DCEC 1244/2021

[2022] HKDC 1518

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

EMPLOYEES' COMPENSATION CASE NO 1244 OF 2021

BETWEEN

CHENG ZISHAN Applicant

and

MAG LOGISTIC COMPANY LIMITED Respondent

Before: Deputy District Judge C To in Court

Date of Hearing: 20 December 2022

Date of Assessment of Compensation: 30 December 2022

ASSESSMENT OF COMPENSATION

INTRODUCTION

1. This is a trial for the assessment of compensation under ss 9, 10 and 10A of the Employees' Compensation Ordinance (Cap 282) (the "**Ordinance**"). The respondent did not attend the trial.

2. By the 3rd Affidavit of Leung Chi Shing, it is affirmed that a copy of the Order dated 24 August 2022 and a cover letter notifying the respondent of the date of the trial were inserted through the letterbox of the respondent at its address. The same were also inserted through the letterbox of Ka Chi Ying, the director of the respondent, at his address. I am therefore satisfied that proper service was effected.

3. On 22 June 2021, the applicant applied for employees' compensation against the respondent in relation to an accident at work which took place on 31 July 2019. Interlocutory judgment was entered into against the respondent on 23 June 2022.

4. The applicant was aged 40 at the time of the accident, and was employed by the respondent as a factory worker starting from 22 July 2019. On 31 July 2019, the applicant was operating a knitting machine. While the weaving ribbon was in the course of being made into a roll, the applicant's right index finger was trapped by the weaving ribbon in motion and her right index finger was injured (the "**Accident**"). The applicant suffered from right index finger subluxation as a result.

5. For the purpose of this assessment of compensation, the following 3 pieces of factual finding are required to be made:

(a) The applicant's monthly income at the time of the Accident;

(b) Percentage of permanent loss of earning capacity; and

(c) Period of temporary incapacity.

THE APPLICANT'S MONTHLY INCOME

6. The applicant's case is that she worked 26 days per month, with an income of HK$9,500.

7. The applicant adduced two cheques respectively dated 5 August 2019 and 5 September 2019 in the amount of HK$2,605 and HK$7,600 issued by the respondent to the applicant. I accept that the HK$2,605 represented the salary for the 8.5 days that the applicant had worked from 22 July 2019 to 31 July 2019. I also accept that the HK$7,600 represented 4/5 of the applicant's income of HK$9,500. I therefore accept that the applicant's monthly income was HK$9,500.

PERCENTAGE OF PERMANENT LOSS OF EARNING CAPACITY

8. Medical Assessment Board ("MAB")'s assessment of the applicant's percentage of permanent loss of earning capacity is at 2%. The applicant does not challenge the result of the assessment.

TOTAL PERIOD OF TEMPORARY INCAPACITY

9. Up to the date of this trial, the applicant has obtained sick leave for 145 days: (a) 31 July 2019 to 28 August 2019; (b) 25 September 2019 to 15 January 2020; and (c) 5 November 2020 to 7 November 2020, which were accepted by the MAB as necessary as a result of the injury.

MEDICAL EXPENSES

10. The applicant asks for medical expenses of HK4,790, which are supported by documentary evidence.

COMPENSATION

11. The various limbs of compensation can be worked out as follows:

(a) **s 9 compensation on compensation in case of permanent partial incapacity**: the applicant was aged 40 at the time of the Accident. Applying the statutory multiplier of 72 (s 7(1)(b) of the Ordinance), and a multiplier of 2%, the relevant compensation is:

HK$9,500 x 2% x 72 = HK$13,680

(b) **s 10 compensation on compensation in case of temporary incapacity**:

(HK$9,500 x 12/365) x 145 x 4/5 = HK$36,230.14

(c) **s 10A compensation regarding payment of medical expenses**:

HK$4,790

12. The total amount of compensation is:

s 9:	HK$13,680.00
s 10:	HK$36,230.14
s 10A:	HK$4,790.00
Total:	**HK$54,700.14**

13. An advance payment in the amount of HK$7,600 was paid to the applicant by the respondent. The total compensation is therefore HK$47,100.14. Interest shall accrue on the sum at half judgment rate from the date of the Accident on 31 July 2019 up to the date of judgment, and thereafter at judgment rate until payment in full.

14. As to the costs, I make a costs order *nisi* that:

(a) The costs of the applicant be borne by the respondent, to be taxed if not agreed; and

(b) The applicant's own costs be taxed in accordance with Legal Aid Regulations.

