INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D126/02

Salaries tax – whether a sum received by the taxpayer is income derived from an 'office or employment of profit' and taxable under section 8 of the Inland Revenue Ordinance ('IRO') – the principles applicable in determining whether a payment received by an employee upon termination of his service is taxable under section 8(1) of the IRO – the label attached to the payment is not decisive – the Board does not have the review jurisdiction enjoyed exclusively by the High Court – the Board has serious doubts whether it is open in law to the Commissioner to re-open the agreement reached with other taxpayers – the agreement would prima facie be binding at common law and it would not be open to either party to renege on the agreement unless such power has been expressly reserved under the agreement – sections 8(1), 64(3) and 70 of the IRO.

Panel: Benjamin Yu SC (chairman), Dennis Law Shiu Ming and Agnes Ng Ka Yin.

Dates of hearing: 8 and 28 January 2003.
Date of decision: 11 March 2003.

This was an appeal by the taxpayer against a determination by the Commissioner of Inland Revenue dated 25 September 2002 in which the Commissioner increased the salaries tax assessment of the taxpayer for the year of assessment 1999/2000 to $1,056,649 with tax payable thereon of $169,130.

Included in the sum of $1,056,649 was a sum of $855,455 which the taxpayer received from his employer upon termination of his employment.

In his determination, the Commissioner concluded that the income of $855,455 received by the taxpayer during the relevant year of assessment and upon the termination of his employment was income derived from an 'office or employment of profit' and taxable under section 8 of the IRO. The taxpayer contended that the sum of $855,455 was severance pay received by him from his employer as compensation for the loss of his employment and should not have been taxed.

The issue in this appeal was therefore whether the sum of $855,455 was received by the taxpayer as income derived from an 'office or employment of profit' and taxable under section 8 of the IRO.

The facts appear sufficiently in the following judgment.

Held:

1. In D80/00, IRBRD, vol 15, 715, this Board summarized the principles applicable in determining whether a payment received by an employee upon termination of his service was taxable under section 8(1) of the IRO. The Board reiterated them as follows:

   (a) a payment would be taxable if it is in the nature of a gift on account of past services;

   (b) a payment made on account of compensation for loss of employment or a payment in lieu of or on account of severance pay is not taxable;

   (c) it is not the label, but the real nature of the payment, that is important;

   (d) the way in which the sum in question was arrived at is a material factor in determining the real nature of the payment.

2. The Board found the taxpayer and Mr B, who was at the relevant time the assistant general manager in charge of the personnel department of Bank A-HK which employed the taxpayer, to be truthful witnesses. The Board accepted their evidence as to primary facts. This did not, however, mean that the Board necessarily accepted the inference that the taxpayer or Mr B asked the Board to draw.

3. The Board had to determine, on the basis of the evidence as to primary facts, whether the taxpayer was liable to pay salaries tax under section 8.

4. In the first place, the Board had to determine what the nature of the payment of $855,455 received by the taxpayer was. The label attached to the payment was by no means decisive, and could, in some cases, be misleading.

5. In the view of the Board, the respondent's argument attached too much importance to the label attached to the payment in the Second Letter and, with respect, ignored the evidence of the taxpayer and of Mr B as to how the Second Letter came about. The Board was satisfied upon the evidence of the taxpayer and of Mr B that the true nature of the payment was compensation to the taxpayer for the loss of his employment.

6. The Board had no doubt that the taxpayer thought that this was the purpose of the payment. The Board was also satisfied that the management of Bank A-HK

regarded the payment thus. The Board was particularly impressed by the following matters:

(a) There was very good reason for the long-serving members of staff to be dissatisfied with the package offered in the First Letter. Under that package, some one in the same or comparable position as the taxpayer would receive nothing by way of severance pay, whereas a staff who had served Bank A-HK for a much shorter period would obtain some compensation. This would prima facie be unfair and such iniquity was corrected by the package offered in the Second Letter.

