INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D36/92

Salaries tax – special bonus paid on commencement of employment – nature of special bonus – inducement to accept offer of employment – 'golden hello' – whether subject to assessment to salaries tax – sections 8(1) and 9(1) of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), Felix Chow Fu Kee and Sir Gordon M Macwhinnie.

Date of hearing: 28 September 1992.
Date of decision: 5 November 1992.

The taxpayer was employed in the United Kingdom. He was offered employment by a company in Hong Kong and to induce him to accept employment in Hong Kong he was offered a 'golden hello' payment of $420,000 when he joined the employment of the new employer in Hong Kong. The assessor assessed the payment of $420,000 to salaries tax. The taxpayer appealed against this assessment. The taxpayer argued that the payment was not a payment which arose out of his employment.

Held:

The payment was an inducement paid as a contractual obligation to the taxpayer in consideration of his taking up the position offered to him and accordingly was a perquisite which came within section 9(1)(a) of the Inland Revenue Ordinance. As the payment arose in Hong Kong it was chargeable to salaries tax.

Appeal dismissed.

Cases referred to:

Glynn v the Commissioner of Inland Revenue 3 HKTC 245
Shilton v Wilmshurst [1991] STC 88
Beak v Robson 25 TC 33
Hochstrasser v Mayes 38 TC 673
Jarrold v Boustead 41 TC 701
Pritchard v Arundale 47 TC 680
Riley v Coglan 44 TC 481
Vaughan Neil v CIR 54 TC 223
Mairs v Haughey [1992] TC 373
Laidler v Perry 42 TC 351
Glantre Engineering Limited v Goodhand 56 TC 165
Hamblett v Godfrey 59 TC 694

D13/89, IRBRD, vol 4, 242
D19/92, IRBRD, vol 7, 156

Doris Lee for the Commissioner of Inland Revenue.
Denis O'Dwyer of Ernst & Young for the taxpayer.

Decision:

1. THE SUBJECT MATTER OF THE APPLICATION

The Taxpayer appealed against the assessment to salaries tax for the year of assessment 1989/90 of a sum received from his then employer pursuant to his contract of employment.

2. THE FACTS

The facts, which were not in dispute are as follows:

2.1 Until late 1989 the Taxpayer was a resident of the United Kingdom and had for some four years been in the employment of a public limited company ('X Co').

2.2 During the second quarter of 1989 he was approached by a Hong Kong incorporated company ('Y Co') with a view to him taking up employment with it.

2.3 The Taxpayer came to Hong Kong where he had discussions with the then chief executive of Y Co whereafter, subject to a satisfactory remuneration package being agreed, he agreed to accept employment with Y Co.

2.4 By a letter dated 28 July 1989 addressed by Y Co to the Taxpayer, signed on behalf of its chief executive, the Taxpayer was offered the position of personnel controller. This letter, a copy of which was before the Board, set out the main terms and conditions of the offered employment, and incorporated other terms and conditions as contained in Y Co's staff handbook a copy of which was enclosed with the letter. This offer was conditional on a satisfactory medical report and acceptable references. The offer was accepted by the Taxpayer by countersigning and returning the letter to Y Co. The date of countersignature is 3 August 1989.

2.5 The letter included the following paragraph:

'4 Incentive Scheme

> You will be entitled to participate in our Incentive Scheme. The scheme considers company profits, departmental profits and individual performance.
>
> In respect of 1990, we will pay you a special bonus of $420,000. This will be paid to you at the time of the award of bonuses which will be at the end of January 1991.'

2.6 The Taxpayer arrived in Hong Kong in time to commence employment in late 1989.

2.7 By letter dated 10 January 1990 Y Co's chief executive advised the Taxpayer that:

> '… your guaranteed bonus of $420,000 will be paid into your bank account on 24 January 1990. I can also confirm that you will participate in the bonus scheme for the financial year ending 31 December 1990.'

