Case No. D82/06

Salaries tax – deductible expenses – dependent parent allowances – professional indemnity insurance – expenses of self-education – sections 33(1), 33(2), 12(1)(a), 12(1)(e) and 12(6) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Ng Tai Chiu and Horace Wong Yuk Lun SC.

Date of hearing: 27 July 2006.
Date of decision: 14 February 2007.

The appellant was a qualified solicitor. He appealed against the determination by the Deputy Commissioner of Inland Revenue ('the Commissioner') by which the Commissioner determined that those objections failed ('the Determination').

The appellant argued, as a preliminary point, that the Commissioner failed to consider his objections to his salaries tax assessments for the years 1998/99 to 2000/01. However, when asked by the Board to produce the relevant notices of objection to the salary tax assessments for the years 1998/99 to 2000/01, the appellant could only point to his letter dated 19 February 2005 to the Inland Revenue Department ('IRD'), which he described as his 'official objection'.

He claimed that he was entitled dependent parent allowances (in respect of both his father and mother) for the year of 2003/04. The appellant had been granted dependent parent allowances for the assessment years of 2001/02 and 2002/03. He had a younger sister, Ms C. On about 8 December 2004, dependent parent allowances in respect of the appellant's parents ('the parents') were granted to the appellant's sister. By IRD's letter of 17 March 2005, the appellant was advised that his sister had already claimed dependent parent allowances in respect of the parents. The appellant was advised, if he would like to pursue his claim for dependent parent allowances, to complete form IR6074A 'for the agreement with [Ms C]'. By a letter dated 1 November 2005, the appellant purportedly informed the IRD that his sister had agreed to let him have the dependent parent allowances in respect of the parents. However, despite the request by IRD (made in a letter dated 9 December 2005) for the appellant to supply his sister's written confirmation that she would withdraw the dependent parent allowances granted to her in respect of the parents, the appellant failed to provide to the Commissioner any written confirmation to that effect. At the hearing of the appeal, the appellant gave no evidence at all regarding any alleged agreement that he had reached with his sister on the question of dependent parent allowances, and he did not call his sister to give evidence on his behalf in that regard.

The appellant also claimed that he was entitled to deduct from his assessable income (1) the amount he paid for obtaining professional indemnity insurance, which he stated to be $19,000 in his notice of objection but the amount stated in his tax return was $21,000; and (2) the sum of $26,800, being the course fees that he paid for taking a course on ' Diploma in Acupuncture' at the Institution B in the year of 2003/04.

Held:

1. The letter of 19 February 2005, if it were to be relied upon by the appellant as his notice of objection, would have been years out of time and could not possibly be a valid notice within the meaning of section 64(1) of IRO. There were no valid notices of objection to the salary tax assessments for the years 1998/99 to 2000/01 within the meaning of section 64(1) of the IRO. In any event, an appeal to the Board under section 66 of the IRO is an appeal from the written determination of the Commissioner after having ' validly objected to an assessment' . There was no valid objection to the salary tax assessments for the years 1998/99 to 2000/01. Accordingly, the Board was not seized of any appeal for the years of assessment 1998/99 to 2000/01.

2. The Board was satisfied that the Commissioner was entitled to take the view, on the evidence before him at the time when he made the Determination, that he was *not satisfied* that the appellant and his sister had agreed which of them would be entitled to claim dependent parent allowances for the year 2003/04. By virtue of section 33(2) of IRO, the Commissioner was enjoined from considering any claim for dependent parent allowance until he was so satisfied. It follows that the Commissioner was correct in determining that the appellant was not entitled to claim dependent parent allowances for the year 2003/04.

