Case No. D17/12

Salaries tax – whether the sum was generated from a recognized retirement scheme – sections 8, 9, 11 and 71 of the Inland Revenue Ordinance ('the Ordinance') – decision not binding between the Appellant and his employer – discretion to adopt a universal approach to fairly treating retirement fund payable to senior or aged retiree – whether the sum as compensation for loss of office – whether or not has jurisdiction to decide the charge of interest.

Panel: Albert T da Rosa, Jr (chairman), Dr Lau Kun Luen Alex and Woo Lee Wah Cecilia.

Date of hearing: 30 May 2011.
Date of decision: 20 July 2012.

The Appellant was offered an employment with Company B which is a global management and human resources strategy consulting firm. Company H is a subsidiary of Company B and is the company which signed on the appointment letter to the Appellant. The Appellant joined Company H's benefit schemes. Under the benefit scheme, he was entitled to the benefit amount which comprised the employer's contribution to the Fidelity Fund. Withdrawal from the Fidelity Fund were subject to vesting condition. On expiry of the vesting period, the Appellant could either cash the remaining benefit amount or instruct Company B to invest, on his behalf, in the Fidelity Fund.

The Appellant finally ceased employment after 2.5 years of service. The remaining benefit amount was partially cashed by the Appellant on 2005 and the rest invested in the Fidelity Fund during the years of assessment 2001/02 to 2005/06.

The Appellant argued that he should not be taxed for compensation payment and in so far the tax is levied, they should be levied at the time of withdrawal.

Held:

1. The Appellant did not deny that the sum was not generated from a recognized retirement scheme for the purpose of the Ordinance. The sum is chargeable to salaries tax (David Hardy Glynn v CIR 3 HKTC 245; D89/02, IRBRD, vol 17, 1089 and D56/09, (2010-11) IRBRD, vol 25, 22 followed). The onus is on the Appellant to show that the Sum comes under any specific exemption in sections 8 and 9 and he has never discharged that duty.

2. Section 11B provided that a taxpayer is subject to salaries tax on income

which accrued to him during the relevant year of assessment. Provision to section 11D(a) provides that income which has either been made available to the person or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person. The Board found that the Appellant's rights to claim payment of the sum has crystallized on expiry of the vesting period. There is no question that the Appellant withdrew sum A in cash in 2005/06. The Board agree that for the purposes of sections 11B and 11D, sum A accrued to the Appellant in the year of assessment 2005/06 and sum B accrued to the Appellant in the years of assessment 2001/02 to 2005/06.

3. The Board is not making a decision binding between him and his employer that his employer does not owe any legal obligation to him --- just that as between the Appellant and the Respondent, the Appellant has not discharged his burden of proof.

4. The Board agreed with the submission that by applying facts of the present case to relevant provisions, there was simply no room for the Commissioner to exercise the discretion to adopt a universal approach to fairly treating retirement fund payable to senior or aged retiree (Wong Tai Wai David and Lee Chi Man v Commissioner of Inland Revenue 6 HKTC 460 followed).

5. The Appellant never signed the separation agreement. The Board rejected the Appellant's proposition to calculate part of the sum as compensation for loss of office (D4/05, (2005-06) IRBRD, vol 20, 256 and D80/00, IRBRD, vol 15, 715 followed).

6. The charge of interest was based on section 71(1) of the Ordinance and it was not a tax assessment and was not within the jurisdiction of the Board to decide (D39/05, (2005-06) IRBRD, vol 20, 577 followed).

Cases referred to:

David Hardy Glynn v CIR 3 HKTC 245
D89/02, IRBRD, vol 17, 1089
D56/09, (2010-11) IRBRD, vol 25, 22
Wong Tai Wai David and Lee Chi Man v Commissioner of Inland Revenue 6 HKTC 460
D4/05, (2005-06) IRBRD, vol 20, 256
D80/00, IRBRD, vol 15, 715
D39/05, (2005-06) IRBRD, vol 20, 577

Taxpayer in absentia.
Yau Yuen Chun and Chan Siu Ying Shirley for the Commissioner of Inland Revenue.

Decision:

Introduction

1. Mr A (the 'Appellant') objects to the additional salaries tax assessments for the years of assessment 2002/03 to 2004/05 and the salaries tax assessment for the year of assessment 2005/06 raised on him as contained in the Determination by the Deputy Commissioner of Inland Revenue dated 26 November 2010.