2.8 The employer's return of remuneration and pension for the year ended 31 March 1990 filed by Y Co in respect of the Taxpayer provided the following information:

> 'Capacity in which employed : Personnel Controller
>
> Period of employment : 1-11-1989 to 31-3-1990
>
> Income:
>
> Salary : $350,000
>
> Other Payments
> - Interest Subsidy : 40,184
>
> $390,184
> =======
>
> Quarters:
>
> 4-11-89 to 8-12-89 : Room
>
> 7-12-89 to 31-3-90 : Flat'

2.9 That document was sent to the Inland Revenue ('IRD') under cover of a letter dated 27 April 1990 from Y Co, a copy of which was before the Board. In this letter Y Co advised the IRD:

> 'We would like to draw to your attention that, on joining [Y Co], [the Taxpayer] was paid the sum of $420,000 to compensate him for forfeited pension and employment rights which were lost as a result of his breaking his contract with his former employer.
>
> We do not regard the above-mentioned sum as remuneration and we have therefore not included it on the attached employer's return.'

2.10 On 21 November 1990 the assessor raised the following 1989/90 salaries tax assessment on the Taxpayer:

'Principal Income [$390,184 + $420,000]	$810,184
Add: Value of Quarters	37,228
Total Assessable Income	$847,412
Tax Payable thereon	$127,111

2.11 By notice dated 3 December 1990 the Taxpayer objected to that assessment as follows:

> 'The total principal income shown in your assessment for the year of assessment 1989/90 is $810,184, whereas my own return and my employer's return show my principal income as $390,184. The difference of $420,000 is presumably the compensation payment which I received in lieu of forfeited pension and employment rights when I broke my contract with my previous employer. I do not regard this sum as taxable remuneration and would therefore be grateful if you would recalculate your assessment.'

2.12 At the assessor's request, under cover of a letter dated 8 August 1991, signed by its personnel manager, a copy of which was before the Board, Y Co supplied a copy of the Taxpayer's contract, the letter dated 28 July 1989, refer paragraph 2.4 above, and a copy of the letter dated 10 January 1990, refer paragraph 2.7 above. This letter included the following:

> 'We would however draw your attention to two of the terms of the contract as and which do not correctly reflect the true situation.
>
> Firstly … [There follows an explanation with respect to Y Co's policy on accommodating employees.]

> Secondly, in the second paragraph of Clause 4: Incentive Scheme, the reference to 1990 and special bonus of $420,000 are also inaccurate. In fact, as will be seen from [Y Co's chairman/chief executive's] letter of 10 January 1990 [see Appendix C], the payment of $420,000 was made on 24 January 1990 and was a totally separate and distinct matter to [the Taxpayer's] participation in the incentive bonus scheme for 1990 (which amounts were computed and paid one year later).
>
> The payment was, therefore, in fact, unrelated to our incentive scheme and was an exceptional special payment to compensate [the Taxpayer] for losses (real and opportunity) which he suffered as a consequence of his leaving his employment [in the United Kingdom] and joining our group here in Hong Kong (our letter 27 April 1990 refers). Basically the rights forfeited in the United Kingdom related to pension and profits share in his former employer.
>
> [The Taxpayer's] remuneration level and other payments/benefits in Hong Kong were unaffected by the calculation and payment of this special compensation. As stated previously, we do not regard this amount as being a part of his remuneration and we have therefore not reported it as such in our year-end returns of income subject to salaries tax.'

2.13 In a further letter dated 29 January 1992 from Y Co to the IRD, a copy of which was before the Board, signed by its chairman, the individual identified as its chief executive in the letters of 28 July 1989 and 10 January 1990, refer, respectively, paragraphs 2.4 and 2.7 above, Y Co stated:

> 'The payment made to [the Taxpayer] in January 1990, which was in fact due to him upon his joining [Y Co], was a one-off payment and was not dependent upon him remaining with [Y Co] for any guaranteed period, his performance in that period or even upon the company's performance within the period. The payment was not refundable if [the Taxpayer] subsequently left the company and was paid as a compensation for loss of previous benefits available to him from his former employer and not related to any future services required to be rendered to [Y Co].'

2.14 In reply to the assessor's enquiries, in a letter dated 19 November 1991 from the Taxpayer's tax representative, a copy of which was before the Board, they stated:

> 'The sum of $420,000 was not arrived at by means of any defined calculation determined by specific values being placed upon the rights forfeited. It represents a mutually agreed sum between [Y Co] and our client payable to him upon taking up his employment in Hong Kong. The sum was in the nature of a 'golden hello' offered and paid to [the

Taxpayer] to induce him to take up the employment in Hong Kong which did not include such beneficial rights as he was entitled to in his employment within the [X Co] in the United Kingdom.'

