax deduction system for educational expense. Medical insurance had long been a tax deductable [sic] expense in the US and I think it should also be adopted in Hong Kong as well. Taxing individuals for getting health insurance is similar to taxing donation to a hospital for charity. A government providing free health care should not punish those who take responsibility of their health care and purchase insurance. A policy taxing medical insurance discourage employees seeking such benefits and rely on

> government support, it punish [sic] those who fight for them and helps employer to limit such benefits to employee."'

The evidence

4. The Taxpayer gave evidence. The Taxpayer is a U.S. citizen. He had entered into an employment agreement with Company B in the U.S. His contract of employment was dated 23 September 2005 ('the Employment Agreement'). He accepted the terms on 26 September 2005. However, he did not start employment until late November 2005.

5. The Employment Agreement was governed by the laws of Singapore. Company B was intending to open an office in Hong Kong. The Taxpayer and his colleagues were based in Hong Kong. However, they spent almost all of their time travelling around the region. He drew to our attention the fact that at no time did Company B have any bank account or had any means of making payments in Hong Kong. All salary payments and any overheads were effected by way of bank transfers by Company B from their overseas accounts.

6. The Taxpayer told us that when he attended his interview, he was of the view that it was an implied term of his employment that he and his family would be provided with health insurance cover. However, it was pointed out to him that the Employment Agreement he entered into did not make any reference to such a benefit. However, he drew our attention to Clause 8 of the Employment Agreement which stated as follows:

> 'The Company will be responsible for the continuation of wage for up to 12 weeks in any one period of incapacity (as medically documented). Company will supplement any insurance coverage in an amount that will allow you to receive the equivalent of your full pay for up to 12 weeks. For periods of illness in excess of 12 weeks, long term disability insurance will be provided. This provision is subject to your acceptance of Company's insurance provider.'

7. However, we are clearly of the view that this Clause itself does not provide health insurance coverage.

8. He told us that when he came to Hong Kong, his family and himself needed medical treatment. He then spoke with Human Resources. He then found that Company B had not provided any health insurance cover. After some discussions with Human Resources in the U.S. and in Singapore, it was suggested that he should take the relevant steps to ensure that a policy was obtained. He met with an insurance agent and in turn, was able to obtain an insurance plan that was offered through Company D. We were informed that ultimate provider was Company E. The Taxpayer entered into an insurance policy which was in his name for the benefit of himself and his family. The Taxpayer confirmed that it was he who made payment in the sum of $55,847. In turn, he completed the necessary forms for reimbursement and in due course received a reimbursement from Company B in the sum of US$7,252.83 being equivalent of the policy sum.

9. On cross-examination, the Taxpayer agreed that the policy was clearly in his name and confirmed that he was responsible to ensure that the premium was paid. However, he was of the view that all along he was acting as what he described as 'an agent' of Company B.

10. The Taxpayer also called Mr F to give evidence. Mr F advised us that he was an insurance consultant.

11. Mr F told us that he was requested by the Taxpayer to provide an insurance plan. However, he confirmed that the policy which he obtained for the Taxpayer was in the Taxpayer's name, he also confirmed that it was the Taxpayer who paid for this through his credit card. Mr F also accepted that the liability and responsibility for the policy fell on the Taxpayer's shoulders.

The relevant statutory provisions

12. Section 8(1)(a) of the Inland Revenue Ordinance (Chapter 112) ('IRO') provides that salaries tax shall be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from any office or employment of profit.

13. Section 8(1A)(a) of the IRO provides that income arising in or derived from Hong Kong includes all income derived from services rendered in Hong Kong including leave pay attributable to such services.

14. Section 9(1)(a) of the IRO defines 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, except –*
>
> …..
>
> *(iv) subject to subsection (2A), any amount paid by the employer to or for the credit of a person other than the employee in discharge of a sole and primary liability of the employer to that other person, not being a liability for which any person was surety;'*

15. Section 9(2A) of the IRO provides that sections (1)(a)(iv) shall not operate to exclude any benefit that is capable of being converted into money by the recipient.

