Case No. D28/11

Salaries tax – Appellant applied to deduct professional fee for consulting lawyer – whether the fee was expense necessarily incurred in the production of assessable income – whether the fee was 'wholly, exclusively and necessarily' incurred in performance of duties – whether the Appellant must incur the expense with no choice – whether the fee deductible as expenses of self-education – sections 2, 12 and 68(4) of the Inland Revenue Ordinance ('IRO'). [Decision in Chinese]

Salaries tax – costs – whether costs order should be imposed against the Appellant – conduct of the Appellant in handling proceedings – section 68(9) and schedule 5 part I of the IRO.

Panel: Chow Wai Shun (chairman), Liu Kin Sing and Patrick Wu Yung Wei.

Date of hearing: 14 July 2011. Date of decision: 10 October 2011.

The Appellant applied to deduct \$22,000 from his salaries tax assessment for the year of assessment 2009/10 as professional fee for consulting lawyer ('said fee'), alleging that the consultation was vital to his professional job. The Appellant further provided copies of two receipts issued by the solicitors' firm dated 6 November 2008 and 13 March 2009. The Assessor disallowed the deduction, holding the view that the said fee was not necessarily incurred in the production of income.

The Appellant objected to the assessment, alleging that he should be allowed to deduct the said fee from his assessable income. The Appellant further alleged that he was involved in legal proceedings in October 2010, and therefore he needed to obtain legal advice to ensure whether the legal proceedings constitute a disclosable crime pursuant to his employment contract. The Deputy Commissioner of Inland Revenue refused to the objection. The Appellant appealed to the Board, alleging that the professional body that he belonged to emphasized continuing learning, in which understanding law is part of the learning area, and that he consulted lawyer with a view to increase the relevant knowledge, and as a result the said fee was necessarily incurred. In the hearing of the appeal, the Appellant elected to make submissions but not to testify on oath.

Held:

The said fee could not be deducted

- 1. In order for an expense to be qualified to be deducted, the taxpayer must prove: (1) that the expenses were incurred; (2) that they were incurred in the performance of duties of the taxpayer; and (3) that they were wholly, exclusively and necessarily so incurred. The three questions, being questions of facts, must all be proven. (D36/90, IRBRD, vol 5, 295, Lomax v Newton 34 TC 558, D55/06, (2006-07) IRBRD, vol 21, 1046 and CIR v Humphrey [1970] 1 HKTC 451 considered).
- 2. 'In the performance of duties' meant in the course of their performance. It meant 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 did not include qualifying initially to perform the duties of the office, or even keeping qualified to perform them (Humbles v Brooks 40 TC 500 considered).
- 3. There was a distinction between expenses incurred in producing income and expenses 'necessarily' incurred in producing income. The word 'necessarily' was not about whether the employer imposed the expenses but whether the duties did, in the sense that, irrespective of what the employer might prescribe, the duties could not be performed without incurring the particular outlay; and the word 'necessarily' pointed to expenses with which it was concerned as being confined to those which each and every occupant of the particular office was necessarily obliged to incur in the performance of its duties, to expenses imposed upon each holder ex necessitate of his office and to such expenses only; the terms employed were strictly, purposively and objective. The deductible expenses did not extend to those which the holder had to incur mainly and only because of circumstances in relation to his office which were personal to himself or were the result of his own volition (CIR v Robert P Burns [1980] 1 HKTC 1181, Brown v Bullock 40 TC 1 and Ricketts v Colquhoun [1926] 10 TC 118 considered).
- 4. In considering 'expenses necessarily incurred in producing assessable income', two factors must be taken into account. Firstly, the expenses must be something which the employee must incur and had no choice. If there was any choice, then it was not necessarily incurred. Secondly, it must be necessarily incurred in the production of the assessable income. It was not sufficient for the employment contract or employer to impose a condition upon the employee if the expense was not incurred in the production of assessable income (D76/90, IRBRD, vol 5, 515 considered).
- 5. Receipts from the solicitors' firm belonged to the year of assessment 2008/09, and the Appellant also confirmed that the legal proceedings had finished in December 2008. The above showed that the said fee was incurred in 2008/09, and therefore it was not deductible; even though the

