

CHU Ru-ying

(Appellant)

and

The Commissioner of Inland Revenue

(Respondent)

Court of First Instance

(Inland Revenue Appeal No. 7 of 2007)

Hon Burrell J

Date of Hearing : 3 June 2008

Date of Judgment : 13 June 2008

Court of Appeal

(Civil Appeal No. 203 of 2008)

Hon Tang VP, Cheung JA and Stone J

Date of Hearing : 30 October 2009

Date of Judgment : 20 November 2009

Inland Revenue Ordinance (Cap. 112) – sections 82A and 82B – whether section 70 is applicable to an appeal under section 82B – jurisdiction of the court on a case stated by Board of Review

Basic Law and Hong Kong Bill of Rights – constitutional and human rights – no issue before Board of Review or insufficient submission made – not necessary to decide

The Appellant and her husband were at the material time the equal and sole shareholders of a company incorporated in Hong Kong. For three years of assessment (Relevant Years), the Appellant was originally assessed to Salaries Tax according to the employment income declared in her tax returns. She did not object to these original assessments.

The Revenue subsequently conducted a tax audit on the Appellant. As a result, additional Salaries Tax assessments were raised on her for the Relevant Years by invoking section 9A of the Inland Revenue Ordinance (IRO). In the assessments, the income derived from agreements entered into by the abovementioned company to provide consultancy services to two named companies was treated as the Appellant's income chargeable to Salaries Tax. The Appellant objected and the Commissioner issued a determination upholding the additional assessments. The Appellant then filed a notice of appeal against the determination. However, the Board of Review (the Board) held the appeal out of time and refused to extend the time for appealing. The Appellant did not appeal against this ruling.

On the basis that the additional assessments had become final and conclusive under section 70, the Deputy Commissioner assessed the Appellant to Additional Tax pursuant to section 82A for filing incorrect returns for the Relevant Years. The Appellant appealed against these Additional Tax assessments, essentially arguing that they had been wrongly made and that section 70 had no application. The Board dismissed the appeal. It is the Board's conclusion that by virtue of section 70 the additional assessments were final and conclusive for all purposes and the Appellant was not entitled to reopen the issues and argue that the determination was wrong. The Board also found that the Appellant had no reasonable excuse for filing the incorrect returns.

The Appellant then requested the Board to state a case under section 69 of the IRO. Of the nine questions posed by the Appellant, the Board decided that only Question 1 relating to section 70 was proper question of law for a case stated. The Board declined Questions 2 to 9 posed by the Appellant which concerned, amongst others, standard of proof, estoppel, constitutional guarantees and human rights issues. At the hearing before the Court of First Instance, the Appellant submitted to remit the matter to the Board to amend its case stated to incorporate all the questions posed by her.

The judge dismissed the Appellant's appeal, concluding that (a) the Board's reasons for not stating a case on Questions 2 to 9 could not be faulted, (b) section 70 was the sole issue, (c) there were no valid grounds for remitting the case to the Board to amend its stated case and (d) it was not permissible, but an abuse of process, for the court to entertain submissions outside the case stated. The judge then answered the question posed in the stated case against the Appellant.

The Appellant appealed to the Court of Appeal.

Held :

- (1) It was common ground that section 82A involves a criminal charge for human rights purposes, as decided in the Board Case No. *D17/08* (following the reasoning in the decision of the Court of Final Appeal in *Koon Wing Yee v Insider Dealing Tribunal and Anor*). The decision of the Board in *D17/08* is highly persuasive. However, in the present case, as the court has heard insufficient submission on the issue and it is not necessary to decide the issue, the court would not do so.
- (2) It is not necessary for the court to consider whether the Additional Tax assessments were excessive either as no issue having been taken before the Board on this issue.
- (3) The court is concerned with a narrow question, namely whether on the section 82B appeal, the Appellant was entitled to reopen the Section 60 assessments. It is clear section 70 covers situations where a taxpayer has already availed his/herself of all the channels of appeal. It is difficult to see why, on a section 82B appeal, section 70 should be inapplicable. The principle is the same though in the present case there was no effective appeal.
- (4) It is important that a taxpayer who has appealed by means of a case stated should be kept within the confines of this procedure and he/she is not permitted to stray outside the question posed.

Appeal dismissed.

In the Court of First Instance

Appellant in person

Mr. Eugene Fung (instructed by the Department of Justice) for the Respondent

In the Court of Appeal

Appellant in person

Mr. Eugene Fung (instructed by the Department of Justice) for the Respondent

Cases referred to in the judgment of the Court of Appeal

Board of Review decision Case No. 17/08, (2008) 23 IRBRD 301

Koon Wing Yee v Insider Dealing Tribunal and Anor [2008] 11 HKCFAR 170

HKSAR v Ng Po On and Anor [2008] 11 HKCFAR 91

Subject Matter Index

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Not necessary to decide as issue not taken before the Board of Review or insufficient submission heard on the issue