

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. BR 89/77

#### *Board of Review:*

L. J. D'Almada Remedios, *Chairman*, G. A. Hope, David K. P. Li, G. E. S. Stevenson, *Members*.

#### **25th August 1978.**

Salaries tax – wife employed by Government on pensionable terms prior to marriage – retiring on marriage and receiving a gratuity – wife re-employed on temporary terms – whether marriage gratuity paid to wife exempt from tax under section 8(2)(c) of the Inland Revenue Ordinance – whether gratuity was compensation for surrender of a benefit derived from holding a permanent and pensionable office.

Prior to her marriage to the appellant the appellant's wife was employed by the Hong Kong Government on pensionable terms. She elected to retire on her marriage and was paid a gratuity of \$28,038.00 under the Pensions Ordinance, Cap. 89. She was re-employed on temporary month-to-month terms after her marriage. The marriage gratuity paid to the wife was included in the appellant's assessable income for salaries tax. The appellant objected to the assessment claiming that the marriage gratuity was a commutation of pension under the Pensions Ordinance and was therefore exempt from tax by virtue of section 8(2)(c) of the Inland Revenue Ordinance. Alternatively, the taxpayer claimed that the sum paid was not income from employment but compensation for the wife's surrender of her right to claim a pension on her retirement and her willingness to be re-employed on less favourable terms. The Commissioner rejected the appellant's claim. On appeal.

**Decision:** Appeal disallowed. Assessment confirmed.

Taxpayer in person.

A. K. Gill for the Commissioner of Inland Revenue.

#### *Reasons:-*

Since June 1964 Miss D (now Mrs. S) has been employed by the Hong Kong Government. She was confirmed to the permanent and pensionable establishment of the Civil Service on the 1st June 1966. On the 1st July 1975 she gave notice of her intended marriage to Mr. S and elected to retire from the service with the benefits due to her. She also expressed a willingness to continue in the service after marriage on temporary month-to-month (non-pensionable) terms. On the 17th July 1975 approval was given to her to retire and for her re-appointment on a temporary month-to-month basis with effect from the 8th October 1975 (which was the day after her vacation leave expires).

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As a consequence of her retirement, she was paid a marriage gratuity of \$29,038.00. It is conceded by the parties that the expression "marriage gratuity" means a gratuity paid to a female officer who retires from public service because she has married or is about to marry.

On the 16th August 1975 she married Mr. S (the Appellant). In computing the income of the Appellant for the year of assessment 1975/76 the Commissioner of Inland Revenue included the marriage gratuity received by his wife as part of his remuneration for salaries tax purposes.

If the gratuity received by Mrs. S is part of her income from employment before marriage, there is some doubt in our minds as to whether the Appellant is liable for tax on Mrs. S's earnings for the period when she was not his wife. However, this is not a point taken by the Appellant in his appeal against the Commissioner's Determination and he has indicated to us that he does not wish to take this point so that, in the event of the Commissioner's Determination being upheld, his liability for tax will not be challenged on this ground.

The case for the Appellant is that the gratuity paid to his wife is not taxable as it was paid in commutation of a pension and therefore exempt from tax by virtue of section 8(2)(c) of the Inland Revenue Ordinance which reads as follows:-

"In computing the income of any person ... there shall be excluded the following:-

- (a) .....
- (b) .....
- (c) any sum received by way of commutation of pension under an approved retirement scheme or the Pensions Ordinance;"

It goes without saying that, to obtain exemption, a pension must be under the Pensions Ordinance as we are not concerned with an approved retirement scheme. Under section 5 of the Pensions Ordinance there is no absolute right to a pension. We think the word "absolute" is significant. It is intended to preserve a right to the Crown, where circumstances are justified, to dismiss a public officer without compensation or to reduce or altogether withhold payment of a pension, at the discretion of the Crown, if an officer has been guilty of negligence, irregularity or misconduct.