said fee was incurred in the relevant year of assessment, it was not incurred in the production of the Appellant's assessable income; further, even the said fee was incurred in the nature as alleged by the Appellant, it was incurred by the Appellant seeking legal advice from the said solicitors' firm, and was not incurred by the Appellant in the performance of his duties or in producing his assessable income (<u>CIR v Humphrey</u> [1970] 1 HKTC 451 considered).

- 6. Further, the Appellant's employment contract required an employee to disclose certain convicted crimes to the department, but did not necessarily require an employee to seek legal advice. The Appellant also failed to prove that he incurred the said fee with no choice, and without incurring the said fee he could not perform his duties. The legal proceedings and the said fee were personal to the Appellant, with no absolute bearing to his duties. In fact, the Appellant was not convicted in the legal proceedings (<u>D76/90</u>, IRBRD, vol 5, 515 and <u>Ricketts v Colquhoun</u> [1926] 10 TC 118 considered).
- 7. The purpose of continuing education and learning was to keep oneself qualified or to increase one's ability to perform the duties. It was not expense incurred in performing duties. Further, continuing education aimed at improving or increasing the Appellant's ability, and was therefore expenses in personal nature; alternatively, the said fee could have brought long-term benefit to the Appellant and was therefore capital expenses. In either case, it failed to fulfil the requirement under section 12(1)(a) of the IRO and was not deductible. For the same reasons, the provision relating to expenses of self-education under section 12(1)(e) of the IRO did not apply to the present proceedings. Further, the legal consultation provided by the solicitors' firm was neither educational courses nor professional examinations (CIR v Humphrey [1970] 1 HKTC 451 and Humbles v Brooks 40 TC 500 considered).

Costs order

8. The Commissioner has on various occasions made detailed explanations to the Appellant in respect of the present proceedings. Notwithstanding that, the Appellant sought to confuse the proceedings by arguing on various irrelevant matters, without even first understanding the basis period concerned in these proceedings. The Appellant's arguments did not have any standing point. The Appellant handled these proceedings in a vexatious manner, wasting much time of the Board and other taxpayers' money.

Appeal dismissed and costs order in the amount of \$5,000 imposed.

Cases referred to:

D36/90, IRBRD, vol 5, 295

Lomax v Newton 34 TC 558 D55/06, (2006-07) IRBRD, vol 21, 1046 CIR v Humphrey [1970] 1 HKTC 451 Humbles v Brooks 40 TC 500 CIR v Robert P Burns [1980] 1 HKTC 1181 Brown v Bullock 40 TC 1 Ricketts v Colquhoun [1926] 10 TC 118 D76/90, IRBRD, vol 5, 515

Taxpayer in person.

To Yee Man and Chan Wai Yee for the Commissioner of Inland Revenue.

案件编号 D28/11

新俸稅-上诉人申请扣除咨询律师专业意见费用-该费用是否为产生应评稅入息必须招致的开支-该费用是否「完全、纯粹及必须」在执行职务时招致-上诉人是否在没有选择下支付该费用-该费用可否作为个人进修开支而获得扣减-《税务条例》(下称《税例》)第2、12及68(4)条

薪俸税-讼费-上诉人应否被判处讼费命令-上诉人处理聆讯的态度-《税例》第68(9)条及附表5第I部

委员会:周伟信(主席)、廖健升及吴勇为

聆讯日期:2011年7月14日裁决日期:2011年10月10日

上诉人在2009/10课税年度薪俸税评税中申请扣除22,000元咨询律师专业意见的费用(下称「该费用」),并声称有关咨询对其专业工作至为重要。上诉人同时提供两张由有关律师行发出的收据副本,日期分别为2008年11月6日及2009年3月13日。评税主任认为该费用并非为产生入息所必须招致的开支,因此不批准扣除有关费用。