(b) The evidence, especially that of Mr B, showed that the management was prompted by the level of severance pay offered by other Japanese institutions to increase the level of compensation to staff. The 'Approval/Record Form' further confirmed that the management of Bank A-HK had in mind an increase of severance pay.

(c) Paragraph 2c of the First Letter already granted to the employees a retention bonus to induce the staff to remain in the employ for as long as was necessary for Bank A-HK's purposes. That part of the payment had been subject to salaries tax, on which there was no appeal.

(d) The manner in which the sum was arrived at, viz one month per year of service, was more consistent with it being in the nature of severance pay than a retention bonus. As the taxpayer pointed out during his submissions, it would be most unlikely for Bank A-HK to be offering about $300,000 per month for him to stay in service.

7. It may be said that the taxpayer was not in law entitled to the level of compensation for loss of his employment, so that the amount paid must either wholly or in part be for some other purposes. Any such argument was, in the Board's view, unsound for the following reasons:

(a) The taxpayer had been a long-serving employee in a relatively senior position. While he was informed around November 1998 through the First Letter that he may be retrenched before June 1999, it would not be right to say that he was given a definite notice of termination. The First Letter left the date of termination totally uncertain, since Bank A-HK asserted the right to terminate the employment at any time.

(b) Even if, as a matter of strict law, the sum of $855,455 would exceed the amount of compensation that the taxpayer would be legally entitled to for

loss of his employment, that was not conclusive of the matter. What the evidence showed was that the taxpayer, qua employee, was under the belief that he was entitled to compensation for loss of his employment and that he demanded for such compensation, while Bank A-HK, qua employer, was prepared to pay such an amount to pacify the taxpayer, thereby meeting his demands. In the view of the Board, if an employer believed (even wrongly) that he should pay an amount by way of compensation, while an employee accepted the same under the (albeit mistaken) belief that he was entitled to that amount by way of compensation, the amount so paid and received would not be taxable as it would not be income received by the employee as a result of his employment.

8. It was also argued that the imposition of conditions on the payment was inconsistent with the contention that the payment was in the nature of severance pay.

9. The Board was unable to accept this argument either. Where an employer, in the position of Bank A-HK, faced the demands of an employee for compensation for loss of employment, the fact that Bank A-HK bargained to have some strings to be attached before agreeing to making such payment did not necessarily affect the nature of the payment as compensation.

10. In this connection, the Board accepted Mr B's explanation and his evidence that the spirit of the payment offered in the Second Letter was to increase the amount of severance pay to an acceptable level in line with what other Japanese companies were offering.

11. It would indeed facilitate a smooth conclusion of the business of Bank A-HK if disgruntled employees were pacified by offering them a fair compensation package. Seen in this light, the wording of the Second Letter was not inconsistent with the payment being in substance a severance payment. But as the Board observed earlier, what was important was not the label, but the real nature of the payment.

12. For these reasons, the Board would allow the appeal, and reduce the assessment appealed against from $1,056,649 to $201,194.

13. It was thus unnecessary for the Board to consider further the question of whether the Board had any jurisdiction to set aside the assessment on the basis that to maintain the same would infringe the principle of fairness.

14. The Board was inclined to accept the respondent's argument on the authority of Aspin v Estill [1987] STC 723 that the Board, as a statutory body, did not have the review jurisdiction enjoyed exclusively by the High Court. Having said that, the Board trusted that though it was beyond the Board's power to grant any relief in the nature of judicial review, the Commissioner would faithfully observe her duty to treat all taxpayers fairly.

15. The Board must, however, express its reservations over the respondent's contention that the Commissioner could re-open agreements entered into under section 64(3) by virtue of the proviso to section 70 of the IRO. Section 70 of the IRO provided that:

> *' Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under section 68(2A) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3), or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal, the assessment as made or agreed to or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value: Provided that nothing in this Part shall prevent as assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year.'*

16. It seemed to the Board that where the Commissioner (or an assessor on his behalf) reached an agreement with a taxpayer on the amount of tax payable and settled their differences, this agreement would prima facie be binding at common law and it would not be open to either party to renege on the agreement unless such power had been expressly reserved under the agreement.

