

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D28/92

Salaries tax – payments received on termination of employment – whether payments accrued to taxpayer in one year or another.

Panel: William Turnbull (chairman), Walter Chan Kar Lok and Richard Lee.

Date of hearing: 6 August 1992.

Date of decision: 29 September 1992.

The taxpayer was employed by a company. On the termination of his employment he received various sums of money including leave pay, bonus, payment in lieu of notice, and a severance payment. The employment of the taxpayer ceased on 31 March 1990 and all of the payments received by him were assessed to salaries tax in the year of assessment 1989/90. The taxpayer argued that the sums paid to him by way of bonus and leave pay should be assessed to tax in the subsequent year of assessment.

Held:

The two payments had been correctly assessed to salaries tax. Sections 11B and 11D provide that where a payment is received by an employee after the end of his employment, it shall be deemed to have accrued on the last day of that employment.

Appeal dismissed.

Iris Ng Yuk Chun for the Commissioner of Inland Revenue.

Taxpayer in person.

Decision:

This is an appeal by a taxpayer against an additional salaries tax assessment raised on him in respect of the year of assessment 1989/90. Upon termination of his employment the Taxpayer received certain sums of money from his employer which were assessed to tax in the year of assessment 1989/90. The Taxpayer maintained they should have been assessed to tax in respect of the following year of assessment. The facts are as follows:

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1. The Taxpayer was employed by a Hong Kong company ('the employer'). The employment of the Taxpayer with the employer ended on 31 March 1990. The employer paid to the Taxpayer various sums of money including leave pay, bonus, payment in lieu of notice, and a severance payment.

2. In his salaries tax return for the year of assessment 1989/90, the Taxpayer declared that he had received the following income during the year ended 31 March 1990:

Salary/wages	\$74,700
Bonus	<u>12,000</u>
	\$86,700
	=====

3. The assessor issued the following 1989/90 assessment to the Taxpayer based on his return:

Total Assessable Income	\$86,700
<u>Less: Charitable Donations</u>	<u>1,800</u>
	84,900
<u>Less: Personal Allowances</u>	<u>34,410</u>
Net Chargeable Income	\$50,490
	=====
Tax Payable thereon	\$4,588
	=====

4. Following the termination of the employment of the Taxpayer the employer informed the Inland Revenue Department that the Taxpayer had received, inter alia, leave pay, bonus, and a terminal award of a total of \$34,358. Following receipt of this information the assessor issued an additional assessment for the year of assessment 1989/90 to the Taxpayer with additional net chargeable income of \$34,358 and tax payable thereon of \$7,524.

5. The Taxpayer objected to this additional assessment on the ground that the severance payment received from the employer should not be subject to salaries tax.

6. The assessor agreed that the severance payment and the payment in lieu of notice totalling \$21,850 were not liable to be assessed to salaries tax but maintained that the entirety of the bonus of \$3,450 and the leave pay of \$6,648 were liable to be assessed to salaries tax and should be assessed in the year of assessment 1989/90. The assessor proposed to revise the additional assessment as follows:

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Total income from the Employer	\$118,648
<u>Less: Terminal award</u>	<u>21,850</u>
Total Assessable Income	96,798
<u>Less: Charitable Donations</u>	<u>1,800</u>
	94,998
<u>Less: Personal Allowances</u>	<u>33,401</u>
Net Chargeable Income	61,597
<u>Less: Original Assessment</u>	<u>50,490</u>
Additional Net Chargeable Income	\$11,107
	=====
Additional Tax Payable thereon	\$2,047
	=====

7. The bonus payment made to the Taxpayer comprised a total of \$15,450 of which \$12,000 was the year-end bonus for the calendar year 1989 and \$3,450 was a pro rata payment in respect of the 3 months up to 31 March 1990.

