

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D101/89

Salaries tax – computation of rental value – whether leave pay and gratuity should be excluded – section 9(2) of the Inland Revenue Ordinance.

Panel: William Turnbull (chairman), Herbert Liang Hing Yin and Vincent Liang Wan Sang.

Date of hearing: 10 November 1989.

Date of decision: 27 February 1990.

The taxpayer was employed on gratuity contract terms. Under the terms of the contract, the taxpayer was entitled to leave and a gratuity on termination of the period of employment. The taxpayer was also entitled to quarters. The taxpayer was re-employed in a different position by the same employer and was paid compensation in lieu of leave pay and the gratuity to which he would have been entitled under his first employment contract. In assessing salaries tax, the assessor included the leave pay and gratuity when calculating the value of the quarters. The taxpayer appealed against this decision.

Held:

On the facts the taxpayer was continuously employed by the same employer. The two contracts were in effect one continuous contract and there was no termination of employment and re-employment. Accordingly it was correct that the leave pay and gratuity should be included in the taxable emoluments of the taxpayer for the calculation of the value of the quarters.

Appeal dismissed.

S McGrath for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by an individual taxpayer who claims that leave pay and a gratuity received by him should be excluded from the computation of 'rental value' under section 9(2) of the Inland Revenue Ordinance.

The facts of the appeal are as follows:

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1. From 11 October 1984 the Taxpayer was employed as an officer in one of the administrative support departments of a local institution on gratuity contract terms. The employment contract was in the form of a letter dated 21 September 1984 and was for a fixed term due to expire on 31 March 1987. Under the terms of the contract the Taxpayer was entitled to leave and a gratuity on termination of the contract of employment. The Taxpayer was also entitled to and received living quarters from his employer. The written letter contract dated 21 September 1984 is hereinafter referred to as 'the first employment contract'.
2. At some date during the employment of the Taxpayer under the first employment contract he was seconded from that administrative department of the institution to be a lecturer on the staff of an academic department. Though he was performing services in a different position he was paid out of the annual budget of the administrative department.
3. Subsequently and during the course of the employment of the Taxpayer under the first employment contract the employer advertised the post which the Taxpayer was seconded and the Taxpayer applied for this post. He was short-listed and in due course was offered the post of a lecturer in the academic department. The formal offer of a new contract of employment was by letter dated 20 October 1986, 'the second employment contract', and offered employment as a lecturer from 11 October 1986. The offer stated that employment as a lecturer was probationary with the period of probation back-dated to 9 December 1985 being the date when the Taxpayer had been seconded as a lecturer to that department. By separate letter also dated 20 October 1986 and to which the formal offer of employment was an enclosure, the Taxpayer was offered the option to carry forward the long leave to which the Taxpayer was entitled under the first employment contract into the second employment contract or to receive payment in lieu of long leave and at the same time receive payment of his pro-rata gratuity on termination of the first employment contract as at 10 October 1986. The Taxpayer chose to receive the payment in lieu of long leave and his gratuity calculated up to 10 October 1986 being the date when the first employment contract had terminated.
4. When assessing tax for the year of assessment 1986/87 the assessor included in the calculation of the taxable value of the living quarters provided by the employer the amount of the leave pay and the gratuity which was paid to the Taxpayer. The Taxpayer objected to this assessment and the Deputy Commissioner by his determination dated 8 November 1988 upheld the assessment. The Taxpayer duly appealed to the Board of Review.

At the hearing of the appeal the Taxpayer appeared on behalf of himself and submitted that the Deputy Commissioner and the assessor were wrong because he had two

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clear and distinct employment contracts. He pointed out that he was in different position in the two employment contracts. He further pointed out that when he had obtained the second employment contract it had been necessary for him to answer a public advertisement, be short-listed and be offered the position as a lecturer. He further pointed out that the two posts were totally different from each other. He explained that the two posts were subject to different budgets within his employer and that he was with two entirely different departments, albeit of the same employer. He submitted that when the second employment contract had terminated the first employment contract, it had also terminated his employment. He said that as the employment had terminated the leave pay and gratuity should not have been included in the calculation of the value of the living quarters provided.

The representative for the Commissioner submitted that a distinction must be drawn between a contract of employment and the employment itself. She pointed out that a person can be employed over a period of time under a number of different employment contracts but this does not terminate the employment. She said that it frequently happens that employees have contracts renewed, extended, or modified with different terms and conditions but this does not terminate the employment.

On the facts of this case we find in favour of the Commissioner and dismiss the appeal. It is clear on the facts that the Taxpayer was at all material times continuously employed by the same employer. We agree that there is a distinction between a contract of employment and the employment itself. The facts of this case are particularly strong because under the first employment contract the Taxpayer was seconded to work as a lecturer even though he was employed under the first employment contract as an officer in an administrative support department. In addition the first employment contract was terminated simultaneously with and as part of the terms offered to him which comprised the second employment contract. Indeed part of the service under the first employment contract was deemed to have been probationary service under the second employment contract.

It is clear that the employer considered that the employment was continuous because they filed an employer's return with the Inland Revenue Department which drew no distinction between employment under the first employment contract and employment under the second employment contract. Likewise when the Taxpayer himself filed his tax return in respect of the year in question he did not differentiate between one employment contract and another. He simply reported his employment with one employer and the total amount of his remuneration for the whole of the year in question.

On the foregoing facts it is clear that there was no termination of employment and that the change of terms of employment was not termination of employment.

For the reasons given we dismiss this appeal and uphold the determination of the Deputy Commissioner.