17. The proviso to section 70 was negative in term, and did not purport to alter the common law in this regard.

18. The Board therefore had serious doubts whether it was open in law to the Commissioner to re-open the agreement reached with other taxpayers. However, for the reasons stated above, it was unnecessary for the Board to reach any conclusion on this issue. This must be left to be determined on another occasion.

Obiter

1. Finally, the Board could not depart from this case without making the following observations. It had transpired only during the hearing that there were four pending appeals raising exactly the same legal and factual issues, set down before four Boards differently constituted. The Board believed that this was most undesirable.

2. If in future the same situation should arise, the Board should be notified well in advance of the position and arrangements should be made for the appeals either to be heard together (if the appellants consent) or at least set down before the same Board.

3. Whilst this Board had the advantage of reading the decision of the Board in D107/02, the Board had come to its own decision in the instant appeal on the basis of the evidence before the Board. The Board had not in fact relied on the decision in D107/02.

4. But unless the appeals were conjoined or set down before the same tribunal, inconsistent findings were possible.

5. Whilst inconsistent results may, in legal theory, be justified on the basis that different boards may hear different evidence and form their own impression of witnesses, this would hardly be comprehensible to a taxpayer who obtained an adverse result from the Board. Any such contingency would speak ill of the administration of justice as a whole and generates unfairness to the particular taxpayer. This should be avoided if at all possible.

6. In the result, the appeal was allowed. The Board ordered under section 68(8)(a) that the assessment appealed against be reduced from $1,056,649 to $201,194.

Appeal allowed.

Cases referred to:

BR8/71 (unreported)
D138/00, IRBRD, vol 16, 19
Extramoney Ltd v CIR (1996) 4 HKTC 394
IRC v National Federation of Self-Employed and Small Business Ltd [1992] 2 All ER 93
Preston v Inland Revenue Commissioners (1985) STC 282
Leung Man Cheung v Secretary for Planning and Lands HCAL 274 etc of 2000
D107/02, IRBRD, vol 18, 32

D80/00, IRBRD, vol 15, 715
Aspin v Estill [1987] STC 723

Wong Kai Cheong for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

The appeal

1. This is an appeal by the Taxpayer against a determination by the Commissioner of Inland Revenue dated 25 September 2002. In that determination, the Commissioner increased the salaries tax assessment of the Taxpayer for the year of assessment 1999/2000 to $1,056,649 with tax payable thereon of $169,130.

2. Included in the sum of $1,056,649 was a sum of $855,455 which the Taxpayer received from his employer upon termination of his employment.

3. In his determination, the Commissioner concluded that the income of $855,455 received by the Taxpayer during the relevant year of assessment and upon the termination of his employment was income derived from an 'office or employment of profit' and taxable under section 8 of the IRO. The Taxpayer contends that the sum of $855,455 was severance pay received by him from his employer as compensation for the loss of his employment and should not have been taxed.

4. The issue in this appeal is therefore whether the sum of $855,455 was received by the Taxpayer as income derived from an 'office or employment of profit' and taxable under section 8 of the IRO.

The facts

5. The following facts are not controversial and we find them proved:

(a) The Taxpayer was employed by the Hong Kong branch of Bank A ('Bank A-HK') since 1 March 1982 until June 1999.

(b) Bank A-HK operated a provident fund plan ('the Plan') for its staff. Under the Plan, a member staff was required to contribute 5% of his basic monthly salary to the Plan while Bank A-HK would contribute 10% of the member staff's basic monthly salary. The Taxpayer was a member of the Plan.

(c) By a letter dated 2 November 1998 ('the First Letter') issued to its employees, Bank A-HK announced that its head office had decided to close the Hong Kong branch no later than June 1999. The letter went on to state that the termination date may not be the same for staff members of the same category. Paragraph 2 of the letter read as follows:

'Unless your employment contract is terminated by [Bank A] at an earlier stage, you have to serve the company until the very last day when our office is totally closed for business. On either case when we take the initiative to terminate your employment contract, you will be compensated with the following payments:

a. Severance pay equivalent to your monthly salary × length of service × 2/3, amount of which will be set off by employer's portion of your Provident Fund entitlement;

b. Payment in lieu of notice corresponding to your rank;

c. A further sum equivalent to 50% of total salary (including basic salary and position allowance but excluding bonus or overtime allowance) to be paid to you during the period concerned.'

