

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D25/92

Salaries tax – resignation – ex-gratia termination payment – whether payment subject to salaries tax.

Panel: William TURNBULL (chairman), Sydney Leong Siu Wing and Terence Tai Chun To.

Date of hearing: 2 July 1992.

Date of decision: 16 September 1992.

The taxpayer resigned from her employment on the ground of ill health. In addition to other benefits she was given by her employer an ex-gratia termination payment equal to one and a half month's basic salary. She submitted that the termination payment should not be subject to tax on account of her sickness.

Held:

The payment was an ex-gratia payment and was subject to salaries tax.

Appeal dismissed.

Cases referred to:

Herbert v McQuade 4 TC 489
D79/88, IRBRD, vol 4, 160
Shilton v Wilmshurst [1991] STC 88

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This is an appeal by a taxpayer against a salaries tax assessment which included a termination payment. The facts are as follows:

1. The Taxpayer was employed as a manager of a company.
2. The Taxpayer resigned from her employment on the ground of ill health.

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3. The employer of the Taxpayer paid to the Taxpayer in addition to her salary and other benefits a termination payment of \$21,000.
4. The termination payment was an ex-gratia payment made by the employer to the Taxpayer upon her resignation.
5. The termination payment was not paid out of an approved provident fund. The quantum of the termination payment was equal to one and a half month's basic salary of the Taxpayer.

At the hearing of the appeal the Taxpayer appeared and represented herself. She submitted that the termination payment should not be subject to salaries tax because she had resigned on account of continuing sickness. She said that her doctor had advised her to leave her job to enable her to recover from her sickness. She said that she had given over two months' notice of termination to her employer. She said that the termination payment was intended to assist her in meeting her on going medical expenses and to compensate her for her loss of employment. She said that in such circumstances she felt that the termination payment should be tax free and that is why she was appealing. She said that after resting for three months she was fully recovered and then obtained employment with a new employer.

The representative for the Commissioner told the Board that the Commissioner agreed that the termination payment was paid by the employer as an ex-gratia payment to compensate the Taxpayer for her loss of employment. He submitted that the termination payment was income from the employment of the Taxpayer. He said that the termination payment was not a payment by way of damages for breach of contract by the employer. He said that the Taxpayer had not been deprived of any rights and it was clear that the termination payment was assessable. He referred us to the following authorities:

Herbert v McQuade 4 TC 489

D79/88, IRBRD, vol 4, 160

Shilton v Wilmshurst [1991] STC 88

This is a simple and straight forward case which arises from the lack of understanding of our tax law by the Taxpayer. An ex-gratia payment made by an employer to an employee upon the termination of an employee's employment is subject to assessment to salaries tax. This is the reason why the Inland Revenue Ordinance provides an exception for payments made from approved provident funds. This payment was not made from an approved provident fund and is accordingly taxable.

For the reasons given this appeal is dismissed.