

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D32/95

Salaries tax - termination of employment - lump sum payment - whether lump sum payment liable to be assessed to salaries tax.

Panel: William Turnbull (chairman), Benjamin Kwok Chi Bun and E M I Packwood.

Dates of hearing: 16 February and 17 March 1995.

Date of decision: 28 June 1995.

The taxpayer was an employee whose employment was terminated. He was paid a lump sum payment on termination. Part of the lump sum payment was not assessed to salaries tax on the basis that it was a long service payment in accordance with the terms of the Employment Ordinance. However the balance thereof was assessed to tax in the year in which the employment was terminated. The taxpayer submitted that the entire payment should not be assessed to salaries tax. In the course of the hearing the appeal was adjourned to enable the parties to ascertain whether or not the lump sum payment was made as a payment in lieu of damages for breach of contract.

Held:

The onus of proof is on the taxpayer. He had not satisfied the Board that the payment was not a long service payment. Accordingly the appeal was dismissed.

Appeal dismissed.

Cases referred to:

D79/88, IRBRD, vol 4, 160

D13/89, IRBRD, vol 4, 242

D19/92, IRBRD, vol 7, 156

D15/93, IRBRD, vol 8, 350

D12/92, IRBRD, vol 7, 122

Maria Tsui Siu Fong for the Commissioner of Inland Revenue.

Taxpayer in person.

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Decision:

This is an appeal by a taxpayer against a salaries tax assessment for the year of assessment 1991/92. The facts are as follows:

1. The Taxpayer was employed by Company X since 1 July 1963. His employment was terminated on 31 January 1992.
2. When the employment of the Taxpayer was terminated he was paid a lump sum payment of \$250,000.
3. The assessor assessed to salaries tax the whole payment of \$250,000 as being part of the taxable emoluments of the Taxpayer in the year when his employment was terminated.
4. The Taxpayer objected to this assessment and the matter was referred to the Deputy Commissioner of Inland Revenue for his determination.
5. By his determination dated 30 September 1994 the Deputy Commissioner of Inland Revenue decided that part of the sum of \$250,000 should not be assessed to salaries tax on the basis that it was a long service payment made in accordance with the terms of the Employment Ordinance and therefore not assessable to salaries tax. However the balance of the lump sum payment was determined to be assessable to salaries tax as being a lump sum payment paid to the Taxpayer on his retirement from employment and being in excess of the statutory obligation of the employer.
6. The Taxpayer appealed to the Board of Review.

At the hearing of the appeal the Taxpayer appeared in person. He said that his employment had been prematurely terminated by his employer before he attained the age of 65. He said that if the employer terminated his employment before the age of 65 it should compensate him. He said that in his opinion he should have been paid more than \$700,000. He went on to say that the employer had originally said that he would be paid \$500,000 but ultimately he only received \$250,000. He said that it was now two years since he had received this payment and he had spent almost all of it to meet his living expenses and rent. He said that he had nothing left for payment of tax.

The Taxpayer went on to explain that the money which was paid to him was not a retirement fund but severance pay and he repeated that it was only half of what he had been promised.

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The representative for the Commissioner submitted that under the Inland Revenue Ordinance (the IRO) the sum of \$250,000 was liable to be assessed to tax because it was not a payment made from an approved retirement scheme. The representative said that by way of concession the Commissioner agreed that an amount equal to the severance pay to which the Taxpayer would have been entitled under the Employment Ordinance would not be assessed to tax but that the balance was assessable and should be assessed. The representative cited to the Board the following Board of Review decisions:

D79/88, IRBRD, vol 4, 160

D13/89, IRBRD, vol 4, 242

D19/92, IRBRD, vol 7, 156

D15/93, IRBRD, vol 8, 350

D12/92, IRBRD, vol 7, 122

It appeared to the Board that there might be substance in the Taxpayer's case if he could establish that the money paid to him was a payment in lieu of damages for breach of contract. The Taxpayer had addressed the Board on the basis that his employment had been prematurely terminated and that he should have been entitled to work until the age of 65. If this had been the case then the lump sum payment would not have been taxable. The Board decided to adjourn the hearing to enable the Taxpayer himself and the representative for the Commissioner to make further enquiries to see whether or not there was any substance in the statement made by the Taxpayer.

The Board was reconvened and met again. At the reconvened hearing the Taxpayer again appeared before the Board and said that he had made enquiries of his employer but his employer was not prepared to appear before the Board to give evidence.

The representative for the Commissioner informed the Board that she had also made enquiries of the employer and produced before the Board a letter which the Commissioner had received from the employer which confirmed a previous letter given to the Commissioner. The information which had been given to the Commissioner was to the effect that the lump sum payment made to the employee was a long service payment granted to him on his retirement. The employer had informed the Commissioner that there was no specified retirement age and that the amount of the lump sum payment had been calculated on the basis of the Taxpayer's long service payment entitlement under the Employment Ordinance plus an additional sum because of his long years of service with the employer and his past performance.

The onus of proof is upon the Taxpayer. In the case before us we have a written statement made by the employer stating that the lump sum payment was in respect of past services. We have a statement by the Taxpayer that the payment was because of early retirement and because the employer had terminated his employment prior to his 65 birthday.

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We are not able to accept the statement made by the Taxpayer. It was apparent when the Taxpayer was addressing us that he was not precise in what he was saying. He indicated that he should have been entitled to compensation of more than \$700,000, was promised \$500,000 but only received \$250,000. We found it hard to believe that someone who thought he was entitled to much more and had been promised much more would accept much less. This cast doubt on the statement by the Taxpayer that the payment was by way of liquidated damages. On the other hand we have a clear written statement from the employer telling us how the employer calculated the payment and making it clear that the payment was a long service payment paid to the Taxpayer upon his compulsory retirement without there being any specific age for retirement.

As the onus of proof is upon the Taxpayer we find in favour of the Commissioner and dismiss this appeal. The assessment against which the Taxpayer has appealed will be reduced in accordance with the determination made by the Deputy Commissioner dated 30 September 1994.