15. The costs order *nisi* shall become absolute in 14 days from the date of this judgment if no application to vary the order is taken out.

16. I thank Ms Lui for her very helpful submissions.

(C To)
Deputy District Judge

Ms Ann Lui, instructed by Legal Aid Department, for the applicant

The respondent was not represented and did not appear

Magistrates Ordinance, Cap.227
ss. 8 & 72, Form 1

SUMMONS TO DEFENDANT

HONG KONG SPECIAL ADMINISTRATIVE REGION
Kwun Tong Magistrates' Courts
Kwun Tong Law Courts Building, 10 Lei Yue Mun Road, Kwun Tong

TO: 0363 KT

Hong Kong company name

Information has been laid THAT YOU, between 8 September 2021 and 9 August 2022, without reasonable excuse, failed to comply with the requirements of a notice in writing dated 7 June 2021 given to you under section 51(1) of the Inland Revenue Ordinance (Cap. 112), that is, you failed to furnish a Profits Tax Return for Final Assessment for the year 2020/21 and Provisional Payment for the year 2021/22 within a reasonable time stated in the said notice.

Contrary to:

The information was laid by WONG HIU FAN, SENIOR TAX INSPECTOR (TEL.: 25943213) of Inland Revenue Department on 9 August 2022.

THIS SUMMONS THEREFORE REQUIRES YOU TO APPEAR on
in **Court No. 7 Kwun Tong Magistrates' Courts** at **Kwun Tong I**
Mun Road, Kwun Tong.

before the magistrate presiding there to answer to the information and to be further dealt with according to law.

Your representative should bring proof that you have duly appointed him / her to represent your corporation. Personal appearance is required, even if you intend to plead guilty.

This Summons is issued under the Magistrates Ordinance (Cap. 227) by a magistrate or an officer of a magistrate's court who is authorized under Section 8(1) of that Ordinance.

Dated: 9 August 2022

裁判官條例(第227章)第8及72條
表格一

致被告傳票
香港特別行政區

案件編號
檔案參考編號

觀塘裁判法院
觀塘鯉魚門道10號 觀塘法院大樓

致:

有人提出告發，指稱你在2021年9月8日至2022年8月9日期間無合理辯解而不遵照根據香港法例第112章《稅務條例》第51(1)條發給你的日期為2021年6月7日的書面通知書內的規定辦理，即你沒有在該通知書內註明的合理時間內，提交一份有關2020/21年度最後評稅及2021/22年度暫繳稅的利得稅報稅表。

違反 香港法例第112章《稅務條例》第51(1)(a)條及第80(2)(d)條

該項告發是於2022年8月9日由香港稅務局的高級稅務督察, 黃曉芬（電話: 25943213）所提出。

因此，本傳票現規定你須於 **2022年10月5日** 乁
觀塘裁判法院 第 **7** 法庭。

在屆時主審的裁判官席前，就該項告發作出答辯，並依法接受進一步處置。

代表你者須備有獲你正式委派代表你公司的證明，縱使你有意認罪，仍須親自到庭。

本傳票乃根據《裁判官條例》(第227章)，由裁判官或由根據該條例第8(1)條獲授權的裁判法院人員發出的。

日期: 2022年8月9日

DCTC 139/2017

IN THE DSTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

TAX CLAIM NO. 139 OF 2017

BETWEEN:

Commissioner of Inland Revenue Plaintiff

and

ENERGY WORLD (H.K.) LIMITED Defendant

Coram:	His Honour Judge KW WONG in Chambers (Open to Public)
Date of Hearing:	27 November 2017
Date of Decision	30 November 2017

DECISION

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1. This is the hearing of the Plaintiff's application to strike out the Defendant's Defence under Order 18 Rule 19 of the Rules of the District Court and to enter judgment as per the 2 relevant tax assessments as pleaded.

