Case No. D14/13

Salaries tax – payment in lieu – section 12, 68(4) and 68(9) of the Inland Revenue Ordinance ('the Ordinance'). [Decision in Chinese]

Panel: Chow Wai Shun (chairman), Chau Cham Kuen and Ha Suk Ling.

Date of hearing: 25 June 2013.
Date of decision: 3 September 2013.

The Appellant's representative contended that the reimbursement by the new employer of the payment in lieu the Appellant paid to his previous employer was incurred in the performance of the Appellant's duty in doing the work required by the new employer and should therefore be an allowable deduction.

Held:

1. The payment in lieu enabling the Appellant to take up his new job by a specified time is personal to the Appellant and was not incurred in the performance of the Appellant's duty in doing the work of the new employer. It was not 'necessarily' 'incurred in the production of assessable income' and was in fact capital expenditure. It did not satisfy the provision of section 12(1)(a) of the Ordinance for deduction.

2. The Board is of the view that since the Appellant was represented by a professional accountant, they should at least be able to assess before the hearing whether or not the grounds of appeal are arguable. The Board, pursuant to the provision of section 68(9) of the Ordinance, orders the Appellant to pay $2,500 as costs of the board.

Appeal dismissed and costs order in the amount of $2,500 imposed.

Cases referred to:

CIR v Humphrey 1 HKTC 451
Nolder v Walters 15 TC 380
CIR v Robert P Burns 1 HKTC 1181
CIR v Franco Tong Sui Lun 7 HKTC 421
D25/08, (2008-09) IRBRD, vol 23, 531

D2/08, (2008-09) IRBRD, vol 23, 48
Humbles v Brooks 40 TC 500
D26/12, (2012-13) IRBRD, vol 27, 622
Ricketts v Colquhoun 10 TC 118
D46/92, IRBRD, vol 7, 436
CIR v Sin Chun Wah 2 HKTC 364
D15/88, IRBRD, vol 3, 223
D124/02, IRBRD, vol 18, 175

Chui Chi Yun Robert of Messrs Robert Chui & Co Certified Public Accountants for the Appellant.
Ng Sui Ling, Louisa and Fung Ka Leung for the Commissioner of Inland Revenue.

案件编号 D14/13

薪俸税 – 代通知金可否扣减 – 《税务条例》（第112章）第12，68(4)及68(9)条

委员会：周伟信（主席）、周湛权及夏淑玲

聆讯日期：2013年6月25日
裁决日期：2013年9月3日

上诉人代表表示上诉人从新任公司获发还上诉人因提早离职而需要支付前雇主的代通知金是实行对新雇主的职务，所以代通知金是在执行职务时产生，因而应获扣减。

裁决：

1. 上诉人有关代通知金支出，不过是上诉人个人特定情况，为了能在指定时间上任新雇主，却不是执行在新雇主任用下的职务时所招致的，所以并非「必须」「为产生应评税入息税而招致」，而且属资本性质支出，并不符合《税务条例》第12(1)(a) 条的扣减条件。

2. 本委员会认为上诉人既有专业会计师代表，理应能最低限度在聆讯前，更审慎衡量其上诉理据是否具备信服力，所以本委员会决定据《税务条例》第68(9)条，命令上诉人支付2,500元作为委员会讼费，该笔款项须加在征收的税款内一并追讨。

上诉驳回及判处港币2,500元的讼费命令。

参考案例：

CIR v Humphrey 1 HKTC 451
Nolder v Walters 15 TC 380
CIR v Robert P Burns 1 HKTC 1181
CIR v Franco Tong Sui Lun 7 HKTC 421
D25/08, (2008-09) IRBRD, vol 23, 531
D2/08, (2008-09) IRBRD, vol 23, 48
Humbles v Brooks 40 TC 500

D26/12, (2012-13) IRBRD, vol 27, 622
Ricketts v Colquhoun 10 TC 118
D46/92, IRBRD, vol 7, 436
CIR v Sin Chun Wah 2 HKTC 364
D15/88, IRBRD, vol 3, 223
D124/02, IRBRD, vol 18, 175

崔志仁会计师行崔志仁代表上诉人出席聆讯。
吴瑞玲及冯加良代表税务局局长出席聆讯。

决 定 书:

1. 上诉人反对税务局发出的 2011/12 课税年度薪俸税评税，税务局副局长于 2013 年 2 月 22 日发出决定书，裁定上诉人反对无效，并修订评税。上诉人就该决定书提出上诉。