2. Unless otherwise specified, references to section numbers and provisos herein are references to sections and provisos in the Inland Revenue Ordinance Chapter 112 (the 'Ordinance').

Appellant absent

3. By letter dated 15 January 2011, the Appellant explained that he could not attend the hearing in person.

4. The matter was brought to the attention of the Chairman on 1 April 2011 and on 4 April 2011 Chairman determined that the hearing will proceed under section 68(2D) in the absence of the Appellant but that his submission will be considered under section 68(2E).

5. Prior to the hearing of 30 May 2011, the Respondent provided the Appellant with the Respondent's written closing submission (the 'Respondent's Submission') and by his letter dated 25 May 2011 the Appellant gave his written response thereto (the 'Appellant's Response').

6. The Appellant bears the onus of prove. Section 68(4) of the Ordinance provides that:

> '*The onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.*'

Grounds of appeal

7. The Appellant's grounds are set out in his Notice of Appeal dated 27 December 2010 under the heading 'Statement of Grounds of Appeal'.

8. From what we could make out it appears that the Appellant is making the following points:

   8.1. what the Board would hereinafter refer to as the 'Cash or MPF Contribution Point' in paragraph (1) of his grounds of appeal which reads:

> '(1) The Deputy Commissioner and his fellow assessors have applied an unfair and impractical approach to rely on Section 11B and Section 11D of the Inland Revenue Ordinance (IRO) to deem the contributions to the corporation's approved Retirement Fund Scheme to a trustee as direct cash payments to the employees and taxed them retrospectively in the years of contribution. As a matter of fact they were contributions to a Retirement Benefit Plan to be withdrawn upon retirement to supplement the deficiency of the Mandatory Provident Fund (MPF).'

8.2. what the Board would hereinafter refer to as the 'Year of Assessment Point' in paragraph (2) of his grounds of appeal which reads:

> '(2) Notwithstanding the apparent injustice and that the imposition of such practice might not be practical or justifiable to long standing or life-time employment cases that would make the innocent retired employees suffered, the Inland Revenue Department (IRD) ignored the adverse consequences that the retired employee has to carry an unexpected burden of additional taxes levied on the date of their termination of employment. The IRD also neglected the back-fired effect that such practice might not be applicable to long service cases due to the time-barred effect limited to five years imposed by the IRO. Certain accrued income might have to be dropped out.'

8.3. what the Board would hereinafter refer to as the 'Employer's Wrong Doing Point' in paragraph (3) of his grounds of appeal which reads:

> '(3) There is another element of unfairness contained in Item 27(h) of the Statement of Facts furnished by the Deputy Commissioner wherein he had forgiven my ex-employer, [Company B's] non-disclosure of the alleged cash benefit but chosen to tax on me retrospectively and on accrual basis. If it is the case, it means that any omissions on the part of the employer could easily be covered by seeking recompense from the employee instead.'

8.4. what the Board would hereafter refer to as the 'Retiree Policy Point' in paragraph (4) of his grounds of appeal which reads

> '(4) Invariably the Deputy Commissioner has shown his rigid approach as indicated in Item 13 of the Reasons for his Determination that he need not pay attention to the universal approach to fairly treating retirement fund payable to seniors or aged retirees. He can soley rely on his conceptual view of the law which might be too

restrictive and out-dated that would warrant a revision to extend the coverage of benefits to retirees due to changes in the circumstances in the community of Hong Kong. Further, he did not show any consideration to tax alternatively on physical withdrawal basis to give a tax break for me as an aged retiree who had contributed to the public revenue during the entire working life and that I also need the money as retirement fund for the upcoming days. This unfortunately is in complete contradiction to the Government's commitment to enhance retirement protection and relieve the pressure on social welfare expenditure, expressed by the Chief Executive in the year 2008, plus the fact that the retirement fund from Fidelity Investment has been used to supplement the deficient proceeds of MPF.'