2. In this Action, the Commissioner of Inland Revenue ("Commissioner" or "Plaintiff") sues the Defendant for $1,721,522.82 being profit tax due and unpaid under section 75 of the Inland Revenue Ordinance, Cap 112 ("IRO"), in respect of the following assessments:

	Year of Assessment	Charge No	Amount (HK$)	Due Date
i)	2008/2009(F)	1-1178240-09-4	4,713,025.82	23 February 2015
ii)	2009/2010(F)	1-1177697-10-4	1,008,497.00	13 February 2016

3. The Defendant filed and served its Defence on 30 March 2017. Various grounds of opposition were stated. This Court is grateful to adopt (with adaptations) the summary of Defence set out from [3] to [11] of the Skeleton of Mr Jonathan Chang, counsel for the Defendant, for the present discussion:

i) The Defendant is set up to provide services to Energy World International Limited ("EWI") and affiliated companies controlled by one Mr Stewart Elliot;

ii) In respect of the 2 relevant tax years, all of the Defendant's income was paid by EWI on a cost reimbursement basis;

iii) EWI is an investment holding company of Mr Elliot which is also engaged in potential and actual energy and infrastructure projects around the world;

iv) EWI is a major shareholder of one Energy World Corporation ("the Australian Listed Company"), which is an Australian listed company;

v) As from 1 January 2002, the Australian Listed Company and EWI entered into a Key Staff Agreement under which EWI has to provide executive management services comprising key staff and other facilities to support the Australian Listed Company;

vi) The Key Staff Agreement provides for a fixed fee of AUS$130,000 on a monthly basis to be paid to the Defendant on behalf of EWI as its trustee;

vii) The terms of the Key Staff Agreement were scrutinized and approved under the Australian securities law and listing rules given the Australian Listed Company and EWI were related. The Australian Listed Company did not recognize any obligation to or services from the Defendant;

viii) Losses of the Defendant were recorded in the aforesaid 2 tax years, but the Plaintiff:

a) Disallow the Defendant's consultancy fees paid to Asia Pacific L.N.G. Ltd ("APLNG") on the basis that the transaction was to be disregarded under s.61A of the IRO as one entered into for the sole or dominant purpose of enabling the Defendant to obtain a tax benefit, or in the alternative such expenses were not deductible under s.16 and s.17 of the IRO; but

b) Add as part of the Defendant's assessable income, the fee paid:

(1) By the Australian Listed Company to EWI under the Key Staff Agreement; and

(2) By Slipform Engineering International (HK) Ltd ("SEHK") to EWI under a management services agreement,

On the basis that EWI was interposed as the entity providing services to the Australian Listed Company and the Defendant in a transaction which is artificial or fictitious, or is entered for the sole or dominant purpose to enable the Defendant to obtain a tax benefit, and is to be disregarded under s.61 and s.61A of the IRD;

ix) There was also duplication of assessments based on the same source of income because,

a) While disallowing the Defendant's consultancy fee paid to APLNG (which as a result formed part of the Defendant's assessable income), the Plaintiff issued profit tax assessment against APLNG for amounts which include the consultancy fees as part of APLNG's income;

b) While adding, and thus treating the fees paid to EWI by the Australian Listed Company as part of the Defendant's assessable income, the Plaintiff issued profit tax assessments against EWI which included such amount as part of EWI's income;

c) While adding, and thereby treating the fees paid to SEHK as part of the Defendant's assessable income, the Plaintiff issued profit tax assessments against SEHK which included such amount as part of SEHK's income;

d) Judgment was entered against SEHK for the Plaintiff in DCTC 1325/2016 on 18 August 2017.

4. In a nutshell, the Defendant is set up to serve EWI, which in turn is to serve the Australian Listed Company. Related companies were involved. Service fees and other money have gone through the Defendant and other related companies. The questions of double or alternative taxation may arise. The Commissioner seems to have disallowed certain claims of the Defendant and related companies on the ground of tax avoidance. It was said certain incomes have been double-counted. It was said by the Defendant that SEHK and the Defendant had been assessed on the same pot of incomes.

5. The Defendant in effect is alleging the assessment unreasonable, wrong and incorrect in law and facts. There should be no profits of the business giving rise to any tax. It is also wrong as a matter of principles to charge the same source of income several times. It is pleaded that the assessments being oppressive, arbitrary, capacious, unreasonable, null and void. Objections under the IRO have also been lodged with the Commissioner.

6. The Plaintiff's striking out is launched relying on section 75(4) of the IRO. In is convenient to set out certain provisions of s.71 & s.75 of the IRO below for easy discussion:

> <u>Section 71(1), (2) & (6)</u>
>
> (1) Tax charged under the provisions of this Ordinance shall be paid in the manner directed in the notice of assessment on or before a date specified in such notice. Any tax not so paid shall be deemed to be in default, and the person by whom such tax is payable, … shall be deemed to be a defaulter for the purposes of this Ordinance.