3. The appellant' s claim for deduction in respect of the amount paid for his professional indemnity insurance related to the assessment year of 2002/03 only. There was no documentary evidence to show that, apart from the sum of $6,000, either the sum of $19,000 or $21,000, or any other amount, had in fact been paid by the appellant during the basis period between 1 April 2002 and 31 March 2003 for professional indemnity insurance. In any event, even if the appellant had proved that he had incurred or paid the expense for obtaining professional indemnity insurance in the assessment year of 2002/03, he would still not be entitled to claim the same as a deduction under section 12(1)(a) of the IRO, as such expense was not incurred by him the production of his assessable income (D91/03, IRBRD, vol 18, 870 followed; CIR v Humphrey 1 HKTC 451 and CIR v Robert Burns 1 HKTC 1181 considered)

4. As to the appellant's claim for deduction in respect of the expense he allegedly incurred in taking a 'Diploma in Acupuncture' course for the year of 2003/04, the Board was not satisfied what qualification or qualifications the course would lead to which would be used by him in some prospective employment. In the Board's view, taking a course that may enable a taxpayer to gain knowledge in some field which may be useful in some unidentified career that he may choose to pursue in the future is simply not sufficient to satisfy the definition of 'prescribed course of education' under section 12(6) of the IRO. In these circumstances, the appellant had failed to discharge his burden in proving that what he took was a prescribed course of education within the meaning of section 12(6) of the IRO (D138/00, IRBRD, vol 16, 19 considered).

Appeal dismissed.

Cases referred to:

D98/98, IRBRD, vol 13, 482
D91/03, IRBRD, vol 18, 870
D138/00, IRBRD, vol 16, 19
Lomax v Newton, 34 TC 558
Brown v Bullock 40 TC 1
Humbles v Brooks 40 TC 500
CIR v Robert Burns 1 HKTC 1181
Lunney v Commissioner of Taxation (1957) 100 CLR 478
Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364
CIR v Humphrey 1 HKTC 451

Taxpayer in person.
Wong Ki Fong for the Commissioner of Inland Revenue.

Decision:

Appeal

1. By three Notices of Objection respectively dated 28 October 2002, 11 March 2004 and 19 February 2005, the Appellant objected to his salaries tax assessments for the years 2001/02 to 2003/04.

2. By a written determination ('the Determination') dated 31 March 2006, the Deputy Commissioner of Inland Revenue ('the Commissioner') disagreed with the Appellant's objections to the assessments, and for reasons set out therein, determined that those objections failed.

3. By a letter dated 4 May 2006, the Appellant gave notice to the Board of Review ('Board') that he would appeal against the Determination. That letter, however, was only received by the Board on 8 May 2006.

Late appeal

4. According to the record of the Postmaster General, the Determination was delivered by registered post to the Appellant's address at Address A on 3 April 2006.

5. By virtue of section 66(1)(a) of the Inland Revenue Ordinance ('IRO'), the Appellant may appeal to the Board within one month after the transmission to him of the Determination. The appeal period started to run from 4 April 2006 and would have expired on 3 May 2006 (see, section 71 of the Interpretation and General Clauses Ordinance and the decision of the Board in D98/98, IRBRD, vol 13, 482).

6. As pointed out in paragraph 3 above, the Appellant's notice of appeal was only received by the Board on 8 May 2006. Prima facie, therefore, the appeal was late.

7. At the hearing of the appeal, questions were raised as to the lateness of the appeal. Initially the Appellant maintained that the appeal was not late. On being informed by Miss Wong, representing the Commissioner of Inland Revenue, that the Commissioner would not oppose an application to extend time for appeal, the Appellant changed his stance and informed the Board that he wished to apply for an extension of time to pursue his late appeal.

8. As the Commissioner did not oppose the application for extension of time, the Board granted the application and proceeded to hear the appeal on its merits.

Grounds of appeal

9. The Appellant in this case is a qualified solicitor.

10. In his notice of appeal the Appellant did not set out any specific grounds of appeal. In his said letter of 4 May 2006, the Appellant stated, inter alia, as follows:

> *'I am [sic] totally disagreed with the Point (21) given by IRD at 1. Determination; and only partially accepted those reasons given by IRD (i.e. page 9-19 of the Determination) which I have already passed and submitted to a certified accountant for checking and review. Further supporting reasons will be submitted to BOR within these two (2) weeks and I therefore reserve my right of appeal hereof.'*

11. No other 'supporting reasons' for his appeal had been submitted to the Board prior to the hearing of the appeal.

12. At the hearing of the appeal, in seeking to argue that the Determination was wrong, the Appellant advanced submissions only on the following points:

(a) he argued, as a preliminary point, that he had made objection against his salaries tax assessment for the years 1998/99 to 2003/04 but the Commissioner had failed to consider his objection in relation to the basis years of 1998/99 to 2000/01. The Determination only dealt with the Appellant's Notices of Objection relating to the years of assessment 2001/02 to 2003/04. The Determination did not deal with the Appellant's salaries tax assessments for the years 1998/99 to 2000/01;

(b) he argued that he was entitled to dependent parent allowances (in respect of both his father and mother). Claiming that he did not mind whether the dependent parent allowances were granted to his sister or to him, he claimed that the Determination did not make clear to him whether he was entitled to dependent parent allowances or not;

(c) it was further argued by the Appellant that he was entitled to deduct from his assessable income the amount that he paid for obtaining professional indemnity insurance. He argued that the expense on such insurance was 'wholly, exclusively and necessarily incurred in the production of' his assessable income, which he earned as a solicitor.

(d) finally, the Appellant argued that he was entitled to deduct from his assessable income in the year 2003/04 the sum of $26,800, being the course fees that he paid for taking a course on 'Diploma in Acupuncture' at the Institution B.

13. The Appellant gave evidence at the appeal. We have considered his evidence carefully and insofar as his evidence is relevant to any of the issues relevant to this appeal, we shall deal with the same when we consider the various issues in the paragraphs below.

Assessment years 1998/99 to 2000/01

14. We will deal with the preliminary point first. As pointed out above, the Appellant argued that the Commissioner had failed to consider his objections relating to his salary tax assessments for the years 1998/99 to 2000/01.

15. The argument is wholly misconceived. When asked by the Board to produce the relevant notices of objection to the salary tax assessments for the years 1998/99 to 2000/01, the

Appellant could only point to his letter dated 19 February 2005 to the Inland Revenue Department ('IRD'), which he described as his 'official objection'.

16. As the Board pointed out to the Appellant during the appeal, if the letter of 19 February 2005 was the only notice given by the Appellant for his alleged objection to the salary tax assessments for the years 1998/99 to 2000/01, that notice was way out of time. Section 64(1) of IRO provides, inter alia, that any person aggrieved by an assessment may, by notice in writing to the Commissioner, object to the assessment; 'but no such notice shall be valid unless it states precisely the grounds of objection to the assessment and is received by the Commissioner *within 1 month* after the date of the notice of assessment.'

17. The letter of 19 February 2005, if it were to be relied upon by the Appellant as his notice of objection, would have been years out of time and could not possibly be a valid notice within the meaning of section 64(1) of IRO.

18. It is clear from the correspondence between the Appellant and IRD that all along IRD did not consider that the Appellant had made any objection to his salary tax assessments for the years 1998/99 to 2000/01. Rather, for those assessment years, IRD had merely treated the Appellant as having made an application under section 70A of IRO. That section provides that if, upon application made within six years after the end of a year of assessment or within six months after the date on which the relative notice of assessment was served, whichever is the later, it is established to the satisfaction of an assessor that the tax charged for that year of assessment is excessive by reason of an error or omission in any return or statement submitted in respect thereof, or by reason of any arithmetical error or omission in the calculation of the amount of the net assessable income, the assessor shall correct such assessment. It is clear from IRD's letter dated 17 March 2005 to the Appellant that IRD was prepared to entertain the Appellant's application in respect of the assessment years 1998/99 to 2000/01 on the basis of section 70A only.

19. This being the case, it is hardly surprising that the Determination only dealt with the assessment years of 2001/02 to 2003/04. On the evidence presently before the Board, those are the only assessment years which are subject to valid notices of objection within the meaning of section 64(1) of IRO.

20. In any event, an appeal to the Board under section 66 of the IRO is an appeal from the written determination of the Commissioner after having 'validly objected to an assessment'. There is no valid objection to the salary tax assessments for the years 1998/99 to 2000/01. Accordingly, in this appeal the Board is not seized of any appeal for the years of assessment 1998/89 to 2000/01, and the Board is not concerned with those years at all.

Onus of Proof

21. Section 68(4) of IRO provides that 'the onus of proving that the assessment appealed

against is excessive or incorrect shall be on the appellant'. Accordingly, the Appellant bears the burden in satisfying the Board that the assessments appealed against are either wrong or excessive.