8.5. what the Board would hereafter refer to as the 'Exigency Withdrawal Point' in paragraph (5) of his grounds of appeal which reads

'(5) The appeal assessor handling my case and now being taken over by the Deputy Commissioner, both refused to make a distinction between money drawn from the employer for exigency purposes and the amount already contributed to the Fidelity Retirement Fund Scheme under the control of the trustee. They treated both as the same category as cash receipt whereby the IRD could conveniently tax upon as disposable income in all years of assessment.'

8.6. what the Board would hereafter refer to as the 'Retirement Contribution Point' in paragraph (6) of his grounds of appeal which reads

'(6) I have explained at length to the IRD assessors that the money contributed to the Fidelity Retirement Scheme was dedicated for the retirement purposes and therefore I have left them there for growth until April 12, 2007. To maximize the proceeds for retirement purposes, I had in fact made good the shortfall in contributions to approx. $100,000 to the Plan through Fidelity's Agent Gain Miles in August 2005. I hope this should negate the Deputy Commissioner's categorical adverse comments in his reasons for determination (Para. 12) that the vested amount of the employer's investment in the Fidelity Retirement Fund was simply part of the taxpayer's income under the terms of his employment and thereby it is without any meaning for retirement purposes.'

8.7. what the Board would hereafter refer to as the 'Compensatory Payment Point' in paragraphs (7) to (9) of his grounds of appeal which reads.

'(7) The Deputy Commissioner failed to recognize the existence of an important element of compensation for loss of office in my negotiation with my ex-employer, which substance was raised for consideration and contained in the exchanges of correspondence with [Company B] Management before my departure. All such documents had been made available to the IRD (Appendix J of Statement of Facts). As the Separation Agreement contained many restrictive and draconian terms for anonymity that in no circumstances could be signed by me for settlement of the outstanding payment from them. However, the Deputy Commissioner refused to acknowledge the fact that the Acting Vice President [Mr C] had made a couple of representations to me before my departure from [Company B] that he understood the shortfall of compensation payment in terms of my exchanges with the [Company B] Management at the impending departure days. With a view to saving [Company B] from making full payment to compensate me for loss of office, he claimed that my entitlement to Fidelity's Retirement Fund could well cover such shortfall. This representation was also made known to the then Office Manager, [Ms D] at even times. In my exchanges of email with [Company B's] Senior Management at [Region E, Country F]. I had clearly and explicitly indicated to them that there was a shortfall of $158,017.75 for compensation for loss of office. Knowing that there was a shortfall in the payment of compensation, [Mr C] suggested to [Company B] Senior Management at [Region E] to add $17,000 amounting to $44,328.77 to lure me to accept a revised Separation Agreement with a view to free [Company B] from any possible legal liability of claims for compensation. It is not understood that the Deputy Commissioner could make a unilateral judgment in favour of [Company B] that the minimum payment per the Hong Kong Employment Ordinance has well covered the employer's obligation for compensation notwithstanding that an additional payment has been offered yet unpaid by [Company B] in the absence of a signature to the Separation Agreement.'

'(8) Throughout the Deputy Commissioner and his fellow assessors did not realize or avoid to recognize the practice in many multinational companies that the corporation is required to pay a full and fair amount of compensation to outgoing executives except in the circumstances of dismissal by misconduct. In my exchanges of email (Appendix J of Statement of Facts) with [Company B] senior management, I had already revealed the point of unfairness that they have compensated and generously paid the three (3) previous outgoing senior staff with compensations over

and above the Hong Kong Employment Ordinance requirement as precedents. It has been advised that the minimum payment in terms of the Hong Kong Employment Ordinance would only be applicable to low wage labourers and clerical staff, and would not be appropriate for senior executives of multinational companies. Unfortunately the Deputy Commissioner is holding a preconceived view on minimum compensation payment requirement that could not be overridden by varied farewell agreements. He did not recognize the possibility and provision contained in the HK Employment Ordinance that certain employers, like [Company B], had used the retirement fund to offset the outstanding compensation payable to outgoing employees, notwithstanding that in the Separation Agreement [Company B] had also shown a motive to make additional payment. The Deputy Commissioner has just used his simple hypothesis, e.g. if the Separation Agreement was not signed, regardless of the validity or legal implications of such document, no additional compensation payment should exist.'

'(9) As an extension to para. (8) mentioned above, the Deputy Commissioner had tried to delineate the relationship between the retirement fund and the amount appropriated for the deficit of compensation for loss of office. He failed to recognize the existence of such arrangement regardless of the circumstances.'