上诉人对有关评税提出反对,声称他应获扣除该费用。上诉人又指他在2010年10月牵涉法律诉讼,故须寻求法律意见以确定有关诉讼是否在雇佣合约上构成须向工作部门披露的罪行。税务局副局长裁定反对无效。上诉人继而向委员会提出上诉,指称他所属专业团体强调持续学习,而了解法律是学习范围之一,他为增进有关方面的见识而向律师咨询专业意见,所以该费用为必须支出。上诉人在上诉聆讯中选择只作陈词,并未宣誓作供。

裁决:

上诉人法律咨询费用不可扣减

1. 一项开支若要符合扣减的条件,纳税人必须证明:(1)他招致了该项开支;(2)该项开支是在执行职务时招致;及(3)完全、纯粹及必须在执行职务时招致。三项条件均属事实的问题、缺一不可(参考 <u>D36/90</u>, IRBRD, vol 5, 295、<u>Lomax v Newton</u> 34 TC 558、<u>D55/06</u>, (2006-07) IRBRD, vol 21, 1046及CIR v Humphrey [1970] 1 HKTC 451)。

- 2. 「为执行职务」是指在执行的过程中、在做职务上的工作和在做职务上的工作时所履行职责而做的事,但不包括最初取得资格为以执行职务的行为,甚或是为保持资格以执行职务的行为,或为执行职务而增添所长的行为(参考 Humbles v Brooks 40 TC 500)。
- 3. 获取入息时所招致开支,与为获取入息而「必须」招致的开支有区分。「必须」一词不在于雇主是否强迫雇员支付某些开支,而是在于职务本身,即是无论雇主规定甚么,有关职务不能够在没有该项特定开支下履行;而「必须」一词亦只限于每名担任某职位的人士为执行其职务而必须招致的开支、每名担任该职位的人士基于其职位需要而被要求支付的开支,但仅限于这些开支;所采用的用语是严格、具有特定目的及有客观根据的。可扣除开支不得延伸至该名担任职位人士主要及可能是由于与其职位相关、私人或由于其个人意愿而招致的开支(参考CIR v Robert P Burns [1980] 1 HKTC 1181、Brown v Bullock 40 TC 1及 Ricketts v Colquhoun [1926] 10 TC 118)。
- 4. 在考虑「必须为产生该应评税入息而招致的开支」时,有两方面的因素需要考虑。其一是雇员一定要而没有选择地招致开支;假如该雇员有其它选择,有关开支便不是必须招致。其二是指在产生该应评税入息时必须招致,雇佣合约或雇主强加条款于雇员是不够的(参考 <u>D76/90</u>, IRBRD, vol 5, 515)。
- 5. 有关的律师行收据日期属于 2008/09 课税年度,而上诉人亦确认涉及的诉讼在 2008 年 12 月已完结,显示该费用应是在 2008/09 年度内招致及支付,所以该费用不能予以扣减;即使该费用在有关课税年度内招致,亦不是为产生上诉人应评税入息而招致;此外,即使该费用具备上诉人所言的性质,但该费用源于上诉人向该律师行寻求法律咨询,并非他在履行其职务或产生其应评税入息所招至(参考 CIR v Humphrey [1970] 1 HKTC 451)。
- 6. 另外,上诉人的雇佣合约要求雇员须向部门披露某些被定罪的罪行,但并没有规定雇员必须寻求法律咨询。上诉人亦未能举证证明他是在没有选择之下支付该费用,而若没有该费用,他将无法执行其职务。而且上诉人涉及的诉讼和招致的支出是他个人的事情,与他要执行的职务并无绝对关系。而事实上,上诉人在该诉讼中并没有被定罪(参考D76/90, IRBRD, vol 5, 515 及 Ricketts v Colquhoun [1926] 10 TC 118)。
- 7. 持续进修及学习的目的旨在保持资格或增添能力以执行职务,并非因执行职务而招致的开支。而且持续学习旨在改善或提升上诉人的能力,故属于个人性质的开支;又或该费用因可为上诉人带来持久利益,所以属资本开支,均不符合《税例》第12(1)(a)条的规定,故不获扣减。

