

Case No. D52/06

Salaries tax – onus wholly on the appellant to show the assessment appealed against is excessive or incorrect – assessment final and conclusive where no valid objection lodged within time – sections 68(4) and 70 of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Albert T DA ROSA, Jr and Andrew Li Shu Yuk.

Date of hearing: 27 September 2006.

Date of decision: 13 October 2006.

The Deputy Commissioner confirmed the assessment for 1991/92 with assessable income \$660,000 and reduced the additional assessment for 1993/94 to \$292,320.

The appellant appealed.

In respect of the assessment for 1991/92, the appellant claimed that he received housing benefit totalling \$330,000 but no salary in the first six months and salary totalling HK\$330,000 but no housing benefit in the remaining six months.

In the year of assessment 1993/94, the appellant alleged that his second former employer had been wound up in that he had only received \$160,000, not \$480,000 from his second former employer.

Held:

Assessment for 1991/92

1. The appellant made no attempt to reconcile or explain the conflict of his latest version with his signed contemporaneous documents and the inconsistencies with his previous versions put forward.
2. The appellant failed to discharge his onus of proving that the assessment appealed against is excessive or incorrect.

Additional assessment for 1993/94

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3. The additional salaries tax assessment for 1993/94 has nothing to do with his second former employer.
4. Salaries tax assessment was raised as per the appellant's return with his own declared employment income of \$480,000 from his second former.
5. There was no objection against the (original) salaries tax assessment, in accordance with section 70, the amount of assessable income from his second former employer was thus final and conclusive.
6. In any event, appellant's assertion was rejected as it was contradicted by his own letter (of his having received no income from his second former employer) in 1995 to the Commissioner.

Appeal dismissed.

Taxpayer in person.

Tang Hing Kwan and Chan Wai Yee for the Commissioner of Inland Revenue.

Decision:

1. By his Determination dated 27 February 2004, the Deputy Commissioner of Inland Revenue:
 - (a) confirmed the Salaries Tax Assessment for the year of assessment 1991/92 under Charge Number 8-8290937-92-5, dated 31 January 1997, showing assessable income of \$660,000 with tax payable thereon of \$99,000;
 - (b) reduced the Additional Salaries Tax Assessment for the year of assessment 1993/94 under Charge Number 9-2459201-94-3, dated 31 January 1997, showing additional assessable income of \$328,320 with additional tax payable thereon of \$49,248 to additional assessable income of \$292,320 with additional tax payable thereon of \$43,848; and
 - (c) reduced the Salaries Tax Assessment for the year of assessment 1994/95 under Charge Number 9-1635821-95-2, dated 15 December 1995, showing net chargeable income of \$357,483 with tax payable thereon of \$63,696 to net chargeable income of \$153,000 with tax payable thereon of \$22,800.

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2. By letter dated 24 March 2004, the appellant wrote to the Deputy Commissioner putting forward various factors for his consideration. He copied his letter to the Clerk to the Board of Review.

3. This case was heard by a differently constituted panel in the afternoon of 4 January 2005. Before producing any draft decision for the consideration of the other panel members, the panel chairman resigned on 7 July 2006.

4. A differently constituted panel was convened to hear the case starting anew.

5. Ms Tang Hing-kwan told the Board that, without setting a precedent, she had no objection to time for appeal being extended in the special circumstances of this case. The Board extended time on the same basis.

6. The appellant told the Board that he was appealing against the assessments for 1991/92 and 1993/94 and that he was not appealing against the assessment for 1994/95.

7. In respect of the 1991/92 year of assessment, the appellant told us that:

- (a) from April to September 1991, he received housing benefit totalling \$330,000 but no salary from his first former employer; and
- (b) from October 1991 to March 1992, he received salary totalling \$330,000 but no housing benefit. Arithmetically, that is \$55,000 per month.

