

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D28/91

Salaries tax – marriage gratuity on retirement – whether exempt from tax under section 8(2)(c) of the Inland Revenue Ordinance.

Panel: Robert Wei QC (chairman), Albert Ho Chun Yan and Douglas C Oxley.

Date of hearing: 28 May 1991.

Date of decision: 5 July 1991.

Madam X was employed by the Hong Kong Government as a civil servant. On her retirement from the civil service on marriage she received a gratuity which was assessed to salaries tax by the assessor. She and her husband appealed against this assessment and argued that the marriage gratuity was similar to a lump sum payment received by way of commutation of pension.

Held:

A marriage gratuity is different from a pension payment and is subject to salaries tax.

Appeal dismissed.

Cases referred to:

Calvert v Wainwright [1947] 1 KB 526

Pauley v Kenaldo [1953] 1 WLR 187

Wright v Boyce [1958] 1 WLR 593

BR 89/77, IRBRD, vol 1, 306

Cape Brandy Syndicate v IRC [1921] 1 KB 64

Canadian Eagle Oil Co Ltd v R [1946] AC 119

Commissioners of Customs and Excise v Top Ten Promotions Ltd [1969] 3 All ER 85

Mapp v Oram [1969] 3 All ER 215

Chiu Kwok Kit for the Commissioner of Inland Revenue.

Taxpayers in person.

Decision:

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1 This is a decision on two appeals: one by Madam X against the additional salaries tax assessments raised on her for the years of assessment 1983/84 and 1984/85 respectively and the other by Mr Y, her husband, against the salaries tax assessment raised on him for the year of assessment 1985/86. The question for decision in both appeals is whether a gratuity received by Madam X on her retirement from the civil service on marriage was assessable to salaries tax.

2. Madam X and Mr Y conducted their appeals in person; Madam X was the main speaker between them. Mr Chiu represented the Commissioner of Inland Revenue whose Deputy's determinations are the subject of these appeals.

3. No witness was called, but the facts mentioned below are agreed or not in dispute.

3.1 Madam X joined the civil service in 1970 on two years' probation. In 1971 she was appointed a higher post on two years' probation. In 1973 she passed the probation bar and was confirmed to the permanent and pensionable establishment.

3.2 In early 1985 Madam X notified the Secretary for the Civil Service that she intended to marry Mr Y in March 1985, that she wished to apply for marriage gratuity and that she wished to be re-appointed after retirement on marriage. The Secretary for the Civil Service then gave approval for Madam X to retire on marriage and to be re-appointed in the same post on non-pensionable temporary month-to-month terms with effect from mid-1985.

3.3 From early 1985 to mid-1985 Madam X was on casual and vacation leave.

3.4 In March 1985 Madam X married Mr Y.

3.5 In mid-1985, pursuant to regulation 6 of the Pensions Regulations, a marriage gratuity in the sum of \$62,746 was paid to Madam X.

4. The grant of a marriage gratuity to a woman officer is authorised by section 6 of the Pensions Ordinance and is regulated by regulation 6 of the Pensions Regulations which provides as one of the pre-conditions for the grant, that she is not eligible for the grant of a pension. It is not in dispute that Madam X was not eligible for the grant of a pension at the time, for the reason that she had not reached the normal retiring age of 55 as provided in section 8 of the Pensions Ordinance. The marriage gratuity was assessed to salaries tax on the view that it was within the meaning of the word 'gratuity' in section 9(1)(a) of the Inland Revenue Ordinance and therefore it is an assessable income. The word is not defined in the Ordinance. Jowitt's Dictionary of English Law, second edition, vol 1, 871 states under 'gratuities', 'the principle that gifts received as a reward for services rendered are subject to income tax' (Calvert v Wainwright [1947] 1 KB 526; Pauley v Kenaldo [1953] 1 WLR 187; Wright v Boyce [1958] 1 WLR 593). Mr Chiu in his written

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submission states that the word 'gratuity' is an ordinary word in the English language and connotes a gift or present usually given on account of past services. For present purposes it is not necessary to explore the exact confines of that word; suffice it to say that a voluntary payment received on account of past services is in our view a gratuity. Alternatively, since the definition of 'income from any office or employment' is inclusive (section 9(1)), a voluntary payment received on account of past services should in our view rank as income from an office or employment. In the present case the marriage gratuity was a voluntary payment in that under the then section 5 of the Pensions Ordinance no officer had an absolute right to a gratuity. The voluntary payment was certainly made on account of her past services; that brings the marriage gratuity within the meaning of section 9(1) of the Inland Revenue Ordinance and renders it assessable to salaries tax.