The letter further stated that if the employee resigned before the closure of Bank A-HK's business, he or she would only be entitled to payments of 2a and half of 2c above.

(d) In the case of the Taxpayer, the fact that he had served Bank A-HK for over 17 years meant that the employer's contribution under the Plan exceeded the amount of his monthly salary × 2/3 × length of service. In other words, he and other long-serving employees would not in fact derive any benefit under clause 2a of the First Letter.

(e) On or about 10 March 1999, Bank A-HK's general manager issued another letter to its employees ('the Second Letter'). The Second Letter stated, inter alia:

'In recognition of your loyalty and support to [Bank A], and also as a means to further smoothening our operations for the months to come, I have had a series of conversations with Head Office and it is my pleasure to announce here today that following incentive payments will be added to employees who satisfied our requirements as follows:

1. Special Retention Bonus

Subject to (2) below, **in addition to** the packages mentioned in our letters dated November 2, 1998 to respective employees, following payments will be added:

a. A sum equivalent to your **monthly salary × length of service × 1/3**, plus

b. A further sum equivalent to **employer's portion of your Provident Fund** (as determined by your number of completed years of service according to Section 4b, Chapter 7C Provident Fund Plan of the Staff Handbook).

2. Conditions/Restrictions

In principle, the above payments applied to all employees of categories 2/2J/3 as classified in the above said letter dated 2/11/98. However, to be eligible to the additional payments, employees **must also** satisfy [Bank A] with the following points:

a. Employees must continue to work for [Bank A] through the very last day until [Bank A] takes the initiative to terminate their services.

b. Employees must continue to perform their duties to our satisfaction up to end of their services. **Their performance will be evaluated by respective superiors**, which will be taken into account when determining one's entitlement of bonus mentioned in (1) above, which may result in reduction of the above payments.

c. Employees must continue to attend their duties punctually. As a measure to keep this morale, your special payments as determined in (1) above will be deducted by a sum derived from the following formula:

(S + L ¸ 2) × monthly salary × 1/20

where S = no. of sick leave & L = no. of lateness, counted from 11/3/99 until your last date of employment.

d. This special retention bonus was approved separately by the Head Office taking into account of the unique situation of HK Branch. To

ensure its smoothness, **no information contained in this letter shall be divulged** to unrelated parties including, but not limited to [ex-Bank A] staff and other overseas branches/subsidiaries of [Bank A]. Any breaches of that will not only lead to non-payment of the above, but may also affect other benefits they are entitled ...'

(f) In the notification filed by Bank A-HK with the Inland Revenue Department ('IRD') under section 52(5) of the IRO, Bank A-HK reported that during the relevant year of assessment, it had paid, inter alia, to the Taxpayer,

(i) 'SEVERANCE PAY:

PER ORDINANCE: HK$22,500 × (17 122/365) × 2/3
= HK$260,013.69

ADD: EX GRATIA PAYMENT: HK$49,350 × (17 122/365) × 1
= HK$595,431.37'

(ii) 'SPECIAL RETENTION BONUS PER LETTER DATED 1/11/1998

HK$394,800.00 × 50% = HK$197,400.00'

The evidence

6. The Taxpayer gave evidence before us. He called one further witness, Mr B. Mr B was, at the relevant time, the assistant general manager in charge of the personnel department of Bank A-HK. We summarise their evidence below:

(a) The Taxpayer had no written employment contract with Bank A-HK.

(b) The Plan of Bank A-HK did not contain any provision which allowed Bank A-HK to set-off the employees' entitlement under the Plan against any liability on the part of Bank A-HK for compensation to the staff for loss of employment.

