

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D75/04

Salaries tax – bonus received after termination of employment – sections 11C and 11D of the Inland Revenue Ordinance ('IRO') – whether bonus should be included in assessable income in year of receipt or last year of employment.

Panel: Ronny Wong Fook Hum SC (chairman), Choi Kin and Susanna W Y Lee.

Date of hearing: 6 December 2004.

Date of decision: 25 January 2005.

The appellant resigned from his employment with Company A effective 31 March 2003.

On 28 May 2003, the appellant received a bonus of HK\$275,264 ('the Bonus'), which was calculated by reference to the 2002 audited profits of the Group of Company A.

The issue before the Board was whether the Bonus should either be included as part of the appellant's income for the year 2002/03 (as contended by Revenue) or 2003/04 (as contended by the taxpayer).

Held:

1. Under section 11C, the appellant was deemed to cease to derive income from Company A upon termination of his employment on 31 March 2003, his last day of employment.
2. Pursuant to section 11D(b)(ii), which dealt with payments made by an employer after an employee had ceased to derive income, the Bonus would be deemed to have accrued to the appellant on the last day of his employment, i.e. 31 March 2003.
3. Had the appellant received the Bonus on 31 March 2003, it would have been included in his assessable income for 2002/03. Section 11D(a) empowered the Commissioner to raise an additional assessment in respect of the Bonus which accrued in 2002/03.
4. This case was wholly indistinguishable from D28/95.

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Appeal dismissed.

Case referred to:

D28/95, IRBRD, vol 10, 169

Chan Man On for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The issue

1. By letter dated 26 February 2003, the Appellant tendered his resignation as Sr. V.P. Operations of Company A with effect as from 31 March 2003.
2. On 28 May 2003, Company A paid the Appellant a sum of \$275,264 by way of Special Bonus. This sum was calculated by reference to the audited profits before tax of the Company A Group for the financial year ended 31 December 2002. That calculation was done on 2 May 2003.
3. The issue before us is whether the sum of \$275,264 should be included as part of the Appellant's income for the year 2002/03 (as contended by the Revenue) or whether it falls to be assessed in 2003/04 (as contended by the Appellant).

The applicable provisions in the Inland Revenue Ordinance (Chapter 112)

4. Section 2(1) provides '*year of assessment*' to mean '*the period of 12 months commencing on 1 April in any year*'.
5. Section 8(1) provides that '*Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from ... any office of employment of profit*'.
6. Section 9(1)(a) provides that income from any office or employment includes '*any wages ... bonus ...*'.

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7. Section 11B provides that *'The assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment'*.

8. Section 11C provides that for the purpose of section 11B, a person shall be deemed to cease to derive income from a source whenever and as often as he ceases to hold any office or employment of profit.

9. Section 11D(a) provides for the purpose of section 11B:

'Income which has accrued to a person during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, when notwithstanding anything contained in this Ordinance, an additional assessment shall be raised in respect of such income'.

10. Section 11D(b)(ii) further provides for the purpose of section 11B:

'subject to proviso (i), any payment made by an employer to a person after that person has ceased ... to derive income which, if it had been made on the last day of the period during which he derived income, would have been included in that person's assessable income for the year of assessment in which he ceased ... to derive income from that employment, shall be deemed to have accrued to that person on the last day of that employment.'

The decision of this Board in D28/95, IRBRD, vol 10, 169

11. The taxpayer in that case resigned from Company X on 13 March 1991. On 9 August 1991, he reached a compromise agreement with Company X whereby Company X agreed to pay the taxpayer \$795,000 being arrears of housing allowance due to him by 17 instalments between July 1991 and October 1993. By 12 July 1994, the taxpayer had received \$795,000 in full. The taxpayer contended that this sum should be assessed as income for the years of receipt. The Revenue however argued that the same should be included as part of the taxpayer's income for the year of assessment 1990/91. This Board upheld the position of the Revenue. This Board pointed out that:

'By section 11C, the Taxpayer is deemed to cease to derive income from [Company X] upon termination of his employment with [Company X] on 12 or 13 March 1991.'

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By section 11D(b)(ii), the various payments totalling \$795,000 which were made after 12 March 1991, that is, after the Taxpayer has been deemed by section 11C to cease to derive income, are deemed to have accrued to the Taxpayer on the last day of employment, that is, on 12 March 1991.

By the date of the determination, the Taxpayer had received \$795,000 in full. Section 11D(a) requires an additional assessment to be raised in respect of such income. This is what the Commissioner has in effect done ...'

Our decision

12. The Appellant's case is wholly indistinguishable from that of the taxpayer in D28/95.
13. By section 11C, the Appellant is deemed to cease to derive income from Company A upon termination of his employment with Company A on 31 March 2003.
14. The sum of \$275,264 was paid to the Appellant on 28 May 2003. Had such payment been made on 31 March 2003 (the last day of the period during which the Appellant derived income), the same would have been included in the Appellant's assessable income for 2002/03, being the year of assessment in which he ceased to derive income from his employment with Company A. By virtue of section 11D(b)(ii), such payment shall be deemed to have accrued to the Appellant on 31 March 2003 being the last day of that employment.
15. As the sum of \$275,264 was income that accrued in the year 2002/03 and given the fact that the Appellant had received the totality of that sum, section 11D(a) empowered the Commissioner to raise an additional assessment in respect of the sum so received as part of the income that accrued to him in 2002/03.
16. For these reasons, we dismiss the Appellant's appeal and confirm the assessment.