

**Case No. D1/10**

**Salaries tax** – income – ceasing employment – when payment from that employment accrued – sections 2(1), 8(1), 9(1), 11B, 11C and 11D of the Inland Revenue Ordinance ('IRO').

Panel: Anthony So Chun Kung (chairman), Ho Hin and Richard Leung Wai Keung.

Date of hearing: 8 May 2008.

Date of decision: 14 April 2010.

The Taxpayer resigned from his position at Company C, which took effect on 31 March 2007. Subsequently in May 2007, Company C paid him an additional bonus of \$237,115. The Assessor raised on the Taxpayer salaries tax by including the additional bonus in the computation. The Taxpayer objected to the assessment, claiming that the additional bonus should be assessed in the year of assessment 2007/08 as per the date of receipt, but not 2006/07. He also complained to have been unfairly treated when compared to his ex-colleagues. The Deputy Commissioner confirmed the assessment. The Taxpayer appealed against the Determination by the Deputy Commissioner.

**Held:**

1. The Taxpayer was correctly assessed to salaries tax by including the additional bonus for the year of assessment 2006/07. The combined effect of sections 11C and 11D of the IRO is that any payment received by the Taxpayer after his employment ceased is deemed to have accrued to him on the last day of his employment. Since the last day of the Taxpayer's employment with Company C fell within the year of assessment 2006/07, the additional bonus formed part of the income he received in 2006/07. This did not depend on the actual date of receipt of the additional bonus (D28/95, IRBRD, vol 10, 169; D75/04, IRBRD, vol 19, 586; and D42/06, (2006-07) IRBRD, vol 21, 794 applied).
2. There was no unfair treatment to the Taxpayer. The treatment he received was merely a fiscal consequence arising from his change in employment status. This was a question of tax policy for the legislature (Wong Tai-wai David & Lee Chi-man v Commissioner of Inland Revenue 6 HKTC 460 applied).

**Appeal dismissed.**

Cases referred to:

D28/95, IRBRD, vol 10, 169

D75/04, IRBRD, vol 19, 586

D42/06, (2006-07) IRBRD, vol 21, 794

Wong Tai-wai David & Lee Chi-man v Commissioner of Inland Revenue 6 HKTC  
460

Taxpayer in person.

Chan Sze Wai Benjamin and Lai Wing Man for the Commissioner of Inland Revenue.

## **Decision:**

### **Introduction**

1. This is an appeal by Mr B ('the Taxpayer') who has appealed in respect of a determination dated 29 February 2008 by the Deputy Commissioner of Inland Revenue ('the Determination'). The Taxpayer objects to salaries tax assessment for the year of assessment 2006/07 raised on him.

2. The Taxpayer claims that the additional bonus in the sum of \$237,115 paid to him by his employer after cessation of his employment should not be assessed in the year of assessment 2006/07 but should be assessed in a subsequent year of assessment 2007/08.

### **The evidence**

3. The Taxpayer conducted his appeal in person. Insofar as the factual background is concerned, no issue is taken with any of the facts set out in the Determination. Therefore, we now find these as facts and now set these out as follows:

- (1) Mr B has objected to the salaries tax assessment for the year of assessment 2006/07 raised on him. The Taxpayer claims that a sum received by him from his former employer after cessation of employment should be assessed to salaries tax in the year of receipt, not in the year of cessation of employment.
- (2) The Taxpayer was previously employed by Company C ('the Employer'). The last date of his employment with the Employer was 31 March 2007.
- (3) The Employer filed a 'Notification by an Employer of an Employee Who is About to Cease to be Employed' ('IR56F') in respect of the Taxpayer, showing inter alia, the following particulars:

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

- (a) Capacity in which employed : Executive Manager, HR&A
  - (b) Period of employment : 1.4.2006 to 31.3.2007
  - (c) Reason for cessation : Resignation
  - (d) Total income : \$1,411,428
- =====

(4) By a supplemental IR56F, the Employer advised that an additional sum of \$237,115 ('the Sum') was paid to the Taxpayer after cessation of his employment.

