Case No. D56/09

Salaries tax – whether the amount paid by the Taxpayer's employer directly into his personal superannuation fund account in Australia chargeable to salaries tax – whether the income received in Australian dollars should be converted to Hong Kong dollars at the exchange rate when the tax was paid – section 9(1)(a) of the Inland Revenue Ordinance ('IRO').

Panel: Colin Cohen (chairman), Richard Leung Wai Keung and Kumar Ramanathan SC.

Date of hearing: 5 February 2010.
Date of decision: 8 March 2010.

The Taxpayer was employed by Company D. He was based in Australia and as such, his remuneration was paid into a Hong Kong bank account in Australian dollars. He therefore saved his tax in Australian dollars.

The Taxpayer objected to the salaries tax assessment raised on him. The Taxpayer claimed that the amount paid by his employer directly into his personal superannuation fund account in Australia does not form part of his employment income and should not be assessed to salaries tax. He also claimed that the exchange rate at the time of paying his tax demand note should be used in arriving at his salaries tax payable.

The Taxpayer considered that an unfair exchange rate had been used when making the assessment . He had been disadvantaged due to the recent economic downturn resulting in the HKD/AUD exchange rate changing dramatically. The Taxpayer took issue with the Inland Revenue using the average rate for the year of assessment in calculating his salaries tax. He took the view that due to the volatile fluctuation in exchange rate between the Australian dollar and the Hong Kong dollar, the average rate was detrimental to him which resulted in him having to pay more tax. He asserted therefore he was being unfairly penalized.

The Taxpayer also contended that the sum placed into the personal superannuation fund could not be accessed until he reached the age of 60 and retired from full-time work. As such, the sum could not be considered as income and therefore could not be taxed. By Australian tax law, it was compulsory to put the employer sponsored and funded monies directly into a superannuation fund. In addition, since the Taxpayer was a full time resident of Australia, in turn he was taxed by the Australian Tax Office. He therefore took the view that he was being taxed on the same amount of money by the Inland Revenue and the Australian Tax Office.

The issues to be decided are:

(a) whether the amount paid by the Taxpayer's employer directly into his personal superannuation fund account in Australia during the year of assessment should be chargeable to salaries tax; and

(b) whether the income received in Australian dollars should be converted to Hong Kong dollars at the exchange rate when the tax was paid.

Held:

1. The payments made to the retirement fund by the Taxpayer's employer pursuant to his employment contract was indeed from his employment which should be accrued to the Taxpayer. Therefore, there can be no doubt that those payments were chargeable to salaries tax. It is also quite clear in the Board's view that income from employment is by no means restrictive to salary only. Section 9(1)(a) of the IRO provides that income from employment includes among other things, that is, salary and perquisite. The perquisite includes money paid for the benefit of an employee by its employer pursuant to the contract of service. It is also quite clear that the payment made by the employer in the case before the Board was pursuant to the terms of the Taxpayer's contract of employment (D89/02, IRBRD, vol 17, 1089 and David Hardy Glynn v CIR 3 HKTC 245 followed).

2. The Taxpayer was indeed entitled to receive payments in lieu of provident fund. Such payment and the additional sacrificed salary were paid by his employer to the retirement fund as directed by the Taxpayer. Therefore, the Board concludes that the payments in question were identifiable sums paid by his employer for his sole benefit and as such was a perquisite for the purposes of section 9(1)(a) and therefore taxable. How the Australian Tax Office would treat any sums received is not a matter for the Board to dwell upon nor to take this into account in the Board's decision.

3. The Board rejected the Taxpayer's assertion that his income should be converted into Hong Kong dollars at the exchange rate when the tax was paid. The rise or fall of the Australian dollar is not something which can be taken into account when one is calculating his salaries tax (B/R 29/75, IRBRD, vol 1, 189 followed).

Appeal dismissed.