(c) When Bank A closed its Hong Kong branch, some 40 to 50 employees were made redundant. They all received the First and the Second Letters, and hence, the same package of payment from Bank A-HK.

(d) When the employees received the First Letter, the long-serving staff of Bank A-HK considered the amount of severance pay offered to be insufficient and voiced their dissatisfaction to the management.

(e) Mr B was the person who drafted both the First Letter and the Second Letter, and was aware of what was in the mind of the management that led to the increase in the package offered to employees. He said that the package offered in the First Letter was structured on the basis of the minimum payment required under the Employment Ordinance ('EO'). When the long-serving members of staff expressed their dissatisfaction, the management surveyed other Japanese institutions in Hong Kong and found that Bank C offered one month's salary per year of service whilst Bank D was even more generous, offering three months of salary per year of service. He told the Board that prior to issuing the Second Letter, he had made inquiry with the IRD, and was told that the IRD would consider severance pay in an amount up to one month's salary per year of service not taxable.

(f) Before issuing the Second Letter, the management of Bank A-HK obtained the approval of the head office via an 'Approval/Record Form' dated 1 March 1999. That document was headed 'Final Payment to Employees' and contained the following recommendation from the Hong Kong branch:

> '... to ensure that operations related to branch closure can be carried out smoothly, following package of final payments is recommended:
>
> ...
>
> Severance Pay (For all employees):
>
> Equivalent to one month's salary for each year of service of employee concerned or pro rata thereof.
>
> Special Retention Bonus (Depends on category of employees):
>
> ...
>
> Category 3: Equivalent to 50% of total salary income for the period from November 1998 to last date of employment around end of June 1999 or extension thereof if necessary. Nevertheless, if one resigns before end of our business, the percentage will be reduced to 25%.'

Mr B's evidence was that this was also drafted by him.

(g) The Taxpayer relied on a letter dated 6 December 2001 from Bank E to the IRD. Bank E was the entity which had taken over Bank A's operation and in that letter, the general manager, Mr F stated that:

> ' After [the First Letter], we had a second thought to the above payment. Considering that many of our ex-employees might have much difficulties to find another comparable positions in view of the very gloomy economic situation in Hong Kong (which, unfortunately turned out to be true) ... we issued [the Second Letter] to the employees announcing the following severance pay compensating their loss of employment would be added ...'

7. It will be noted that the terms of the Second Letter did not quite reflect the recommendation from the Hong Kong branch to the head office. The recommendation was for 'severance pay' to be increased to one month per year of service, whereas the Second Letter described the increase as part of the 'Special Retention Bonus', which was to be made subject to conditions that the staff continued to perform satisfactorily. As stated above, it was Mr B who drafted the recommendation as well as the Second Letter. He admitted that the matter was handled poorly at the time. He explained that the Second Letter was drafted in the way it was because of his ignorance over the importance of correctly describing the payment as severance pay. He added that by the time the letter was issued, it was already March 1999 and the smoothness of finalisation of the bank's operation was critical. For this reason, the letter was drafted to impose conditions regarding continuation of performance. He emphasized, however, that the whole spirit behind the Second Letter was to increase severance pay to one month per year of service.

8. The Taxpayer also testified to the effect that many of his fellow employees had settled with the IRD on the basis that an amount equivalent to two thirds of one month's pay per year of service would be regarded as severance pay and not as income from employment. He produced part of a letter from an assessor which evidenced an agreement between the assessor with one of his colleagues to that effect. He was originally prepared to accept one third of one month's pay per year of service as taxable, and argued that he had been, but should not be, treated unfairly by the IRD. Mr Wong, for the Respondent, accepted that there were cases where the assessor reached agreement with a number of taxpayers in the manner detailed in the Taxpayer's evidence. He contended, however, that these agreements were entered into under a mistake and that, if the Board were to uphold the Respondent's arguments, it would be open to the Commissioner to revise the assessment, and that there would be no unfairness to the Taxpayer.