有关事实

2. 上诉人只委托代表出席。上诉人代表表示对决定书所载的决定所据事实，不提任何争议。本委员会遂根据该等事实，与及双方于聆讯前已提交的文件证供，裁定与本上诉的有关事实如下：

(1) 上诉人自 2007 年 6 月 1 日起受雇于 A 雇主。根据有关的雇佣合约，上诉人或 A 雇主在雇用期的第一个月后，须给予对方三个月的通知期以终止合约。

(2) B 雇主于 2011 年 8 月 15 日致函上诉人，要求上诉人在获取录后一个月内上班，并承诺上诉人，发还他因提早离职而需要支付前雇主的代通知金，并以上诉人两个月的薪金额为限，同时上诉人须在 B 雇主服务不少于六个月。

(3) 上诉人其后向 A 雇主请辞，并服务至 2011 年 9 月 30 日止。由于他的辞职通知期不足三个月，他于离职时须向 A 雇主支付了一笔为数相等于一个月另 28 天薪金的代通知金 67,038 元（下称代通知金）。代通知金于 2011 年 10 月 7 日以对冲形式，于上诉人从 A 雇主于离职时应得款额中扣减。

(4) 上诉人自 2011 年 10 月 1 日起受雇于 B 雇主，C 职位，职责包括研究和开发新产品。

(5) A 雇主就上诉人提交了一份由雇主填报，有关其雇员行将停止受雇的通知书，当中载有以下资料：

受雇期间：	01-04-2011至30-09-2011
入息：	元
薪金	208,050
假期工资	41,245
	249,295

(6) B 雇主就上诉人提交了一份截至 2012 年 3 月 31 日一年内，由雇主填报的薪酬及退休金报税表，当中载有以下资料：

受雇期间：	01-10-2011至31-03-2012
入息：	元
薪金	240,000
花红	10,082
其他津贴	67,038
	317,120

(7) 上诉人在其 2011/12 课税年度个别人士报税表内，填报以下有关薪俸税的资料：

a. 他于该年度内所获得入息

雇主名称	期间	入息
		元
A雇主	01-04-2011至30-09-2011	182,256
B雇主	01-10-2011至31-03-2012	317,120
		499,376

b. 他申索扣除以雇员身份付给认可退休计划的强制性供款 12,000 元。

(8) 评税主任向上诉人作出以下 2011/12 课税年度薪俸税评税：

	元	元
入息[第2(5)及2(6)项事实]		
(249,295元+317,120元)		566,415
减：居所贷款利息	4,690	
退休计划供款		
(第2(7)b项事实)	12,000	16,690
		549,725
减：免税额		168,000

	元	元
应课税入息实额		381,725
应缴税款（已扣除税款宽减）		40,893

(9) 上诉人反对上述评税。其后他提交了一份由 B 雇主于 2011 年 10 月 19 日发给他的粮单副本，当中显示他无需就 2011 年 10 月份的收入支付退休计划供款。于是副局长按评税主任意见，修订 2011/12 课税年度薪俸税评税如下：

	元	元
入息[第2(8)项事实]		566,415
减：居所贷款利息	4,690	
退休计划供款	11,000	15,690
		550,725
减：免税额		168,000
应课税入息实额		382,725
应缴税款（已扣除税款宽减）		41,893

上诉理由及陈词

3. 上诉人代表拟定的上诉理由及陈词，虽分别为英文及中文，但重点相同：

(1) 当上诉人收到 B 雇主在 2011 年 8 月 15 日发出的信函，知悉其要求和补偿安排，便进行与 A 雇主的离职及代通知金安排，目的为满足 B 雇主的要求，是实行对 B 雇主的职务，所以代通知金是在执行职务时产生。

(2) 代通知金直接产生相应课税的补偿收入，具备相关的'perceived connection'，与税务提述的相关案例事实不同（见下文），所以应获扣减。

争议点

4. 由于上诉人没有就退休计划供款一项提出任何争议，所以本个案的唯一争议点，是上诉人可否获扣减代通知金。

有关法律条文及原则

5. 《税务条例》第 12 条规定：

「*(1) 在确定任何人在任何课税年度的应评税入息实额时，须从该人的应评税入息中扣除—*

. . . . . .

