

Case No. D34/05

Salaries tax – share options – when a source of employment income is deemed to commence or cease – sections 8, 9(1), 9(4), 11B, 11C, 11D, 66(1)(a), 66(1A), 68(2D) and 68(2E) of the Inland Revenue Ordinance ('IRO').

Panel: Kenneth Kwok Hing Wai SC (chairman), Melville Thomas Charles Boase and Kwong Chi Keung.

Date of hearing: 10 June 2005.

Date of decision: 8 August 2005.

The appellant was granted options to subscribe for shares quoted on an overseas stock exchange during his employment. After his retirement from his employment, the appellant, on three separate occasions, exercised the options. The assessor raised on the appellant salaries tax, computing the gains in accordance with section 9(4). The taxpayer objected to the three salaries tax assessments.

Held:

1. On his cessation to hold employment by his former employer, the appellant is **deemed** by section 11B and 11C to cease to derive income from this source. The appellant had no source of employment income in any of the three relevant years of assessments and there is no basis for any salaries tax to be charged or assessed on any gain realised by the exercise of his options after cessation of his employment.
2. Proviso (ii) to section 11D(b) does not assist the respondent because option gains computed in accordance with section 9(4) is not 'payment made by an employer to a person after that person has ceased or been deemed to cease to derive income'.

Appeal allowed.

Cases referred to:

D31/03, IRBRD, vol 18, 477

D18/03, IRBRD, vol 18, 415

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Taxpayer in absentia.

Austin Grady and Go Min Min for the Commissioner of Inland Revenue.

Decision:

1. The appellant has been resident overseas since about 30 September 1994. It is not clear:
 - (a) when the Determination dated 28 January 2005 was transmitted to him at his overseas address, and
 - (b) whether his notice of appeal dated 24 February 2005 and received by the Clerk to the Board of Review on 9 March 2005 was outside the one month time limit under section 66(1)(a) of the Inland Revenue Ordinance, Chapter 112.
2. The respondent has no objection to an extension of time. If the appeal was out of time, we extend time for appeal under section 66(1A).
3. We also accede to the appellant's application under section 68(2D) & (2E) to hear the appeal in the absence of the appellant or his representative and to consider written submissions submitted on his behalf to the Board.
4. This is an appeal against the Determination of the Deputy Commissioner of Inland Revenue dated 28 January 2005 whereby:
 - (a) Salaries tax assessment for the year of assessment 1996/97 under charge number 9-2521183-97-4, dated 6 July 2001, showing assessable income of \$2,046,508 with tax payable thereon of \$306,976 was confirmed;
 - (b) Salaries tax assessment for the year of assessment 1998/99 under charge number 9-2311615-99-1, dated 21 December 2004, showing net chargeable income of \$1,102,047 with tax payable thereon of \$176,847 was confirmed; and
 - (c) Salaries tax assessment for the year of assessment 2000/01 under charge number 9-2045662-01-6, dated 1 November 2002, showing net chargeable income of \$776,842 with tax payable thereon of \$121,563 was confirmed.

The relevant facts

5. The facts in 'Facts under which the Determination was arrived at' in the Determination was admitted by the appellant and we find them as facts. For the purpose of our decision, the relevant facts are stated below.

6. On 1 September 1988, the appellant commenced his Hong Kong employment by his former employer.

7. On 27 June 1989, 26 June 1990, 25 June 1991, 23 June 1992 and 29 June 1993 the appellant was granted options to subscribe for shares quoted on an overseas stock exchange.

8. On 30 September 1994 the appellant retired from his employment by his former employer.

9. On 3 July 1996 the appellant exercised the options granted to him on 26 June 1990. On 23 January 1997, he exercised the options granted to him on 29 June 1993. The assessor raised on the appellant salaries tax for the year of assessment 1996/97, computing the gains in accordance with section 9(4).

10. On 24 September 1998 the appellant exercised the options granted to him on 25 June 1991. The assessor raised on the appellant salaries tax for the year of assessment 1998/99, computing the gain in accordance with section 9(4).

11. On 7 March 2001 the appellant exercised the options granted to him on 23 June 1992. The assessor raised on the appellant salaries tax for the year of assessment 2000/01, computing the gain in accordance with section 9(4).

