

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D15/93

Salaries tax – payment on termination of employment – whether assessable to salaries tax.

Panel: Robert Wei Wen Nam QC (chairman), Erwin A Hardy and Yu Yui Chiu.

Date of hearing: 5 May 1993.

Date of decision: 1 July 1993.

The taxpayer received a lump sum from her employment when she resigned. She resigned for health reasons after completing twenty years of service. She was paid a lump sum in recognition of her long service. She submitted that the payment was not subject to salaries tax.

Held:

The payment was not damages for breach of contract and was not paid out of an approved Provident Fund or Retirement Fund. Accordingly it was subject to assessment to salaries tax under section 8 of the Inland Revenue Ordinance.

Appeal dismissed.

Case referred to:

D12/92, IRBRD, vol 7, 122

Wong Kuen Fai for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

1. This is an appeal by an individual (the taxpayer) against the salaries tax assessment raised on her for the year of assessment 1991/92.
2. She contended that a sum of \$X received by her upon resignation from her employment was not subject to salaries tax on the ground that it was (1) compensation for the loss of her right to a severance payment which would have been paid to her in 1988 when her employers moved their offices from Place A to Place B, or (2) a long service payment payable upon her resignation after over 20 years of service.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

3. There was no dispute as to facts. From the evidence of the Taxpayer and a representative from her employers and the documents produced to us, we find the facts briefly to be these. The Taxpayer was employed as a clerk during the period from 1971 to 1991. In 1988 her employers moved their offices from Place A to Place B. Some staff members including the Taxpayer who lived in Place A found the move inconvenient in terms of transport and wished to leave the employment. As a result some of them left and received 'severance payments'. The employers requested the Taxpayer to stay on to work in the new offices in Place B and promised in return to pay her upon her retirement a sum not less than the amount of the 'severance payment'. She agreed to continue her employment on those terms. She was 40 when she resigned for health reasons in 1991, having completed over 20 years of service. The sum of \$X was paid to her in recognition of her long service, but was not a 'long service payment' in accordance with the Employment Ordinance.

4. The first question to consider is whether the sum is liable to salaries tax under section 8 of the Inland Revenue Ordinance (IRO). It has recently been stated that a payment which is not damages for breach of contract and which is not paid out of an approved provident fund or retirement scheme is subject to salaries tax if it is paid in respect of the services provided by the taxpayer to his employer (D12/92, IRBRD, vol 7, 122). In our view, the sum of \$X was such a payment and subject to salaries tax under section 8 (IRO).

5. The Taxpayer's contention is no doubt based on a practice of the Revenue, as confirmed by Mr Wong, the Commissioner's representative, which exempts from salaries tax severance payments and long service payments paid in accordance with the Employment Ordinance. We were taken through the relevant provisions of that ordinance and are satisfied that the sum of \$X was neither a severance payment nor a long service payment within the meaning of that ordinance. Entitlement to a severance payment depends, among other things, on a dismissal or lay-off (see section 31B of the ordinance). The Taxpayer was neither dismissed nor laid off in 1988 or 1991. As for a long service payment, the statutory requirements are, among other things, that the employee is (a) dismissed or (b) certified to be permanently unfit for the type of work for which he is employed or (c) that he terminates his contract at the age of 65 (see section 31R). The Taxpayer was none of those things. It follows that the Revenue practice in question has no application in this case.

6. This appeal is therefore dismissed, and the salaries tax assessment in question is hereby confirmed.