**Case No. BR 13/74**

*Board of Review* :

L. J. D'Almada Remedios, *Chairman*, Charles A. Ching, W. F. Houstoun & A. G. Hutchinson, *Members.*

**13th January 1975.**

Salaries tax—additional assessment for salaries tax to include gratuity paid to taxpayer—whether gratuity should be brought into computation of his income for year of assessment or for subsequent year.

The appellant, who was employed by the Hong Kong Government on expatriate contract terms, was entitled to receive payment of a sum by way of gratuity on the satisfactory completion of his tour of resident service i.e. on the 3rd April 1973. He was also entitled to vacation leave, commencing on the 4th April 1973. Government Regulations allowed payment of the gratuity to be made not earlier than 4 clear days before the employee's departure on vacation leave. The payment voucher for the appellant's gratuity was cleared by the Treasury on the 30th March 1973 and credited to his account on the 2nd April 1973. The appellant was assessed to additional salaries tax on the gratuity paid to him for the year of assessment ended 31st March 1973. The appellant objected on the ground that as his claim to the gratuity did not arise before the expiration of his tour of resident service i.e. 3rd April 1973 the gratuity should not form part of his assessable income for the year of assessment 1972/73.

**Decision:** Appeal allowed. Assessment to be revised.

Appellant in person.

Charles Lui for the Commissioner of Inland Revenue.

*Reasons* :

For the year of assessment 1972/73 an additional assessment for salaries tax was raised against the Appellant to include a gratuity paid to and received by him.

The Appellant's case is that the gratuity paid should not be brought into the computation for the year of assessment with which we are concerned but in the subsequent year.

At the hearing of this appeal, the Revenue queried the necessity of the Appellant's objection to the assessment on the ground that the Appellant was notified of his entitlement to apply for a relation back of the gratuity under proviso (i) of section 11D of the Inland Revenue Ordinance in which event, on the application of the proviso, he would not be prejudiced by the assessment because, in the final result, the amount of tax payable by the

Appellant would be the same as if he were right in his contention. However, the Appellant has indicated his intention to proceed with the appeal as he desires a ruling on the issue : a stand which we think the Appellant is entitled to take having validly objected to the assessment. In the circumstances, for the purpose of our decision we need only state the facts that have a bearing on the point involved.

The Appellant is an expatriate government servant. He is employed on contract terms which require him to do a specified tour of resident service. His tour of service (including an extention period) expires on the 3rd of April 1973. He is then entitled to vacation leave commencing from the 4th of April 1973. The payment voucher for the Appellant's gratuity was cleared by the Treasury on the 30th of March 1973 (four days before the Appellant's departure from the Colony) and credited to the Appellant's account on the 2nd of April 1973.

It is common ground that the gratuity is part of the Appellant's income. In the ascertainment of assessable income for salaries tax, the Ordinance provides that : —

> "Income accrues to a person when he becomes entitled to claim payment thereof".

In our view this is clearly intended to mean that income accrues to a person when he has a legal right to receive payment of that income. In other words, when his right to payment has crystallized and he is entitled to "claim"—in the context meaning enforce—payment.

The Appellant's case is that he can only claim the gratuity when his tour of resident service expires which is the 3rd of April 1973. For this reason the gratuity should not come into the computation for the year of assessment 1972/73. The Revenue's contention is that the Establishment Regulations form part of the Appellant's contract of service and that by the terms of E.R. 146(1) the Appellant is allowed payment of the gratuity not earlier than four clear days before his departure on vacation leave. As the Appellant's vacation leave commenced on the 4th of April 1973, it is contended that the gratuity was properly brought into account for the year of assessment ended the 31st of March 1973 since the Appellant became entitled to payment on the 30th of March 1973.

We have mentioned that the Appellant is employed on contract terms. A copy of that contract has been produced to us. There is a clause in the contract that deals with the gratuity payable to the Appellant. This clause in the contract is to some extent similar to E.R. 146 although the wording is slightly different. The contract states that the Appellant is subject to the Orders and Regulations of Government and to Departmental Instructions and to Colonial Regulations but "these Regulations do not constitute a contract between the Crown and its servants". Some passing reference is also made to the Establishment Regulations. Whether these Regulations form part of the Appellant's contract of service is not for us to decide. But in so far as the gratuity is concerned we are of the view that we ought not look to E.R. 146(1) to determine the Appellant's rights or to resolve the issue. This is because the Appellant's contract of service deals with the question of gratuity and, as we have mentioned earlier, covers what is contained in E.R. 146(1). The contract, therefore,

prevails and we must look to it, and not to E.R. 146(1), to see what was agreed between the parties and thereby determine their respective rights.

