Case No. D33/98

Salaries tax – whether payment from assets of staff provident fund and staff retirement plan subject to salaries tax – whether recognized occupational retirement schemes – Inland Revenue Ordinance sections 2, 8(1), 9(1), 87A – Occupational Retirement Schemes Ordinance section 2.

Panel: Ronny Wong Fook Hum SC (chairman), Chiu Chun Bong and Ho Kai Cheong.

Date of hearing: 22 January 1998.
Date of decision: 29 May 1998.

On 1 November 1972, the taxpayer commenced employment with Bank X (the Band). On 11 January 1978, the Commissioner of Inland Revenue gave its approval under the then 87A of the Inland Revenue Ordinance (IRO) to a Staff Provident Fund Scheme (the Scheme) of the Bank. The approval letter from the Commissioner indicates that lump sum payments to the Bank's employee pursuant to the Scheme 'will not be liable to salaries tax'. It further makes clear that 'approval is automatically cancelled should any alteration be made to the terms or conditions of the Scheme without notice to (the Commissioner)'.

On 5 January 1987, the Commissioner approved a Staff Retirement Plan (the Plan) of the Bank under the then section 87A of the IRO. The letter of approval from the Commission indicates that 'this approval is automatically cancelled should any alteration be made to the terms or conditions of the Plan without notice to me within one month of the date of change.'

Following the enactment of the Occupational Retirement Schemes Ordinance on 15 October 1993, the Scheme and the Plan became recognized occupational retirement schemes as defined by section 2 of that Ordinance.

In June 1995, the Bank was taken over by another bank. As a result, the Scheme and the Plan were terminated on 30 June 1995. Payment from the assets of the Scheme and the Plan were made to the taxpayer as one of the members of the Scheme and the Plan in July 1995.

The constitutes a material alteration to the terms and additions of the Scheme and the Plan.

By letter dated 14 July 1995, the Commissioner informed the Bank's representative that its approvals were withdrawn from 29 June 1995.

Held:

1. Section 8(1) of the IRO provides that salaries tax shall be charged on every person in respect of his income arising in or derived from any office or employment of profit. Section 9(1)(a) defines income from employment to include any amount received by an employee from a provident fund or scheme, other than a recognized occupational retirement scheme, as represents the employer's contributions. A recognized occupational retirement scheme is defined by section 2 of the IRO to mean an occupational retirement scheme approved by the Commissioner under section 87A where such approval has not subsequently been withdrawn.

2. As the approvals previously given by the Commissioner to the Scheme and the Plan were withdrawn on 14 July 1995, it follows that the Scheme and the Plan were not recognized occupational retirement schemes exempted under section 9(1) of the IRO. The receipts of the taxpayer are therefore taxable.

Appeal dismissed.

Jennifer Chan for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. On 1 November 1972, the Taxpayer commenced employment with Bank X ['the Bank'].

2. On 11 January 1978, the Commissioner of Inland Revenue gave its approval under the then section 87A of the Inland Revenue Ordinance ['the IRO'] to a Staff Provident Fund Scheme ['the Scheme'] of the Bank with effect from 1 January 1977. Under this Scheme:

a. All Chinese employees of the Bank who had completed a period of service of at least 1 year automatically became members of the Scheme.

b. Only the Bank but not the employee made contributions to the fund. Such contributions were not treated as the employees' income.

c. The Bank made its contributions to the fund on an annual basis. On the last day of December in each year, the Bank contributed to the fund in respect of each member who was in the employment of the Bank on that day an amount equal to his salary paid for the month of December in that year.

d. A participating member who resigned, retired or was dismissed from the service of the Bank and had completed less than 10 years of service with the Bank would not be entitled to any benefit under the Scheme.

The approval letter from the Commissioner indicates that lump sum payments to the Bank's employees pursuant to the Scheme 'will not be liable to salaries tax'. If further makes clear that the 'approval is automatically cancelled should any alteration be made to the terms or conditions of the Scheme without notice to [the Commissioner]'.

3. On 5 January 1987, the Commissioner approved a Staff Retirement Plan ['the Plan'] of the Bank under the then section 87A of the IRO. Under this Plan:

a. Employees who had completed a continuous period of service of at least 20 years with the Bank automatically became member of the Plan.

b. Only the Bank but not the employees made contributions to the Plan. Such contributions were not treated as the employees' income.

c. A participating member who retired at the age of 60 would be entitled to a lump sum equal to his final monthly salary multiplied by his period of service subject to a maximum of 40 years.

   The letter of approval from the Commissioner indicates that 'this approval is automatically cancelled should any alteration be made to the terms or conditions of the Plan without notice to me within one month of the date of change.'

4. Following the enactment of the Occupational Retirement Schemes Ordinance on 15 October 1993, the Scheme and the Plan became recognised occupational retirement schemes as defined by section 2 of that Ordinance.

5. By notice dated 12 May 1995, the Bank notified its employees the proposal of Bank Y to take over the Bank in June 1995. As a result of such take-over, the Scheme and the Plan would be terminated on 30 June 1995. The Bank further informed its staff that assets of the Scheme and the Plan would be distributed to its members in July 1995. This of course constitutes a material alteration to the terms and conditions of the Scheme and the Plan and strikes at the foundation whereby the Commissioner gave its two approvals. By letter dated 14 July 1995, the Commissioner informed the Bank's representative that its approvals were 'hereby withdrawn with effect from 29 June 1995'. The Bank's representative was further informed that 'The effect of withdrawal is that any sum representing the employer's contribution payable to members will be subject to salaries tax in accordance with sections 8 & 9 of the IRO in the hands of the members.

6. Payments from assets of the Scheme and the Fund were made by the Bank in favour of the Taxpayer. The issue before us relates to the taxability of such payments.

The contentions of the Taxpayer

7. The Taxpayer maintains that the amounts should not be taxable as they were distributions from Staff Provident Fund Scheme and Staff Retirement Plan.

8. The Taxpayer and her colleagues who accompanied her at the hearing made further complaints in relation to their loss of benefits upon their transfers to their new employer.

Our Decision

9. The Taxpayer's position stems from a misunderstanding of the relevant provisions of the IRO.

a. Section 8(1) of the IRO provides that salaries tax shall be charged on every person in respect of his income arising in or derived from any office or employment of profit.

b. Section 9(1)(a) defines income from employment to include any amount received by an employee from a provident fund or scheme, other than a recognized occupational retirement scheme, as represents the employer's contributions.

c. A 'recognized occupational retirement scheme' is defined by section 2 of the IRO to mean an occupational retirement scheme approved by the Commissioner under section 87A where such approval has not subsequently been withdrawn.

10. As pointed out in paragraph 5 above, the approvals previously given by the Commissioner to the Scheme and the Plan were withdrawn on 14 July 1995. It follows that the Scheme and the Plan were not 'recognized occupational retirement scheme' for the purpose of the exemption under section 9(1) of the IRO. The receipts of the Taxpayer are therefore clearly taxable.

11. Whilst we have some sympathy in relation to the other complaints of the Taxpayer and her colleagues, those complaints should be directed to their old/new employers. They are of no relevance to the issue before us.

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