Section 6 of the Pensions Ordinance set out the conditions under which a person holding a pensionable office becomes eligible for a pension. Putting it simply, a pensionable officer who elects to retire does not thereby become entitled to a pension. He must have attained the normal age of retirement (55 years) or the age of 45 years when such retirement is with the approval of the Governor and, if such officer was appointed with the

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approval of the Secretary of State and has not attained the normal age of retirement, then such retirement is with the approval of the Governor and the Secretary of State. There are other circumstances mentioned in section 6 to which a person may become entitled to a pension but they are not relevant to these proceedings.

Mrs. S has not reached a retirement age.

The Pensions Ordinance does, however, contemplate the situation of a female officer who intends to retire by reason of marriage as will be seen from the proviso to section 6 which reads as follows:-

“Provided that a gratuity *may* be granted to a female officer, in accordance with the provisions of this Ordinance, who retires for the reason that she has married or is about to marry, notwithstanding that she is not otherwise eligible under this section for the grant of any pension, gratuity or other allowance.”.

The emphasis on the word ‘may’ in the proviso is our own, which we think is indicative that payment of a gratuity is not necessarily as of right because Regulation 6 of the Pensions Regulations sets out the circumstances that must exist for the payment of a marriage gratuity. Mrs. S’s case falls within the conditions laid down in Regulation 6 and she was, therefore, paid a marriage gratuity.

It seems to us, therefore, that Mrs. S did not qualify for a pension at the date of her retirement as she did not reach the requisite retirement age, but was eligible for the payment of a marriage gratuity.

An interesting point made by the Appellant is that, under Regulation 4 of the Pensions Regulations, a pensionable officer who has been in service for upwards of 10 years may be granted on retirement a pension at the annual rate of 1/600th of his pensionable emoluments for each complete month of his pensionable service. We construe this Regulation to mean that, if a public officer retires with the approval of the Crown, having served for 10 years or more but before attaining the retirement age, then he may be granted a pension computed at the rate specified in that Regulation. Entitlement to a pension, however, is not as of right. The words ‘may be granted’ mentioned in Regulation 4 are enabling and not mandatory. The words ‘subject to the provisions of the Ordinance’ contained in Regulation 4 predicate that, if retirement age is not reached, then, unless the other qualifications for a pension as mentioned in section 6 of the Pensions Ordinance are satisfied, such public officer is not entitled to a pension.

It was, therefore, not obligatory on the part of the Crown to grant Mrs. S a pension. There is no evidence before us that Mrs. S applied for or was granted or offered a pension. In the circumstances, there could be no commutation of pension within the meaning of section 8(2)(c) of the Inland Revenue Ordinance, because ‘commutation’ is the conversion of a right to receive a series of smaller payments for a lump sum fixed payment.

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The Appellant argues, in the alternative, that Mrs. S, in electing to retire, surrendered her right to the benefit of a permanent and pensionable office and agreed to be re-engaged on less favourable terms and, in return for this surrender and as an incentive to taking up employment and thereby not depriving the Government of her years of experience, she was paid a lump sum on retirement and on taking up her employment. It is, therefore, contended that the sum Mrs. S received was not income from employment.

It may well be that Mrs. S, by electing to retire, forfeited her right to the benefit of a pensionable office, which might not have been the case had she continued in service up to retirement age. But there is no evidence before us that the gratuity she received was in return for her surrender of pension rights. Nor are we able to draw such an inference as, in our view, she was not entitled to claim a right to receive a pension. She had, however, a right to claim a gratuity by virtue of Regulation 6 of the Pensions Regulations. There is no evidence before us that the gratuity she received was in consideration of or an incentive for her being re-employed on less favourable terms. Indeed, it seems likely that the marriage gratuity would have been paid as a result of her retirement on account of marriage pursuant to the proviso to section 6 of the Pensions Ordinance irrespective of whether she elected to be re-employed.

We are unable to agree with the contention of the Appellant that the onus is on the Revenue to show that Mrs. S is liable for salaries tax on the gratuity received by Mrs. S from her employer. Having regard to sections 9(1)(a) and 68(4) of the Inland Revenue Ordinance, it is our view that the burden is on the Appellant to show that Mrs. S is not chargeable to such tax and that the assessment is incorrect.

For the reasons we have given, the gratuity paid to Mrs. S is taxable and the assessment is, therefore, confirmed.