Cases referred to:

David Hardy Glynn v CIR 3 HKTC 245
D89/02, IRBRD, vol 17, 1089

B/R 29/75, IRBRD, vol 1, 189

Taxpayer in person.
Chan Shun Mei and Chan Tak Hong for the Commissioner of Inland Revenue.

Decision:

Introduction

1. This is an appeal by Mr A ('the Taxpayer') who has appealed in respect of a determination dated 16 September 2009 by the Acting Deputy Commissioner of Inland Revenue ('the Acting Deputy Commissioner') ('the Determination'). The Taxpayer objects to salaries tax assessment for the year of assessment 2007/08 raised on him.

2. The Taxpayer claims that the amount paid by his employer directly into his personal superannuation fund account in Australia does not form part of his employment income and as such should not be assessed to salaries tax. Secondly, he also claims that the exchange rate at the time of paying his tax demand note should be used in arriving at his salaries tax payable.

The evidence

3. The Taxpayer conducted his appeal in person and very helpfully indicated that he did not take issue 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 A ('the Taxpayer') has objected to the salaries tax assessment for the year of assessment 2007/08 raised on him. The Taxpayer claims that the amount paid by his employer directly into his personal superannuation fund account in Australia does not form part of his employment income and should not be assessed to salaries tax. He also claims that the exchange rate at the time of paying his tax demand note should be used in arriving at his salaries tax payable.

(2) Company B, a wholly owned subsidiary of Company D, is a private company incorporated in Hong Kong and has been carrying on business in Hong Kong.

(3) By a letter dated 10 July 2006, Company B offered to employ the Taxpayer commencing 1 November 2006. The offer was subject to the Company B Conditions of Service 2002 ('the Agreement') which contained, inter alia, the following term:

'12.1 (The Taxpayer) will receive a Provident Fund Scheme contribution of 15½% of Salary (less any mandatory payments paid by (Company B) in respect of (him)) paid with Salary or by such other arrangements as (the Taxpayer) might request, subject to mutual agreement'

(4) Company B filed an Employer's Return of Remuneration and Pensions in respect of the Taxpayer for the year of assessment 2007/08 showing, among other things, the following particulars:

(a)	Period of employment:	1.4.2007 to 31.3.2008
(b)	Capacity in which employed:	Position E
(c)	Particulars of income:	
	Salary	$1,744,241
	Bonus	116,772
	Total	$1,861,013

(5) (a) In his Tax Return – Individuals for the year of assessment 2007/08, the Taxpayer declared the same employment income as in Fact (4)(c) above. He declared that he did not have any solely-owned properties which were let out during the year.

(b) The Taxpayer also claimed deduction of home loan interest and declared the following particulars:

Location of the property involved:	Address F ('the Property')
His share of ownership:	100%
His share of home loan interest:	$186,527
The Property was occupied as his residence for the full year:	Yes

(6) The Assessor raised on the Taxpayer the following salaries tax assessment for the year of assessment 2007/08:

Income [Fact (4)(c)]	$1,861,013
Less: Home loan interest	(100,000)*
	1,761,013
Less: Allowances	(300,000)
Net chargeable income	$1,461,013
Tax payable thereon	$212,872

* Deduction for home loan interest was restricted to the statutory limit.

(7) The Taxpayer objected to the above assessment on the ground that the then exchange rate should be used when calculating his salaries tax payable as this was what the bank would use when exchanging his Australian dollars into Hong Kong dollars for paying his tax bill.

(8) In amplification of his ground of objection, the Taxpayer put forward the following contentions:

(a) He was employed by Company D. He was based in Australia and as such, his remuneration was paid into a Hong Kong bank account in Australian dollars. He therefore saved for his tax in Australian dollars.

(b) An unfair exchange rate had been used when making the assessment. He had been disadvantaged due to the recent economic downturn resulting in the HKD/AUD exchange rate changing dramatically.