Dependant parent allowances

22. The Appellant has been granted dependent parent allowances for the assessment years of 2001/02 and 2002/03.

23. The Appellant has a younger sister, Ms C. On about 8 December 2004, dependent parent allowances in respect of the Appellants' parents ('the parents') were granted to the Appellant's sister.

24. By his letter dated 19 February 2005, the Appellant claimed dependent parent allowances in respect of the parents for the year 2003/04.

25. Section 33(3) of the IRO provides inter alia that:

> '*Where a dependent parent allowance….. has been granted-*
>
> ……
>
> *(c) to a person and, within 6 months of such allowance being granted, another person appears to the Commissioner to be eligible to be granted that allowance in respect of the same parent….. for the year of assessment,*
>
> *the Commissioner shall invite the persons to whom the allowance has been granted and any other individual who appears to the Commissioner to be eligible to be granted the allowance to agree which of them is to have the allowance (being an agreement consistent with the provisions of this Part) and the Commissioner may in consequence of such agreement, or if the individuals do not so agree within a reasonable time, within the period specified in section 60, raise additional assessments under that section.'*

26. Section 33(2) of IRO provides that:

> '*Subject to sections 31(2) and (3) and 31A(2) and (3), where the Commissioner has reason to believe that 2 or more persons are eligible to claim [dependent parent allowance] in respect of the same parent……the Commissioner shall not consider any claim until he is satisfied that the claimants have agreed which of them shall be entitled to claim in that year*.'

27. By IRD's letter of 17 March 2005, the Appellant was advised that his sister had already claimed dependent parent allowances in respect of the parents. The Appellant was advised, if he would like to pursue his claim for dependent parent allowances, to complete form IR6074A 'for the agreement with [Ms C]'.

28. By a letter dated 1 November 2005, the Appellant purportedly informed the IRD that his sister had agreed to let him have the dependent parent allowances in respect of the parents. However, despite the request by IRD (made in a letter dated 9 December 2005) for the Appellant to supply his sister's written confirmation that she would withdraw the dependent parent allowances granted to her in respect of the parents, the Appellant failed to provide to the Commissioner any written confirmation to that effect.

29. In paragraph 18 of the Determination, the Commissioner set out his reason for disagreeing with the Appellant's objection in this regard:

> 'In the present case, [Ms C] was granted dependent parent allowances in respect of [the parents] on 8 December 2004. On 19 February 2005…i.e. within 6 months of such allowances being granted to [Ms C], it appeared that the Taxpayer was eligible to be granted dependent parent allowances in respect of [the parents] for the same year of assessment 2003/04. The Taxpayer contended that [Ms C] consented to let him have dependent parent allowances for this year, but he did not supply [Ms C's] written confirmation of her withdrawal of such allowances. In accordance with section 33(4) of the Ordinance, I consider that it is just that neither the Taxpayer nor [Ms C] should be granted dependent parent allowances in respect of both [parents] for the year of assessment 2003/2004 and additional assessments would be raised on [Ms C] accordingly.'

30. Apart from a bare assertion made in his letter dated 1 November 2005 that his sister had consented to 'let [him] have the Dependent Parent Allowance', there is no other evidence of his sister's alleged consent. The fact that he failed to supply any written confirmation from his sister evidencing such consent is telling. At the hearing of the appeal, the Appellant gave no evidence at all regarding any alleged agreement that he had reached with his sister on the question of dependent parent allowances, and he did not call his sister to give evidence on his behalf in that regard.

31. We are satisfied that the Commissioner was entitled to take the view, on the evidence before him at the time when he made the Determination, that he was *not satisfied* that the Appellant and his sister had agreed which of them would be entitled to claim dependent parent allowances for the year 2003/04. By virtue of section 33(2) of IRO, the Commissioner is enjoined from considering any claim for dependent parent allowance until he is so satisfied. It follows that the Commissioner was correct in determining that the Appellant was not entitled to claim dependent parent allowances for the year 2003/04.

