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.

案件編號 D14/13

薪俸稅-代通知金可否扣減-《稅務條例》(第112章)第12,68(4)及68(9)條

委員會:周偉信(主席)、周湛權及夏淑玲

聆訊日期:2013年6月25日 裁決日期:2013年9月3日

上訴人代表表示上訴人從新任公司獲發還上訴人因提早離職而需要支付前僱 主的代通知金是實行對新僱主的職務,所以代通知金是在執行職務時產生,因而應獲 扣減。

裁決:

- 1. 上訴人有關代通知金支出,不過是上訴人個人特定情況,為了能在指定時間上任新僱主,卻不是執行在新僱主任用下的職務時所招致的,所以並非「必須」「為產生應評稅入息稅而招致」,而且屬資本性質支出,並不符合《稅務條例》第12(1)(a)條的扣減條件。
- 2. 本委員會認為上訴人既有專業會計師代表,理應能最低限度在聆訊前, 更審慎衡量其上訴理據是否具備信服力,所以本委員會決定據 《稅務條例》第68(9)條,命令上訴人支付2,500元作為委員會訟費,該筆 款項須加在徵收的稅款內一併追討。

上訴駁回及判處港幣2,500元的訟費命令。

參考案例:

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

崔志仁會計師行崔志仁代表上訴人出席聆訊。 吳瑞玲及馮加良代表稅務局局長出席聆訊。

決定書:

1. 上訴人反對稅務局發出的 2011/12 課稅年度薪俸稅評稅,稅務局副局長 於 2013年2月22日發出決定書,裁定上訴人反對無效,並修訂評稅。上訴人就該決 定書提出上訴。

有關事實

- 2. 上訴人只委託代表出席。上訴人代表表示對決定書所載的決定所據事實,不提任何爭議。本委員會遂根據該等事實,與及雙方於聆訊前已提交的文件證供,裁定與本上訴的有關事實如下:
 - (1) 上訴人自 2007 年 6 月 1 日起受僱於 A 僱主。根據有關的僱傭合約, 上訴人或 A 僱主在僱用期的第一個月後,須給予對方三個月的通知 期以終止合約。
 - (2) B僱主於 2011 年 8 月 15 日致函上訴人,要求上訴人在獲取錄後一個月內上班,並承諾上訴人,發還他因提早離職而需要支付前僱主的代通知金,並以上訴人兩個月的薪金額為限,同時上訴人須在B僱主服務不少於六個月。
 - (3) 上訴人其後向 A 僱主請辭,並服務至 2011 年 9 月 30 日止。由於他的辭職通知期不足三個月,他於離職時須向 A 僱主支付了一筆為數相等於一個月另 28 天薪金的代通知金 67,038 元(下稱代通知金)。代通知金於 2011 年 10 月 7 日以對沖形式,於上訴人從 A 僱主於離職時應得款額中扣減。
 - (4) 上訴人自 2011 年 10 月 1 日起受僱於 B 僱主, C 職位, 職責包括研究和開發新產品。

(5) A僱主就上訴人提交了一份由僱主填報,有關其僱員行將停止受僱 的通知書,當中載有以下資料:

受僱期間:01-04-2011至30-09-2011入息:元薪金208,050假期工資41,245249,295

(6) B僱主就上訴人提交了一份截至2012年3月31日一年內,由僱主 填報的薪酬及退休金報稅表,當中載有以下資料:

受僱期間:	01-10-2011至31-03-2012
入息:	元
薪金	240,000
花紅	10,082
其他津貼	<u>67,038</u>
,	<u>317,120</u>

- (7) 上訴人在其 2011/12 課稅年度個別人士報稅表內,填報以下有關薪 俸稅的資料:
 - a. 他於該年度內所獲得入息

僱主名稱	期間	<u>入息</u>
		元
A僱主	01-04-2011至30-09-2011	182,256
B僱主	01-10-2011至31-03-2012	317,120
•		499,376

- b. 他申索扣除以僱員身份付給認可退休計劃的強制性供款 12,000元。
- (8) 評稅主任向上訴人作出以下 2011/12 課稅年度薪俸稅評稅:

	元	元
入息[第2(5)及2(6)項事實]		
(249,295元+317,120元)		566,415
減:居所貸款利息	4,690	
退休計劃供款		
(第2(7)b項事實)	12,000	16,690
		549,725
減:免稅額		168,000

定課稅入息實額元元<u>381,725</u>

應繳稅款(已扣除稅款寬減)

40,893

(9) 上訴人反對上述評稅。其後他提交了一份由 B 僱主於 2011 年 10 月 19 日發給他的糧單副本,當中顯示他無需就 2011年 10 月份的收入支付退休計劃供款。於是副局長按評稅主任 意見,修訂 2011/12 課稅年度薪俸稅評稅如下:

	元	元
入息[第2(8)項事實]		566,415
<u>減</u> :居所貸款利息	4,690	
退休計劃供款	11,000	15,690
		550,725
<u>減</u> :免稅額		<u>168,000</u>
應課稅入息實額		<u>382,725</u>
應繳稅款(已扣除稅款寬減)		41,893

上訴理由及陳詞

- 3. 上訴人代表擬定的上訴理由及陳詞,雖分別為英文及中文,但重點相同:
 - (1) 當上訴人收到 B 僱主在 2011 年 8 月 15 日發出的信函,知悉其要求和補償安排,便進行與 A 僱主的離職及代通知金安排,目的為滿足 B 僱主的要求,是實行對 B 僱主的職務,所以代通知金是在執行職務時產生。
 - (2) 代通知金直接產生相應課稅的補償收入,具備相關的'perceived connection',與稅務提述的相關案例事實不同(見下文),所以應獲扣減。

爭議點

4. 由於上訴人沒有就退休計劃供款一項提出任何爭議,所以本個案的唯一 爭議點,是上訴人可否獲扣減代通知金。

有關法律條文及原則

- 5. 《稅務條例》第12條規定:
 - 「(1) 在確定任何人在任何課稅年度的應評稅入息實額時,須從該人的應 評稅入息中扣除一

.

- (a) 完全、純粹及必須為產生該應評稅入息而招致的所有支出及 開支,但屬家庭性質或私人性質的開支以及資本開支則除 外;」。
- 6. 《稅務條例》第68(4)條規定:

「證明上訴所針對的評稅額過多或不正確的舉證責任,須由上訴人承擔」。

- 7. 委員會認為,下列答辯人代表援引的案例,適用於本個案:
 - (1) 為產生該評稅入息
 - (a) 在 <u>CIR v Humphrey</u> 1 HKTC 451 中,高等法院法官認為,稅例第 12(1)(a)條中「為產生應評稅入息」(in the production of assessable income),與英國法例要求的「在執行職位或受僱工作職務時」(in the performance of the duties of the office or employment)沒有重大分別。該案納稅人從住所駕車往返工作地點,並非在執行職務,所以即使他獲僱主發還部份金額已被視作應評稅入息,其所招致的開支不能獲扣除。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.'

同案中上訴庭亦認同Nolder v Walters 15 TC 380一案所說,「在執行職務」指在做職位上的工作,在做一些當做職位上工作時他在職責上要做的事項。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(以下稱 Burns 案), 上訴庭指出必須區分「在獲取入息時支付的開支」 (an expense incurred in gaining income)和「為獲取收入而必 須支付的開支」(an expense incurred necessarily for the purpose of gaining it),只有前者可獲扣除。案中納稅人的法律開支, 被裁定為是為免他無法賺取應評稅入息而招致,屬於後者, 並非「為產生應評稅入息」而招致的,所以否決該項申索。

(2) 與個人合約責任有關的支出不能扣減

- (a) 在 CIR v Franco Tong Sui Lun 7 HKTC 421 中,高等法院法官表明,納稅人在合約訂明他須負上的彌償責任,並不是他在執行受僱工作的職務時所產生的責任。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.'