8. The Taxpayer objected to the proposal of the assessor and the matter was referred to the Deputy Commissioner. By his determination dated 28th April 1992 the Deputy Commissioner agreed with the assessor and determined that the additional salaries tax assessment for the year of assessment 1989/90 should be reduced as proposed by the assessor from additional net chargeable income of \$34,358 with tax payable thereon of \$7,524 to additional net chargeable income of \$11,107 with tax payable thereon of \$2,047.

9. By letter dated 13 May 1992 the Taxpayer appealed to this Board of Review.

At the hearing of the appeal the Taxpayer appeared on his own behalf. He said that when his employment terminated he received a lump sum which he thought was all severance pay and which he therefore excluded from his salaries tax return. Subsequently the Inland Revenue Department took the matter up with him and the Inland Revenue Department agreed that \$21,850 comprising the actual severance pay and payment in lieu of notice were not subject to salaries tax. However the balance of \$10,098 which had been paid to him on termination had been included as part of his taxable income for the year of assessment 1989/90.

He submitted that the sum of \$3,450 was his year-end bonus paid in advance because he left the company. He said that it should be subject to salaries tax but not in the year of assessment 1989/90. He said that this amount was the bonus to which he would have been entitled at the end of the calendar year 1990 but had been paid to him in advance because his employment terminated. He pointed out that the sum of \$12,000 was correctly assessed in the year of assessment 1989/90 because it related to the year 1989. If the sum of

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\$3,450 was taxed in the same year of assessment it would mean that he was paying tax on two different annual bonuses in one year of assessment which would be unfair. He said that the second bonus should have been paid to him in December 1990 and accordingly was taxable income for the year of assessment 1990/91.

With regard to the leave pay he said that he had worked full time and received his full salary for the period from January to March 1990 and again if he had not left his employment at the end of March 1990 he would have received his leave pay or taken his leave after 31 March 1990. Accordingly he submitted that the sum of \$6,648, being leave pay, should be assessed to salaries tax in the year of assessment 1990/91 and not in the year of assessment 1989/90. He pointed out that he did not challenge the assessability of either of the two sums of money but maintained that they had been assessed to tax in the wrong year of assessment.

The representative for the Commissioner submitted that the assessor and the Deputy Commissioner were correct in assessing the two sums to salaries tax in the year of assessment 1989/90. He referred the Board to the provision of the Inland Revenue Ordinance, sections 11B and 11D. He referred to the facts which were not disputed. He said that the claim being made by the Taxpayer was fully understandable because the bonus and leave pay would attract a lower rate of tax due to the lower level of the income of the Taxpayer if it was assessed in the year of assessment 1990/91. However he submitted that on the wording of the Inland Revenue Ordinance it was not possible to assess the two sums in the year of assessment 1990/91 and that they must be assessed in the year of assessment 1989/90.

This Board has considerable sympathy for the Taxpayer because after his employment terminated it was some time before he was able to find alternative employment. Though he could not state exactly when the money was paid to him it would appear that it was received by him after the end of his employment which happened to be on the final day of the tax year. Had his employment terminated one day later the two sums would have been assessable to tax in the year of assessment 1990/91. Unfortunately for the Taxpayer that is not the case. His employment terminated on the last day of the year of assessment 1989/90 and whenever these two sums were paid to him they accrued due to him at that moment in time. Section 11B of the Inland Revenue Ordinance states that the assessable income of a person in any year of assessment shall be the aggregate amount of income accruing to him from all sources in that year of assessment. Section 11D(a) provides a safeguard that income shall not be assessed to tax until it is received but when it is received it is then assessed to tax in respect of the year in which it accrued. The second proviso to section 11D(b) then goes on to provide that if a payment is made to an employee after his employment has ceased, such payment shall be deemed to have accrued to that person on the last day of his employment. Unfortunately for the Taxpayer in this case his employment ceased on the last day of the tax year and the two payments have been correctly assessed to tax in the year of assessment 1989/90. For the reasons given we dismiss this appeal and confirm the determination of the Assistant Commissioner.

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