8.8. what the Board would hereafter call the 'Interest Rate Point' in paragraph (10) of his grounds of appeal which reads:

'(10) Section 66(3) of the IRO has stipulated that the appellant must give all relevant grounds and reasons for the appeal otherwise the Board might not consider any new submission of details during the time of hearing. I hope the Board will appreciate that the ensuing point is of paramount importance to me to fend off any possible vindication and to protect my interest as a retiree lacking strong financial backing. After lodging my objection to the Salaries Tax Assessment for the year of assessment 2005/06 on 12th March, 2007 (Attachment #1), the IRD has at long last given a Commissioner's Determination on 26 November 2010 to revitalize all holdover tax that would be due from me. For the sake of justice I have to advise the Board that there is a grave concern that there could be an exorbitant interest charge of 8% p.a. dating back to the period wherein the tax was held over. If the ultimate outcome from the BOR has decided that some taxes are payable, I certainly will abide to the Board's decision. However I would like to prevent imposition of any unreasonable interest charge used as a

reprisal for objection to the assessments.'

8.9. what the Board would hereafter call the 'Prolonged Delay Point' in the free standing paragraph after paragraph (10) of his grounds of appeal which reads;

' Due to the special circumstances that the 2005/06 assessment was incorrectly assessed in the 1st stance followed by multiple corrections of errors which were repeatedly incorrect in the calculation of taxes due from me, prior to arriving at the prevailing additional assessments for the years of assessment 2002/03 to 2004/05 and revised assessment for the year of assessment 2005/06. I strongly believe that my case needs to appeal fro an equitable judgment from the Board. Under such circumstances I am compelled to mention that that I should not be held accountable for the prolonged delays and procrastination of my case being handled by the most tardy, negligent, irresponsible and arrogant assessors who had dragged on without a fair settlement for more than 46 months. For example, the 1st assessment for the year of assessment 2005/06 was raised one year later until 6th March, 2007. Thereafter there were two complaints lodged with the IRD Complaints Section without avail (Attachments No. 1 & 7) and the Appeal Assessor issued a repetitive and crucifying enquiry on 1st December 2009 (Attachment No. 9). My reply was not acknowledged until the Deputy Commissioner issued a determination one year later. I therefore would like to seek the Board's opinion on whether the Commissioner should still levy interest charge on the holdover taxes resulting from the protracted inquires initiated at a very late stage, e.g. five years after my cessation of employment with [Company B] and there was a long elapse of time let go by his fellow assessors not to submit the case for a determination expeditiously and within a reasonable time frame. This has caused tremendous frustration and anxiety on me that have been injurious to my health after retirement. Their repeated and incorrect calculation of taxes due from me at the beginning and in the interim has also created a great deal of stress on me unnecessarily, to worry about the upcoming heavy financial burden after retirement. I do feel that the IRD should be held accountable. Should the Board find that this issue is outside the BOR's jurisdiction, I would like to have the Board's recommendation as how to proceed through the proper channels.'

9. In short, it seems that the Appellant is saying

9.1. he should not be taxed for compensation payment, and

9.2. in so far the tax is levied, they should be levied at the time of withdrawal.

The facts

10. The Commissioner relied on the 'facts' as set out in sub-paragraphs (1) to (33) of paragraph 1 in the Determination.

11. In his Notice of Appeal, the Appellant commented on the following sub-paragraphs of paragraph 1 in the Determination namely (8); (12) (a) and (b); (21)(a); (22)(a) and (23); (27)(h); (31)(d); and (32) (d) (ii). These comments did not set out relevant primary facts in disputes but were rather comments on interpretations.

12. In the Appellant's Response, the Appellant also took issues with the Respondent over various matters but did not further raise any disagreement over the 'facts' in the sub-paragraphs (1) to (33) of paragraph 1 in the Determination.

13. Thus, save for any inherent improbabilities and those aforesaid facts commented on by the Appellant, the Appellant has no quarrels to the other facts in the Determination.

14. We find the following:

14.1. Company B is a company incorporated in Region G, Country F. It is a global management and human resources strategy consulting firm. Company H is also incorporated in Country F and is a subsidiary of Company B. At all relevant times, Company H has a branch in Hong Kong which carried on business in Hong Kong.