(a) 完全、纯粹及必须为产生该应评税入息而招致的所有支出及开支，但属家庭性质或私人性质的开支以及资本开支则除外；」。

6. 《税务条例》第 68(4)条规定：

「*证明上诉所针对的评税额过多或不正确的举证责任，须由上诉人承担*」。

7. 委员会认为，下列答辩人代表援引的案例，适用于本个案：

(1) 为产生该评税入息

(a) 在 CIR v Humphrey 1 HKTC 451 中，高等法院法官认为，税例第 12(1)(a)条中「为产生应评税入息」（in the production of assessable income），与英国法例要求的「在执行职位或受雇工作职务时」（in the performance of the duties of the office or employment）没有重大分别。该案纳税人从住所驾车往返工作地点，并非在执行职务，所以即使他获雇主发还部份金额已被视作应评税入息，其所招致的开支不能获扣除。原文如下:

> ' *It seems to me that it is quite clear that the respondent was not travelling on duty when travelling from his home to his office in Tai Po and that it was his responsibility to get to his place of work, and that it was a journey of a private or personal nature; the position is the same on his return journey from Tai Po to his home.*'

同案中上诉庭亦认同Nolder v Walters 15 TC 380一案所说，「在执行职务」指在做职位上的工作，在做一些当做职位上工作时他在职责上要做的事项。原文如下：

'*"In the performance of the duties" means in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office.*'

(b) 在 CIR v Robert P Burns 1 HKTC 1181 中(以下称 Burns 案)，上诉庭指出必须区分「在获取入息时支付的开支」（an expense incurred in gaining income）和「为获取收入而必须支付的开支」（an expense incurred necessarily for the purpose of gaining it），只有前者可获扣除。案中纳税人的法律开支，被裁定为是为免他无法赚取应评税入息而招致，属于后者，并非「为产生应评税入息」而招致的，所以否决该项申索。

(2) 与个人合约责任有关的支出不能扣减

(a) 在 CIR v Franco Tong Sui Lun 7 HKTC 421 中，高等法院法官表明，纳税人在合约订明他须负上的弥偿责任，并不是他在执行受雇工作的职务时所产生的责任。原文如下：

'*The indemnity obligations imposed on the taxpayer were imposed by his contract, they were not imposed by his duties in performing his employment.*'

据该案法官的分析，在薪俸税税制中，有关法律所注视的是直接归因于该职务本身的开支，而有关职务属于纳税人受雇执行的确实职务，就该案而言，不是指他因履行其雇佣合约而导致的个人开支。条例所预期的开支，绝对及只会是寓意雇佣活动本身所招致的，而非其个人合约的责任，虽然该等责任可被归纳为关乎纳税人赚取他的薪酬，与及在该案中的有关计算内，但其开支并非在执行纳税人职务在做受雇所作的工作时所招致的。原文如下：

'*[W]hat the law looks for in a salaries tax regime are expenses which are directly referable to the duty itself, the very tasks which the taxpayer is employed to do and not expenses which are personal to him arising, in this case, from his contract of employment … The expenses contemplated by the section are strictly and only those referable to the activity of the employment itself as opposed to other personal contractual obligations which, although referable to the earning of his salary by the taxpayer and, as in this case, its very computation, are not expenses incurred in the performance of the taxpayer's duty in doing the work required of that employment.*'

(b) 委员会在 D25/08, (2008-09) IRBRD, vol 23, 531 中，作出以下对支付代通知金的分析：

> 「*上诉人要能早到『新雇主』上班就必须先符合『旧雇主』的雇佣合约，付清了代通知金。这是她对『旧雇主』的合约责任。无论上诉人是自掏腰包或从其他管道筹措现金去清付，就如本案从『新雇主』处拿到的，都是在清付她自己的合约责任。亦就是说，当上诉人提早离职，作为雇主『旧雇主』就可根据合约向她本人追讨代通知金，这是由执行合约所产生的她的个人债务。上诉人可以找其他人替她支付，但所支付的仍是她的合约责任及个人债务。*」

(3) 获得最初资格不等同执行职务

委员会在 D2/08, (2008-09) IRBRD, vol 23, 48 中，引用法官在 Humbles v Brooks 40 TC 500 的观点，说明「在执行所担任职位或受雇工作的职务」，意思是指在执行过程中、在做职务上的工作、及在做职务上的工作时所须履行的责任，但不包括在最初取得资格以执行职务的行为，甚或保持执行这些职务的资格的行为，亦并不包括为执行职务而增添所长的行为；即使因雇主的规定而必须招致有关开支，这规定本身也不会令开支符合有关规则，而如雇主没有如此规定，也未必不能引用有关规则。原文如下：

