

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D21/84

Board of Review:

H. F. G. Hobson, *Chairman*; Lawrence H. L. Fung & Ho Yiu-wah, *Members*.

8 January 1985.

Salaries tax—section 59(1) of the Inland Revenue Ordinance—whether an assessment raised under the proviso to the section was valid—section 11(D)(b) of the Inland Revenue Ordinance—whether certain leave pay should be related back.

The Appellant received on the 20 September, 1982 from his employer a lump sum of \$26,422 as leave pay for the period 2 October, 1982 to 26 November, 1982. The Appellant left Hong Kong on 5 October, 1982, and the Appellant's employer had already advised the Commissioner about the Appellant's intended departure. On 15 October 1982, the Assessor gave notice to the Taxpayer pursuant to S. 51(1) to complete his 1982/83 Tax Return within 2 weeks. On 19 October, prior to the expiry of the 15 October notice, the Assessor raised an assessment under the proviso to Section 59(1). The Appellant appealed on the grounds that the assessment was invalid as not complying with the "about to leave" limb of the proviso and that the leave pay should be treated as required by Section 11(D)(b).

Held:

- (1) On the facts the Assessor was invoking the "any other reason" limb of the proviso and the assessment was therefore valid. Nonetheless if the Assessor supposed, though erroneously, that the Taxpayer had not left Hong Kong, such belief, not being tainted by any improper motive, would not invalidate the notice.
- (2) The proviso to S. 11(D)(b) did not apply, as the Appellant's employment was not terminated and the lump sum was stated by his employer as "leave pay" which was generally considered as having been earned at the conclusion of the period of service.

Appeal dismissed.

A. J. Halkyard for the Commissioner of Inland Revenue.

B. J. Fludder for the Appellant.

Reasons:

F appeared for the Taxpayer in this appeal and Mr. A. J. Halkyard, Assessor (Appeals), appeared for the Inland Revenue Department (IRD).

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The Taxpayer was assessed to Salaries Tax for the year 1981/82 and 1982/83. The Acting Deputy Commissioner of Inland Revenue upheld the assessments and the Taxpayer thereupon appealed on the grounds that:—

- (a) the 1982/83 assessment was invalid as not complying with the first limb of the proviso to section 59(1) of the Inland Revenue Ordinance; and
- (b) certain leave pay should be treated as required by section 11(D)(b).

As regards ground (a) the relevant statutory provision reads as follows:—

“S. 59(1) Every person who is in the opinion of an assessor chargeable with tax under this Ordinance shall be assessed by him as soon as may be after the expiration of the time limited by the notice requiring him to furnish a return section 51(1):

Provided that the assessor may assess any person at any time if he is of opinion that such person is about to leave the Colony, or that any other reason it is expedient to do so.”

It is common ground that:—

- (1) on the 27 May 1982 the Taxpayer advised IRD that he would be leaving Hong Kong end of September 1982;
- (2) on the 13 September 1982 the Taxpayer’s employer advised IRD that the Taxpayer would be transferred to Australia at the “beginning of October 1982”;
- (3) on 4 October 1982 the employer advised IRD that the Taxpayer would “leave Hong Kong on 5 October 1982 but he will return to Hong Kong on 30 October 1982 in transit to Australia”;
- (4) the Taxpayer left Hong Kong on 5 October 1982;
- (5) on 15 October 1982 the Assessor gave notice to the Taxpayer pursuant to S. 51(1) to complete his 1982/83 Salaries Tax Return within 2 weeks from the date of the notice;
- (6) on 19 October 1982 the Assessor raised an assessment “under S. 59(1) proviso of the Inland Revenue Ordinance” (the “S. 59(1) assessment”);
- (7) such assessment was raised prior to the expiry of the 15 October notice;
- (8) the Taxpayer having returned in transit to Australia filed the Salaries Tax Return on the 30 October 1982.

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The Taxpayer's grievance lies in the fact that when he left Hong Kong on the 5 October he was not under notice to file the tax return and that when he returned on the 30 October he did file the tax return but in the interval the Assessor has raised the section 59(1) assessment.

This grievance is readily understood but the question is whether or not it is open to us to treat the section 59(1) assessment as invalid. F referred to a letter of 19 November 1982 by the Assessor of which the relevant part reads:—

“By virtue of the proviso to section 59(1) of the Inland Revenue Ordinance, an Assessor may assess any person at any time if he is of opinion that such person is about to leave the Colony. Therefore the assessment for 1982/83 dated 19 October 1982 under charge number 8-8276592-83-7 was validly made. As the Assessment was raised in the absence of the Salaries Tax Return, it must be an estimate assessment under S. 59(3).”

F contends that the first sentence constitutes evidence that it was in reliance on the “about to leave” limb of the proviso rather than the “any other reason” limb upon which the Assessor relied and that as the Taxpayer had already left Hong Kong the Assessor could not invoke that limb. To this Mr. Halkyard says if it is accepted that the Assessor actually knew that Taxpayer had left when the S. 59(1) assessment was made it would be absurd to assume that the Assessor was relying on “about to leave” limb. We would agree that the Assessor's letter of the 19 October was couched in such a manner as to suggest, at least superficially, that the Assessor had not on the 19 October addressed himself to the “any of the reason” limb: nonetheless if the Assessor supposed, though erroneously, that the Taxpayer had not left Hong Kong we are of the view that such belief, not being tainted by any improper motive, would not invalidate the notice.

However since we have formed the view that the Assessor was indeed invoking the second limb, notwithstanding the explanation in the letter of the 19 October, because he must by the 19 October have been very conscious of the fact that though the Taxpayer had left on the 5 October he would return (albeit in transit) on the 30 October and that though the 15 October notice expired on the 29 October that notice only dealt with the need to file a return—i.e. it was not an assessment—and therefore the Taxpayer might be out of reach when the assessment was finally made, with a possibility that tax might not be recoverable.

The action of the Assessor was perhaps rather heavy handed in the case of this Taxpayer, who had and has shown no signs of ducking his liability, nonetheless having concluded that the second limb of the proviso had been invoked we hold the S. 59(1) assessment to be valid. The financial outcome from the Taxpayer depends upon our views on the second ground of appeal.

The Taxpayer received on the 20 September 1982 from his employers a lump sum of \$26,422 as leave pay for the period 2 October 1982 to 26 November 1982. F contended that the Taxpayer's office or employment was terminated on the 2 October and therefore the first proviso to S. 11D(b) applies or if that argument fails then by the second proviso the lump sum should be related back and deemed to be income of an earlier period in which case, he argues, a portion of it should be attributable to 5 weeks in 1981/82 and thereby form part of

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that year's assessable income rather than 1982/83. In our opinion these contentions must fail because as stated in the Employer's return the lump sum was stated by the Employer to be "leave pay" not a gratuity on termination of office nor deferred pay or arrears of pay arising from an award of salary or wages. The Taxpayer's employment was not terminated and in the absence of examining the terms of his service—which were not tendered in evidence—we consider that the normal practice of treating leave as earned only at the conclusion of the period (be it a year or some longer or shorter period) of service and the pay attributable to the leave should be treated accordingly. In simplistic terms if the Taxpayer had been sacked for misconduct one day before he left Hong Kong he would not have been entitled to the pay on the argument that it related to a period when he was behaving himself as would be the case if, for some reason, the payment of his salary for an earlier period had been deferred.

The Taxpayer's appeal on both grounds therefore fails.