Case No. D12/03

Salaries tax – whether a sum paid by an employer to an employee on the completion of contract was a gratuity – whether it is chargeable income – onus of proof on appellant – sections 8(1)(a), 9(1)(a) and 68(4) of the Inland Revenue Ordinance ('IRO') – sections 31B(1), 31B(2) and 31D(1)(b) of the Employment Ordinance ('EO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Christopher Chan Wai Hong and William Tsui Hing Chuen.

Date of hearing: 22 April 2003.
Date of decision: 9 May 2003.

By an 'Employment Contract for A Native-speaking English Teacher (NET) Appointed under the Enhanced NET Scheme Contract Period: From 1 September 1998 to 31 August 2000' ('the Employment Contract'), the appellant was appointed as a native-speaking English teacher in the graduate master rank by the School.

Clause 9 of the Employment Contract provided that:

' Contract Gratuity

> Upon satisfactory completion of the employment contract, the Employee shall be granted a gratuity, the amount of which is equivalent to 15% of the total basic salary receivable over the contract period.'

At $46,485 a month over 24 months, the amount was $46,485 × 24 × 15% = $167,346.

According to the School authority, a new native English teacher had been employed to replace the appellant right after his leaving. This was not disputed by the appellant.

There was no dispute that $167,346 was paid to the appellant.

By his determination dated 10 January 2003, the Commissioner of Inland Revenue reduced the additional salaries tax assessment for the year of assessment 2000/01 from additional net chargeable income of $167,346 with additional tax payable thereon of $28,449 to additional net chargeable income of $138,794 with additional tax payable thereon of $23,595.

Nevertheless, the appellant objected to such additional salaries tax assessment for the year of assessment 2000/01.

The issue was whether the said sum of $167,346 was a gratuity and was chargeable income by reason of sections 8(1)(a) and 9(1)(a) of the IRO.

The facts appear sufficiently in the following judgment.

Held:

1. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on the appellant.

2. At common law, the Employment Contract was a contract for a fixed term of two years. It expired by effluxion of time on 31 August 2000. At common law, the appellant had no right to any renewal of his employment, and, apart from clause 9, was not entitled to any termination payment.

3. The fact that the School paid two sums totalling $167,346 to the appellant purportedly under clause 9 suggested that the School considered there was satisfactory completion of the Employment Contract. At the very least, the School did not wish to take any issue on whether there was satisfactory completion of the Employment Contract.

4. $167,346 was chargeable income by reason of sections 8(1)(a) and 9(1)(a) of the IRO which provide:

   '8(1)(a) 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 … any office or employment of profit'.

   '9(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 …'

5. If, as the appellant contended, he did not complete the Employment Contract satisfactorily, that would only mean that he had no right at common law to be paid any sum under clause 9. That would not convert the payment of $167,346 by the

School into a payment to compensate for loss of his employment. He had no right to be paid any sum for termination of the Employment Contract which had simply expired. The payment would have been a gratuity and was chargeable income by reason of sections 8(1)(a) and 9(1)(a).

6. In respect of the position under the EO, section 31D(1)(b) provides that for the purpose of and subject to Part VA of the EO, where the employment contract is for a fixed term and that term expires without being renewed under the same contract, the employee shall be taken to be dismissed by his employer.

7. Section 31B(1) provides that an employee is entitled to severance payment where he is dismissed by his employer 'by reason of redundancy'.

8. Section 31B(2) provides that:

' For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that –

(a) his employer has ceased, or intends to cease, to carry on the business –

(i) for the purposes of which the employee was employed by him; or

(ii) in the place where the employee was so employed; or

(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish.'

9. Although the appellant was deemed by section 31D(1)(b) of the EO to have been dismissed for the purpose of Part VA of the EO, he was not dismissed by reason of redundancy. The requirements of the School for a native English teacher had neither ceased nor diminished. The School employed a new native English teacher to replace the appellant right after his leaving.

10. For the above reasons, the appellant had not discharged the onus under section 68(4) of the IRO. The appeal was dismissed and the assessment as reduced by the Commissioner was confirmed.

Appeal dismissed.

Tang Hing Kwan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. By his determination dated 10 January 2003, the Commissioner of Inland Revenue reduced the additional salaries tax assessment for the year of assessment 2000/01 under charge number 9-1838581-01-8, dated 29 January 2002, showing additional net chargeable income of $167,346 with additional tax payable thereon of $28,449 to additional net chargeable income of $138,794 with additional tax payable thereon of $23,595.

2. The Appellant sent the following document by registered post to 'The Clerk to the Board of Review' at Room 1003, Tower Two, Lippo Centre, 89 Queensway, Hong Kong:

> ' Tax No. ... [Name of the Appellant]
> [Address of the Appellant]
> 10th Feb. 2003
>
> To whom it may concern
> Re: Tax objection/appeal notice
>
> I continue to object to your assessment for addition tax for the year 2000/2001.
>
> Your lengthy and unclear assessment of my case shows that you haven't grasped my points.
>
> I wish this latest assessment to be treated in the same way as your assessment of my tax when I left [the Previous School].
>
> What is written in a contract and what occurs during the contract period are two different things. My contract was not renewed at [the School], thus my position was made redundant. Whether or not [the school] appointed someone else is not relevant to my case. You seemed to dwell on this point. It is ridiculous to pay someone a bonus/gratuity and then not to reappoint them. The bonus is for satisfactory work . In my case at [the School] my work was not satisfactory enough for them to reappoint me. It therefore became a redundancy payment.