9. It transpired during the hearing that Mr B and two other colleagues of the Taxpayer had pending appeals before the Board on exactly the same issues. Mr B's appeal was in fact allowed by the Board in a decision handed down on 9 January 2003.

10. The evidence was concluded at the first hearing on 8 January 2003. In addition to the submissions pertaining to the facts of this appeal and the relevant taxation principles, the Board invited assistance from the parties on the effect of the decision of the Board in Mr B's appeal, and also on the following issues:

(a) whether it would be open to the Commissioner to re-open an agreement concluded with a taxpayer under section 64(3) of the IRO, and if not whether it would be unfair to the Taxpayer if he were not treated in the same way as other taxpayers in the same position as he was; and

(b) whether in discharging its functions under the IRO, the Board can or should have regard to the principle of fairness in administrative law, and whether it is open to the Board to set aside an otherwise valid and legal assessment on the basis that the Taxpayer was not treated fairly.

The Board wishes to record its gratitude to Mr Wong for his able and courteous submissions.

The Respondent's submissions

11. On the principal issue, the Respondent relies mainly on the wording of the First and the Second Letters. In particular, Mr Wong pointed out that the First Letter followed the formula prescribed by sections 31G(1) and 31I(a) of the EO, and the amount payable thereunder was properly regarded as severance pay. The Second Letter described the additional payment as 'Special Retention Bonus' and was expressed to be 'in recognition of (the employee's) loyalty and support' to Bank A. Furthermore, the payment of this bonus was conditional on the Taxpayer satisfactorily performing for the remainder of his period. It was argued that this would be inconsistent with the payment being in the nature of compensation for loss of office or employment.

12. On the issue of whether the Taxpayer was treated unfairly and whether the Board can take this matter into consideration, the Respondent argued that:

(a) Under the proviso to section 70 of the IRO, the Commissioner is not precluded from re-opening an assessment even after an agreement had been reached between a taxpayer and the assessor under section 64(3) of the IRO. Mr Wong relied on the observations of the Board in BR8/71 (unreported) and D138/00, IRBRD, vol 16, 19, and of the remarks of Patrick Chan J (as he then was) in Extramoney Ltd v CIR (1996) 4 HKTC 394.

(b) There would be no unfairness to the Taxpayer since the agreements with other taxpayers were reached upon a mistake, especially where the mistake could be corrected.

(c) Whilst it is accepted that the Commissioner of Inland Revenue owes a duty of fairness (see IRC v National Federation of Self-Employed and Small Business Ltd [1982] 2 All ER 93 at page 113 and Preston v Inland Revenue Commissioners (1985) STC 282 at page 292, and per Cheung J (as he then was) in Leung Man Cheung v Secretary for Planning and Lands HCAL 274 etc of 2000 at page 18), the Board of Review does not have a supervisory jurisdiction over the Commissioner, and that such jurisdiction of review belongs exclusively to the High Court. Mr Wong submitted that even if the Taxpayer had a grievance that some sort of administrative unfairness had been encountered by him, the proper way to complain about this would not be an appeal to the Board of Review, but to apply for judicial review, which is subject to the exclusive jurisdiction of the Courts.

13. As to the decision of the Board in Mr B's appeal (D107/02, IRBRD, vol 18, 32), Mr Wong informed the Board that the Commissioner has, after obtaining legal advice from the Department of Justice, decided to appeal against that decision. Mr Wong outlined his broad submissions as to why we should not follow that decision.

The Taxpayer' s submissions

14. The Taxpayer's evidence has been outlined above. His case is that the sum of $855,455 was in the nature of severance pay. He contended, with some force, that if the amount of $855,455 (which was payable to him only on the terms of the Second Letter) was an inducement for him to remain in Bank A-HK's employment, he would in effect be given a salary of $300,000 a month for the remaining three months. This, he suggests, would be absurd. He also pointed out that it is nonsensical for an inducement payment to be calculated by reference to the period of service. Such a form of calculation, he argued, would be more consistent with the payment being in the nature of severance pay.