8. He confirmed his assertions on oath.

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

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

10. Whether the appellant received housing benefit but no salary in the first six months and salary but no housing benefit in the remaining six months is a question of fact. The Board is not satisfied that the appellant has discharged his onus on a balance of probabilities and decides this factual issue against him. His latest version conflicts with contemporaneous documents which he signed and is not consistent with previous versions put forward by him. He made no attempt to reconcile or explain the discrepancies. The following documents were submitted or signed by him:

- (a) In his salaries tax return for 1991/92, he reported salary income of \$60,000 and left the items 'Value of Quarters Provided' and 'Quarters Provided' blank.

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His latest version is that his salary income was \$330,000 and he was provided with quarters during the first six months.

- (b) A residential flat which he owned was said to be the quarters. He was one of the directors who signed his first former employer's audited financial statements for 1991/92. There was no mention of any tenancy agreement (whether oral or written) under disclosure of directors' interests in contracts. The notes on the accounts showed directors' emoluments of \$660,000. The management accounts showed director's emoluments of \$660,000. His latest version is that his first former employer had entered into a tenancy agreement with him and that he had emoluments of \$330,000.
- (c) In the letter dated 1 September 2003, a firm of certified public accountants objected to the 1991/92 salaries tax assessment. It was alleged that his salary income was '\$5,000 x 12 months = \$60,000'. His latest version is that his salary income was \$330,000 or \$55,000 per month x 6 months.
- (d) In the paragraph numbered 2 in his letter dated 16 June 2004 to the Board of Review, he alleged that his first former employer 'paid 600,000 residential rental fee for me yearly'. On his latest version, the 'residential rental fee' for 1991/92 was \$330,000.
- (e) In the paragraph numbered 3 in his letter to the Clerk dated 24 January 2005, he alleged that his first former employer provided him with quarters from day one until his departure from the company in 1995. On his latest version, his first former employer ceased providing him with quarters as from October 1991 (at least for six months), long before his departure.

11. For the reasons we have given above, his appeal against the salaries tax assessment for 1991/92 fails.

12. In the year of assessment 1993/94, he was employed also by his second former employer. He alleged that his second former employer had been wound up and that he had only received \$160,000, not \$480,000, from his second former employer.

13. The additional salaries tax assessment for 1993/94 has nothing to do with his income from his second former employer. What it did was to increase the appellant's salary income from his first former employer from \$60,000 to \$360,000.

14. In his composite tax return for 1993/94, he declared employment income of \$480,000 from his second former employer.

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15. The assessor raised the salaries tax assessment for 1993/94 as per the appellant's return.

16. There was no objection against the (original) salaries tax assessment. Without an objection, there is no determination. Without a determination, there is no appeal to the Board.

17. Moreover, by reason of section 70 of the Ordinance, the assessment as made shall be final and conclusive for all purposes of the Ordinance as regards the amount of such assessable income:

'Where no valid objection ... has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income ... the assessment as made ... shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income ...

Provided that nothing in this Part shall prevent an assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year.'

18. In other words, \$480,000 is final and conclusive as the amount of assessable income from his second former employer. He cannot re-open the issue and the Board has no jurisdiction to decide that the amount of assessable income from his second former employer is less than \$480,000.

19. In any event, we reject his assertion that he has only received \$160,000 from his second former employer. His assertion is contradicted by his own letter dated 18 December 1995 to the Commissioner. He was effectively asking for the provisional salaries tax for 1994/95 to be held over and he alleged:

'Since March 1994 I received no income from [the second former employer] which I was employed for one year only (1993 – march 94).'

If he had received only one third of his income (\$160,000 out of \$480,000) for 1993/94 from his second former employer, he would and should have said so, in place of the paragraph quoted above.

20. For the reasons we have given above, his appeal against the additional salaries tax assessment for 1993/94 fails.

21. As the appellant has not pursued his appeal against the salaries tax assessment for 1994/95, that appeal fails.

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22. We dismiss the appeal and confirm the assessments as confirmed or reduced by the Deputy Commissioner.