However, as the Commissioner has relied on E.R. 146(1) we will, for completeness, set it out. It reads : —

> "Subject to the provisions of paragraphs (2) and (3) of this Regulation and to the terms of particular agreements in individual cases, a gratuity is payable, upon satisfactory completion of the agreement, or if the officer's services are terminated by the Government for reasons other than misconduct, for the completed period of service, including earned vacation leave and the actual travelling time to the Colony on first appointment (provided it does not exceed the standard voyage period—see E.R. 1205), at the rate appropriate to the tour of service in Hong Kong which the officer has just completed under paragraph (4) of this Regulation. The gratuity relating to the period of the journey to Hong Kong on first appointment, where applicable, and for the period of service in Hong Kong will be paid not earlier than four clear working days before the officer's departure on vacation leave: that relating to the officer's vacation leave will be paid on the expiry of such leave.".

In the Appellant's contract the gratuity is dealt with in separate paragraphs. The material parts are as follows : —

> "14(i) — On satisfactory completion of the tour of service required by this Memorandum or if the Officer's services are terminated for reasons other than misconduct, the Officer will receive a gratuity for the period of service . . .
>
> "(ii) The gratuity . . . relating to the completed period of resident service . . . is normally paid not earlier than four clear working days before the officer's departure on vacation leave . . .".

The Appellant's contract was entered into with the Secretary for the Civil Service. Mr. T. who is the head of the Conditions of Service Division and who, on behalf of the Secretary for the Civil Service, deals with contract officers and the agreements with them appeared before the Board and stated that a contract officer is not eligible for any terminal benefits until he has completed his period of service; that this is made clear to contract officer; that although normally the gratuity is paid four days before vacation leave this is basically an administrative convenience but the department does not accept that it has a liability until the whole period of resident service is completed.

We assume that Mr. T. was called by the Appellant to show that there was a complete understanding and agreement between the Appellant and his employers as to what was intended by gratuity clause and that there is no conflict of views as to the rights of the parties.

Be that as it may, when a transaction has been reduced into writing by agreement between the parties, the writing becomes, in general, the exclusive record thereof and the intention of the parties must be gathered by what is stated in the document itself.

Looking at the contract are we able to say when the Appellant became entitled, as a matter of right, to receive payment? We think the answer is found in clause 14(i). It states that the Appellant will receive a gratuity when he completes the tour of service required by the memorandum which, under the contract, is the 3rd of April 1973. That clause also imposes a condition for the payment of the gratuity. The condition is "satisfactory completion". He, therefore, does not become entitled to the gratuity until there is not only completion but satisfactory completion; and this can only be shown when he completes his duties on the 3rd of April. If he attempts to claim it before that date his claim would be premature. We are concerned with the date when the Appellant had a legal right to receive payment. Early or late payment is not the criteria. The operative words in clause 14(i) are : "On satisfactory completion . . . the officer will receive a gratuity". It, therefore, spells out the time when he is entitled to receive it.

Clause 14(ii) must, therefore, be read to see how it fits in with the clear and unambiguous statement of intention expressed in clause 14(i) and we must endeavour to construe it, if possible, in a manner that is in harmony with and not repugnant to clause 14(i). Having regard to the collocation of the words used in clause 14(ii) we do not think it is at variance with the preceding sub-clause. Clause 14(ii), when read "in pari materia" with clause 14(i), serves to indicate that the employer is favourably disposed to allow advance payment of the gratuity but the employee should not expect the receipt of it earlier than four clear working days before the officer's departure on vacation leave. It does not create a legal obligation on the part of the employer to make the advance payment; nor does it fix the date or time for the advance payment which is in the nature of a concession rather than of right. To hold otherwise would be to make the two sub-clauses of clause 14 inconsistent with each other and we are constrained by the general rules of interpretation of documents to avoid a construction that would produce such an effect unless one finds that the language used is such that they are incapable of being reconciled. In our view no repugnancy arises as we believe that the interpretation which we have ascribed to the clause is what the parties intended. This being so, we agree with the Appellant that his legal right to receive payment does not crystallize until he completes his tour of resident service. That date is the 3rd of April 1973.

We would mention in passing that we would be disposed to construe E.R. 146(1) (if it were applicable) in a similar manner.

For the reasons given above, the assessment is set aside and we are remitting this case to the Commissioner for him to revise the assessment accordingly.