

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D142/98

**Salaries Tax** – whether additional chargeable income a loan from former employer – whether assessment excessive or incorrect – section 68(4) of the Inland Revenue Ordinance.

Panel: Kenneth Kwok Hing Wai SC (chairman), Edward Chow Kam Wah and Lily Yew Kuin King Suk.

Dates of hearing: 6 July and 31 October 1998.

Date of decision: 30 December 1998.

The taxpayer is appealing against the Commissioner's determination to reject his objection against the additional salaries tax assessment of \$30,000 for the year of assessment 1994/95 on the ground that the additional chargeable income in the sum of \$150,000 was in fact a loan from his former employer.

Held:

- (1) The taxpayer had not made any part repayment towards the alleged loan for about 23 months and was allegedly not financially capable of repaying a single cent despite the receipt of a bonus in the sum of \$270,000. The Board drew the irresistible inference that the former employer agreed with the taxpayer on \$420,000 as the amount of the bonus but deducted \$150,000 by way of set-off in repayment of the loan.
- (2) The taxpayer had failed to discharge his onus under section 68(4) of the Inland Revenue Ordinance, Chapter 112 ('the IRO'), of proving that the assessment was excessive or incorrect.
- (3) The Respondent (the CIR) volunteered a concession that the 'bonus' in the sum of \$270,000 included \$25,000 being one month's payment in lieu of notice which should be excluded from the assessable income. The Board granted leave to the taxpayer under section 66(3) of the IRO to amend his grounds of appeal to include this point and reduced the assessment to one showing additional net chargeable income of \$125,000 and the additional tax payable thereon is \$25,000.

**Appeal allowed in part.**

Ngan Man Kuen for the Commissioner of Inland Revenue.  
Taxpayer in person.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### **Decision:**

1. This is an appeal against the determination dated 25 March 1998 by the Commissioner of Inland Revenue, rejecting the Taxpayer's objection against the additional salaries tax assessment for the year of assessment 1994/95 ('the Relevant Year of Assessment') dated 11 March 1996 showing additional net chargeable income of \$150,000 with additional tax payable thereon of \$30,000 ('the Assessment').

2. The appeal first came up for hearing on 6 July 1998 before a panel comprising Mr Kenneth Hing-wai Kwok, SC, Mr Gregory Robert Scott Crichton and Mr Paul Ng Kam-yuen. At the request of the Taxpayer, the panel decided to adjourn the matter to a date to be advised by the Clerk to the Board of Review, to be heard by a panel not necessarily comprising the same 3 persons constituting that panel.

3. At the adjourned hearing on 31 October 1998 before us, the Taxpayer appealed on the ground that the \$150,000 was and remained a loan by his former employer.

### **The facts**

4. On the statement of facts in the determination, the document produced at the hearing of the appeal, and the oral evidence given by the Taxpayer, we make the following findings of facts.

5. From about 1 November 1990 about 10 October 1994, the Taxpayer was employed by his former employer as a manager.

6. By a cheque dated 12 November 1992, payable to the Taxpayer in the sum of \$150,000, the Taxpayer's former employer lent the Taxpayer the sum of \$150,000 ('the Loan').

7. Although the Taxpayer was to repay the Loan by deductions from his salary, the Loan remained wholly unpaid for about 23 months.

8. The Taxpayer's employment was terminated by about 10 October 1994 (Monday) when a cheque in the sum of \$270,000 dated 7 October 1994 issued by the Taxpayer's former employer in favour of the Taxpayer was given to the Taxpayer.

9. By the employer's return dated 1 May 1995, the former employer stated that salary in the sum of \$570,000 had accrued to the Taxpayer for the period from 1 April 1994 to 10 October 1994.

10. By letter dated 8 September 1995 accompanying the Taxpayer's salaries tax return, the Taxpayer's then representative alleged that:

## INLAND REVENUE BOARD OF REVIEW DECISIONS

‘the ex-employer of our client, has erroneously included a loan to our client of \$150,000 in his salaries, while filing the employers return for the year ended 31 March 1995. This amount should be excluded from our client’s assessable income, being loan.’