> ‘ *“In the performance of the said duties” means in the course of their performance… It means “in doing the work of the office, in doing the things which it is his duty to do while doing the work of the office”. It does not include qualifying initially to perform the duties of the office, or even keeping qualified to perform them… it does not mean adding to the taxpayer’s usefulness in performing his duties. The requirement of the employer that the expenditure shall be incurred does not, of itself, bring the expense within the Rule, nor does the absence of such a requirement exclude it from the application of the Rule…*’

委员会于参考多个案后并指出，有关支出扣除的规定非常严格，即使支出或开支与受雇工作有关，仍不一定属于「为产生该应评税入息而招致」。

(4) 必须

委员会在 D26/12, (2012-13) IRBRD, vol 27, 622 中，参考 Ricketts v Colquhoun 10 TC 118 的法律原则：如有关开支不是每名担任此职位的雇员都必须在执行职务中招致，而是因私人情况或个人选择而招致的，则不属于「必须」不能获得扣除。原文如下：

'*.. the language… points to the expenses with which it is concerned as being confined to those which each and every occupant of the particular office is necessarily obliged to incur in the performance of its duties… The deductible expenses do not extend to those which the holder has to incur mainly and, it may be, only because of circumstances in relation to his office which are personal to himself or are the result of his own volition.*'

(5) 非家庭、私人或资本性开支

委员会在 D25/08, (2008-09) IRBRD, vol 23, 531 中，认为有关代通知金是为了能获取新工作而支出的，与投资生产无异，属资本性支出，所以不获扣减。

(6) 已知的关连性(Perceived connection)必须等同当值及在执行职务期间(On duty and in the course of the duties)

委员会在 D46/92, IRBRD, vol 7, 436 中，引用 Huggins 法官在 Burns 案一案表达的意见，就是「已知的关连性测试」与「当值测试」意思相同及同样地严谨，因而不会界定一个较宽松或较广泛的意思。开支必须是在纳税人当值及在执行职务期间招致。有关的开支与职务之间必须存有已知的关连性，而且该项已知的关连性所包含的意思，必须等同于当值及在执行职务期间或没有比此所指更广泛的意思。原文如下：

'*…[W]hat Huggins, JA said at page 1190 namely, "in practice there is probably no real distinction between this 'on duty test' and the 'perceived connection test' of the Australian courts." What Huggins, JA is saying is that the Australian perceived connection test is just as strict and has the same meaning as the on duty test and is not to be given a looser or wider meaning…*

Having reviewed the Hong Kong cases which by implication has reviewed the overseas cases we are able to state quite clearly and simply that section 12(1)(a) of the Inland Revenue Ordinance requires that the outgoing or expense must be "wholly, exclusively

and necessarily" incurred and as a separate matter that it must be incurred "in the production of the assessable income". In relation to this second test the expense must be incurred while the Taxpayer is on duty and in the performance of his duties. There must be a "perceived connection" between the expense and the duties and the "perceived connection" must be the same as or have no wider meaning than 'on duty and in the course of the duties".'

(7) 代通知金不能扣减

在 CIR v Sin Chun Wah 2 HKTC 364 中(以下称 Sin Chun Wah 案)，高等法院法官解释，一项开支是否产生入息或在产生入息过程中而招致，须多考虑开支本身的必要性，而不是雇员或拟从事专业执业业务者要先招致这开支，才可以开始从事这些活动，从中赚取有关入息。原文如下：

'*… whether or not an expenditure is incurred in or in the course of producing one's income "depends upon considerations which are concerned more with the essential character of the expenditure itself than with the fact that unless it is incurred an employee or a person pursuing a professional practice will not even begin to engage in these activities from which their respective incomes are derived".*'

另外，众多案例亦指明，为了可以获取应评税入息的支出(expenditure for the purpose of the production of assessable income)是要与为产生应评税入息的支出(expenditure in gaining or for the production of assessable income)区别出来。所以在案中，支付给旧雇主的代通知金支出，不是为产生纳税人在新雇主的入息而招致的支出；更加不是完全、纯粹及必须为产生该应评税入息而招致的。原文如下：

'*…[I]t is clear from the authorities… that expenditure for the purpose of the production of assessable income is to be distinguished from expenditure in gaining or for the production of assessable income…*

In the light of the guidance afforded by those authorities in my judgment the payment in lieu of notice to [the ex-employer] was not expenditure incurred in the production of the emoluments the Taxpayer earned from the [new employer]; a fortiori it was not wholly, exclusively and necessarily incurred in the production of that assessable income.'