基于同样理由,《税例》第12(1)(e)条有关个人进修开支并不适用于本案。此外,该律师行提供的法律咨询并非教育课程或专业考试(参考CIR v Humphrey [1970] 1 HKTC 451 及 Humbles v Brooks 40 TC 500)。

讼费命令

8. 税务局局长已就本案多次向上诉人详细解释,而上诉人连评税基期亦未厘清,便东拉西扯,企图混淆视听。上诉人的论据根本没有任何立足点,处理本个案粗枝大叶,理屈词穷,浪费委员会的时间及其它纳税人的金钱。

上诉驳回及判处港币5,000元的讼费命令。

参考案例:

D36/90, IRBRD, vol 5, 295 Lomax v Newton 34 TC 558 D55/06, (2006-07) IRBRD, vol 21, 1046 CIR v Humphrey [1970] 1 HKTC 451 Humbles v Brooks 40 TC 500 CIR v Robert P Burns [1980] 1 HKTC 1181 Brown v Bullock 40 TC 1 Ricketts v Colquhoun [1926] 10 TC 118 D76/90, IRBRD, vol 5, 515

纳税人亲自出席聆讯。 陶绮雯及陈慧仪代表税务局局长出席聆讯。

决定书:

- 1. 上诉人对税务局向他发出的 2009/10 课税年度薪俸税评税提出反对,声称他应获扣除他申索的征询法律意见的费用。税务局副局长于 2010 年 12 月 7 日发出决定书,裁定反对无效。上诉人继而向本委员会书记办事处提出上诉。
- 2. 上诉人选择只作陈词,并未宣誓作供。

本个案相关事实

3. 从已呈堂文件及基于上诉人选择不作供,本委员会接纳上述副局长决定 书内决定所据事实,为本个案相关事实。现概列如下:

- (1) 在相关期间,上诉人是政府A部门(下称A部门)的B专业人员。
- (2) 上诉人在其 2009/10 课税年度的个别人士报税表中,申报他从 A 部门所得的受雇入息,总金额为 774,945 元。从该笔受雇入息中,上诉人申索扣除以下开支:
 - (a) 支出及开支 XX,XXX 元,其详细资料填写为「香港[B 专业] 学会会籍、有关[B 专业]注册的法律意见」。
 - (b) 认可慈善捐款 100 元。
 - (c) 尚认可退休计划支付的强制性供款 12,000 元。
- (3) 应评税主任查询,上诉人就申索扣除的支出及开支(上文第 3(2)(a) 段),提供以下数据及文件:

	<u>详细资料</u>	<u>金额(元)</u>
(a)	缴付C律师行	22,000
	(下称该律师行)的费用(注)	
(b)	香港B专业学会会员费	X,XXX
(c)	B专业注册费	XXX
	总计	XX,XXX

- 注: 上诉人声称有关的意见征询对其B专业工作至为重要,同时夹 附两张由该律师行,分别在2008年11月6日及2009年3月13日, 向上诉人发出的付款收据副本。
- (4) 评税主任认为,上述该笔 22,000 元的法律费用,并非为产生该笔应评税入息所必须招致的开支,因此,评税主任没有准予扣除有关费用,向上诉人作出以下 2009/10 课税年度的薪俸税评税:

	元
入息(上文第3(2)段)	774,945
减:支出及开支(注)	X,XXX
认可慈善捐款	(100)
退休计划供款	(12,000)
入息净额	XXX,XXX