The law

15. In D80/00, IRBRD, vol 15, 715, this Board summarised the principles applicable in determining whether a payment received by an employee upon termination of his service is taxable under section 8(1) of the IRO. We reiterate them below:

(a) a payment would be taxable if it is in the nature of a gift on account of past services;

(b) a payment made on account of compensation for loss of employment or a payment in lieu of or on account of severance pay is not taxable;

(c) it is not the label, but the real nature of the payment, that is important;

(d) the way in which the sum in question was arrived at is a material factor in determining the real nature of the payment.

Our findings and reasons therefor

16. Before setting out our conclusions on the issues in this appeal, we should first record that we find the Taxpayer and Mr B to be truthful witnesses. We accept their evidence as to primary facts. This does not, however, mean that we necessarily accept the inference that the Taxpayer or Mr B asks us to draw.

17. It falls upon us to determine, on the basis of the evidence as to primary facts, whether the Taxpayer was liable to pay salaries tax under section 8. In the first place, we have to determine what the nature of the payment of $855,455 received by the Taxpayer was. The label attached to the payment is by no means decisive, and could, in some cases, be misleading.

18. In our view, the Respondent's argument attaches too much importance to the label attached to the payment in the Second Letter and, with respect, ignores the evidence of the Taxpayer and of Mr B as to how the Second Letter came about. We are satisfied upon the evidence of the Taxpayer and of Mr B that the true nature of the payment was compensation to the Taxpayer for the loss of his employment.

19. That the Taxpayer thought that this was the purpose of the payment, we have no doubt. We are also satisfied that the management of Bank A-HK regarded the payment thus. We are particularly impressed by the following matters:

(a) There was very good reason for the long-serving members of staff to be dissatisfied with the package offered in the First Letter. Under that package, some one in the same or comparable position as the Taxpayer would receive nothing by way of severance pay, whereas a staff who had served Bank A-HK for a much shorter period would obtain some compensation. This would prima facie be unfair and such iniquity was corrected by the package offered in the Second Letter.

(b) The evidence, especially that of Mr B, shows that the management was prompted by the level of severance pay offered by other Japanese institutions to increase the level of compensation to staff. The 'Approval/Record Form' further confirms that the management of Bank A-HK had in mind an increase of severance pay.

(c) Paragraph 2c of the First Letter already granted to the employees a retention bonus to induce the staff to remain in the employ for as long as was necessary

for Bank A-HK's purposes. That part of the payment had been subject to salaries tax, on which there is no appeal.

(d) The manner in which the sum was arrived at, viz one month per year of service, was more consistent with it being in the nature of severance pay than a retention bonus. As the Taxpayer pointed out during his submissions, it would be most unlikely for Bank A-HK to be offering about $300,000 per month for him to stay in service.

20. It may be said that the Taxpayer was not in law entitled to the level of compensation for loss of his employment, so that the amount paid must either wholly or in part be for some other purposes. Any such argument is, in our view, unsound for the following reasons:

(a) The Taxpayer had been a long-serving employee in a relatively senior position. While he was informed around November 1998 through the First Letter that he may be retrenched before June 1999, it would not be right to say that he was given a definite notice of termination. The First Letter left the date of termination totally uncertain, since Bank A-HK asserted the right to terminate the employment at any time.

(b) Even if, as a matter of strict law, the sum of $855,455 would exceed the amount of compensation that the Taxpayer would be legally entitled to for loss of his employment, that is not conclusive of the matter. What the evidence shows is that the Taxpayer, qua employee, was under the belief that he was entitled to compensation for loss of his employment and that he demanded for such compensation, while Bank A-HK, qua employer, was prepared to pay such an amount to pacify the Taxpayer, thereby meeting his demands. In our view, if an employer believes (even wrongly) that he should pay an amount by way of compensation, while an employee accepts the same under the (albeit mistaken) belief that he was entitled to that amount by way of compensation, the amount so paid and received would not be taxable as it would not be income received by the employee as a result of his employment.