14.2. By a letter dated 20 March 2001, the Appellant was offered an employment with Company B. Though the offer was given by Company B, it was Company H which signed on the letter. The offer letter did not contain specific details of the Appellant's remuneration and benefits.

14.3. By an agreement titled Letter of Appointment made on 20 March 2001 ('the Appointment Letter'), Company H offered and the Appellant accepted the employment with effect from 2 April 2001. The Appointment Letter included, among others, the following terms:

' Salary

4) [The Appellant] will be paid a basic salary at the rate of HK$50,935 per month. After one year of service, [The Appellant] may receive a 13th month annual salary, at the discretion of [Company H] ...

...

Benefits, Holidays and Annual Leaves

9) [The Appellant] will be eligible to join [Company H's] Benefit Schemes that comprise 20% of [The Appellant's] monthly salary, which is inclusive of Mandatory Provident Fund contributions. ...

...

Termination

14) Either [Company H] or [The Appellant] can terminate the Agreement by providing one months' written notice in advance or one month's salary in lieu of such notice.'

14.4. The Appellant joined the benefit schemes as mentioned in clause 9 of the Appointment Letter (the 'Benefit Scheme'). As a result, 20% of his salary was payable by Company H to him monthly (the 'Benefit Amount'). The Benefit Amount was used to cover the following:

(a) mandatory contribution by Company H to a Mandatory Provident Fund Scheme ('MPF') which was $1,000 each month;

(b) payment of premium by Company H to provide medical insurance benefit for the Taxpayer and his spouse; and

(c) (for the remaining amount) (the 'Remaining Benefit Amount') invested into a Fidelity Retirement Fund Scheme ('Fidelity Fund' subject to some cash withdrawal) after deduction of management fee of 2% by the broker. The vesting schedule of the investment made was as follows:

Completed year of services of the Taxpayer	Vesting percentage
Less than 6 months	Nil
Completed 6 months but less than 1 year	20%
Completed 1 year but less than 1.5 years	40%
Completed 1.5 years but less than 2 years	60%
Completed 2 years but less than 2.5 years	80%
Completed 2.5 years	100%

14.5. After completion of 2.5 years of service with Company H, the Appellant could either cash the Remaining Benefit Amount directly from Company H or let Company H invest it, on his behalf, into the Fidelity Fund.

14.6. The Appellant ceased employment with Company H on 17 August 2005, well after 2.5 years of service.

14.7. The computation of the Remaining Benefit Amount was as follows:

Year of assessment	Salary (i)	Benefit Amount (ii) = (i) x 20%	MPF (iii)	Insurance (iv)	Remaining Benefit Amount (v) = (ii)-(iii)-(iv)
	$	$	$	$	$
2001/02	667,249.00	133,449.80	12,000.00	3,341.68	118,108.12
2002/03	728,590.00	145,703.80	12,000.00	14,076.36	119,655.84
2003/04	760,716.00	152,143.20	12,000.00	13,125.68	127,017.52
2004/05	790,561.20	158,112.24	12,000.00	12,926.46	133,185.78
2005/06	278,639.65	55,727.93	5,000.00	5,707.08	45,020.85
		645,136.97			542,988.11

14.8. The Remaining Benefit Amount was partially cashed by the Appellant and the rest invested in the Fidelity Fund during the years of assessment 2001/02 to 2005/06 as follows:

Year of assessment	The Remaining Benefit Amount (i)	Cashed (ii)	Balance after cashed (iii)=(i)-(ii)	Management fee (iv)	Invested into the Fidelity Fund (v) = (iii)-(iv)
	$	$	$	$	$
2001/02	118,108.12	-	118,108.12	-	118,108.12
2002/03	119,655.84	-	119,655.84	361.90	119,293.94
2003/04	127,017.52	30,994.90	96,022.62	1,882.78	94,139.84
2004/05	133,185.78	85,746.47	47,439.31	930.17	46,509.14
2005/06	45,020.85	*24,899.91	20,120.94	394.52	19,726.42
	542,988.11	141,641.28			**397,777.46

* Sum A
**Sum B

Note: Sum A $24,899.91+ Sum B $397,777.46 = $422,677.37 (collectively called 'the Sum' herein).

