

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D2/93

Salaries tax – whether income should be subject to profits tax and not salaries tax – personal assessment – deduction of trading loss against income subject to salaries tax.

Panel: William Turnbull (chairman), Albert Ho Chun Yan and Robert Kwok Chin Kung.

Dates of hearing: 6 January and 16 February 1993.

Date of decision: 20 April 1993.

The taxpayer was assessed to salaries tax on income which he claimed should have been assessed to profits tax and against which he could have offset certain trading losses which he had incurred. The assessor rejected the taxpayer's claim to have his income assessed under profits tax and proceeded to assess the same to salaries tax. The taxpayer appealed to the Board of Review. The case was adjourned and a compromise was reached under which the taxpayer accepted that he was subject to salaries tax and the assessor accepted that he was entitled to apply for personal assessment and to offset against his salaries tax income certain trading losses which he had incurred. The terms of the compromise settlement were referred to the Board of Review which had already partly heard the case.

Held:

The Board was satisfied that the terms of compromise fairly reflected the true position and accepted the same.

Appeal compromised.

Chiu Kwok Kit for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against an additional salaries tax assessment raised upon him for the year of assessment 1989/90. The Taxpayer appealed against the additional assessment on the ground that he should have been chargeable to profits tax and not salaries tax. For convenience we will summarise the facts as follows:

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1. In respect of the year of assessment 1989/90 the Taxpayer filed a salaries tax return in which he disclosed income which he had received from two sources but did not disclose income which he had received from a third source. He was duly assessed to tax in respect of the income which he had disclosed.
2. Subsequently an employer's tax return was filed with the Commissioner in respect of the third source of income which indicated that the Taxpayer had also received \$43,038 which was stated to be income which would normally be assessed to salaries tax.
3. The assessor after receipt of the notice from the Taxpayer's alleged employer issued an additional salaries tax assessment for the year of assessment 1989/90.
4. The Taxpayer objected to this additional assessment on the ground that the income had been included in his business income under his business registration and would be double taxed if also assessed to salaries tax.
5. The assessor made further enquiries and maintained the view that the Taxpayer's income from the third source was derived from an employment and chargeable to salaries tax. The matter was referred to the Deputy Commissioner for his determination.
6. By his determination dated 18 September 1992 the Commissioner confirmed the additional salaries tax assessment on the ground that the Taxpayer was an employee and not self-employed.
7. The Taxpayer duly appealed to this Board of Review.

The hearing of the appeal was set for 6 January 1993 when the Taxpayer appeared in person and gave evidence and was cross-examined. It became apparent that the facts of the case were complex and it was not possible for the hearing of the case to be concluded on the date set for the hearing. It was necessary for the partly heard case to be adjourned for a new date to be fixed.

A subsequent date for the hearing was fixed at the request of the parties when the Taxpayer and the representative for the Commissioner duly appeared before the Board and informed the Board that following the previous hearing the parties had reached a compromise. A statement of agreed terms was filed under which the Taxpayer agreed that the third source of income was subject to salaries tax and not business profits tax. However the Commissioner agreed that the Taxpayer was allowed to deduct from his additional assessable income certain outgoings and expenses and that the Taxpayer had available to deduct from his taxable income under personal assessment a trading loss which he had incurred in the year of assessment 1989/90.

A copy of the statement of agreed terms which was filed before the Board and confirmed by both parties is attached to this Decision.

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In the circumstances and having heard the evidence previously given by the Taxpayer the Board is satisfied that the statement of agreed terms fairly reflects the true position and should be accepted by the Board.

Accordingly the Board orders that the additional salaries tax assessment for the year of assessment 1989/90 should be revised as proposed by the parties and the Board notes that the Commissioner accepts that a loss of \$45,525 incurred by the Taxpayer during the year of assessment 1989/90 is accepted to be a trading loss which is available for deduction against the Taxpayer's total income under personal assessment.

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Appeal to the Board of Review
Additional Salaries Tax Assessment 1989/90
[The Taxpayer]
Statement of Agreed Terms

For the purpose of settling the above appeal, the Taxpayer and the Commissioner of Inland Revenue have agreed that the additional salaries tax assessment 1989/90 should be revised as follows:

Additional Assessable Income	\$43,038
<u>Less: Outgoings and expenses</u> (10% x \$43,038)	<u>4,304</u>
Revised Additional Assessable Income	<u>\$38,734</u>
Revised Tax Payable	<u>\$6,926</u>

2. At the same time, the Commissioner accepts that the loss of \$45,525 (\$33,036 + \$12,250 + \$239) incurred by the Taxpayer during the year of assessment 1989/90 was a trading loss which was available for deduction against the Taxpayer's total income under personal assessment.