此案随后在委员会案例 D15/88, IRBRD, vol 3, 223 、D124/02, IRBRD, vol 18, 175 及 D25/08, (2008-09) IRBRD, vol 23, 531，都被引用，裁定纳税人向前雇主支付的代通知金，不是「必须为产生应评税入息而招致」的，因此不获扣除；其中 D25/08 的纳税人，同样获新雇主发还代通知金，而发还的金额已被作为应评税入息。

案情分析

8. 上诉人代表就 Sin Chun Wah 案的陈词，首先是针对其与本个案事实上的不同，就是在该案中，纳税人自愿付出代通知金，新雇主没有补偿。本个案上诉人代表认为，若有相应课税收入，则代通知金的扣减性立即存在。至于 D25/08，上诉人代表直认两个个案案情极度相似，但指称该委员会忽略了以下一段判词，误解了 Sin Chun Wah 案的原则：

> *' Section 51 of the Australian Income Tax Assessment Act 1936-1967 provides that all outgoings to the extent to which they are incurred in gaining or producing the assessable income shall be allowable deductions. The High Court of Australia allowed expenses of the theses as deductible because the teacher's certificate automatically entitled the teacher to be paid more for the same work; but the expenses of the university course were held not to be deductible because there was no "perceived connection" between the outgoings and the assessable income.*'

亦即是上诉人代表所仗赖的「已知的关连性」测试。

9. 有关上述一段判词，本委员会认为上诉人代表断章取义，没有理会上文下理。在 Sin Chun Wah 案中，当时的税务局局长代表，主要倚赖 Burns 案作为其上诉理据，于是高等法院 Nazareth 法官在其判词中，阐释 Huggins 法官在 Burns 案中的分析。而 Huggins 法官在 Burns 案考虑澳洲的条文和案例，是由于该等条文和案例在委员会聆讯阶段已被提述，委员会裁断纳税人上诉得直，亦建基于该等案例之上，故此，高等法院在处理税务局局长的上诉时，必须再行审视。在重新审视该等案例后，正如答辩人代表之前的提述，Huggins 法官就「已知的关连性」测试下了脚注（参上文第 7(6)段），所指的是开支或支出与职务的关连，有关开支或支出，乃「完全、纯粹及必须」「为产生应评税入息而招致」，门坎高而严格。而根据众多案例，「为产生应评税入息而招致」有局限于在执行职务时招致的意思，不一定包括全部与应评税入息有关的开支和支出，就正如在上诉人代表引用判词中的例子，亦不是所有与升职有关的开支都有所指的「已知关连性」，因此，因为 Burns 案涉及的开支不符合相关的条件，所以裁定税务局局长胜诉，所以，本委员会认为上诉人代表引用的判词，对上诉人没有任何帮助。

10. 此外，根据 Huggins 法官在 Burns 案就「已知的关连性」测试的分析，开支或支出的扣减与应评税入息，在香港的税务法则中并没有绝对的对称面(tax symmetry)，所以，上诉人代表提出「若有相应课税收入则代通知金的扣减性立即存在」的论点，本委员会并不接纳。

11. 上诉人代表另外提出，上诉人是在满足新雇主要求的上任时间，是实行其对新雇主的职务，所以为此而招致代通知金的支出，是在执行职务中产生云云。本委员会认为此论点牵强，有关支出只是上诉人根据其与旧雇主的合约条款支付，以使上诉人能提早为新雇主工作，属于为获取收入(for the purpose of production of income)，具资本性质，而非在执行新雇主任用下的职务，在获取入息时(in the production of income)支付的开支。

12. 正如上文所述，有关支出是由于上诉人个人的特定情况，没有证据显示每位新雇主任用下，出任相同岗位的雇员都须支付前雇主代通知金，所以有关支出并非「必须」招致。

总结

13. 经详细考虑所有呈堂文件、双方的陈词和案情，与及基于上文的分析，上诉人有关代通知金支出，不过是上诉人个人特定情况，为了能在指定时间上任新雇主，却不是执行在新雇主任用下的职务时所招致的，所以并非「必须」「为产生应评税入息而招致」，而且属资本性质支出。所以，本委员会裁定有关代通知金支出，并不符合《税务条例》第 12(1)(a)条的扣减条件，驳回上诉人的上诉，从而确定上文第 2(9)段的修订评税。

14. 另外，本委员会在考虑双方有关讼费陈词后，认为上诉人既有专业会计师代表，理应能最低限度在聆讯前，更审慎衡量其上诉理据是否具备信服力，所以，本委员会决定据《税务条例》第 68(9)条，命令上诉人缴付$2,500 作为委员会讼费。有关条文规定，这笔讼费须加在征收税款内一并追讨。