21. It was also argued that the imposition of conditions on the payment was inconsistent with the contention that the payment was in the nature of severance pay. We are unable to accept this argument either. Where an employer, in the position of Bank A-HK, faced the demands of an employee for compensation for loss of employment, the fact that Bank A-HK bargained to have some strings to be attached before agreeing to making such payment does not necessarily affect the nature of the payment as compensation. In this connection, we accept Mr B's explanation and his evidence that the spirit of the payment offered in the Second Letter was to increase the amount of severance pay to an acceptable level in line with what other Japanese companies were offering. It would indeed facilitate a smooth conclusion of the business of Bank A-HK if disgruntled employees

are pacified by offering them a fair compensation package. Seen in this light, the wording of the Second Letter is not inconsistent with the payment being in substance a severance payment. But as we observed earlier, what is important is not the label, but the real nature of the payment.

22. For these reasons, we would allow the appeal, and reduce the assessment appealed against from $1,056,649 to $201,194.

23. It is thus unnecessary for us to consider further the question of whether this Board has any jurisdiction to set aside the assessment on the basis that to maintain the same would infringe the principle of fairness. We are inclined to accept the Respondent's argument on the authority of Aspin v Estill [1987] STC 723 that this Board, as a statutory body, does not have the review jurisdiction enjoyed exclusively by the High Court. Having said that, we trust that though it is beyond the Board's power to grant any relief in the nature of judicial review, the Commissioner would faithfully observe her duty to treat all taxpayers fairly.

24. We must, however, express our reservations over the Respondent's contention that the Commissioner can re-open agreements entered into under section 64(3) by virtue of the proviso to section 70 of the IRO. Section 70 of the IRO provides:

> *'Where no valid objection or appeal has been lodged within the time limited by this Part against an assessment as regards the amount of the assessable income or profits or net assessable value assessed thereby, or where an appeal against an assessment has been withdrawn under section 68(2A) or dismissed under subsection (2B) of that section, or where the amount of the assessable income or profits or net assessable value has been agreed to under section 64(3), or where the amount of such assessable income or profits or net assessable value has been determined on objection or appeal, the assessment as made or agreed to or determined on objection or appeal, as the case may be, shall be final and conclusive for all purposes of this Ordinance as regards the amount of such assessable income or profits or net assessable value: Provided that nothing in this Part shall prevent as assessor from making an assessment or additional assessment for any year of assessment which does not involve re-opening any matter which has been determined on objection or appeal for the year.'*

25. It seems to us that where the Commissioner (or an assessor on his behalf) reached an agreement with a taxpayer on the amount of tax payable and settle their differences, this agreement would prima facie be binding at common law and it would not be open to either party to renege on the agreement unless such power has been expressly reserved under the agreement. The proviso to section 70 is negative in term, and does not purport to alter the common law in this regard. We therefore have serious doubts whether it is open in law to the Commissioner to re-open the

agreement reached with other taxpayers. However, for the reasons stated above, it is unnecessary for us to reach any conclusion on this issue. This must be left to be determined on another occasion.

26. Finally, we cannot depart from this case without making the following observations. It has transpired only during the hearing that there are four pending appeals raising exactly the same legal and factual issues, set down before four Boards differently constituted. In our view, this is most undesirable. If in future the same situation should arise, the Board should be notified well in advance of the position and arrangements should be made for the appeals either to be heard together (if the appellants consent) or at least set down before the same Board. Whilst this Board has the advantage of reading the decision of the Board in D107/02, we have come to our own decision in the instant appeal on the basis of the evidence before us. We have not in fact relied on the decision in D107/02. But unless the appeals are conjoined or set down before the same tribunal, inconsistent findings are possible. Whilst inconsistent results may, in legal theory, be justified on the basis that different boards may hear different evidence and form their own impression of witnesses, this would hardly be comprehensible to a taxpayer who obtains an adverse result from the Board. Any such contingency would speak ill of the administration of justice as a whole and generates unfairness to the particular taxpayer. This should be avoided if at all possible.

27. In the result, the appeal is allowed. We order under section 68(8)(a) that the assessment appealed against be reduced from $1,056,649 to $201,194.