2.15 The assessor subsequently determined that the rental value of the Taxpayer's quarters was wrongly calculated whereby the 1989/90 salaries tax assessment should be revised as follows:

Principal Income		$810,184
Add:	Value of Quarters	
33/148 x $810,184 x 8%	$14,451	
115/148 x $810,184 x 10%	62,953	77,404
Revised Assessable Income		$887,588
Tax Payable thereon		$133,138

2.16 In his determination dated 13 March 1992 the Deputy Commissioner of IRD rejected the Taxpayer's objection and adjusted the salaries tax assessment from that set out in paragraph 2.10 above to that set out in paragraph 2.15 above citing the following reasons:

(1) Section 9(1)(a) of the Inland Revenue Ordinance provides that income from any office or employment includes wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite or allowance.

(2) In the present case the Taxpayer claims that the sum of $420,000 he received from his employer was a compensation and should not be included as part of his income chargeable to tax. On the facts before me, I cannot accept the Taxpayer's claim. There is neither evidence nor details produced to show that the Taxpayer has forfeited his rights under his previous employment. On the other hand, it seems clear that the amount was paid as a contractual payment. I am therefore satisfied that such guaranteed sum has been correctly categorized as income from employment as defined in section 9(1)(a) of the Ordinance and is therefore chargeable to tax.

(3) For the above reasons the objection fails. The assessment is hereby revised as per Fact (10).

2.17 The Taxpayer had resigned from Y Co's employment before the letter of 8 August 1991, refer paragraph 2.12 above, was written.

3. NOTICE AND GROUNDS OF APPEAL

The Taxpayer's tax representative gave notice of appeal on 10 April 1992 the grounds of appeal being:

'1) The salaries tax assessment for 1989/90 is erroneous and excessive.

2) The payment of the sum of $420,000 to [the Taxpayer] does not fall within the meaning of income from employment in section 8(1) of the Inland Revenue Ordinance. The sum was a capital payment, paid to our client to entice him to move to Hong Kong and take up a new employment. The payment was not dependent upon or client remaining in the service of his employer and therefore performing any services in Hong Kong. Accordingly the payment should not be taxable under section 8(1) of the Ordinance.'

4. D19/92, IRBRD, vol 7, 156

4.1 The decision in this case, which was heard on 14 May 1992, was issued on 31 July 1992 and was available to the Board. One aspect of that case involved a taxpayer who agreed to transfer from his employment in London to an associated Hong Kong company subject to the Hong Kong company making a lump sum payment of US$50,000 as an inducement to him and without which he would not have taken up the offer. The Board found that this payment was correctly assessed to salaries tax.

4.2 As this decision has not yet been published it would not have been available to the Taxpayer's representative and although a copy would have been delivered to the Commissioner there could be no guarantee that it had gone no further than the desks of those involved with that particular appeal. As it appeared to the Board to be relevant to the appeal it was about to hear the Clerk to the Board being asked to make suitably blanked copies available to the Taxpayer's representative and the Revenue's representative.

5. THE CASE FOR THE TAXPAYER

5.1 The Taxpayer was represented by his tax representative at the appeal.

5.2 In an opening submission the tax representative:

5.2.1 Identified the nature of the dispute, confirmed the date of commencement of the Taxpayer's employment with Y Co, refer paragraph 2.6 above, and the month of payment of the $420,000, refer paragraph 2.7 above.

5.2.2 Took the Board through the determination and was then referred to paragraph 4 of the Taxpayer's contract of employment, refer paragraph 2.5 above, and advised the Board that this paragraph should not have been in the contract and that the IRD accepted that this was nothing to do with the 'Incentive Scheme'.

5.2.3 Commented particularly on paragraph III(2) of the determination, refer paragraph 2.16 above, which was described as a 'somewhat surprising statement' and a suggested explanation was that the determination was 'somewhat premature'.

5.2.4 Read the first three sentences of paragraph III(2) and stated that the Taxpayer had offered to obtain evidence as to the intent of Y Co's chairman/chief executive from him but that this offer had not been taken up. The Board was advised that the Y Co's chairman/chief executive was now based in London as was the person who had signed the letter of 28 July 1989, refer paragraph 2.4 on his behalf, information which was known to the Board.

