

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D124/02

Salaries tax – perquisite – payment in lieu of notice by new employer – deductible expenses – payment in lieu of notice.

Panel: Ronny Wong Fook Hum SC (chairman), Samuel Chan Yin Sum and William E Mocatta.

Date of hearing: 2 January 2003.

Date of decision: 26 February 2003.

In order to work with a new employer, the appellant had to pay a total of \$260,477 as payment in lieu of notice to his original employer. The arrangement was that the new employer paid \$243,780 for him while he paid the balance, that is, \$16,697.

The two issues in this appeal are whether the payment by his new employer was perquisite and whether the payment by him was deductible expenses.

Held:

1. The payment by the new employer was for discharging the appellant's liability to make payment in lieu of notice to his original employer. Thus, it was a perquisite (David Hardy Glynn v CIR [1990] 3 HKTC 245 applied).
2. As to the payment by the appellant, it was not incurred in the production of the income he earned from his new employer. Thus, it was not deductible expenses (Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364 followed).

Appeal dismissed.

Cases referred to:

David Hardy Glynn v CIR [1990] 3 HKTC 245
Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364
D15/88, IRBRD, vol 3, 223

Leung Wing Chi for the Commissioner of Inland Revenue.
Taxpayer represented by his wife.

INLAND REVENUE BOARD OF REVIEW DECISIONS

Decision:

1. The Appellant commenced employment with an association ('the Association') on 19 August 1996. Under his terms of employment with the Association, he was required to serve three months' notice in order to terminate his employment with the Association.

2. By letter dated 18 April 2000, a company ('the Company') offered to engage the Appellant with effect from 22 May 2000.

3. The Appellant decided to accept the offer from the Company on 26 April 2000. By letter of the same day, he sought to terminate his service with the Association with effect from 22 May 2000.

4. By letter dated 18 May 2000, the Association accepted the Appellant's request for early release with effect from 22 May 2000 upon the following terms:

'You are required to reimburse the Association an amount of HK\$260,477, being the equivalent of 65 days' salary in lieu of notice. Of the said amount, we understand that your new employer will pay HK\$243,780 (being 2 months' salary in lieu of notice) to the Association on your behalf. Thus the balance you are required to pay will be HK\$16,697, which will be deducted from your final payment'.

5. By cheque dated 19 May 2000, the Company paid the Association \$243,780.

6. These are two issues before us:

- (a) whether the sum of \$243,780 was part of the Appellant's income chargeable to salaries tax;
- (b) whether the Appellant is entitled to deduct \$16,697 as expenses incurred in the production of his income from the Company.

The assessability of the sum of \$243,780

7. The Revenue says that the sum of \$243,780 is assessable as the same constitutes 'perquisite' within the meaning of section 9(1) of the Inland Revenue Ordinance (Chapter 112). The Appellant however contends that such a construction would amount to charging him salaries tax on a double income basis for the 65 days between 22 May 2000 and 26 July 2000.

8. In David Hardy Glynn v CIR [1990] 3 HKTC 245 Privy Council expressed the view that:

INLAND REVENUE BOARD OF REVIEW DECISIONS

‘Although a perquisite must mean the payment of money common sense requires that a perquisite must also include money which can be obtained from property which is capable of being converted into money. A perquisite also includes not only money which is actually paid to an employee but money which is paid in discharge of a debt of the employee’.

9. The offer letter from the Company dated 18 April 2000 made no reference to the sum of \$243,780. The offer was however for fresh employment to commence on 22 May 2000. We are however of the view that a proper inference to be drawn is that the Appellant and the Company varied the terms of the offer letter whereby the Company undertook to pay the Association \$243,780 in order to secure the early release of the Appellant. The Appellant was at all times entitled to enforce such undertaking on the part of the Company.

10. We are of the view that the sum of \$243,780 is taxable as a perquisite which arose in or was derived from the Appellant’s employment with the Company. By tendering his resignation on 26 April 2000 with effect from 22 May 2000, the Appellant had incurred a liability to pay the Association salary in lieu of notice. The Company expended \$243,780 in partial discharge of such liability of the Appellant. The Appellant contends that he was not under any contractual obligation to pay the Association as he could easily have stayed on for three more months without incurring any liability for payment in lieu. The short answer to that argument is that he did not choose to stay but opted for an early release. As indicated by the Association’s 18 May 2000 letter, he was ‘required’ to make the payments stipulated therein.

11. The Appellant’s apparent grievance stems from the fact that he did not receive any part of \$243,780. We are of the view that such grievance is misplaced. The 18 April 2000 offer from the Company was for employment to commence on 22 May 2000. The sum of \$243,780 was expended to discharge the Appellant’s obligations vis-a-vis the Association in order to facilitate his employment with the Company.

The deductibility of the sum of \$16,697

12. The position is clearly settled by the ruling of the High Court in Commissioner of Inland Revenue v Sin Chun Wah 2 HKTC 364 and by the decision of this Board in D15/88, IRBRD, vol 3, 223.

13. In Commissioner of Inland Revenue v Sin Chun Wah the High Court held that payment made by a government employee to the Government in lieu of notice so as to enable him to commence his employment with the Mass Transit Railway Corporation (‘MTRC’) was not expenditure incurred in the production of the emoluments he earned from the MTRC. Such payment was not wholly, exclusively and necessarily incurred in the production of his assessable income from the MTRC.

INLAND REVENUE BOARD OF REVIEW DECISIONS

14. On the basis of D15/88, the fact that \$16,697 was set off against his final month's salary from the Association makes no difference to his liability.
15. For these reasons, we dismiss the appeal and confirm the assessment.