32. In the Determination, the Commissioner stated that in exercise of his discretion under section 33(4) of IRO, he considered just that neither the Appellant nor his sister should be granted dependent parent allowances in respect of the parents for the year 2003/04. We do not consider that any exercise of discretion under section 33(4) is relevant here. The Commissioner is simply enjoined by section 33(2) from considering the Appellant's claim for dependent parent allowance until he is satisfied that there has been agreement within the meaning of that subsection. Whether the Commissioner would proceed to raise additional assessment against the sister is another matter. That question falls to be dealt with under section 33(3) and section 60 of IRO. As far as the Appellant's objection was concerned, the Commissioner was simply acting in accordance with section 33(2).

Professional Indemnity Insurance

33. For reasons set out below, the issue whether the Appellant was entitled to deduct from his assessable income the amount that he paid for his professional indemnity insurance relates to the assessment year 2002/03 only.

34. In his notice of objection dated 28 October 2002 given in respect of the salary tax assessment for the year 2001/02, the Appellant stated that he objected to the assessment on the ground that the Commissioner had failed to make deductions of his self-education expenses and other expenses, and referred to his 'last submitted return' for such expenses.

35. In his tax return filed for the year 2001/02, the Appellant only claimed deductions for expenses in respect of the following items:

(a)	Practising Certificate (Law Society):	$21,600
(b)	Continuing Prof. Dev. Course	$5,500
(c)	Mandatory contribution to recognised retirement schemes in the capacity of an employee	$10,000
(d)	dependent parent allowances for the parents	

36. It is thus clear from the Appellant's tax return for the year 2001/02 that he was not claiming deduction for any expense paid in respect of professional indemnity insurance. Hence there is no question of his objecting to the 2001/02 assessment on the basis of an item of expense which he did not claim to have paid or expended.

37. Similarly, for the year 2003/04, when the Appellant gave notice of objection by his letter dated 19 February 2005, he did not mention professional indemnity insurance at all as a ground for objecting the assessment for the year 2003/04. This is not surprising because, in his tax

return filed for that year, the Appellant had not claimed deduction based on professional indemnity insurance. Accordingly, there is no question of his objecting to the 2003/04 assessment on the basis of an item of expense which he did not claim to have paid or expended.

38. However, in his tax return filed for the year 2002/03, the Appellant did claim deduction on account of an expense in the sum of $21,000, being the amount for 'Professional Ind. Ins.' In his notice of objection dated 11 March 2004, the Appellant objected to the 2003/04 assessment on the basis, inter alia, that his expense on professional insurance/indemnity in the sum of $19,000 was not allowed. Hence the issue as to whether the Appellant was entitled to claim deduction for the amount expended in payment of his professional indemnity insurance relates only to the assessment year of 2002/03.

39. As is apparent from paragraph 38 above, there is a discrepancy in the amount of professional indemnity insurance claimed to have been paid by the Appellant for the year 2002/03. In his tax return, the amount was stated to be $21,000 while in his notice of objection, it was stated to be $19,000. Moreover, the documents submitted by the Appellant do not show that he had paid either sum during the basis period from 1 April 2002 to 31 March 2003. In particular, the Appellant produced a letter dated 20 September 2003 issued by one Messrs D (a firm of solicitors in which the Appellant formerly worked as a consultant). In that letter, the Appellant's contribution to professional indemnity insurance for the period from October 2003 to September 2004 was stated to be $13,000. The letter further recorded that the insurance contributions that was *due from* the Appellant in the *previous* period (presumably from October 2002 to September 2003) was as follows:

'Your calculations for April 2003	$6,000.00 deducted from payout
July 2003	$2,000.00 not paid'

40. There is no documentary evidence to show that, apart from the sum of $6,000, either the sum of $19,000 or $21,000, or any other amount, had in fact been paid by the Appellant during the basis period between 1 April 2002 and 31 March 2003 for professional indemnity insurance. At the hearing of the appeal, the Appellant gave no evidence at all in this regard. He had not sought to explain the discrepancies in his documents nor had he given any evidence as to what was the actual amount that he claimed to have paid during that basis period in respect of professional indemnity insurance. On the evidence before the Board, apart from the sum of $6,000, the Appellant failed to prove that he had paid the amount of professional indemnity insurance in the assessment year of 2002/03. The onus is upon the Appellant to show that the assessment was either excessive or incorrect.