(5) In his Tax Return – Individuals for the year of assessment 2006/07, the Taxpayer declared the following income particulars:

Name of Employer	Capacity Employed	Period	Total Amount
The Employer	Executive Manager, HR&A	1.4.2006 – 31.3.2007	\$1,411,428

(6) The Assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2006/07:

Assessable income (\$1,411,428 [Fact (3)] + \$237,115 [Fact (4)])	\$1,648,543
<u>Less: Deductions</u>	<u>(27,990)</u>
	1,620,553
<u>Less: Allowances</u>	<u>(280,000)</u>
Net chargeable income	\$1,340,553
	=====
Tax payable thereon	\$229,205
	=====

(7) The Taxpayer objected to the above assessment. He claimed that the Sum was paid to him by the Employer in May 2007 and hence it should be treated as income for the year of assessment 2007/08 instead of 2006/07.

4. Since the facts were agreed and there was no issue between the parties as to the facts that formed the subject matter of the appeal, the Taxpayer did not give evidence. In this appeal, the Taxpayer relied on the two grounds stated in his Notice of Appeal dated 11 March 2008, these two grounds can be summarized as follows:

- (1) Right of equal treatment: the Taxpayer should not be treated differently from his ex-colleagues in the same tax year period just because he was not working with the Employer anymore;

- (2) Principle of fairness: based on fairness principle and consistent with the practices of assessment for the Taxpayer's salaries tax in the past, it is unfair to include bonus for two years under one year of assessment

**The issue to be decided**

5. The only issue in this appeal is whether the Sum of \$237,115 should be included in the Taxpayer's assessable income for the year of assessment 2006/07 (as determined by the Deputy Commissioner in the Determination), or whether it falls to be assessed in the year of assessment 2007/08 (as contended by the Taxpayer).

6. The sections of the Inland Revenue Ordinance ('IRO') relevant to the issue are sections 2(1), 8(1), 9(1), 11B, 11C and 11D:

- (a) Section 8(1) of the IRO is the charging section of salaries tax. Insofar as relevant, it provides as follows:

*'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 the following sources-*

(a) *any office or employment of profit;*

- (b) The term of 'income from employment' is defined in section 9(1)(a) of the IRO, which provides the following:

*'Income from any office or employment includes-*

(a) *any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance, whether derived from the employer or others, ....'*

- (c) In the ascertainment of assessable income, section 11B of the IRO provides as follows:

*'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.'*

- (d) Section 11C of the IRO provides that:

*'For the purpose of section 11B, a person shall be deemed to commence or cease, as the case may be, to derive income from a source whenever and as often as he commences or ceases-*

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

(a) *to hold any office or employment of profit,*

(e) The relevant parts of section 11D of the IRO provides as follows:

*‘For the purpose of 11B-*

(a) *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 assessment 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:*

....

(b) *income accrues to a person when he becomes entitled to claim payment thereof:*

*Provided that-*

(i) ....

(ii) *subject to proviso (i), any payment made by an employer to a person after that person has ceased or been deemed to cease 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 or is deemed to cease to derive income from that employment, shall be deemed to have accrued to that person on the last day of that employment.*

(emphasis underlined)

(f) Section 2(1) of the IRO defines the term of ‘*year of assessment*’ to mean ‘*the period of 12 months commencing on 1 April in any year*’.

7. In D28/95, IRBRD, vol 10, 169, the taxpayer’s employment with Company A ceased on 13 March 1991. On 9 August 1991, Company A agreed to pay a sum of \$795,000 being arrears of housing allowance, to the taxpayer by 17 instalments over the period from July 1991 to October 1993. The taxpayer contended that the payments should be assessed as income for the years of receipt. In dismissing the taxpayer’s appeal, the Board said at page 174 as follows:

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

*‘The combined effect of sections 11C and 11D(a) and (b)(ii) is fatal against the Taxpayer’s contention and we reject it.*

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

*By section 11D(b)(ii), the various payments totaling \$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 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.....’*

