Case No. D35/92

Salaries tax – bonus in lieu of pension and travelling expenses – whether assessable to salaries tax and deductible as expenses.

Panel: Howard F G Hobson (chairman), Victor R P Hughes and Eric Lo King Chiu.

Date of hearing: 19 October 1992.
Date of decision: 5 November 1992.

The taxpayer was employed by the Hong Kong Government and incurred travelling expenses in travelling from his house to the site where he worked. He submitted that these expenses should be deducted from his assessable income. The taxpayer was paid a bonus on the termination of his employment which he submitted was in lieu of a pension.

Held:

Travelling expenses to and from a place of work are not deductible from assessable income. The gratuity or bonus paid to the taxpayer on the termination of his employment was taxable and did not qualify as a non assessable pension.

Appeal dismissed.

Cases referred:

D79/88, IRBRD, vol 4, 160
CIR v Humphreys [1970] 1 HKTC 451

Wong Kuen Fai for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

This decision is concerned with an appeal against a salaries tax assessment for the year of assessment 1990/91 which included a bonus and disallowed travelling expenses.

By a local resident staff agreement (the Agreement) dated 20 June 1988 the Taxpayer was engaged by the Hong Kong Government for a period of two and a half years. The engagement ended on 22 September 1990. Pursuant to the Agreement he took leave

prior to the cessation of his employment during which he received $1,157 leave pay. He also received back pay of $195 and $13,713 being a bonus payable to him at the end of his engagement.

The Taxpayer objected to the assessment to the extent of $15,065, being the total of the above amounts, and further maintained that $2,002 incurred by him on bus fares from his house to the site at which he worked should be an allowable deduction. The facts are not in dispute.

The grounds of appeal and the Taxpayer's submission may be paraphrased as follows:

1. The $13,713 was a bonus paid in substitution for a pension to which he would be entitled if he had been a permanent government servant and such pensions are not taxable. Alternatively it is in the nature of compensation for the lack of the job security and retirement benefits to which government permanent staff are entitled.

2. The $2,002 was an expense wholly, exclusively and necessarily incurred in the production of the assessable income.

We can find no legal merit in either of these arguments. In the first place pensions, per se, which arise in or derive from Hong Kong, as is the case with government servants, are liable to salaries tax (section 8(1)(b) of the Inland Revenue Ordinance). If the pension is commuted then the lump sum is not liable to tax if the pension is derived from an approved pension scheme (section 8(2)(c)). Next section 9(1) provides that 'income from any office or employment includes … salary, leave pay … bonus …'. Hence the $195 back pay and the $1,157 leave pay are caught. As to the remaining $13,713 the Agreement specifically states that 'on completion of service the person engaged will be eligible for a bonus equivalent to 5% of the gross salary drawn during the period of engagement'. The Employer confirmed that the $13,713 represented 5% of the Taxpayer's gross basic salary.

The representative from the Inland Revenue Department referred us to D79/88, IRBRD, vol 4, 160 which dealt with an ex-gratia payment to an employee on his resigning, however there is no element of gift in the case before us, the $13,713 was a contractual requirement described as a bonus to which section 9(1)(a) expressly refers. The Taxpayer submitted that the nomenclature 'Bonus' used in the Agreement is not correct: we do not agree. We think 'bonus' implies an extra payment for satisfactory service and is the correct nomenclature, and has nothing to do with pensions.

As to the travelling expenses claim it has long been a tenet of tax law in England that 'it is the responsibility of every employee to get himself to his place of employment and that the expenses of his doing so are his own private concern and not the responsibility of his employer'. The expense of getting to work is not an act done in the performance of his duties. This principle was examined in depth in the leading local case of CIR v Humphreys [1970] 1 HKTC 451 the appeal decision of which is binding on us.

Although that case was concerned with sums reimbursed by his employer to Humphreys towards the expenses he incurred travelling between his house and his office the decision is relevant. It established that not only was the reimbursed amount taxable income but he could not set off against his income the actual travelling expenses incurred because the latter were not expenses wholly, exclusively and necessarily incurred by him in the production of his assessable income. The Taxpayer referred to the spirit of the Employees Compensation Ordinance implying that some analogy might be drawn but the Inland Revenue Department representative quite rightly pointed out that section 5A of that Ordinance provides that compensation for injury is restricted to means of transport operated or arranged by the employer and not used as public transport.

We therefore dismiss this appeal.