41. In respect of the sum of $6,000 paid and even assuming that the Appellant had duly proved payment of the alleged expense of professional indemnity insurance, of whatever amount, the Appellant's claim that he was entitled to deduct the said expense is fraught with legal difficulties. To be so entitled, the Appellant has to establish that the amount that he paid is an expense 'wholly,

exclusively and necessarily incurred' by him 'in the production of the assessable income' (see, section 12(1)(a) of IRO).

42. Rule 6 of the Solicitors (Professional Indemnity) Rules ('Indemnity Rules') provides that every solicitor who is, or is held out to the public as, a solicitor in Practice in Hong Kong shall be required to have and maintain Indemnity (as defined under Rule 2 of the Indemnity Rules). Rules 3 and 4 of the Indemnity Rules provide for a fund, established and maintained by the Law Society, to which contributions shall be made or caused to be made by solicitors in accordance with the provisions of Schedule 1.

43. Paragraph 1 of the First Schedule of the Indemnity Rules provides that every principal in Practice shall, in respect of himself and of all assistant solicitors and consultants in his firm, make or cause to be made the contributions as are set out in paragraph 2 in respect of that Practice. Paragraph 2 of the said Schedule set out the formula applicable for calculation of the amount of contributions to be made under paragraph 1. The amount of contribution depends on the gross fee income of the firm of solicitors and also the number of principals, assistant solicitor and consultants in the firm. As pointed out above, in the year 2002/03, the Appellant was a consultant of Messrs D, whose principals would be obligated to make contributions to the fund under paragraph 1 of the First Schedule of the Indemnity Rules.

44. The Indemnity Rules were made by the Council of the Law Society pursuant to its rule making power under section 73A of the Legal Practitioners Ordinance (Chapter 159), and section 2 of the same Ordinance provides that no person shall be qualified to act as a solicitor unless, inter alia, he is complying with the Indemnity Rules that apply to him.

45. In D91/03, IRBRD, vol 18, 870, this Board held that the payment of contributions by a solicitor for obtaining professional indemnity insurance was not a deductible expense under section 12(1)(a) of IRO. Although the payment was made, and was required to be made, by the solicitor in order to qualify himself to perform his duties as a solicitor, such payment was not 'incurred in the production of the assessable income' but was incurred so as to put the solicitor in a position to earn the income. Hence a distinction was drawn between incurring an expense *for the purpose of* enabling the taxpayer to earn his income, and incurring an expense *in the production of* his assessable income.

46. In drawing the distinction, the Board referred to a number of cases including Lomax v Newton, 34 TC 558, Brown v Bullock 40 TC 1, Humbles v Brooks 40 TC 500, CIR v Robert Burns 1 HKTC 1181, Lunney v Commissioner of Taxation (1957) 100 CLR 478 and Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364. We would add the case of CIR v Humphrey 1 HKTC 451 to the citation of cases, where the Supreme Court (Appellate Jurisdiction) of Hong Kong compared the relevant provisions of the IRO with the English Income Tax Act 1952 (Rule 7 to Schedule E) and the Australian Income Tax and Social Services Contribution Act (section 51), and concluded that the difference in wordings in the legislations were

immaterial. It would require 'the taking of refined and rather insubstantial distinctions' to escape from the course of reasoning in the English authorities (per Dixon CJ in Lunney v Commissioner or Taxation, supra).

47. The authorities cited by the Board in D91/03, which included both Hong Kong as well as English and Australian cases, well support the distinction drawn by the Board between an expense incurred to put the taxpayer in a position to earn income, and an expense incurred in the production of his assessable income. As Huggins JA observed in CIR v Robert Burns (supra at pages 1189-1190):

> *'In Lunney v Commissioner of Taxation (1957) 100 CLR 478 the majority of the court thought that there was an important distinction between an expense incurred in gaining income and one incurred necessarily for the purpose of gaining it….'*

48. We would follow this well-settled line of cases and hold that even if the Appellant had proved that he had incurred or paid the expense for obtaining professional indemnity insurance in the assessment year of 2002/03, he would still not be entitled to claim the same as a deduction under section 12(1)(a) of IRO, as such expense was not incurred by him in the production of his assessable income.