<u>减</u>:已婚人士免税额 (216,000)

注: 上文第3(3)(b)段+上文第3(3)(c)段

- (5) 上诉人反对上述评税,并提出理由。评税主任继而发信上诉人,解释该等法律费用不符合《税务条例》第12(1)(a)条所载明的条件,并邀请上诉人撤回反对。
- (6) 上诉人没有撤回反对,并为详述其反对的理据,作出申辩和提交其雇佣合约摘录。其中合约条款包括如上诉人曾因某些罪行而被定罪,他须在合约开始前披露,另如雇员其后被发现未有披露他在合约开始前,或在合约涵盖期间内,因上述罪行而被定罪的事宜,则雇主有权在不影响本身的其它权利的情况下,向该雇员作出纪律处分,或向该雇员讨回全部或部份向其发放的酬金。而上诉人声称,他在2010年10月牵涉法律诉讼,故须寻求法律意见,以确定该等诉讼是否构成须向A部门披露的罪行。
- (7) 税务局副局长发出上文第 1 段所指的决定书,上诉人不服,向本委员会提出上诉。

上诉理由

- 4. 上诉人在其上诉通知及上诉理由陈述书中,夹附其于 2010 年 12 月 13 日及 12 月 20 日致税务局书函,与及税务局于 2010 年 12 月 20 日及 12 月 29 日的回复。
- 5. 上诉人在其 2010 年 12 月 13 日的书函提出,税务局未有考虑该法律咨询的双重功用。他申辩称,由于他必需为香港 B 专业学会会员,方可受雇目前的工作,而按香港 B 专业学会规定,会员必须持续学习,而除专业技术外,持续学习的课题必须涵盖各方面,包括法律,所以法律学习费用为必须的支出。
- 6. 税务局 2010 年 12 月 20 日的覆函指出,职员曾致电上诉人解释有关事宜, 书函中阐释《税务条例》第 12(1)(a)条,有关薪俸税下可获扣除支出,与及第 12(1)(e) 及 12(6)条有关进修开支扣除的规定。
- 7. 上诉人 2010年12月20日的函件,是向税务局要求副局长决定书的中文 文本;税务局于2010年12月29日回复,应上诉人的要求,夹附决定书中文译文。

上诉人陈词

- 8. 总括上诉人的陈词,他强调持续学习是必须的,亦是其所属专业团体要求和鼓励的,而持续学习包括的范围广泛,学习和了解法律是其中之一,专业团体及雇主纵有提供有关专业操守及法律的课程,但为增进自己有关法律方面的见识,向律师咨询专业意见,亦是持续学习的一种方式。上诉人亦出示了一页由香港 B 专业学会发给会员,有关持续专业进修要求的书函、两页从该会网站撷取,有关相同项目的数据,与及两版自制的,上诉人于 2008 年参加的持续专项进修记录表格,作为左证。
- 9. 有关两张由该律师行发出的收据,上诉人在响应本委员会的提问时补充说,日期为2009年3月13日的收据上所示的有关事项,是上诉人涉及的个人诉讼的法院编号,该诉讼于2008年11月时仍在进行中,约于同年12月完结,而该律师行只提供口头意见,没有任何书面数据。至于为何第二张收据于2009年3月13日才发出,上诉人只表示律师行通常在收到款项后数天甚至一周,才签发收据。
- 10. 有关上文第 8 段提述的,上诉人自行编制的持续专业进修记录,上诉人在响应委员会查询时表示,其中大部份列出的项目,经有关专业团体审定,另外他会自行安排其它学习与训练。

案情分析

争议点

11. 在这个案中,本委员会须决定的问题是,在确定上诉人的应评税入息实额时,他是否应获扣除上述一笔向该律师行缴付的法律费用。

《税务条例》的有关规定和相关法律原则

- 12. 《税务条例》的有关条文如下:
 - (1) 第 2(1)条
 - '课税年度'指任何一年自4月1日起计的12个月期间。
 - (2) 第 12(1)条

在确定任何人在任何课税年度的应评税实额时,须从该人的应评税入息中扣除一

(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;

....

