

## INLAND REVENUE BOARD OF REVIEW DECISIONS

### Case No. D25/98

**Salaries tax** – whether payment described as “long service payment” constituted long service payment within the meaning of the Employment Ordinance – whether liable to salaries tax – sections 8 of the Inland Revenue Ordinance – sections 31R and 31T(2) of the Employment Ordinance.

Panel: Ronny Tong Ka Wah SC (chairman), Philip Kan Siu Lun and Yu Yui Chiu.

Date of hearing: 17 April 1998.

Date of decision: 20 April 1998.

The taxpayer was employed by Company X. On 31 December 1995, the taxpayer’s contract was terminated and was paid a “long service payment” in the sum of \$72,334 but was immediately re-employed by Company X on 1 January 1996.

The taxpayer objected to the sum of \$72,334 being treated as assessable income by the Revenue but was rejected by the Commissioner of Inland Revenue. The Revenue conceded that by practice, long service and severance payments paid under or by reason of the Employment Ordinance, Chapter 57 (“the Ordinance”) were not taxable because they as compensation for loss of employment did not constitute income from employment within the meaning of section 8 of the Inland Revenue Ordinance, Chapter 112.

Held:

1. Whether the sum constitutes long service payment within the meaning of the Ordinance must be determined by the circumstances of the payment and the provisions of the ordinance, not merely by the description of the employer or anybody else.
2. The key consideration was whether there was a loss of employment. If there was no loss of employment, then the payment could not be compensation for such loss and must be treated as a payment arising out of the taxpayer’s employment (D26/94 followed). This approach is wholly in line with sections 31R and 31T(2) of the Ordinance.
3. The taxpayer’s case falls within section 31T(2) which provides that an employee shall not be taken to be dismissed by his employer if his contract of employment is renewal, or he is re-engaged by the same employer under a new contract of employment; and the renewal or re-engagement takes effect

## INLAND REVENUE BOARD OF REVIEW DECISIONS

immediately on the ending of his employment under the previous contract. Accordingly, the Board found itself bound to find that the sum paid does not constitute long service payment within the meaning of the Ordinance and the appeal was dismissed.

*Per curiam.* If the new employment were not to take effect until a few days after the termination of the previous contract of employment, section 31T(2) might well not be applicable.

### **Appeal dismissed.**

Case referred to:

D26/94, IRBRD, vol 9, 189

Cheung Lai Chun for the Commissioner of Inland Revenue.  
Taxpayer in person.

### **Decision:**

#### **Background Facts**

1. The Taxpayer was and is a printing technician employed by Company X ('the Employer'). He started his employment with the Employer on 26 March 1980.
2. On 30 December 1991, the Taxpayer was paid by the Employer a sum of \$63,364 described as 'long service payment' for his service between 26 March 1980 and 31 December 1988. We are not concerned with this payment.
3. On 31 December 1995, his employment contract was terminated and he was paid another 'long service payment' in the sum of \$72,334 for the period between 1 January 1989 and 31 December 1995 which constituted the subject matter of this appeal.
4. The Taxpayer, however, was immediately re-employed by the Employer on 1 January 1996. The Employer in a letter dated 10 September 1997 addressed to the Revenue, said, 'The Taxpayer's post and job nature remain unchanged.'

#### **The Assessment**

5. The Revenue originally raised on the Taxpayer the following salaries tax assessment for the year of assessment 1995/96:

#### **Assessable Income**

## INLAND REVENUE BOARD OF REVIEW DECISIONS

Salary	HK\$207,902
Bonus	<u>HK\$ 17,000</u>
	HK\$224,902
<b>Less Allowances</b>	
Basic	(HK\$ 79,000)
Child	(HK\$ 44,000)
Dependent parent	<u>(HK\$ 28,000)</u>
	(HK\$151,000)
<b>Net Chargeable Income</b>	<u>HK\$ 73,902</u>
<b>Tax Payable</b>	<u>HK\$ 7,163</u>

6. The Taxpayer objected to this assessment on the basis that the figure for salary should be \$200,485 instead of \$207,902 and that there was a 'long service payment' of \$72,334 ('the Sum').

7. Upon further investigation, the Revenue re-assessed the Taxpayer thus:

<b>Assessable Income</b>	
Salary	HK\$200,485
Bonus	HK\$ 17,000
The Sum	<u>HK\$ 72,334</u>
	HK\$289,819
<b>Less Allowances</b>	
Basic	(HK\$ 79,000)
Child	(HK\$ 44,000)
Dependent parent	<u>(HK\$ 28,000)</u>
	(HK\$151,000)
<b>Net Chargeable Income</b>	<u>HK\$138,819</u>
<b>Tax Payable Thereon</b>	<u>HK\$ 19,963</u>

8. The Taxpayer further objected to this assessment but by a determination dated 24 October 1997, his objection was rejected by the Commissioner of Inland Revenue. From that determination, the Taxpayer appeals.

### **Whether The Sum (Long Service Payment) Is Taxable**

9. The Revenue concedes that by practice, long service and severance payments paid under or by reason of the Employment Ordinance, Chapter 57 ('the Ordinance') are not taxable because they as compensation for loss of employment do not constitute income from employment within the meaning of section 8 of the Inland Revenue Ordinance, Chapter 112.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

10. The Taxpayer argued because of this established practice the Sum is not taxable since it constitutes long service payment with the meaning of the Ordinance.

11. When questioned by us as to the basis of this contention, he said the Sum was long service payment because that was how it was described by the Employer and both he and the Labour Department agreed that it was so.

12. In our view, this contention is wholly misconceived. While this Board has every sympathy for the Taxpayer, whether the Sum constitutes long service payment within the meaning of the Ordinance must be determined by the circumstances of the payment and the provisions of that ordinance. It does not become a long service payment just because the Employer or for that matter, any body else says so.

13. The key consideration here is whether there was a loss of employment. If there was and the Sum was compensation for such loss, then it is not income arising from employment within the meaning of section 8 of the Inland Revenue Ordinance, Chapter 112. If there was no loss of employment, then the Sum cannot be compensation for such loss and must be treated as a payment arising out of the Taxpayer's employment. This appears to be the decision of this Board in D26/94, IRBRD, vol 9, 189 cited to us by the Revenue.

14. This approach is wholly in line with the provisions in the Ordinance. Section 31R provides that long service payment would only become payable where either the employee is dismissed or he terminates his contract in certain circumstances. There is no suggestion here that the Taxpayer had terminated his employment contract.

15. Section 31T(2) provides:

*'An employee shall not be taken ... to be dismissed by his employer if –*

- (a) his contract of employment is renewed, or he is re-engaged by the same employer under a new contract of employment; and*
- (b) the renewal or re-engagement takes effect immediately on the ending of his employment under the previous contract.'*

16. That is precisely the case here. We appreciate that the Employer may well be taking advantage of the law and so structured his affairs so that substantial long service or severance payments are not payable in cases of employees who have worked for him for a long time. It is, however, neither within our power nor appropriate for us to comment on such a course of conduct except perhaps to observe that if the new employment were not to take effect until a few days after the termination of the previous contract of employment, section 31T(2) might well not be applicable.

## INLAND REVENUE BOARD OF REVIEW DECISIONS

17. In these circumstances, we are bound to find that the Sum does not constitute long service payment within the meaning of the Ordinance and the appeal must be dismissed.