(Signed)'

3. At the hearing on 22 April 2003, the Appellant said:

' I think what I put here is clear. Frankly, there is one very important point to note in everything I have said to the Tax Department – Inland Revenue, sorry – and that is it doesn't matter what is in the documentation at the beginning; it's what occurs during the contract – which is not a piece of paper – and what happens at the end of the contract, and that is what I have been saying to the Tax Department all along. It's not a matter of what people put in a statement here at the beginning; it's what occurs during the contract and what occurs at the end.

Now, the other, the other major point is that a gratuity or a bonus should be paid to somebody who has, in my opinion, excelled or done very well in their work, and should be given for good efforts, and at the end of that, at the end of that they would usually, 95 per cent of cases, be re-employed.

In this – in the case of [the Previous School] that didn't occur and I did not have to pay the additional tax. What I am saying to you is, or suggesting to you is, that at [the School] exactly the same thing occurred.

For me, they are parallel cases. I know that I have received loads and loads of pieces of paper here which try to prove that they are not, but I am not talking about these pieces of paper; I am talking about what went on during that two year appointment and what happened at the end.

What happened at the end is that I didn't go back to [the School]. What happened at the end of [the Previous School] is that I didn't go back to [the Previous School]. That's my point.'

4. When asked if he had any witness, the Appellant said:

' Any witness? I don't need any witness.'

5. When asked whether he had any further document to submit to us, the Appellant said:

' No. All of the documents that were sent to the Tax Department are here in these files.'

6. When asked whether he had finished making his point, the Appellant said:

' Yes.'

7. We told the Appellant and Ms Tang Hing-kwan that we did not think it was necessary to call on the Revenue to respond and we would give our decision in writing which we now do.

8. By an 'Employment Contract for A Native-speaking English Teacher (NET) Appointed under the Enhanced NET Scheme Contract Period: From 1 September 1998 to 31 August 2000' ('the Employment Contract'), the Appellant was appointed as a native-speaking English teacher in the graduate master rank by the School. Clause 9 of the Employment Contract provided that:

> ' Contract Gratuity
>
> Upon satisfactory completion of the employment contract, the Employee shall be granted a gratuity, the amount of which is equivalent to 15% of the total basic salary receivable over the contract period.'

9. At $46,485 a month over 24 months, the amount was $46,485 × 24 × 15% = $167,346.

10. According to the School authority, a new native English teacher had been employed to replace the Appellant right after his leaving. It would appear from the Appellant's document dated 10 February 2003 that this was not disputed by him.

11. Section 68(4) of the IRO provides that the onus of proving that the assessment appealed against is excessive or incorrect is on an appellant.

12. At common law, the Employment Contract was a contract for a fixed term of two years. It expired by effluxion of time on 31 August 2000. At common law, the Appellant had no right to any renewal of his employment, and, apart from clause 9, was not entitled to any termination payment. The fact that the School paid two sums totalling $167,346 to the Appellant purportedly under clause 9 suggested that the School considered there was satisfactory completion of the Employment Contract. At the very least, the School did not wish to take any issue on whether there was satisfactory completion of the Employment Contract. $167,346 is chargeable income by reason of sections 8(1)(a) and 9(1)(a) of the IRO which provide:

> *' 8(1)(a) 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 ... any office or employment of profit'.*
>
> *' 9(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 ...'*

13. If, as the Appellant contended, he did not complete the Employment Contract satisfactorily, that would only mean that he had no right at common law to be paid any sum under clause 9. That would not convert the payment of $167,346 by the School into a payment to compensate for loss of his employment. He had no right to be paid any sum for termination of the Employment Contract which had simply expired. The payment would have been a gratuity and is chargeable income by reason of sections 8(1)(a) and 9(1)(a).

14. We turn now to the position under the EO. Section 31D(1)(b) provides that for the purpose of and subject to Part VA of the EO, where the employment contract is for a fixed term and that term expires without being renewed under the same contract, the employee shall be taken to be dismissed by his employer. Section 31B(1) provides that an employee is entitled to severance payment where he is dismissed by his employer 'by reason of redundancy'. Section 31B(2) provides that:

> *'For the purposes of this Part an employee who is dismissed shall be taken to be dismissed by reason of redundancy if the dismissal is attributable wholly or mainly to the fact that –*
>
> *(a) his employer has ceased, or intends to cease, to carry on the business –*
>
> *(i) for the purposes of which the employee was employed by him; or*
>
> *(ii) in the place where the employee was so employed; or*
>
> *(b) the requirements of that business for employees to carry out work of a particular kind, or for employees to carry out work of a particular kind in the place where the employee was so employed, have ceased or diminished or are expected to cease or diminish.'*

15. Although the Appellant is deemed by section 31D(1)(b) of the EO to have been dismissed for the purpose of Part VA of the EO, he was not dismissed by reason of redundancy. The requirements of the School for a native English teacher had neither ceased nor diminished. The School employed a new native English teacher to replace the Appellant right after his leaving.

16. For the reasons we have given, the Appellant has not discharged the onus under section 68(4) of the IRO. We dismiss the appeal and confirm the assessment as reduced by the Commissioner.