Case No. D47/12

Salaries tax – deduction of rental expenses – sections 12(1)(a) and 68(4) of the Inland Revenue Ordinance. [Decision in Chinese]

Panel: Chow Wai Shun (chairman), Lau Kun Luen Alex and Pang Melissa Kaye.

Date of hearing: 20 December 2012. Date of decision: 28 January 2013.

The Appellant appealed against the Inland Revenue Department's refusal to allow his relevant rental expenses to be deducted from his assessable income. His grounds were that: had he not been employed to work in Hong Kong, he would not have any private reason to have to rent a place in Hong Kong; it was owing to the employment contract that he had to find a living place here; he thus executed the lease and incurred the rental expenses, so such expenses must be wholly, exclusively and necessarily incurred in the production of his assessable income.

Held:

- 1. The Appellant's relevant rental expenses (assuming he did have incurred the amounts which he claimed to be deducted) were expenses which he incurred for renting a place of rest and lodging for himself during off-work hours, but not incurred in the course of performing his duties, in doing the work of the office, or in doing the things which it was his duty to do while doing the work of the office (Ricketts v Colquhoun 10 TC 118; Humbles v Brooks 40 TC 500); as such, according to CIR v Humphrey 1 HKTC 451, such expenses were not incurred 'in the production of the assessable income'; and according to D28/08, (2008-09) IRBRD, vol 23, 624, such expenses were private in nature and should not be deducted from the assessable income.
- 2. The fallacy of the Appellant's argument lay in his misunderstanding of the words 'in the production of the assessable income'. In <u>CIR v Robert P Burns</u> 1 HKTC 1181, the Court of Appeal in dismissing the taxpayer's claim pointed out that it must distinguish between 'in the production of assessable income' and 'for the production of assessable income', the latter being expenses incurred to prevent the taxpayer from being unable to earn the assessable income but not expenses incurred 'in the production of assessable income'. By the same token, if the Appellant did not come to Hong Kong, he would be unable to earn the assessable income, therefore his rental expenses were

incurred 'for the production of assessable income' but not 'in the production of assessable income'.

Appeal dismissed.

Cases referred to:

CIR v Humphrey 1 HKTC 451 Humbles v Brooks 40 TC 500 Ricketts v Colquhoun 10 TC 118 D54/94, IRBRD, vol 9, 324 D28/08, (2008-09) IRBRD, vol 23, 624 CIR v Robert P Burns 1 HKTC 1181

Taxpayer in person.

Chan Siu Ying for the Commissioner of Inland Revenue.

案件编号 D47/12

薪俸税-租金支出扣除-《税务条例》第12(1)(a)条及第68(4)条

委员会:周伟信(主席)、刘冠伦及彭韵僖

聆讯日期:2012年12月20日 裁决日期:2013年1月28日

上诉人就其相关租金支出不获税务局从其应评税入息中扣除提出上诉,理由是:如果他不受聘到香港工作,他没有私人生活上的需要必需在香港租住,他是先有雇主聘用的合约,然后在此找寻栖身之所,签立租约,招致租金支出,所以该项支出是完全及纯粹为产生其应评税入息而招致。

裁决:

- 1. 上诉人相关租金支出(假定其确曾招致有关申索扣除的款额)是上诉人租住在公余时间用以休息和睡觉的居所的开支,并非在其执行职务的过程中、在做职务上工作或在做职务上的工作时,为履行职责而做的事情而招致的(Ricketts v Colquhoun 10 TC 118; Humbles v Brooks 40 TC 500);如此,根据CIR v Humphrey 1 HKTC 451,该等支出并不属于「为产生该应评税入息」的开支;而且另据委员会案例D28/08,(2008-09) IRBRD,vol 23,624,该等租金支出属私人性质的开支,所以不得从应评税入息中扣除。
- 2. 上诉人论点的错谬,在于对「为产生该应评税入息」的误解。在 CIR v Robert P Burns 1 HKTC 1181中,上诉庭在否决纳税人申索时指出,必须区分'in the production of assessable income',后者乃为免纳税人无法赚取应评税入息,因此而招致的开支,并非「为产生该应评税入息」而起的。同样道理,上诉人不到香港,便无法赚取应评税入息,因而他的租金支出,是'for the production of assessable income',却不是「为产生该应评税入息」而招致的。

上诉驳回。

参考案例:

CIR v Humphrey 1 HKTC 451 Humbles v Brooks 40 TC 500 Ricketts v Colquhoun 10 TC 118 D54/94, IRBRD, vol 9, 324 D28/08, (2008-09) IRBRD, vol 23, 624 CIR v Robert P Burns 1 HKTC 1181