(c) The exchange rate at the time he submitted his tax return to the Inland Revenue Department ('the Department') was approximately HKD8 to AUD1. At the time he objected against the assessment, it became approximately HKD4 to AUD1. He had a balance of tax due of HKD212,872, which, at an exchange rate of HKD8:AUD1, meant he should owe AUD26,609. However, as the exchange rate had become HKD4.8:AUD1, the tax due equated to AUD44,350. Therefore, he had been unfairly penalized and was paying too much tax compared to what he earned.

(d) The total amount of income earned in Australian dollars was AUD244,727 [AUD275,889.77– (AUD32,959.52 - AUD1,796.78)] [see Fact (9) below]. At a tax rate of 15%, the tax due should be AUD36,709 before taking into account the deductions. However, his tax was calculated by the Department based on income of HKD1,461,013, resulting in him owing HKD256,762, which equated to AUD53,000 at an exchange rate of HKD4.85:AUD1. This was well in excess of 15% of his income in Australian dollars. He should only pay 15% of AUD244,727 less the home loan interest deduction and the allowances. The net chargeable income should approximately be AUD162,000 and the tax payable at 15% tax rate should be AUD24,300. Using the exchange rate of HKD4.85:AUD1, the tax payable should be HKD117,000.

(e) As he lived in Australia, he kept his salary in Australian dollars. He did not convert his income into Hong Kong dollars at the time of receipt of earnings.

(f) The payment in lieu of provident fund of AUD32,959 ('the Sum') [see Fact (9) below] went straight into his superannuation fund ('the Retirement Fund'), in Australia.

(g) The Sum placed into the Retirement Fund could not be accessed until he reached the age of 60 and retired from full-time work. As such, the Sum could not be considered as income and therefore could not be taxed.

(h) By Australian tax law, it was compulsory to put the employer sponsored and funded monies directly into a superannuation fund. He was, by law, compelled to put the Sum into a superannuation fund, and did request the employer to remit the Sum directly into the Retirement Fund.

(9) To substantiate his objection, the Taxpayer furnished a breakdown of his income as follows:

Nature	Amount AUD	Amount HKD [1]
Basic salary	212,641.96	1,434,376
Payment in lieu of provident fund	32,959.52 [2]	222,328
Payment in lieu of provident fund	(1,796.78)	(12,120)
Other payments	14,773.85	99,657
Sub-total	258,578.55	1,744,241
Profit sharing	17,311.22	116,772
Total [Fact (4)(c)]	275,889.77	1,861,013

Note 1: Converted at 6.7455, the average buying rate for the year of assessment 2007/08
Note 2: AUD212,641.96 x 15.5% [Fact (3)]

(10) In correspondence with the Assessor, the Taxpayer confirmed that:

(a) The Sum was paid in accordance with clause 12.1 of the Agreement at Fact (3) above.

(b) Company D paid the Sum directly to the Retirement Fund, which was located in Australia.

(c) As it was a contractual obligation of Company D to pay 15.5% of salary as payment in lieu of provident fund, it was to be assumed

that in law, Company D was compelled to pay it in accordance with the terms of the Agreement. It went without saying that he had full rights in a court of law to recover any unpaid amounts and therefore a right of action against his employer.

(11) (a) Upon enquiries by the Assessor, Company B provided the following information:

(i) The remuneration was paid into the Taxpayer's bank account in Hong Kong through autopay.

(ii) The contribution was paid directly to the Retirement Fund with effect from August 2007.

(iii) The fund provider was chosen at the Taxpayer's own choice. Company B did not get involved except forwarding part of his salaries to the Retirement Fund upon request.

(iv) In case the contribution was not paid into the Retirement Fund, Company B would normally remit the contribution again in the following month unless the Taxpayer requested the payment to be paid with his salary.

(b) Company B provided the following documents:

(i) A copy of the form 'Salary Sacrifice Authorisation' ('the Authorisation Form') completed by the Taxpayer on 24 July 2007, showing, inter alia, the following particulars:

- The Taxpayer requested Company B to deduct from his monthly salary AUD4,000 and pay it to his Australian Superannuation Fund with effect from August 2007.