Expenses of self-education

49. Section 12(1)(e) of IRO provides as follows:

> *'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-*
>
> …
>
> *(e) the amount of the expenses of self-education paid in the year of assessment not exceeding the amount prescribed in subsection (6).'*

50. Subsection (6) of section 12 of IRO provides:

> *'For the purposes of subsection (1)(e)-*
>
> ...
>
> *(b) 'expenses of self-education" means expenses paid by the taxpayer as-*
>
> *(i) fees, including tuition and examination fees, in connection with a*

prescribed course of education undertaken by the taxpayer;

…

(c) 'prescribed course of education' means a course undertaken to gain or maintain qualifications for use in any employment and being-

(i) a course of education provided by an education provider;

(ii) a training or development course provided by a trade, professional or business association; or

(iii) a training or development course accredited or recognized by an institution specified in Schedule 13;

(d) 'education provider' means-

(i) a university, university college or technical college'

51. Schedule 13 of IRO sets out the institutions that may accredit or recognise training or development courses for the purpose of section 12(6)(c)(iii). Amongst the institutions set out therein is the Law Society of Hong Kong.

52. At the hearing of the appeal, the Appellant only made submissions and gave evidence in relation to the expense that he allegedly incurred in taking a 'Diploma in Acupuncture' course for the year 2003/04. The Appellant made no submissions and gave no evidence in relation to other self-education expenses for the other years.

53. We note that for the year of assessment 2001/02, the Appellant claimed in his tax return to have incurred a sum of $5,500 as his expense for undertaking 'Continuing Prof. Dev. Course' ('CPD courses'). The Commissioner had allowed the claim to the extent of $990 only, taking the view that the Appellant had failed to prove that the balance of the claim (that is, $4,510) had in fact been incurred by him as alleged. As pointed out above, the Appellant had made no submissions and given no evidence at all at the hearing of the Appeal regarding his alleged self-education in the year 2001/02. No credible documentary evidence (receipts, cheque payments etc.) had been submitted or produced by the Appellant to prove that the sum of $4,510 had in fact been incurred by him as a qualifying expense of self-education. This being the case, the Appellant failed to discharge his onus in showing that the Commissioner was wrong in not allowing the deduction of $4,510 as a self-education expense for the year 2001/02.

54. In his tax return filed for the year of assessment 2002/03, the Appellant claimed to have incurred a sum of $5,000 as his expense for undertaking CPD courses. The Commissioner

had allowed the claim to the extent of $1,380 only, taking the view that the Appellant had failed to prove that the balance of the claim (that is, $3,620) had in fact been incurred by him as alleged. Again, as in the case for the year 2001/02, at the hearing of the Appeal the Appellant had made no submissions and given no evidence at all regarding his alleged self-education in the year 2002/03. No documentary evidence had been submitted or produced by the Appellant to prove that the sum of $3,620 had in fact been incurred by him. Accordingly, the Appellant failed to discharge his onus in showing that the Commissioner was wrong in not allowing the deduction of $3,620 as a self-education expense for the year 2002/03.

55. As regards the year of assessment 2003/04, the Appellant did produce copies of certain receipts which show that a total sum of $26,800 was paid by him as course fees for taking the course on 'Diploma in Acupuncture'. However, the identity of the issuer of the receipts was not clear from the receipts themselves (the chops of the issuer appearing on the receipts were illegible) and Miss Wong (representing the Commissioner) did not accept that the receipts were issued by Institution B.

56. The Appellant was cross-examined on this point and he confirmed that the course of 'Diploma in Acupuncture' was provided by Institution B. We are prepared to accept the Appellant's evidence in this regard and accept that the course was provided by Institution B and the course fees were paid by the Appellant to Institution B.

57. However, we are of the view that the claim for deduction of self-education expense in respect of the course on 'Diploma in Acupuncture' must fail. To qualify for such deduction, the Appellant must prove, inter alia, that the course in question is a prescribed course of education, namely that it is 'a course undertaken to gain or maintain qualifications for use in any employment'. Hence, in order to qualify, the Appellant has to prove:

(a) that the taking of the course would enable him to gain or maintain some qualification or qualifications; and

(b) that the qualification or qualifications gained or maintained by taking the course would be used by him for some prospective employment.