12. The appellant objected to these three salaries tax assessments.

13. The Deputy Commissioner confirmed these three assessments.

Our decision

14. Section 8(1)(a) provides that:

'(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 profit ...'

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15. It is plain from the clear wording of section 8(1) that a person must derive income from employment (office or pension) before salaries tax is chargeable.

16. Sections 11B and 11C provide that:

‘ 11B 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.

11C For the purpose of section 11B, a person shall be deemed to commence or cease, as the case may be, to derive income from a source whenever and as often as he commences or ceases-

(a) to hold any office or employment of profit ...’

17. It is plain from the clear wording of sections 11B and 11C that in computing the assessable income of a person, that person shall be deemed to cease to derive income from a source whenever and so often as he ceases to hold any employment.

18. The appellant ceased to hold any employment as from 1 October 1994. On his cessation to hold employment by his former employer, he is **deemed** by sections 11B and 11C to cease to derive income from this source, that is, his employment by his former employer. The appellant had no source of employment income in any of the three relevant years of assessment, that is, 1996/97, 1998/99 and 2000/01 and there is no basis for any salaries tax to be charged or assessed on any gain realised by the exercise of his options after cessation of his employment.

19. We should add that proviso (ii) to section 11D(b) which provides that:

‘ 11D For the purpose of section 11B ...

(b) income accrues to a person when he becomes entitled to claim payment thereof:

Provided that-

(i) ...

(ii) subject to proviso (i), any payment made by an employer to a person after that person has ceased or been deemed to cease to derive income which, if it had been made on the last day of the period during which he derived income, would have been included in that person’s assessable income for the year of assessment in which he ceased or is deemed to cease to derive

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income from that employment, shall be deemed to have accrued to that person on the last day of that employment.'

does not assist the respondent because option gains computed in accordance with section 9(4) is not 'payment made by an employer to a person after that person has ceased or been deemed to cease to derive income'.

20. Mr Austin Grady relied on section 9(1)(d) and section 9(4). In our decision, neither provision assists the respondent. Section 9(1) lists items included as income. Section 9(4) is a provision on determining the amount of gain. Neither section 9(1)(d) nor section 9(4) is concerned with when a source of employment income is deemed to commence or cease.

21. Our decision on the interpretation of sections 8, 11B and 11C is sufficient to dispose of the appeal in favour of the appellant. It is thus not necessary for us to deal with any of the points raised on behalf of the appellant, many of which are bad, some are unarguably bad and one is misleading.

22. Mr Austin Grady did not refer to sections 11B and 11C in his written submissions. Before we part with this case, we would like to echo what was said in two reported cases on citation of relevant authorities. In D31/03, IRBRD, vol 18, 477 at 484:

'27. Barristers are bound by their professional code to ensure that the court or tribunal is informed of any relevant decision on a point of law or any legislative provision, of which they are aware and which they believe to be immediately in point, whether it be for or against their contention.

28. Citing a relevant decision does not prevent an advocate from arguing that the decision is distinguishable or wrongly decided (unless it is binding on the court or tribunal). If the advocate does not think that the relevant decision is distinguishable or wrongly decided or if the advocate knows that the decision is binding, and if he hides the relevant decision, he may be thought to be trying to induce the court or tribunal to reach a wrong decision. Any such attempt prejudicially affects the credibility of both the party and the advocate and cannot be in the long term interests of either. Nor is it in the best interests of justice.'

In D18/03, IRBRD, vol 18, 415 at 418:

'20. We do not know if Mrs Wong Yuen Wan-ye is a barrister. If she is, her conduct is governed by paragraph 136 of the Code of Conduct of the Hong Kong Bar which provides that:

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“In civil and, subject to the provisions of paragraph 154, in criminal cases, a barrister must ensure that the Court is informed of any relevant decision on a point of law or any legislative provision, of which he is aware and which he believes to be immediately in point, whether it be for or against his contention.”

21. *The Commissioner of Inland Revenue is a party in every tax appeal before the Board. It is in the long term interests of the Commissioner to earn the Board's trust, confidence and respect.*
22. *It is also in the long term interests of every tax representative, whether representing the taxpayer or the Revenue, to build up a reputation with the Board as an able and reliable tax representative with undoubted integrity.'*

Disposition

23. We allow the appeal and annul all three assessments appealed against.