14.9. That part of the Remaining Benefit Amount which was invested by the Appellant in the Fidelity Fund during the years of assessment 2001/02 to 2005/06 only become vested in accordance with the years of service as set out in the table in paragraph 14.4(c) herein and therefore became vested in the following amounts during the following years:

Year of assessment	Sum B	Vested amount of Sum B 2001/02	2002/03	2003/04	2004/05	2005/06
	$	$	$	$	$	$
2001/02	118,108.12	47,243.25	56,691.90	14,172.97		
2002/03	119,293.94	-	95,435.15	23,858.79		
2003/04	94,139.82	-	-	94,139.82		
2004/05	46,509.13	-	-	-	46,509.13	
2005/06	19,726.41	-	-	-	-	19,726.41
	397,777.42	47,243.25	152,127.05	132,171.58	46,509.13	19,726.41

15. In coming to the above findings,

15.1. we have taken note of the Appellant's claims especially those made in his 'Compensatory Payment Point' and the Year of Assessment Point discussed below;

15.2. we note that the Appellant's comments as noted in paragraph 11 herein do not set out specific facts in disputes but are rather comments of interpretation; and

15.3. we do not find any inherent improbability in the Respondent's postulations.

16. The Assessor has not brought into charge, and the Determination has not included, the sum of $47,243.25 [see paragraph 14.9 herein] which was vested in the year of assessment 2001/02 and was time barred at the time the additional salaries assessment was made.

17. The Determination has also factored in the relevant time basis factor in recognition of the Appellant's assessable income.

18. In the Determination, sum B was assessed on the basis of the respective amounts in the years of assessment 2002/03 to 2005/06 and Sum A was assessed in the year of assessment 2005/06 as follows:

Year of assessment	2002/03	2003/04	2004/05	2005/06
	$	$	$	$
Sum A	-	-	-	24,899.91
Sum B accrued [see paragraph 14.9 herein]	152,127.05	132,171.58	46,509.13	19,726.41
	152,127.05	132,178.58	46,509.13	44,626.32
Time basis factor	312/365	318/366	287/365	136.94/139
Amount accrued after time basis factor	130,037.00	114,838.00	36,570.00	43,964.00

Year of assessment	2002/03	2003/04	2004/05	2005/06
	$	$	$	$
Add: Quarter value adjustment due to change of income	13,003.00	11,484.00	3,657.00	4,396.00
Net Chargeable Income in dispute	143,040.00	126,322.00	40,227.00	48,360.00

The issues

Cash or MPF Contribution Point

19. In formulating his Cash or MPF Contribution Point, the Appellant on the one hand seems to allege that '… contributions to corporation's approved Retirement Fund Scheme …' were wrongly treated by the Respondent but on the other hand concedes that 'As a matter of fact they were contributions … to supplement the deficiency of the Mandatory Provident Fund (MPF).'

20. In fact the Appellant did not deny that the Sum was not generated from a recognised retirement scheme for the purpose of the Ordinance.

21. The sum is chargeable to Salaries Tax. (See David Hardy Glynn v CIR 3 HKTC 245 and D89/02, IRBRD, vol 17, 1089 and D56/09, (2010-11) IRBRD, vol 25, 22.) The onus is on the Appellant to show that the Sum comes under any specific exemption in sections 8 and 9 and he has never discharged that duty.

Year of Assessment Point

22. In the Respondent's Submission, the Respondent submitted that

> ' The first question for the Board to decide is whether the sum of $422,677.37 (the "sum" subject to time basis factor is chargeable to Salary Tax. If it is chargeable to Salaries Tax, the next question for the Board to decide is in which year of assessment should the Sum be assessed.'

23. In the Appellant's Response, the Appellant stated his position regarding the issues as follows:

> ' ...there has never been a dispute on the taxability of the total sum $422,677.37, which has always in my view chargeable to Salaries Tax. ...
>
> The main issue in my mind is whether the IRD had correctly raised the additional taxes... and made revision to ... its assessment [as he did] instead of accepting my request to tax the sum in the year of assessment 2007/08 wherein the retirement sum was physically withdrawn.
>
> I also noted that the Appeals Assessor has tried to skip the request for an important decision from the Board on whether the IRD has rightly ignored a

possible reduction in the total assessable income on my ex-employer Company B used such retirement sum to substitute for the promised additional severance payment as payment in lieu.'