11. The Taxpayer’s salaries tax return for the Relevant Year of Assessment disclosed a salary of \$150,000 and a lump sum to be related back of \$270,000, making a total of \$420,000.

12. The assessor raised salaries tax assessment on the Taxpayer with an assessable income of \$420,000 and tax payable thereon of \$47,400. By way of note to the assessment, the assessor informed the Taxpayer that the amount of the loan had been ‘excluded subject to review’.

13. By letter dated 27 February 1996, the former employer stated that the salary reported of \$570,000 should be broken down as follows, that is to say, salary for period 1 April 1994 to 10 October 1994 in the amount of \$150,000; ‘bonus ... in cash’ for period 1 November 1990 to 10 October 1994 in the amount of \$270,000; and ‘bonus ... by waiving a loan owed by the employee’ for period 1 November 1990 to 10 October 1994 in the amount of \$150,000; and that the total sum of \$420,000 (\$270,000 + \$150,000) as bonus ‘was arrived at by negotiation between our company and [the Taxpayer] and there was no specific basis used in the calculation. The \$420,000 was paid partly as cash and partly by waiving of a loan interest as shown above.’

14. The assessor was of the view that the whole \$420,000 of the bonus as alleged by the former employer should be included in the Taxpayer’s assessable income. Since the Taxpayer had not been assessed to tax on the ‘waiving’ (strictly speaking it should be the setting-off) of the Loan, the assessor raised additional salaries tax assessment for the Relevant Year of Assessment showing additional net chargeable income of \$150,000 with additional tax payable thereon of \$30,000.

15. The Taxpayer objected against the additional assessment.

16. The Commissioner rejected the objection.

17. By notice of appeal dated 18 April 1998, the Taxpayer appealed.

### **Taxpayer’s evidence**

18. The Taxpayer gave evidence on oath and testified that at the time of termination of his employment, the amount of bonus agreed upon was \$270,000 and that the Loan remained a loan.

### **Our decision**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

19. We do not find the Taxpayer's evidence credible and have no hesitation in rejecting it. For about 23 months during the Taxpayer's employment, he had not made a single cent in repayment of the Loan or any part thereof. If, at the time of termination of the Taxpayer's employment, the former employer was still looking to the Taxpayer to repay the Loan, the former employer could simply deduct \$150,000 from his bonus of \$270,000 and paid him \$120,000. The Taxpayer sought to explain this by saying that his former employer understood his financial difficulties. We disbelieve the Taxpayer. The Taxpayer had not made any part repayment for about 23 months and was allegedly not financially capable of repaying a single cent despite the receipt of \$270,000. What prospects could the former employer be looking forward to in receiving any repayment of and part of the Loan by the Taxpayer? We draw the inference which appears to us to be irresistible that the former employer agreed with the Taxpayer on \$420,000 as the amount of the bonus, deducted \$150,000 by way of set-off in repayment of the Loan, and gave him a cheque for \$270,000.

20. The Taxpayer has plainly failed to discharge the onus under section 68(4) of the Inland Revenue Ordinance, Chapter 112, of proving that the Assessment is excessive or incorrect. But for a concession volunteered by Miss Ngan on behalf of the Respondent (the CIR), we would have dismissed the appeal and confirmed the Assessment. We might have made an order for costs under section 68(9).

### **Respondent's concession**

21. We turn now to the concession. Miss Ngan accepted that the \$270,000 included \$25,000 being one month's payment in lieu of notice which should be excluded from the assessable income. This point is not covered by the grounds of appeal. Pursuant to section 66(3), we grant leave to the Taxpayer to amend his grounds of appeal to raise the point. Based on the respondent's volunteered concession, we reduce the Assessment to one showing additional net chargeable income of \$125,000, with additional tax payable thereon of \$25,000.