58. In his evidence, the Appellant maintained that he took the course on Acupuncture not for interest but with an intention that sometime in the future he may practise acupuncture in Hong Kong. He claimed that as he spoke a number of languages he hoped to use his language skills in acupuncture. However, he did not give any evidence as to what qualification or qualifications would be gained or maintained by taking the course. He told the Board that the course that he took was only a 'basic learning course'. Apart from the course name 'Diploma in Acupuncture', we have no evidence what qualification or qualifications the course would lead to upon its successful completion. We do not know, for example, whether the diploma was a professional diploma and what that diploma would entitle the holder to do. The Appellant told us in evidence that he in fact failed the

course as he was too busy working in City E. Upon cross-examination, the Appellant confirmed to this Board that in order to practise acupuncture in Hong Kong, one would need to be qualified as a registered Chinese medicine practitioner, and he was not so qualified. Unless he is or becomes a qualified or listed Chinese medicine practitioner, even if he had succeeded in completing the course, he would not be able to practise acupuncture in Hong Kong (see Chinese Medicine Ordinance, Chapter 549). The Appellant told us during cross examination that he was not a qualified Chinese medicine practitioner and that 'it may be not [sic.] easy to be qualified under the new law'. He gave no evidence as to what prospective employment he intended to use the qualification or qualifications (if there was any) that may be obtained by completion of the course.

59. In a decision by this Board (D138/00, IRBRD, vol 16, 19), it was held that a police constable who paid fees for attending a Chinese opera course was not entitled to deduct the same from his assessable income as a qualifying expense of self-education. The Board held (in paragraph 12 of the Decision):

> '*The definition of "prescribed course of education" envisages a course to "gain … qualification for use in any employment". This lends support to the Taxpayer's argument that he is entitled to deduct expenses incurred to gain qualification in any future employment that he might be engaged after his retirement. This, however, is merely an initial hurdle which the Taxpayer has to surmount. He has to further satisfy us that Chinese opera is relevant to the "qualification" of his prospective employment and that the course was provided by an institution approved by the Commissioner. The Taxpayer did not identify what prospective employment he had in mind and how Chinese opera could be relevant to such prospective employment…*'

60. The Appellant has not satisfied us what qualification or qualifications the course on 'Diploma in Acupuncture' would lead to which would be used by him in some prospective employment. In our view, taking a course that may enable a taxpayer to gain knowledge in some field which may be useful in some unidentified career that he may choose to pursue in the future is simply not sufficient to satisfy the definition of 'prescribed course of education' under section 12(6) of IRO.

61. In these circumstances, we hold that the Appellant has failed to discharge his burden in proving that the course that he took was a prescribed course of education within the meaning of section 12(6) of the IRO.

Extra-statutory concessions

62. As pointed out above, in his tax returns for 2001/02 and 2002/03, the Appellant has claimed deduction on account of the expenses that he incurred in paying for his practicing certificate and membership fees for the Law Society. The Commissioner had refused to allow the deduction.

However, the Commissioner had allowed a similar deduction for the year 2003/04.

63. Miss Wong for the Commissioner indicated to the Board that the Commissioner was prepared, by way of extra-statutory concessions, to allow further deductions in respect of the expenses on practising certificate and membership fees for the years of assessment 2001/02 and 2002/03. In the circumstances, the net chargeable income for those two years would be adjusted as follows:

Year of Assessment	**2001/02**	**2002/03**
Net chargeable income according to the Determination	$206,429	$233,424
Less: Practising certificate and membership fees	$8,600	$8,600
Revised net chargeable income	$197,829	$224,824
Revised tax payable thereon	$20,130	$27,720

Decision

64. For reasons set out above, we would allow the appeal only to the extent of the extra-statutory concessions set out in paragraph 63 above and order that the salary tax assessments of the Appellant for the years 2001/02 and 2002/03 be revised in accordance with paragraph 63. Save to that extent, the appeal is dismissed.