- (e) 在该课税年度内支付的不超过第(6)款所订明的个人进修开支款额的款额。
- (3) 第 12(6)条

为施行第(1)(e)款-

.....

- (b) '个人进修开支'指纳税人支付的以下开支一
 - (i) 与纳税人修读的订明教育课程有关的费用,包括学费及 考试费;或
 - (ii) 就纳税人为取得或维持在任何受雇工作中应用的资格 而参加的由教育提供者、行业协会、专业协会或业务协 会主办的考试而支付的费用,.....
- (c) '订明教育课程'指为取得或维持在受雇工作中应用的资格而修读的以下课程—
 - (i) 由教育提供者提供的教育课程;
 - (ii) 由行业协会、专业协会或业务协会提供的训练或发展课程;或
 - (iii) 由附表13指明的机构所审定或认可的训练或发展课程;
- (d) '教育提供者'指一
 - (i) 大学、大学学院或工业学院;
 - (ii) 《教育条例》(第279章)凭借该条例第2条而不适用的 教育机构;
 - (iii) 根据《教育条例》(第279章)第13(a)条注册的学校:
 - (iv) 根据《教育条例》(第279章)第9(1)条获豁免而无需注册的学校;

- (v) 获局长为第16C条的施行而批准的机构;或
- (vi) 获局长根据(e)段而批准的机构;

.....

(4) 第 68(4)条

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。

有关法律原则

- 13. 委员会案例 <u>D36/90</u>, IRBRD, vol 5, 295,引用 <u>Lomax v Newton</u> 34 TC 558,认为一项开支若要符合扣减的条件,纳税人必须证明:(1)他招致了该项开支;(2)该项开支是在执行职务时招致;及(3)完全、纯粹及必须在执行职务时招致。有关判词节录如下:
 - "...In Lomax v Newton..., Vaisey J stated: "The words are stringent and exacting; compliance with each and every one of them is obligatory if the benefit of the rule is to be claimed successfully."
 - 7.1 Therefore, to succeed, the Taxpayer must prove: (1) that the expenses were incurred, (2) that they were incurred in the performance of duties of (the Taxpayer) and (3) that they were wholly, exclusively and necessarily so incurred.'
- 14. <u>D55/06</u>, (2006-07) IRBRD, vol 21, 1046 的个案中, 纳税人申索扣除多项开支,但由于未能提交实质或同时期的证据,证明他在有关课税年度,在执行职务时招致了该等开支,以产生该年度的应评税入息,被驳回上诉。
- 15. 在 CIR v Humphrey [1970] 1 HKTC 451 一案中,上诉庭法官认为《税务条例》第 12(1)(a)条中,为产生应评税入息这词组,跟英国相关法例中要求,为执行职位或受雇工作的职务,在释义上没有重大分别。
- 16. 在 <u>Humbles v Brooks</u> 40 TC 500 一案中,一名校长需要任教多个科目,包括历史,而为了增进他在该学科的知识,他参加了一系列的课程,他认为这些课程的费用应获扣除。法官否决他的申索,认为有关开支并非他在备课时,或履行他的教学工作时必须的招致的开支。法官并解释为执行有关职务这词组,是指在执行的过程中、在做职务上的工作和在做职务上的工作时所履行职责而做的事,但不包括最初取得资格为以执行职务的行为,甚或是为保持资格以执行职务的行为,或为执行职务而增添所长的行为。相关判词的原文如下:

- "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....'
- 17. <u>CIR v Robert P Burns</u> [1980] 1 HKTC 1181 一案涉及一名练马师,因被指违反其中一条赛事规例,被英皇御准香港赛马会董事局吊销执照六个月,为此他提出上诉并上诉成功。该练马师指有关的法律费用应获扣除,因作为练马师,他必须持有有效的练马师执照才可赚取收入。然而,上诉庭指出,在获取入息时所招致开支,与为获取入息而必须招致的开支,两者必须有区分;而有关的法律费用,仅是为了确保该练马师不会丧失赚取其应评税入息的专业资格而招致,却并非为产生应评税入息而招致,所以不予以扣除。
- - "... The text is not whether the employer imposes the expenses but whether the duties do, in the sense that, irrespective of what the employer may prescribe, the duties cannot be performed without incurring the particular outlay."
- 19. 在 <u>Ricketts v Colquhoun</u> [1926] 10 TC 118 中,法官指必须一词,只限于每名担任某职位的人士为执行其职务而必须招致的开支、每名担任该职位的人士基于其职位需要而被要求支付的开支,并仅限于这些开支;换言之,所采用的用语是严格的,及具有特定目的,并非出于个人喜好,而是有客观根据的。可扣除的开支不得延伸至该名担任职位人士,主要及可能是由于与其职位相关、私人或由于其个人意愿而招致的开支。相关判词原文如下:
 - "...the language of the Rule 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, to expenses imposed upon each holder ex necessitate of his office and to such expenses only... in other words, the terms employed are strictly, and, I cannot doubt, purposely, not personal but objective. 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."
- 20. 在 <u>D76/90</u>, IRBRD, vol 5, 515 中,委员会扼要地概述了《税务条例》第 12(1)(a)条中,必须为产生该应评税入息而招致的开支,所考虑的两方面因素。其一是雇员一定要而没有选择地招致的开支;假如该雇员有其它选择,有关开支便不是必须招致。其二是指在产生该应评税入息时必须招致,雇佣合约或雇主强加条款于

雇员是不足够的。相关判词的原文如下:

"...The word "necessarily" has also been given a very precise interpretation. The expenses must be necessarily incurred in the production of the assessable income. This means that this test has two limbs. The expense must be something which the employee must incur and has no choice. If there is any choice, then it is not necessarily incurred. Secondly it must be necessarily incurred in the production of the assessable income. This means that it is not sufficient for the employment contract or employer to impose a condition upon the employee if the expense is not incurred in the production of assessable income."

分析

- 21. 经听取双方陈词及已提交的证供,与及参照前述法例条文及案例后,本委员会对案情分析如下。
- 22. 根据《税务条例》第 12(1)(a)条及援引委员会案例 <u>D36/90</u>,要获得扣减开支,上诉人必须证明(1)他在有关课税年度招致了该项开支;(2)该项开支是在执行职务时招致的;及(3)完全、纯粹及必须在执行职务时招致的。三项条件均属事实的问题,而且必须同时符合,缺一不可。
- 23. 有关课税年度的评税基期为 2009 年 4 月 1 日至 2010 年 3 月 31 日,而该律师行发给上诉人的两张收据,日期属于 2008/09 课税年度,上诉人在响应委员的提问中确认,涉及诉讼于 2008 年 12 月已完结,显示该笔律师费开支,应是在 2008/09 年度内招致和支付,上诉人亦未能提出同时期证据反证,所以该笔开支并不符合有关法律和法律原则的要求,不能予以扣减。事实上,单凭这点已足以驳回上诉人的上诉。
- 24. 即若该笔费用在有关课税年度招致,亦不是为产生上诉人应评税入息而招致的。上诉人声称有关法律咨询,可助他确定是否须向雇主披露其所涉及的法律诉讼,同时他可藉此学习有关法律知识,以符合他作为香港 B 专业学会会员,必须持续学习的规定。然而,他所呈堂的自行编制的记录表,未经有关专业学会评核,上诉人亦承认并非所有项目是有关专业学会审定的,他亦未有提出具体证据,证明该项法律咨询获有关专业学会确认为持续学习项目之一,更何况将法律咨询与持续学习相题并论,是混为一谈,极为牵强。
- 25. 即使正如上诉人所言,该笔开支具备两重性质,但该笔开支源于上诉人向该律师行寻求法律咨询,并非他在履行其 A 部门职位职务时招致,纵然上诉人辩称若他不招致该笔开支,他可能因未有向雇主作出适当披露而遭解雇,但据 CIR v Humphrey 的原则,这极其量只能说明,该笔开支旨在确保上诉人不会被妨碍赚取其应评税入息而招致,却并非为产生其应评税入息而招致。举证上,上诉人亦未能证明,假如他没有招致该笔开支,他便不能执行作为 A 部门 B 专业人员的职务。