纳税人亲自出席聆讯。 陈筱莹代表税务局局长出席聆讯。

决定书:

1. 上诉人反对税务局向他作出 2010/11 课税年度薪俸税评税,署理税务局副局长于 2012 年 7 月 6 日发出决定书,裁定上诉人反对无效。上诉人不服,遂向本委员会书记办事处提出上诉。

有关事实

- 2. 上诉人于聆讯开始时呈交两份由税务局发出,但未有夹附在答辩人文件集的书函。其一是日期为2012年3月14日致上诉人的书函,表示于同日去信上诉人雇主索取资料,尚待回复,故对上诉人对有关评税的反对,未能作出决定;另一是日期为2012年4月16日向上诉人雇主催促回复的书函。由于两封书函答辩人均有存档,并经考虑其中内容后,本委员会认为,接纳该两封书函呈堂,没有导致任何不公平聆讯。
- 3. 另外,上诉人亦有宣誓作供,但具体事实与上述决定书所载的决定所据 事实相符,答辩人代表亦没有提出盘问。委员会裁定与本上诉的有关事实如下:
 - (1) 上诉人自 2010 年 5 月 31 日起受雇于 A 公司,职位为助理工程师。 受聘前,上诉人在 B 城市居住。
 - (2) 上诉人雇主就上诉人提交的 2010/11 课税年度的雇主报税表中,载 列如下资料:

(a) 受雇期间31-05-2010 – 31-03-2011(b) 入息元薪金/工资230,741雇主提供居住地方没有

- (3) 上诉人在其 2010/11 课税年度个别人士报税表内,申报相同数据及 入息,同时申请扣除租金支出 87,600 元,和以雇员身份付给认可退 休计划的强制性供款。
- (4) 评税主任认为租金支出乃私人性质的开支,因此不予扣除,遂向上 诉人发出下列的薪俸税评税:

	元
入息	230,741
减:认可退休计划的强制性供款	
(230,741元 x 5%)	11,538
	219,203
减:基本免税额	108,000
应课税入息实额	<u>111,203</u>
应缴税款(已扣除税款宽减)	<u>1,863</u>

- (5) 上诉人于 2011 年 11 月 15 日提出反对上述评税,评税主任于 2011年 12 月 19 日覆函解释有关扣除开支的规定,并邀请上诉人撤 销其反对,上诉人于 2011年 12 月 29 日回复拒绝。
- (6) 税务局于 2012 年 4 月 27 日获上诉人雇主确认,上诉人并无获得任何房屋津贴等福利,并于 2012 年 6 月 8 日致函上诉人,表示由于未能就有关反对达成协议,个案须交由答辩人决定。

上诉理由及陈词

- 4. 上诉人的上诉理由是:如果他不受聘到香港工作,他没有私人生活上的需要必需在香港租住,他是先有雇主聘用的合约,然后找寻栖身之所,签立租约,招致租金支出,所以该项支出是完全及纯粹为产生其应评税入息而招致。
- 5. 上诉人并指出,上述决定书的理由牵强空洞,没有对应他提出的反对理由。而他对税务局向他的雇主进一步查询,合理理解为答辩人不反对他的申述,只待他的雇主提供数据才能决定。然而,税务局在收到上诉人雇主的回复后,却表示由于未能达成协议,故将个案交上诉组,令他失望和困惑不解。

《税例》的有关规定和案例

6. 双方认同下列由答辩人代表提出的《税务条例》条文,适用于本个案。

7. 适用《税务条例》有关规定如下:

(a) 第12条:

- 「(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、绝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;

(b) 第 68 条:

- 「(4) 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。」
- 8. 就适用案例方面,上诉人承认法律知识有限,但认为案例有相似和不尽相同之处,惟他未能确定是否有相反案例,只是不同法官可以有不同的理解。
- 9. 委员会受本港普通法法制约束,视法院判例具约束力,本委员会案例亦 具说服力。经考虑答辩人所提案例后,认为下述案例适用于本个案。
- 10. 在 <u>CIR v Humphrey</u> 1 HKTC 451 中,高等法院上诉庭法官认为,《税务条例》第 12(1)条中'in the production of assessable income'(「为产生该应评税入息」),与英国法例中要求的'in the performance of the duties of the office or employment'(可译为「为执行职位或受雇工作的职务」),在释义上没有重大分别。
- 11. 在 <u>Humbles v Brooks</u> 40 TC 500 中,法官解释「为执行职位或受雇工作的职务」,是指在执行的过程中、在做职务上工作和在做职务上的工作时,为履行职责而做的事情。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"."
- 12. 在 Ricketts v Colquhoun 10 TC 118 中,法官指出「必须」一词,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,并仅限于该等开支;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。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, 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.'
- 13. 在 $\underline{D54/94}$, IRBRD, vol 9, 324 的 个 案 中 , 委 员 会 援 引 $\underline{Ricketts\ v\ Colquhoun}$,提出任何人都必须在某处食宿,一般而言,会在自家进行。若 他选择于工作地方以外居住,须离家另找栖身之处,这属于个人选择,非因其受雇需 要而引致;而原则上,他并不会在执行职务中食宿,而是在执行职务前或后才会那样。 原文如下:
 - 'A man must eat and sleep somewhere... Normally, he performs those operations in his own home, and if elects to live away from his work so that he must find board and lodging away from home, that is by his own choice, and not by reason of any necessity arising out of his employment; nor does he, as a rule, eat or sleep in the course of performing his duties, but either before or after their performance.'
- 14. 在 <u>D28/08</u>, (2008-09) IRBRD, vol 23, 624 的个案中,委员会援引 <u>CIR v Humphrey</u>,裁定租金支出并非在执行职务中招致,而且租金支出属家庭或私人性质的开支,不符有关扣除的严格规定。原文如下:
 - 'The authority of <u>CIR v Humphrey</u> 1 HKTC 451 concluded that the rental expenses were obviously not incurred in the performance of the duties of the Taxpayer's employment. It is quite clear that these are private or domestic expenses. Hence, her attempt to deduct rental expenses paid by her... cannot be made out and as such, she was unable to satisfy the stringent conditions laid down under section 12(1)(a) of the IRO.'

案情分析

- 15. 本个案的争议点是:上诉人因应聘到香港工作而招致的租金支出,是否符合《税务条例》第 12(1)条的要求,属「完全、纯粹及必须为产生该应评税入息而招致」的支出及开支,又不属家庭性质或私人性质的开支或资本开支,因而可以从他的应评税入息中扣除。
- 16. 答辩人在书面陈词中提出,没有证据显示上诉人确曾招致有关申索扣除的全部款额,理由是上诉人曾向税务局提供日期为 2011 年 1 月 9 日的租约,该租约

载列他由 2011 年 2 月 1 日起,以月租 7,300 元租住 C 地区一物业,然而,该租约与 2010/11 课税年度相关的只有两个月,即 2011 年 2 月及 3 月。由于答辩人没有及早向上诉人查询,本委员会假定上诉人确曾招致有关申索扣除的款额。

- 17. 然而,根据上列的案例,即使上诉人确曾招致有关租金支出,他仍必须证明该等开支是完全、纯粹及必须在他执行职务时招致的。本委员会援引Ricketts v Colquhoun 及 Humbles v Brooks,裁定该等支出是上诉人租住在公余时间用以休息和睡觉的居所的开支,并非在其执行职务的过程中、在做职务上工作或在做职务上的工作时,为履行职责而做的事情而招致的,如此,根据 CIR v Humphrey,该等支出并不属于「为产生该应评税入息」的开支;而且另据委员会案例 D28/08,该等租金支出属私人性质的开支,所以不得从应评税入息中扣除。
- 18. 上诉人论点的错谬,在于对「为产生该应评税入息」的误解。在CIR v Robert P Burns 1 HKTC 1181 中,上诉庭在否决纳税人申索时指出,必须区分'in the production of assessable income'和'for the production of assessable income',后者乃为免纳税人无法赚取应评税入息,因此而招致的开支,并非「为产生该应评税入息」而起的。同样道理,上诉人不到香港,便无法赚取应评税入息,因而他的租金支出,是'for the production of assessable income',却不是「为产生该应评税入息」而招致的。
- 19. 至于上诉人对税务局举措的批评,虽非无的放矢,例如决定书的决定理由只得寥寥数语,书函用语有时引起误解;事实上,答辩人代表亦承认,有未善可改进之处,包括加强与纳税人的沟通,与及来往书函多用普罗大众可以理解的用语等。然而,上诉人的批评并不构成具体的上诉理由,左右本委员会的裁决。

结论

20. 经详细考虑所有证据和双方的陈词,与及基于上文的分析,上诉人未能履行《税务条例》第 68(4)条的举证责任,而委员会从客观事实上亦认为,案情不符《税务条例》第 12(1)条的可扣除开支的严格要求,所以,委员会驳回上诉人的上诉,并确定上文第 3(4)段的评税。