(2) Tax shall be paid notwithstanding any notice of objection or appeal, unless the Commissioner orders that payment of tax or any part thereof be held over pending the result of such objection or appeal:

Provided that where the Commissioner so orders he may do so conditionally upon the person who or on whose behalf the objection or appeal is made providing security for the payment of the amount of tax or any part thereof the payment of which is held over either—

(a) by purchasing a certificate issued under the Tax Reserve Certificates Ordinance (Cap. 289); or

(b) by furnishing a banker's undertaking, as the Commissioner may require.

…

…

(6) Notwithstanding anything contained in the previous subsections of this section the Commissioner may agree to accept payment of tax by instalments.

Section 75(1), (2) & (4)

(1) Tax due and payable under this Ordinance shall be recoverable as a civil debt due to the Government.

(2) Whenever any person makes default in payment of tax the Commissioner may recover the same by action in the District Court notwithstanding that the amount is in excess of the sum mentioned in section 33 of the District Court Ordinance (Cap. 336).

(3) …

(4) In proceedings under this section for the recovery of tax the court shall not entertain any plea that the tax is excessive, incorrect, subject to objection or under appeal, but nothing in this subsection shall be construed so as to derogate from the powers conferred by the proviso to section 51 (4B)(a) to give judgment for a less sum in the case of proceedings for the penalty specified therein.

7. The Plaintiff submits that the 2 assessments should be paid under s.71(1) of the IRO before the due date. They were not so paid. So unless the Defendant has applied and been accepted for hold over under

s.71(2)[1], or to pays it by instalments under s.71(6) of the IRO, the Plaintiff is entitled to recover the tax as a civil debt by suing them in the District Court.

8. The gist of the Plaintiff's submission is that the scheme under the IRO draws a distinction between assessment and tax. Reliance is made to *Ng Chun-kwan v CIR* per Hon Briggs CJ[2]. The payment of tax is now being governed by the District Court which should not be burdened with the facts and all the details underlying the assessment. This is a task belonging to the assessment and is now being undertaken by the Board of Review and Court of First Instance under Part II of the IRO. S.75(4) of the IRO therefore provides that this Court should not entertain any plea that the tax charged is excess, incorrect, subject to objection or under appeal.

9. Mr Chang for the Defendant submits that the assessment of the Commissioner is a nullity. He should not have made the assessment in the first place as it could not have been made by any reasonable decision-maker. There was never any assessment for him to act upon. His submission is that such "public law ground's defence" is also available. He relies on 2 English authorities of *Wandsworth LBC v Winder*[3] and *Anisminic v Foreign Compensation Commission & Anor*[4]. He also relies

[1] According to the oral submission of Miss Chan at the hearing, in respect of the year of assessment 2008/2009, the Defendant has applied to the Commissioner for a holdover. In respect of the assessment 2009/2010, the Defendant has applied for an objection.

[2] [1976] HKLR 94 at 98

[3] [1985] 1 AC 461

[4] [1969] 2 AC 147

on a local authority, *A-G v Chino Industries Ltd (in Voluntary Liquidation)*[5].

10. *Anisminic (supra)* has been discussed in *Ng Chun-kwan*, and this Court does not think its application had then been doubted in that case. *Wandsworth (supra)* is no more than another authority to support the propositions, particularly, nullity can be raised by a defendant to defend his position as a matter of right.

11. *Chino Industries* concerned a dispute between the Commissioner and the liquidator of a company in liquidation. The tax in dispute were provisional profit tax for a year. The liquidator considered that since there was no profit chargeable to tax for the previous year and this year, he rejected the proof of debt filed by the Commissioner. The Commissioner appealed.

12. The parts of the IRO relevant to *Chino Industries* are these. A provisional tax for a year is contingent upon or predicated on the profit made by the person in the previous year. If a person is not chargeable to any tax because there are no assessable profits for the previous year, there can be no liability for provisional profit tax for that year. It must follow if the assessable profit for the previous year is zero, there is no liability to pay provisional profit tax for the year[6]. The Commissioner simply has no power to charge provisional tax.

