

Hong Kong (SAR) Tax Alert

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Salaries Tax – CFA makes unanimous decision on compensation for loss of rest days and statutory holiday days

Summary



On 10 November 2023, the Court of Final Appeal (CFA) handed down its decision on the case of *Dr Leung Ka-Lau v Commissioner of Inland Revenue*¹. The CFA unanimously allowed the Commissioner's appeal and upheld that an award of damages granted to the taxpayer for his loss of rest days and statutory holidays was income from employment and thus assessable for Hong Kong Salaries Tax.

Background

Pursuant to a separate CFA judgement, the taxpayer, Dr Leung Ka-Lau, had been awarded a sum of HK\$1,765,821 as compensation for his loss of rest days and statutory holidays. When considering the taxability of the sum, the Court of Appeal² held that the sum was not income from employment and was not assessable for Hong Kong Salaries Tax. The present case is the Commissioner's appeal to the CFA on the taxability of the sum. For prior coverage of the Court of Appeal case, please refer to our [Hong Kong \(SAR\) Tax Alert - Issue 4, March 2023](#).

The Decision

By applying the test established in *Fuchs v Commissioner of Inland Revenue (2011) 14 HKCFAR 74*, the CFA found the following:

- i. The purpose for which the sum was paid arose from the taxpayer acting as or being an employee. At the request of the Hospital Authority, he was required to be on standby and hold himself ready to go to the hospital at any time. This was what the sum was aimed at compensating. The taxpayer stood by on his holiday and rest days because he was an employee of the Hospital Authority. In doing so, the taxpayer was "acting as or being an employee".
- ii. The sum may be viewed as a payment for past services. The taxpayer provided the Hospital Authority a service by being on stand-by, even if he was not called on to go to the hospital. The Hospital Authority had a responsibility to properly staff its hospitals on holidays and statutory rest days. It fulfilled that obligation, in part, by requiring the taxpayer to be on call on those days.
- iii. The terms of the contract that provided for holidays and rest days, of which the taxpayer was deprived, may be viewed as an inducement to prospective employees to enter into a contract for services with the Hospital Authority.

¹ The CFA judgment can be accessed via this [link](#) to the Judiciary website.

² The Court of Appeal judgment can be accessed via this [link](#) to the Judiciary website.

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The CFA disagreed with the taxpayer's argument that the sum was not paid pursuant to the contract of employment, but rather to abrogate the taxpayer's rights. The present case is distinguished from other precedent "abrogation cases" as it did not involve a termination of employment.

The CFA also disagreed that the sum was damages for the Hospital Authority's breach of the Employment Ordinance. Acknowledging that the Hospital Authority may have arguably violated the Employment Ordinance, the principal reason the payment was ordered was the entitlement to payment for the taxpayer's standing by on holidays and rest days.

KPMG Observations

The unanimous CFA decision brings the present case to a definitive close and establishes the precedence for the taxability of compensation for the loss of rest days and statutory holidays. Notably, despite applying the key principles consistently throughout the Board of Review, Court of First Instance, Court of Appeal and CFA, different outcomes were obtained. Application of these principles will continue to be a contentious matter in Hong Kong.

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