- The name of the fund holding company was the Retirement Fund.

- The Taxpayer understood and accepted that super-fund contributions would be included in the annual employer's tax return as taxable earnings.

(ii) Copies of remittance advice slips for the months August 2007 to March 2008 showing that AUD4,000 was remitted to the Retirement Fund each month.

(12) It subsequently came to the Assessor's knowledge that the Taxpayer had let out the Property. In reply to the enquiries raised by the Assessor, the

Taxpayer confirmed that he had let out the Property with effect from 15 June 2007.

(13) In accordance with the information provided by the power company, the Taxpayer closed the electricity account at the Property on 26 October 2006.

(14) The Assessor does not accept that the exchange rate at the time of paying the tax bill should be adopted when calculating the Taxpayer's salaries tax payable. She also considers that the Sum was a perquisite received or deemed to have been received by the Taxpayer and hence should be fully assessable. Moreover, since the Property was not used as the Taxpayer's residence, the Taxpayer's claim for home loan interest deduction should not be accepted. The Assessor therefore proposes to revise the salaries tax assessment for the year of assessment 2007/08 as follows to withdraw the home loan interest deduction:

Income [Fact (4)(c)]	$1,861,013
Less: Allowances	(300,000)
Net chargeable income	$1,561,013
Tax payable thereon	$229,872

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.

The issues to be decided

5. We need to consider the following two issues:

(a) whether the amount paid by the Taxpayer's employer directly into his personal superannuation fund account in Australia during the year of assessment 2007/08 should be chargeable to salaries tax; and

(b) secondly, whether the income received in Australian dollars should be converted to Hong Kong dollars at the exchange rate when the tax was paid.

The relevant legislation

6. Section 8(1)(a) of the Inland Revenue Ordinance (Chapter 112) ('IRO') provides as follows:

'(1) 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; and'

7. Section 9(1)(a) of the IRO defines the meaning of 'income from employment'. It reads as follows:

'(1) 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, except-

(i)-(iii) (Repealed 24 of 2003 s. 3)
(iv) subject to subsection (2A), any amount paid by the employer to or for the credit of a person other than the employee in discharge of a sole and primary liability of the employer to that other person, not being a liability for which any person was surety;'

8. Section 9(2A) of the IRO provides as follows:

'(2A) Subsection (1)(a)(iv) shall not operate to exclude-

(a) any benefit that is-

(i) provided by an employer otherwise than in connection with a holiday journey; and
(ii) capable of being converted into money by the recipient;

(b) …..

(c) …..

from income from any office or employment.'

9. Section 11B of the IRO states 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.'

10. Section 11D of the IRO also provides as follows:

'For the purpose of section 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 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:

Provided that for the purposes of this paragraph income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person;

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

Provided that-

(i) …..
(ii) …..'

Burden of proof

11. Regard should also be had to section 68(4) which states as follows:

'(4) The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

12. Hence, the burden of proof falls upon the shoulders of the Taxpayer to show that the assessment is incorrect.

The relevant case law

13. Our attention was drawn to the following Decisions:

(a) David Hardy Glynn v CIR 3 HKTC 245;
(b) D89/02, IRBRD, vol 17, 1089; and
(c) BR 29/75, IRBRD, vol 1, 189.

14. The IRO does not contain any definition of the term 'perquisite' in section 9(1)(a). Therefore, we need to consider the relevant case law to assist us in providing a suitable definition. In David Hardy Glynn v CIR 3 HKTC 245, the issue before the Privy Council was whether or not the school fees paid by an employer in respect of an employee's child constituted income from employment of the employee. The Privy Council held that money paid for the benefit of an employee by his employer pursuant to the contract of service was a perquisite and therefore the sum of school fees paid by the company was

employment income. Lord Templeman said at pages 250 – 251:

> *'The result of the authorities is that a perquisite includes money paid to the taxpayer and money expended in discharge of a debt of the taxpayer. There is no difference between a debt of the taxpayer discharged by an employer pursuant to the contract of service and money paid for the benefit of an employee by his employer pursuant to the contract of service ….. For present purposes it suffices that an identifiable sum of money required to be expended by an employer, pursuant to a contract of service for the benefit of the employee, is money paid at the request of the employee and is either part of the employee's salary or is a monetary perquisite taxable as such …..'*

15. Lord Templeman further stated at page 251:

> *'….. There is nothing in Section 9 to suggest that the expressions "salary" and "perquisite" do not include sums contracted to be paid by the employer for the benefit of the employee.'*

16. D89/02, IRBRD, vol 17, 1089 is of assistance. There, the Taxpayer was a senior captain. It was a term of his employment that he would receive a provident scheme contribution of 15.5% of salary (less all mandatory payments paid by his employer in respect of him) paid with salary or by such other arrangements as he might request subject to mutual agreement. Specific instructions were given to his employer to make payment of the 15.5% provident scheme contribution to a United Kingdom provident fund company which was chosen by him. He asserted that these contributions were not paid to him as salary and at no time did he have direct control of, did not form part of his employment income and should not be chargeable to salaries tax. The Board dismissed his appeal and in turn, held that such sums were income from the taxpayer's employment and fell within the category of 'perquisite' and as such were assessable to tax. The Board said at page 1100:

> *'….. As held in the Glynn case, a perquisite was said to include "money paid to the taxpayer and money expended in discharge of a debt of the taxpayer and that there was no difference between a debt of the taxpayer discharged by an employer pursuant to the contract of service and money paid for the benefit of an employee by his employer pursuant to the contract of service". In the present case, since the provident fund provider to which the Relevant Sums were paid was the Taxpayer's choice and the payment of the Relevant Sums was made by Company C in discharge of the Taxpayer's liability towards his provident fund provider and also for the benefit of the Taxpayer, the Relevant Sums were thus income from his employment falling within the category of "perquisite" and as such are assessable to tax.*
>
> *We note the Taxpayer's argument that the Relevant Sums did not accrue to him during the years of assessment because he did not have control and could not enjoy the benefit of the Relevant Sums until retirement. However, we disagree with the Taxpayer that the Relevant Sums did not accrue to him during the*

> *years of assessment. Under his contract of employment, he was entitled to receive a provident fund scheme contribution which was to be paid with his salary or by such other arrangements as he might request. In other words, he was entitled to and expected payment of the contribution by Company C each month. Had Company C not paid the Relevant Sums to the provident fund provider as directed by the Taxpayer when they fell due, the Taxpayer would forthwith have a right of action against Company C to recover the same and not until the time of his retirement. Section 11D(b) provides that income accrues to a person when he becomes entitled to claim payment thereof. Thus, the Relevant Sums had accrued to the Taxpayer in the years of assessment in question. Since the Relevant Sums had been dealt with by Company C on his behalf and according to his directions, the Relevant Sums were also deemed to have been received by him in the relevant years of assessment when they were paid by Company C to his provident fund provider. Hence the Relevant Sums constitute the Taxpayer's taxable income in the years of assessment in question.'*

17. In BR 29/75, IRBRD, vol 1, 189, the Board rejected the taxpayer's contention that the rate of exchange should be adopted in converting his employment income from U.S. dollars into Hong Kong dollars at the prevailing rate at the time of paying of the tax. The Board endorsed the IRD's practice to adopt the average exchange rate for the year of assessment in which the income was received and said at page 191:

> *'….. A taxpayer is taxed on a percentage of the income he receives so that such percentage is properly referable to the buying power or value of the currency converted to the Hong Kong dollar equivalent of such currency at the time of its receipt. It would, therefore, be realistic to have regard to the value of the currency during the basis period in Hong Kong dollars and for that purpose to take the mean or average rate for the twelve months of that period. If the strength of the U.S. dollar had risen sharply in value in later years surely it would not be right for a taxpayer to pay more by a calculation of a higher rate than is represented by the value of currency at the time of its receipt.'*