8. The decision in D28/95 was followed by the Board in another case D75/04, IRBRD, vol 19, 586. In that case, the taxpayer’s employment was terminated upon his resignation on 31 March 2003. On 28 May 2003, he received a bonus, which was calculated on 2 May 2003 by reference to the audited profits of his ex-employer for the year ended 31 December 2002. The taxpayer argued that the bonus should be assessed as part of his income for the year of assessment 2003/04. The Board, however, rejected the taxpayer’s argument and held that the bonus should be assessed in the year of assessment 2002/03 pursuant to sections 11C, 11D(a) and 11D(b)(ii) of the IRO.

9. A more recent case concerning the assessment of post-cessation income is D42/06, (2006-07) IRBRD, vol 21, 794. In that case, the taxpayer’s employment ceased on 16 March 2004. On 29 June 2004, he received from his ex-employer a sum of \$22,885, being his housing allowance for the month of March 2004. The taxpayer claimed that he had not been entitled to claim payment of the housing allowance in the year of assessment 2003/04. As the allowance had eventually been paid to him in the year of assessment 2004/05, it should be assessed as his income for the same year. Having considered the decisions in D28/95 and D75/04, the Board rejected the taxpayer’s claims and held that the housing allowance should be assessed as his income of assessment 2003/04. At page 800, the Board made the following comments in respect of sections 11C and 11D of the IRO:

*‘It can be seen that sections 11C and 11D of [the Ordinance] are all “deeming” provisions. They can work against or in favour of a taxpayer depending on the personal circumstances of the individual taxpayer.’*

10. In the present case, there is no dispute that the Taxpayer’s employment was terminated by his resignation, and the last day of his employment was 31 March 2007. By section 11C of the IRO, the Taxpayer is deemed to cease to derive income from the Employer on 31 March 2007. The Sum was effectively paid to the Taxpayer on 4 May 2007. By the operation of 11D(b)(ii), the Sum should be deemed to have accrued to the

(2010-11) VOLUME 25 INLAND REVENUE BOARD OF REVIEW DECISIONS

Taxpayer on 31 March 2007, being the last day of his employment with the Employer, in the year of assessment 2006/07.

11. The present case is wholly indistinguishable from those of the taxpayers in D28/95, D75/04 and D42/06. We have no hesitation in accepting that the Taxpayer was correctly assessed to salaries tax in respect of the Sum for the year of assessment 2006/07. Indeed, as rightly pointed out by the Board in D28/95, the combined effect of sections 11C, 11D(a) and 11D(b)(ii) of the IRO was fatal against the contention that post-cessation payment should fall to be assessed in the year of receipt.

12. We also reject the grounds of appeal relied upon by the Taxpayer. Had the Taxpayer's employment with the Employer continued, there is no doubt that Sum would have been assessed in the year of assessment 2007/08 pursuant to sections 11B and 11D(b) of the IRO. Also had the Taxpayer's last day of employment to be after 31 March 2007, again no doubt that Sum would have been assessed in the year of assessment 2007/08. At the hearing, even the Taxpayer accepted that the last day of employment was a date agreed upon by him after he discussed with the Employer. Since the employment ceased in the year of assessment 2006/07, section 11D(b)(ii) comes into play and the Sum is 'deemed' to have accrued to the Taxpayer in that year of assessment. This is so notwithstanding the actual receipt of the Sum subsequently.

13. The tax treatment received by the Taxpayer in respect of the Sum is merely a fiscal consequence arising from his change in employment status. As Deputy Judge To, as he then was, mentioned in Wong Tai-wai David & Lee Chi-man v Commissioner of Inland Revenue 6 HKTC 460, 'the change of status of an individual may bring about fiscal consequences' and 'this is a question of tax policy for the legislature'. In the present case, we do not find any discriminatory treatment or unfairness over the tax treatment in respect of the Sum at all.

### **Conclusion**

14. We have no hesitation in coming to the conclusion that this appeal must be dismissed for the above reasons. Hence we dismiss the appeal.