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[5] [1997] HKLRD 833

[6] see Page 838 A-B of *Chino Industries*

13. In *Chino Industries*, the Commissioner accepted there was no liability to tax for the previous year. It was said by Hon Le Pichon J (as the learned JA then was) that such acceptance effectively nullified the entire assessment of tax including the provisional tax component[7]. It rendered the assessment a nullity in its entirety[8]. Accordingly, there was no power or jurisdiction under the IRO to charge any provisional tax. There is also nothing in the IRO which precludes the court from entertaining a jurisdictional complaint[9].

14. However, I do not think *Chino Industries* can help the Defendant. The tax in the present Action is not provisional tax, the power or jurisdiction to charge is statutory and dependent upon the chargeable tax of the previous year. The nullity referred to in that case is one that goes to jurisdiction to charge tax, i.e. the root of the Commissioner's power. The Defence suggested herein is simply not the same.

15. In my judgment, the Defence now raised is no more than saying that the tax being unreasonably imposed, duplicitous or wrong in principles because he has wrongly invoked the tax avoidance provisions under s.61A of the IRO and charged the same income doubly. There is no dispute that the Defendant has been involved in business activities which entitles the Commissioner to examine its tax liability. It is not a case of wrong identity. In essence, the Defendant's case is basically that the Defendant's activities in question should not have attracted tax. It is

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[7] See page 838F of *Chino Industries*

[8] See page 838J of *Chino Industries*

[9] See page 839AB of *Chino Industries*

another way of saying the tax chargeable incorrect. Such plea falls squarely within the scope envisaged by s.75(4) of the IRO which this Court is expressly prohibited to accept for the purpose of the Commissioner's recovery action.

16. In the Court's judgment, the assertion that the present assessment is a "nullity" is no more than saying that the Commissioner is not entitled to come to his view as he did now because he had disregarded allegedly relevant facts, or accepted allegedly irrelevant facts or applied the law wrongly. As explained above, in substance the Defendant is saying the present assessment being incorrect albeit it can be phrased differently as nullity. This is caught by s.75(4) of the IRO. There is also no or insufficient pleaded particulars or evidence on, for examples, suggesting lack of jurisdiction (such as in the case of *Chino Industries*), or bad faith, dishonest or even breach of natural justice on the part of the Commissioner to show that the decision can be regarded as a nullity in substance.

17. From the long line of authorities[10] provided by the Plaintiff, I am satisfied that the Defendant's grounds of defence are, as a matter of law, not those that can be accepted by this Court in any tax recovery action by the Commissioner. I agree with the Court of Appeal decision in *Ng Chun-kwan v The Commissioner of Inland Revenue*[11] in which it was

[10] The following cases are cited: *CIR v Au Yuk –shuet* (1966) 1 HKTC 489; *Ng Chun-kwan v CIR* [1976] HKLR 94; *CIR v Choy Sau Kam* (1983) 2 HKTC 10; *CIR v Ewig Industries Co Ltd* (unrep) DCTC 7883 of 2005 14 December 2006; *CIR v Nam Tai Trading Co Ltd* [2010] 3 HKC 1; *Kong Tai Shoes Manufacturing Co Ltd v CIR* [2012] 4 HKLRD 780; *CIR v Chan Chun Chuen* (unrep) DCTC 2290 of 2010 15 April 2013; *CIR v Lau Chi-sing* (unrep) DCCJ 12121 of 2000 26 April 2001; *CIR v Slipform Engineering International (HK) Ltd* (unrep) DCTC1325 of 2016 18 August 2017

[11] [1976] HKLR 94

suggested that s.75(4) of IRO was wide enough almost to "wrap up all" objections which could be made to any assessment, and defence was very limited. If the Defendant would like to challenge the correctness or otherwise of its tax assessment, it should follow the review/appeal procedure as set out in the IRO.

18. I therefore strike out the Defence on ground that it discloses no reasonable defence. The IRO bars the Defendant from raising the defence it now seeks to raise. I therefore enter judgment for the Plaintiff against the Defendant for the sum of HK$1,721,522.82 together with interest at judgment rate from 18 January 2017, i.e. the date of the writ herein until judgment and thereafter at judgment rate until full payment.

19. There is no reason why the usual rule of costs to follow the event not applicable. I make a costs order nisi that the Defendant do pay the costs of the Plaintiff at District Court scale together with certificate for counsel, to be taxed if not agreed. Such costs order be made absolute if there is no application to vary the same in 14 days.

(WONG King-wah)
District Judge

Miss Katherine Chan GC, of the Department of Justice, for the plaintiff
Mr Jonathan Chang, instructed by Hogan Lovells, for the defendant