16. Section 12(1)(a) of the IRO provides that in ascertaining the net assessable income of a person for any year of assessment, there shall be deducted from the assessable income of that person all outgoings and expenses, other than expenses of a domestic or private nature and capital expenditure, wholly, exclusively and necessarily incurred in the production of the assessable income.

The burden of proof

17. The burden of proof is set out in section 68(4) of the IRO and the burden is on the Taxpayer to prove that any assessment being appealed against is excessive or incorrect.

18. Our attention was drawn to the following cases:

(a) D19/92, IRBRD, vol 7, 156;

(b) David Hardy Glynn v CIR 3 HKTC 245;

(c) D56/86, IRBRD, vol 2, 323; and

(d) CIR v Humphrey 1 HKTC 451.

19. In particular, we refer to D56/86, IRBRD, vol 2, 323 there the Board held that the right of reimbursement of dental expenses was a benefit and a perquisite which could be converted into money or money's worth by the taxpayer and it was a taxable benefit. In that case, the taxpayer was an employee of a firm which was engaged by the Government on various projects. In his contract of employment his immediate employer was obliged to provide the taxpayer and his family with medical and dental attention equivalent to that prescribed for Government officers. However, by arrangement, the taxpayer and his family could either seek treatment at the Government dental clinics or seek private treatment and claim reimbursement. Therefore, the taxpayer and his family obtained private treatment and after settling the bill the taxpayer claimed reimbursement from the Government. It was held that the amount reimbursed was assessed to salaries tax.

20. The Taxpayer has contended that the Sum is not chargeable to salaries tax. He put forward to us two arguments:

(a) Firstly, he asserted that the Sum was neither an 'allowance' nor a 'perquisite' under section 9(1)(a) of the IRO; and

(b) He took the view that the Sum was paid to cover a liability of Company B. He asserted that he only acted as a trustee to purchase the insurance policy for Company B.

Discussion

21. It is quite clear from the evidence we heard and having regard to the facts of this case that none of the submissions put forward by the Taxpayer can be made out. There was no evidence at all put before us to show that the Taxpayer was an agent for Company B, indeed, the facts of this case show the complete opposite. There was nothing in the Employment Agreement which provided for health insurance cover to be provided by Company B. The Taxpayer was asked to obtain the cover and in turn, there was a

reimbursement paid to him by Company B for the premium that was paid by him.

22. We have no difficulties in accepting the submissions put forward by Ms Leung on behalf of the Inland Revenue Department. The insurance policy was clearly executed by the Taxpayer in his personal name and was signed by the Taxpayer and the insurance agency, Company D. It is clear that by entering into an insurance policy with an insurance agency, the Taxpayer incurred a liability to pay the premium. He was legally obliged to discharge that debt to Company D. Hence, the contract for payment of the insurance premium was between the Taxpayer and Company D and not between Company B and Company D. Although there was a reimbursement by Company B, this did not result in Company B having the sole or primary liability in respect of the discharge of the insurance premium.

23. The argument that the Taxpayer contended that he acted as a trustee for Company B cannot be made out. The insurance policy was executed in the Taxpayer's name, it was signed by him and therefore, the liability to pay the premium rested with the Taxpayer. Indeed, on the evidence given by himself and indeed, Mr F, this was conceded.

24. We also have no hesitation in accepting the submission that the insurance policy covered the Taxpayer and his family, term life insurance and annual travel insurance of the Taxpayer. By entering into the insurance policy with Company D, the Taxpayer and his family were entitled to such benefits and coverage as set out in the policy cover. Therefore, the insurance premium was the Taxpayer's private expense since it was his responsibility to make payment. The fact that there was reimbursement does not shift the responsibility to Company B. Hence, there can be no deduction of the Sum pursuant to section 12(1)(a).

25. Therefore, having very carefully considered all submissions put to us by the Taxpayer and having reviewed all the relevant authorities, we have no hesitation in coming to the conclusion that this appeal must be dismissed.