5. Madam X based her argument on a comparison she made between a marriage gratuity and a sum received by way of commutation of pension under section 8(2)(c) of the Inland Revenue Ordinance (called a gratuity under the old pension scheme (regulation 23 of the Pensions Regulations) and a commuted pension gratuity under the new pension scheme (section 24 of the Pension Benefits Ordinance)). Her contention is that as the gratuities under section 8(2)(c) are exempted from tax, so should a marriage gratuity; otherwise it is unfair, since both are gratuities and affect one's pension prospects. We are unable to accept that. First, the word 'gratuity' is not used in section 8(2)(c). Second, the gratuity under both the old and the new pension schemes is a right once the officer has exercised his/her option under regulation 23 or section 24 as the case may be, while Madam X's marriage gratuity was a voluntary payment. Third, while a gratuity under either pension scheme reduces the amount of pension payable, Madam X's marriage gratuity did no such thing. Her retirement had terminated her service and with it her prospects of pension. Last, a gratuity under the pension schemes is a lump sum commuted from a pension while a marriage gratuity has no link with any pension. In view of these differences, we do not think that Madam X's marriage gratuity is comparable to a sum received by way of commutation of pension.

6. Mr Chiu cited BR 89/77, IRBRD, vol 1, 306, in which the Board rejected the taxpayer's argument that the marriage gratuity paid to his wife was not taxable as it was paid in commutation of a pension. In the present case Madam X's argument is a little different. While stopping short of repeating the argument of the taxpayer in the BR 89/77 case, she nevertheless sought to draw a parallel between marriage gratuity and a sum received by way of commutation of a pension on the ground of 'unfairness'. Her approach arose from a lack of understanding of the principles governing the interpretation of tax statutes. The relevant words of the Inland Revenue Ordinance are clear. The question is simply whether the marriage gratuity is within the exemption provided by section 8(2)(c). If it is not, as we think is the case, that is the end of the matter. Rowlatt J in Cape Brandy Syndicate v IRC [1921] 1 KB 64 at 71 says, 'In a taxing Act, one has to look merely at what is clearly said. There is no room for any intendment. There is no equity about a tax. There is no presumption as to a tax. Nothing is to be read in, nothing is to be implied. One can only look fairly at the language used'. These words have been approved time and again: for example, by Viscount Simon LC in Canadian Eagle Oil Co Ltd v R [1946] AC 119 and by Lord Upjohn in Commissioners of Customs and Excise v Top Ten Promotions Ltd [1969] 3

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All ER 85 HL at 90, and in Mapp v Oram [1969] 3 All ER 215 HL at 222-3, where Lord Upjohn says:

‘The complexities of income tax law today are bound to give rise to cases of anomalies and hardships, sometimes even injustices, not always against the subject, sometimes, although less often, against the Crown. Unless there is some real ambiguity in the language used, and I do not think that there is here, it is quite unsafe to allow anomaly, hardship and injustice to control the language Parliament has used. Let us stick to the celebrated words of Rowlatt J, approved in your Lordships’ House which, as I have so recently quoted them in Commissioners of Customs and Excise v Top Ten Promotions Ltd, I will not quote again.’

7. As an alternative to her main argument, Madam X asked that 50% only of the marriage gratuity should be taxed, and she was told that there was no authority under the Inland Revenue Ordinance for that to be done. She then asked for the whole of the marriage gratuity to be treated as income for the year of assessment 1984/85 instead of being spread over a three-years period ending on the day of her retirement, that is, mid-1985. When she was told that again there was no authority for that to be done, but that she could have the whole gratuity treated as income for the year of assessment 1985/86, she stated that she would rather have it on a three-years spread.

8. It follows that these appeals are dismissed and that the assessments in question are hereby confirmed.