據該案法官的分析,在薪俸稅稅制中,有關法律所注視的是直接歸因於該職務本身的開支,而有關職務屬於納稅人受僱執行的確實職務,就該案而言,不是指他因履行其僱傭合約而導致的個人開支。條例所預期的開支,絕對及只會是寓意僱傭活動本身所招致的,而非其個人合約的責任,雖然該等責任可被歸納為關乎納稅人賺取他的薪酬,與及在該案中的有關計算內,但其開支並非在執行納稅人職務在做受僱所作的工作時所招致的。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) 委員會在 <u>D25/08</u>, (2008-09) IRBRD, vol 23, 531 中,作出以下 對支付代通知金的分析:

> 「上訴人要能早到『新僱主』上班就必須先符合『舊僱主』 的僱傭合約,付清了代通知金。這是她對『舊僱主』的 合約責任。無論上訴人是自掏腰包或從其他管道籌措現 金去清付,就如本案從『新僱主』處拿到的,都是在清 付她自己的合約責任。亦就是說,當上訴人提早離職, 作為僱主『舊僱主』就可根據合約向她本人追討代通知 金,這是由執行合約所產生的她的個人債務。上訴人可 以找其他人替她支付,但所支付的仍是她的合約責任及 個人債務。」

(3) 獲得最初資格不等同執行職務

委員會在 <u>D2/08</u>, (2008-09) IRBRD, vol 23, 48 中,引用法官在 <u>Humbles v Brooks</u> 40 TC 500 的觀點,說明「在執行所擔任職位或受僱工作的職務」,意思是指在執行過程中、在做職務上的工作、及在做職務上的工作時所須履行的責任,但不包括在最初取得資格以執行職務的行為,甚或保持執行這些職務的資格的行為,亦並不包括為執行職務而增添所長的行為;即使因僱主的規定而必須招致有關開支,這規定本身也不會令開支符合有關規則,而如僱主沒有如此規定,也未必不能引用有關規則。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..."

委員會於參考多個案後並指出,有關支出扣除的規定非常嚴格,即 使支出或開支與受僱工作有關,仍不一定屬於「為產生該應評稅入 息而招致」。

(4) <u>必須</u>

委員會在 <u>D26/12</u>, (2012-13) IRBRD, vol 27, 622 中,參考 <u>Ricketts v</u> <u>Colquhoun</u> 10 TC 118 的法律原則:如有關開支不是每名擔任此職位的僱員都必須在執行職務中招致,而是因私人情況或個人選擇而招致的,則不屬於「必須」不能獲得扣除。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、私人或資本性開支

委員會在 <u>D25/08</u>, (2008-09) IRBRD, vol 23, 531 中,認為有關代通知金是為了能獲取新工作而支出的,與投資生產無異,屬資本性支出,所以不獲扣減。

(6) 已知的關連性(Perceived connection)必須等同當值及在執行職務期間(On duty and in the course of the duties)

委員會在 D46/92, IRBRD, vol 7, 436 中,引用 Huggins 法官在 Burns 案一案表達的意見,就是「已知的關連性測試」與「當值測試」意思相同及同樣地嚴謹,因而不會界定一個較寬鬆或較廣泛的意思。開支必須是在納稅人當值及在執行職務期間招致。有關的開支與職務之間必須存有已知的關連性,而且該項已知的關連性所包含的意思,必須等同於當值及在執行職務期間或沒有比此所指更廣泛的意思。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) 代通知金不能扣減

在 CIR v Sin Chun Wah 2 HKTC 364 中(以下稱 Sin Chun Wah 案),高等法院法官解釋,一項開支是否產生入息或在產生入息過程中而招致,須多考慮開支本身的必要性,而不是僱員或擬從事專業執業業務者要先招致這開支,才可以開始從事這些活動,從中賺取有關入息。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,眾多案例亦指明,為了可以獲取應評稅入息的支出 (expenditure for the purpose of the production of assessable income)是要與為產生應評稅入息的支出(expenditure in gaining or for the production of assessable income)區別出來。所以在案中,支付給舊僱主的代通知金支出,不是為產生納稅人在新僱主的入息而招致的支出;更加不是完全、純粹及必須為產生該應評稅入息而招致的。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.'