- 26. 另者,上诉人的雇佣合约要求雇员须向 A 部门披露某些被定罪的罪行,但并没有规定雇员必须寻求法律咨询,上诉人亦未能举证,说明他是在没有选择的情况下支付该笔开支,而若没有支付该笔开支,他将无法执行其职务,不符 D76/90的原则。而且,上诉人涉及的诉讼和因此招致的该笔支出,是他个人的事情,并非每一位任职 A 部门 B 专业人员,在执行他的职务时均必须付出与该笔开支性质相同的支出,不符 Ricketts v Colquhoun 一案的要求。事实上,上诉人并没有被定罪。
- 27. 根据 CIR v Humphrey 及 Humbles v Brooks,持续进修及学习的目的,只属于保持资格以执行职务,或在增添能力,以执行职务,不是在执行职务、在做职务上的工作或在做职务上的工作时所履行职责而做的事的过程中而招致的开支,并不属于为产生应评税入息而招致的开支;而且,持续学习旨在改善或提升上诉人的个人能力,该笔开支属个人性质;又或该笔开支因可为上诉人带持久利益,所以属资本开支,均不符合《税务条例》第12(1)(a)的规定,所以不获扣减。
- 28. 有关《税务条例》第 12(1)(e)条有关个人进修开支是否适用于本个案,首先,上文第 23 段的分析,同样足以否定该条文的适用性。此外,该律师行并非《税务条例》第 12(6)(c)及(d)条订明的教育提供者、协会或指定机构。委员会认为,该律师行向上诉人提供的是法律咨询,并非教育课程或专业考试,所以第 12(1)(e)条同样未能对上诉人的上诉,带来任何帮助。

委员会讼费

- 29. 本委员会邀请双方就委员会讼费问题陈词。根据《税务条例》第 68(9)条及附表 5 第 I 部,凡委员会不减少或不取消有关评税额,则可命令上诉人缴付一笔不超过 5,000 元的款项,作为委员会的讼费,该笔款项须加在征收的税款内一并追讨。
- 30. 上诉人认为,个案涉及税额少,他的上诉不是没有理据,而有关命令属惩罚性命令。税务局局长代表则提出,税务局已就本个案多番向上诉人解释不予扣减该笔开支的原因,并强调上诉人上诉理据不充份,亦不成立。
- 31. 从已呈堂文件看,本委员会确定税务局局长所言,他们已就本个案多次向上诉人详细解释原委,加上从上文分析可见,上诉人根本连评税基期亦未厘清,便东拉西扯,将法律咨询和持续学习硬套起来,企图混淆视听。上诉人的论据根本站不住脚,甚至可以说是没有任何立足点。本委员会认为,上诉人处理本个案,粗枝大叶,理屈词穷,简直是浪费本委员会的时间和其它纳税人的金钱,故按《税务条例》第68(9)条及附表5第1部,命令上诉人另缴付5,000元,作为委员会的讼费。

总结

32. 经详细考虑所有证据和双方的陈词,与及基于上文的分析,本委员会裁定上诉人败诉,并确定上文第3(4)段的评税,并命令上诉人缴付上文第31段的讼费。