

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D30/00

Salaries tax – revised notification filed by employment – assessable – ex gratia payment – sections 8, 9 and 68(4) of the Inland Revenue Ordinance (‘IRO’), Chapter 112.

Panel: Ronny Wong Fook Hum SC (chairman), James Julius Bertram and Ho Chung Ping.

Date of hearing: 28 April 2000.

Date of decision: 29 June 2000.

The taxpayer employment was terminated on 23 May 1997. The termination notice spelt out various entitlements of the taxpayer on termination. On 30 October 1997, the employer filed a notification in respect of the taxpayer. The sum stated in the notification was \$423,792. The taxpayer was assessed on the basis of that notification and duly settled the tax so demanded by the Revenue. On 30 October 1998, the employer submitted a revised notification in respect of the income accrued to the taxpayer for the period ended 30 November 1997 with an aggregate sum of \$602,802.

The assessor had ascertained that the additional amount of \$179,010 (‘the Relevant Sum’) reported in the revised notification was discretionary payment made by the employer in favour of the taxpayer pursuant to clause 7(c) of the employment contract. The issue before the Board is whether the Relevant Sum is assessable as part of the taxpayer’s income.

The taxpayer contends that the Relevant Sum ‘was made in compensation for loss of office and not as an emolument derived from services rendered’. The taxpayer asserts that ‘the payment was ex gratia’ to a member of staff of the employer ‘whose services will no longer be required’.

Held:

1. The Relevant Sum is income arising in or derived from Hong Kong from an employment of profits.
2. The Relevant Sum was paid to the taxpayer pursuant to clause 7(c) of his employment contract. It was paid to him as a result of termination of his employment pursuant to express contractual provisions regulating the relationship between the parties. The taxpayer obtained the Relevant Sum by virtue of his employment with the employer. No question of compensation arises as the employment was severed in strict

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accordance with the procedure expressly agreed between the parties at the inception of their relationship.

Appeal dismissed.

Leung Wing Chi for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

Background

1. By letter dated 29 August 1995 [‘ the Employment Contract’], the Taxpayer was appointed by a Government authority [‘ the Authority’] as planning engineer II in the Authority’ s project division with effect from 6 November 1995.

- (a) Clause 1(d) of the Employment Contract provided for its termination by either party giving not less than two months’ prior written notice to the other party.
- (b) Clause 7 regulated the Taxpayer’ s participation in the Authority’ s retirement benefits scheme.

‘ If your services have been terminated by the Authority under clause 1(d) and in circumstances under which : -

- (i) benefits under the scheme become payable to you; and
- (ii) the amount of the benefits payable under the scheme is less than 25% of all salary paid to you under clause [4] and bonus payments paid to you under clause [6]

then the Authority shall have a discretion to pay to you such additional amount as, in aggregate with the amount of benefits under the scheme, equals 25% of such salary and bonus payments taking into account tax payable, as estimated by the Authority, on such salary and bonus payments.’

- (c) Clause 17(b)(ii) of the Employment Contract outlined various entitlements of the Taxpayer in the event of the Authority terminating the Taxpayer’ s employment for reasons other than the Taxpayer’ s misconduct.

2. By letter dated 25 September 1996, the Taxpayer was promoted to the position of

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planning engineer I. The terms of the Employment Contract were varied with increase in remuneration and other entitlements. Thereafter the Employment Contract could only be terminated by the service of three months' written notice.

3. The Taxpayer's employment with the Authority was terminated by notice from the Authority dated 23 May 1997 [' the Termination Notice'] to take effect from 1 December 1997. The Termination Notice spelt out various entitlements of the Taxpayer on termination. The Authority also indicated to the Taxpayer that ' details of the calculation of your final salary payment will be provided to you one month prior to your final day of service.'

4. On 30 October 1997, the Authority filed a notification in respect of the Taxpayer who was about to leave Hong Kong. The notification contained the following particulars:

(a) Period of employment :	1-4-1997 to 30-11-1997
(b) Particulars of income :	\$
Salary	309,000
Leave pay	4,747
Bonus	36,401
Others	<u>72,744</u>
	<u>423,792</u>

5. The Taxpayer was assessed on the basis of this notification. The Taxpayer duly settled the tax so demanded by the Revenue. A letter of release was issued to the Authority in respect of its notification dated 30 October 1997.

6. On 30 October 1998, the Authority submitted a revised notification in respect of the income accrued to the Taxpayer for the period ended 30 November 1997 as follows :

	\$
Salary	309,900
Leave pay	4,747
Bonus	36,401
Others	<u>271,754</u>
	<u>602,802</u>

7. The assessor had ascertained that the additional amount of \$179,010 [' the Relevant Sum'] reported in the revised notification was discretionary payment made by the Authority in favour of the Taxpayer pursuant to clause 7(c) of the Employment Contract.

8. The issue before us is whether the Relevant Sum is assessable as part of the Taxpayer's income.

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Hearing before us

9. The Taxpayer did not appear at the hearing on 28 April 2000.
10. We decided to consider this appeal in his absence pursuant to section 68 of the IRO.

The Taxpayer's grounds for appeal

11. The grounds relied upon by the Taxpayer are set out in his letter dated 21 January 2000. The Taxpayer contends that the Relevant Sum 'was made in compensation for loss of office and **not** as an emolument derived from services rendered.' The Taxpayer asserts that 'the payment was ex gratia' to a member of staff of the Authority 'whose services will no longer be required'. (Emphasis of the Taxpayer).

The relevant provisions in the IRO

12. Section 8 of the IRO states :

'(1) Salaries tax shall, subject to the provisions of this Ordinance, be charged for each year of assessment on every person in respect of his income arising in or derived from Hong Kong from the following sources –

(a) any office or employment of profits; and

(b) any pension.'
13. Section 9 defines income from employment to include any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others.
14. Section 68(4) provides that :

' the onus of proving that the assessment appealed against is excessive or incorrect shall be on the appellant.'

Our decision

15. We have no doubt that the Relevant Sum is income arising in or derived from Hong Kong from an employment of profits.
16. The Relevant Sum was paid to the Taxpayer pursuant to clause 7(c) of his Employment Contract. It was paid to him as a result of termination of his employment pursuant to express

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contractual provisions regulating the relationship between the parties. The Taxpayer obtained the Relevant Sum by virtue of his employment with the Authority. No question of compensation arises as the employment was severed in strict accordance with the procedure expressly agreed between the parties at the inception of their relationship.

17. For these reasons, we dismiss the Taxpayer's appeal.