此案隨後在委員會案例 $\underline{D15/88}$, IRBRD, vol 3, 223、 $\underline{D124/02}$, IRBRD, vol 18, 175 及 $\underline{D25/08}$, (2008-09) IRBRD, vol 23, 531,都被引用,裁定納稅人向前僱主支付的代通知金,不是「必須為產生應評稅入息而招致」的,因此不獲扣除;其中 $\underline{D25/08}$ 的納稅人,同樣獲新僱主發還代通知金,而發還的金額已被作為應評稅入息。

案情分析

- 8. 上訴人代表就 <u>Sin Chun Wah</u>案的陳詞,首先是針對其與本個案事實上的不同,就是在該案中,納稅人自願付出代通知金,新僱主沒有補償。本個案上訴人代表認為,若有相應課稅收入,則代通知金的扣減性立即存在。至於 <u>D25/08</u>,上訴人代表直認兩個個案案情極度相似,但指稱該委員會忽略了以下一段判詞,誤解了 <u>Sin Chun Wah</u>案的原則:
 - '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.'

亦即是上訴人代表所仗賴的「已知的關連性」測試。

9. 有關上述一段判詞,本委員會認為上訴人代表斷章取義,沒有理會上文下理。在 Sin Chun Wah 案中,當時的稅務局局長代表,主要倚賴 Burns 案作為其上訴理據,於是高等法院 Nazareth 法官在其判詞中,闡釋 Huggins 法官在 Burns 案中的分析。而 Huggins 法官在 Burns 案考慮澳洲的條文和案例,是由於該等條文和案例在委員會聆訊階段已被提述,委員會裁斷納稅人上訴得直,亦建基於該等案例之上,故此,高等法院在處理稅務局局長的上訴時,必須再行審視。在重新審視該等案例後,正如答辯人代表之前的提述,Huggins 法官就「已知的關連性」測試下了註腳(參上文第7(6)段),所指的是開支或支出與職務的關連,有關開支或支出,乃「完全、純粹及必須」「為產生應評稅入息而招致」,門檻高而嚴格。而根據眾多案例,「為產生應評稅入息而招致」有局限於在執行職務時招致的意思,不一定包括全部與應評稅入息有關的開支和支出,就正如在上訴人代表引用判詞中的例子,亦不是所有與升職有關的開支和有所指的「已知關連性」,因此,因為 Burns 案涉及的開支不符合相關的條件,所以裁定稅務局局長勝訴,所以,本委員會認為上訴人代表引用的判詞,對上訴人沒有任何助益。

- 10. 此外,根據 Huggins 法官在 <u>Burns</u>案就「已知的關連性」測試的分析,開支或支出的扣減與應評稅入息,在香港的稅務法則中並沒有絕對的對稱面(tax symmetry),所以,上訴人代表提出「若有相應課稅收入則代通知金的扣減性立即存在」的論點,本委員會並不接納。
- 11. 上訴人代表另外提出,上訴人是在滿足新僱主要求的上任時間,是實行其對新僱主的職務,所以為此而招致代通知金的支出,是在執行職務中產生云云。本委員會認為此論點牽強,有關支出只是上訴人根據其與舊僱主的合約條款支付,以使上訴人能提早為新僱主工作,屬於為獲取收入(for the purpose of production of income),具資本性質,而非在執行新僱主任用下的職務,在獲取入息時(in the production of income)支付的開支。
- 12. 正如上文所述,有關支出是由於上訴人個人的特定情況,沒有證據顯示每位新僱主任用下,出任相同崗位的僱員都須支付前僱主代通知金,所以有關支出並非「必須」招致。

總結

- 13. 經詳細考慮所有呈堂文件、雙方的陳詞和案情,與及基於上文的分析, 上訴人有關代通知金支出,不過是上訴人個人特定情況,為了能在指定時間上任新 僱主,卻不是執行在新僱主任用下的職務時所招致的,所以並非「必須」「為產生 應評稅入息而招致」,而且屬資本性質支出。所以,本委員會裁定有關代通知金支 出,並不符合《稅務條例》第 12(1)(a)條的扣減條件,駁回上訴人的上訴,從而確定 上文第 2(9)段的修訂評稅。
- 14. 另外,本委員會在考慮雙方有關訟費陳詞後,認為上訴人既有專業會計師代表,理應能最低限度在聆訊前,更審慎衡量其上訴理據是否具備信服力,所以,本委員會決定據《稅務條例》第68(9)條,命令上訴人繳付\$2,500作為委員會訟費。有關條文規定,這筆訟費須加在徵收稅款內一併追討。