24. It appears that the Appellant is objecting to the additional salaries tax assessments for the years of assessment 2002/03 to 2004/05, and the salaries tax assessment for the year of assessment 2005/06 raised on him claiming

24.1. that the accruals should be taken as at the date of withdrawal; and

24.2. that the assessments are excessive.

25. The Appellant claims that even if the Sum is not compensation for loss of office and is taxable; it should be assessed in the year of withdrawal from the Fidelity Fund (that is year of assessment 2007/08).

26. Section 11B provides that a taxpayer is subject to salaries tax on income which accrued to him during the relevant year of assessment. Proviso to section 11D(a) provides that income which has either been made available to the person or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person.

27. Under the terms of the Appellant's employment, he was eligible to join the Benefit Scheme. Under the Benefit Scheme, he was entitled to the Benefit amount which comprised the employer's contribution to the Fidelity Fund. Withdrawals from the Fidelity Fund were subject to vesting condition. On expiry of the vesting period, the Appellant could either cash the Remaining Benefit Amount or instruct Company B to invest, on his behalf, in the Fidelity Fund. In other words, the Appellant's rights to claim payment of the Sum has crystalized on expiry of the vesting period.

28. There is no question that he withdrew Sum A in cash in 2005/06. Question if any relates to Sum B.

29. We agree with the Revenue's submission that, for the purposes of sections 11B and 11D, Sum A accrued to the Appellant in the year of assessment 2005/06 and Sum B accrued to the Appellant in the years of assessment 2001/02 to 2005/06 as set out in paragraphs 14.8 and 14.9 herein.

30. Proviso to section 11D(b)(ii) which deemed payment which was received after employment had terminated to have accrued to that person on the last day of employment had no application because of the application of the proviso to section 11D(a).

<u>'Employer's Wrong Doing Point'</u>

31. The Appellant complaint that the Revenue unnecessarily sided with his employer.

> ' It is not understood that the Deputy Commissioner could make a unilateral judgment in favour of Company B that the minimum payment per the Hong Kong Employment Ordinance has well covered the employer's obligation for compensation notwithstanding that an additional payment has been offered yet unpaid by Company B in the absence of a signature to the Separation Agreement'

32. In rejecting the Appellant's allegation, the Board (just as the Revenue) is not making a decision binding between him and his employer that his employer does not owe any legal obligation to him --- just that as between the Appellant and the Respondent, the Appellant has not discharged his burden of proof. This also disposes of the Appellant's 'Employer's Wrong Doing Point'.

Retiree Policy Point

33. Regarding the Appellant's request of adopting a 'universal approach to fairly treating retirement fund payable to senior or aged retiree', we agree with the Respondent's submission that by applying facts of the present case to relevant provisions, there was simply no room for the Commissioner to exercise the discretion in the way as contended by the Appellant (Wong Tai Wai David and Lee Chi Man v Commissioner of Inland Revenue 6 HKTC 460 refers.)

Exigency Withdrawal Point

34. Whether the withdrawal were made for exigencies is irrelevant. The Appellant made the withdrawals in questions as of right.

Retirement Contribution Point

35. These have been dealt with in paragraphs 19 to 21 herein.

36. The fact remains that the Appellant did not deny that the Sum was not generated from a recognised retirement scheme for the purpose of the Ordinance.

Compensatory Payment Point

37. The Appellant claims that of the amount of $832,612 reported by Company H as the Appellant's income from 1 April 2005 to 17 August 2005 $202,346.52 (which included the Sum the amount of $422,677.37 in dispute) and calculated below was compensation for loss of office:

		$
(a)	Special bonus (the 'Alleged Special Bonus') mentioned in separation agreement (the 'Separation Agreement') offered by Company H as the Appellant	44,328.77

		$
(b)	Shortfall of compensation (the 'Alleged Shortfall') computed on the basis of monthly salaries times year of service less statutory severance payment and the Alleged Special Bonus	158,017.75
		202,346.52

38. We reject the Appellant's proposition for the following reasons:

38.1. In Case D4/05, (2005-06) IRBRD, vol 20, 256 the Board stated

'*For a sum to be compensation, it must be shown that there is the loss or surrender of rights on the part of the Taxpayer and a legal liability on the part of (the employer) to pay compensation for loss of such right.*'

