Case No. BR 3/73

Board of Review :

L. J. D'Almada Remedios, *Chairman*, A. Zimmern, Q.C., E. J. Lawrence & Seaward Woo, *Members.*

12th November 1973.

Salaries tax—ascertainment of assessable income—Inland Revenue Ordinance s. 11(2)—assessment of salaries tax on lump sums awarded by company to employee on retirement.

The appellant retired from contract service with a Hong Kong company and was immediately re-engaged on a monthly basis. The company paid the employee on his retirement the sum of $150,000 (an amount based on one month's salary for every full year's service) and the sum of $61,500 (not out of an approved retirement scheme, but in accordance with the company's policy) as an addition to the capital sum withdrawn from the provident fund namely $79,000 to provide for the purchase of an annuity equal to 1/3rd of the appellant's finishing salary. The appellant was assessed for salaries tax under section 11(2) of the Inland Revenue Ordinance, the assessment including the sums of $150,000 and $61,500 paid to the appellant. The appellant appealed against this assessment. On appeal.

Decision: Appeal dismissed. Assessment confirmed.

Case referred to:—Weston v. Hearn, 25 T.C. 428.

Reasons :

The Appellant was employed by G. & Co. He retired from contract service with that Company on the 31st of December 1969, and was re-engaged on a monthly basis from the 1st of January 1970. Upon his retirement his employer paid him a sum of $150,000 (an amount based on, but not necessarily equivalent to, one month's salary for every full year's service). The Appellant also withdrew a sum of $79,000 from his employer's provident fund. This sum was withdrawn under an approved retirement scheme, so the Appellant is not eligible to salaries tax on this sum by virtue of section 8(2)(*c*) of the Inland Revenue Ordinance. The Appellant was further paid a sum of $61,500 (not out of an approved retirement scheme) but in accordance with the Company's policy as an addition to the capital sum withdrawn from the provident fund to provide for the purchase of an annuity equal to 1/3 of the Appellant's finishing salary. These primary facts are referred to by the Commissioner in his Determination and are supported by letters from the Appellant's employers.

The Appellant did not give evidence before the Board and no witness were called on his behalf.

The Appellant did not give evidence before the Board and assessment 1970-71 (Basis Period : 1.4.69 to 31.3.70) under section 11(2). The assessment includes the ex-gratia payment of $150,000 and the sum of $61,500 paid to the Appellant. Against this assessment, the Appellant, through his tax representative, lodged five Grounds of Appeal. These grounds were very exhaustively dealt with in written submissions produced and argued before the Board. We have carefully considered these submissions, but, in our view, they are without any real merit. For the purpose of this appeal it is sufficient if we merely set out the substance on which grounds of appeal were based together with our reasons for differing with the contentions made.

GROUND 1: "That the Appellant joined the Company in 1933 and retired from that employment on the 31st of December 1969 and, therefore, his income for the period from the 1st of April 1969 to the 31st of December 1969, should be assessed under section 11(6) of the Ordinance."

As the Assessor has rightly put it, the Appellant's service with the Company was not discontinued but retained on new terms or under a new contract: his "employment" as such was not terminated. He remained employed for there was no break or termination of employment. In any event, we cannot see how the Appellant could be assessed under section 11(6). That section is applicable where a person ceases to derive income from a source. The Appellant's taxable income was throughout derived from the same source.

GROUND 2: "The Provident Fund started in 1952; HK$140,625.75 should have been there in respect of the Appellant's 35 years service in December 1969. In fact, only HK$79,111.44 was in the fund. The balance, $61,514.31 ($61,500.00 sic), was the sum due to the Appellant from the Fund and identical in nature with the $79,111.44 he had already received. Therefore, the $61,500.00 is not taxable."

The application for approval of the Provident Fund under section 87A of the Ordinance was made by the Appellant's employers on the 4th July 1957. On the evidence before the Board and confirmed in a letter from the Appellant's employers, the $61,500.00 was not paid from an approved retirement scheme. It was paid to increase the Appellant's pension entitlement in keeping with the Company's policy. A sum so paid is clearly taxable under the Ordinance and it is not with our rights to hold otherwise whatever the equitable considerations may be.

GROUND 3: "The gratuity of HK$150,000.00 is an entitlement to income arising at a time outside the period of tenure of employment and cannot be allocated, therefore, to a period for inclusion in the assessable income. If the new proviso of 1965/66 might within the limits of any fairness be invoked it must be confined to the period 1966-69 only."

The purpose of the payment is clarified in the exhibits produced which show that it is and has been the practice of the Company to effect such payment to expatriate staff on a formula not necessarily equivalent to but based on one month's salary for every full year's of service. The payment was calculated by reference to previous service and as it accrued to the Appellant by virtue of his service with the Company, it is chargeable to tax. See also **Weston v. Hearn**[1]**.**

GROUND 4: "A claim of $750 as monthly allowances for travelling expenses as salesman, depreciation on his car, petrol, cleaning, parking, cross-harbour expenses, insurance and registration, all having been incurred in the earning of commission."

As to whether this sum was so expended monthly is a question of fact. There is no evidence that the Appellant incurred such an expenditure, or, indeed, as to what expenditure he did incur, if any. Nor is there any evidence to show that if there were any of such outgoings or expenses they were incurred "wholly, exclusively and necessarily' in the production of assessable income. The Appellant has wholly failed to establish to our satisfaction the conditions that must be proved before this claim can be allowed. We would add that these expenses were not even claimed in his returns.

GROUND 5: "A claim of entertainment allowance which consumed 40% of the commission earned by the Appellant by way of rebate commission."

This is another item on which there is not a scrap of evidence in support of such a claim. The comments we have made in regard to Ground 4 apply, *mutatis mutandis*, to this ground of appeal.

In short, we find no substance in this whole appeal and it goes without saying that the assessment is confirmed.

[1] 25 T.C. 428.