The Taxpayer's arguments

Superannuation Payment

18. The Taxpayer took the view that having regard to the fact he elected to have his employer sent A$4,000 per month directly to his specific Retirement Fund, he asserted that he could not access this money until he turned 60 years of age and retired from full time employment. He also indicated to us that the Australian Taxation Office ('the ATO') took the view that since he was a full time resident of Australia, in turn, he was taxed by the ATO at the rate of 15.5%. He therefore took the view that he was being taxed on the same amount of money by the IRD and the ATO.

The Exchange Rate

19. He also drew to our attention the fact that since he was paid in Australian dollars, he was always subject to currency fluctuations between the Australian dollar and the Hong Kong dollar which had been exceptionally volatile over the relevant period. He took issue with the IRD using the average rate for the year of assessment in calculating his salaries tax. He took the view that due to the volatile fluctuations in exchange rate between the Australian dollar and the Hong Kong dollar, the average rate was detrimental to him which resulted in him having to pay more tax. He asserts therefore he was being unfairly penalized.

Discussion

Superannuation Payment

20. The Taxpayer's case is very similar to the scenario which the Board dealt with in D89/02, IRBRD, vol 17, 1089. We have no hesitation in coming to the conclusion that the payments made to the retirement fund by the Taxpayer's employer pursuant to his employment contract was indeed from his employment which should be accrued to the Taxpayer. Therefore, there can be no doubt that those payments were chargeable to salaries tax. It is also quite clear in our view that income from employment is by no means restrictive to salary only. Section 9(1)(a) of the IRO provides that income from employment includes among other things, that is, salary and perquisite. It was held by the Privy Council in David Hardy Glynn v CIR 3 HKTC 245 the perquisite includes money paid for the benefit of an employee by its employer pursuant to the contract of service. It is also quite clear that the payment made by the employer in the case before us was pursuant to the terms of the Taxpayer's contract of employment.

21. The Taxpayer was indeed entitled to receive payments in lieu of provident fund. Such payment and the additional sacrificed salary were paid by his employer to the retirement fund as directed by the Taxpayer.

22. Therefore, we conclude that the payments in question were identifiable sums paid by his employer for his sole benefit and as such was a perquisite for the purposes of section 9(1)(a) and therefore taxable.

23. The Taxpayer's argument before us was on the basis that he felt he had been unfairly treated in that he was facing a double taxation scenario. How the ATO would treat any sums received is not a matter for us to dwell upon nor to take this into account in our decision.

24. His contentions, however strongly felt, are irrelevant for us when considering the issues that are before this Board.

25. We have no hesitation in accepting that the relevant payments indeed did accrue to the Taxpayer during the relevant year of assessment 2007/08.

The Exchange Rate

26. Clearly, the IRO does not provide what exchange rates should be used in converting a taxpayer's employment income which is received in a foreign currency when calculating salaries tax.

27. However, the past practice of the IRD has always been to adopt the average buying rate for this particular purpose.

28. The argument that utilising a conversion rate long after the income is received, that is, when the tax is due to be paid is in our view unrealistic. It is unacceptable that exchange gains or indeed, losses should be relevant to the calculation of the salaries tax.

29. We also refer to BR 29/75, IRBRD, vol 1, 189. It is quite clear that there can be no doubt that the Board in that case took the view that the correct approach by the IRD is to adopt an average buying rate for the relevant year of assessment. That being so, we have no hesitation in accepting that the case before us took the average buying rate for the year of assessment 2007/08 in computing the value of the income received by the Taxpayer during the year in Hong Kong dollars.

30. We reject the Taxpayer's assertion that his income should be converted into Hong Kong dollars at the exchange rate when the tax was paid. The rise or fall of the Australian dollar is not something which can be taken into account when one is calculating his salaries tax.

Conclusion

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