38.2. In Case No. D80/00, IRBRD, vol 15, 715 the relevant facts as summarized in the head note reads

' *On termination of his employment, the taxpayer was paid ... and a sum described as "top-up supplement" amount. ...The taxpayer contended that the "top-up supplement" was not in the nature of an ex gratia redundancy payment which [the employer] was morally, though not legally obliged to pay. The taxpayer argued that the "top-up supplement" was not taxable.*'

and the head note further summarized the approaches to be adopted in the following manner:

'*The principles which should apply in cases where the issue is whether a payment received by an employee upon termination of his employment is taxable under section 8(1) of the IRO are: (1) a payment would be taxable if it is in the nature of a gift or present usually given on account of past services. The word "gratuity" connotes a gift or present usually given on account of past services; (2) 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; (3) it is not the label, but the real nature of the payment, that is important; (4) the way in which the sum in question was arrived at is a material factor in determining the real nature of the payment (D24/88, IRBRD, vol 3, 289; D13/89, IRBRD, vol 4, 242; D12/92, IRBRD, vol 7, 122; D19/92, IRBRD, vol 7, 156; D15/93, IRBRD, vol 8, 350; D43/93, IRBRD, vol 8, 323; D13/94, IRBRD, vol 9, 136; D16/95, IRBRD, vol 10, 144; D90/96, IRBRD, vol 11, 727; D3/97, IRBRD, vol 12, 115;*

D24/97, IRBRD, vol 12, 195; D50/99, IRBRD, vol 14, 474; D30/00, IRBRD, vol 15, 339 considered)'

38.3. The Appellant never signed the Separation Agreement.

38.4. The Alleged Shortfall was only the compensation asked for by the Appellant in the email from the Appellant to his employer. There the Appellant complained

(a) that his employer has 'ignored all [his employer's] norm [not contractual or other legal obligations] to treat outgoing employees fairly' (emphasis added)

(b) that his employer has 'not observed the generally accepted practice [again not contractual or other legal obligations] applying to most responsible and caring employers [not just law abiding employers generally]' (emphasis added)

and then said 'I therefore would request you to consider my case again in more reasonable and sympathetic perspectives. Say ... to enable one to bridge the gap before retirement ... I therefore sincerely hope that you all can understand ... I put forward three options for your kind consideration ...' (emphasis added)

38.5. The litany of alleged malpractices complained of by the Appellant in his email to his colleagues sent on his last day of work does not show breach of any rights enforceable by him.

Interest Rate Point

39. For the sake of completeness, the Respondent has in the written submission to the Board set out (based on the amount of net chargeable income and tax payable per the Determination) the interest charged on the Appellant, and we have repeated the same below for information:

39.1. No interest would be payable for the year of assessment 2005/06 under charge number X-XXXXXXX-XX-X as the tax of $75,096 held over unconditionally would be completely discharged. Besides, the following amount would be refunded to the Appellant:

	$
Proposed revised net chargeable income per Determination	308,567
Proposed revised tax payable thereon	50,913
Less: Tax already paid	(51,803)
Proposed tax repayable	(890)

39.2. Interest would only be paid for the years of assessment 2002/03 to 2004/05 and the amount would be computed from the date of payment specified in the relevant notice of assessment to the date the Board issued its decision as follows:

Year of assessment	Charge Number	Amount of tax held over $	Date of payment
2002/03	X-XXXXXXX-XX-X	24,317	27-04-2009
2003/04	X-XXXXXXX-XX-X	23,369	10-08-2009
2004/05	X-XXXXXXX-XX-X	8,046	10-08-2009

40. However, the charge of interest was based on section 71(1) of the Ordinance and it was not a tax assessment and was not within the jurisdiction of the Board to decide (D39/05, (2005-06) IRBRD, vol 20, 577 refer.).

Prolonged Delay Point

41. The function of this Board is to determine the tax de novo according to the information supplied by the Appellant irrespective of the previous wrong assessment (if any).

Conclusion

42. The Appellant has not discharged his burden of proof and his arguments are rejected.

43. We dismiss the appeal and confirm the Determination.