

the additional assessments are not perquisites which are taxable as part of the taxpayer's income.

The appeal is allowed and the assessments discharged.

The Board has noted that the taxpayer's employer has not sought to deduct as an expense for profits tax, the amounts sought to be charged in this case.

Case No. BR 13/70

Board of Review:

S. V. Gittins, Q.C., *Chairman*, F. G. Nigel, R. S. Huthart and D. T. Nolan, *Members*.

26th July 1970.

Profits tax—lump sum payments to employees upon termination of taxpayer's business—whether deductible expenses—Inland Revenue Ordinance, sections 16(1) and 17(1)(b).

The appellant firm ceased business when taken over by a newly formed company. The firm, in its final accounts, charged a sum as being the total of lump sum payments made to six members of its staff. The payments were disallowed by the Commissioner as deductions for the purpose of assessment for profits tax. On appeal.

Decision: Assessment appealed against confirmed.

Lau Chung Him for the Appellant.

L. A. Winspress for the Commissioner of Inland Revenue.

Case referred to:—Godden v. Wilson, (1962) 40 T.C. 174.

Reasons:

The taxpayer firm was a partnership with 2 partners. It commenced business in 1931 and ceased business on 31st July 1968 when its business was taken over by a new limited company.

In its accounts for the final period of trading, from 1st January 1968 to 31st July 1968 the firm sought to charge a sum of \$136,000 under the heading "Allowance for Staff Service Termination". This sum was paid to 6 members of the staff who had been employed by the firm for from 18 to 36 years, and the amounts paid to these employees varied from 1½ years to 2½ years of their latest annual incomes.

These payments were disallowed by the Commissioner as deductions for the purpose of assessment for profits tax and the taxpayer appealed therefrom.

The grounds of appeal are:—

- (1) that the payments were made in accordance with a long standing understanding between the firm and its employees that the employees would receive a lump sum on being paid off after long service in lieu of a formal retirement scheme.

A meeting was held between the firm and its employees on 28th February 1968 whereat the managing partner confirmed the aforesaid undertaking.

- (2) that the confirmation of the undertaking on 28th February 1968 contributed materially to the profits earned during the period 1st January 1968 to 31st July 1968, because without such undertaking the employees would either have left the firm's employment or would have worked at decreased efficiency.

The Board is of the opinion that on the evidence before it the payments were made on the termination of the taxpayer's business and therefore were not expenses incurred in the production of profits in respect of which the taxpayer was chargeable to tax [S. 16(1) of *Cap. 112.*]. Further section 17(1)(b) specifically provides that no deduction is allowable in respect of any expenses not expended for the purpose of producing chargeable profits.

For those reasons the first ground of appeal fails.

As to the second ground of appeal, no evidence was adduced to support the contention that without the promise to pay the termination of service gratuities the profits for the period 1st January 1968 to 31st July 1968 would have suffered. It is noted that all the employees who received the gratuities were re-employed by the new limited company.

Upjohn, L.J. in **Godden v. Wilson**¹, said: "It is perfectly true that this payment might have been so devised that the company might have been entitled to claim this as a deductible expense, as being the remuneration of (the employee) during this period; but in fact, it was not so devised". In the present case,

¹ (1962) 40 T.C. 174.

if it was necessary to keep the employees contented and efficient until the business of the taxpayer firm was taken over by the new limited company, the taxpayer could have given the employees substantial increases for the last 5 or 6 months, and if the Assessor could be satisfied that these were necessary for the production of profits then the payments would have been deductible.

However, in the present case, the payments were not so devised, and therefore do not escape the principles laid down in section 16(1) and section 17(1)(b). The second ground of appeal therefore fails.

The appeal is dismissed and assessment as determined by the Commissioner is confirmed.

Case No. BR 3/71

Board of Review:

Y. H. Chan, *Chairman*, B. A. Bernacchi, J. L. Bray & Hon. W. T. S. Wang, *Members*.

6th August 1971.

Salaries tax—taxpayer granted special leave without pay—whether ceasing to hold office or employment of profit—Inland Revenue Ordinance, s. 11(6) and (7).

The appellant, a university lecturer, was granted special leave without pay for three years to study in the U.S.A. after which time he intended to return to Hong Kong and resume his post at the University. His period of unpaid leave began on 6th October 1970 and he was assessed for salaries tax for the year of assessment 1970/71 based on his income for the year which ended on 31st March 1970.

He appealed against the assessment claiming that he ceased to hold an office or employment of profit on 6th October 1970. The Board considered, as a preliminary point, whether it had jurisdiction to entertain the appeal in the absence of the appellant or any representative appointed by him. Section 68(2D) and (2E) covers this situation with effect from 23rd June 1972. On appeal.

- Decision:*
1. The appellant's contract had not been terminated and what he would ultimately return to was an office or employment of profit. The lesser of remuneration did not change the character of the employment.
 2. Appeal refused, assessment confirmed.