5.2.5 Referred the Board to an exchange of personal correspondence between his firm's chairman for tax services and the Deputy Commissioner dated 3 April 1992 and 6 April 1992. The first letter was addressed to the deputy commissioner and was an attempt to persuade him to reconsider his determination and the second letter was his reply rejecting that suggestion.

5.2.6 Stated that the submission for the Taxpayer was that this payment was not within the meaning of 'income from employment' and referred the Board to the definition of emoluments in both the United Kingdom and Hong Kong legislation.

5.2.7 Stated that United Kingdom precedents will be persuasive and had been accepted as persuasive in other Hong Kong tax cases citing Glynn v the Commissioner of Inland Revenue 3 HKTC 245 at 251.

5.3 The Taxpayer, having sworn, gave evidence to describe the benefits he lost when he left X Co and the part that loss played in the negotiations leading to his employment with Y Co. The Board had available to it copies of documents prepared by X Co and which, presumably, had been provided to the Taxpayer as one of its employees which listed and explained the various benefits it afforded to its employees. The evidence of the Taxpayer was a synopsis of these documents. His evidence covered:

5.3.1 What his employment had been with X Co at the time of his resignation and the benefits to which he was entitled as set out in two documents produced to the

Board, one titled 'Schedule of Benefits' and the other 'Outline of the [X Co] Senior Executives' Pension Scheme'.

5.3.2 How he had been approached by Y Co, to become its personnel controller, during the second quarter of 1989 and how his remuneration package was negotiated. He explained that he was interviewed by Y Co's then chairman/chief executive who referred him to Y Co's then personnel controller to work out his remuneration package. The salary offered was based on a scale but he required to be compensated for less attractive 'fringe benefits' and the loss of pension rights as well as other potential and real benefits. He stated that these negotiations took two to three months.

5.3.3 What his benefits with X Co had been and what Y Co offered, namely:

5.3.3.1 A twelve month notice period, as opposed to three months with Y Co.

5.3.3.2 Loss of the X Co pension scheme, as opposed to a provident fund with Y Co.

5.3.3.3 Loss of a permanent health insurance scheme for which Y Co offered nothing comparable.

5.3.3.4 Loss of a death benefit of ten years' salary under a personal accident scheme and travel insurance, as opposed to a death benefit of four years and no travel insurance.

5.3.3.5 The loss of a free annual medical benefit.

5.3.3.6 An effective reduction of one sixth of his annual leave by virtue of having to work on Saturday mornings for Y Co.

5.3.3.7 The loss of a car and the provision of petrol.

5.3.3.8 The loss of the right to discounts of from 10% to 40% of certain types of merchandise sold in most of X Co's retail stores.

5.3.3.9 The loss of reimbursement of two third of his telephone bill.

5.3.3.10 Loss of the right to acquire clothing without payment as sold in X Co's retail stores, to a prescribed value.

5.3.3.11 Loss of the right to an interest-free housing loan, as opposed to a loan from Y Co at 5% interest which, if used for the purchase of a residence in Hong Kong, extinguished the contractual right to free local residential accommodation.

5.3.3.12 Loss of the right to acquire shares of X Co under a structure which was tax efficient, something not available with Y Co.

5.3.3.13 Loss of a free British rail season ticket and reimbursement of car parking fees when he drove to his office in London.

5.3.3.14 Loss of a scheme providing assistance for the widow of a senior executive of X Co with dependent children.

5.3.3.15 Loss of a fairly modest home entertainment allowance.

5.3.3.16 Loss of the right to reimbursement of the initial membership fee and annual fee for one non-X Co group credit card.

5.4 Under cross-examination he stated that:

5.4.1 He had an honour degree from a university in the United Kingdom.

5.4.2 After being referred to paragraph 4 of the employment letter, refer paragraph 2.5 above, that the wording gave him an entitlement to two payments for 1990.

5.4.3 The $420,000 had been paid in January 1990 after he had spoken to Y Co's chairman/chief executive.

5.4.4 The $420,000 was not volunteered by Y Co and was something he had negotiated to obtain. He had recognised that if his employment with Y Co did not work out he would have lost out.

5.4.5 If he had not been able to negotiate this payment he would not have accepted employment with Y Co.

5.4.6 His reasons for leaving X Co, notwithstanding this involved sacrificing the attractive benefits he had previously described in his evidence, which were that he was born overseas, had a young family and was personally interested in overseas travel. He was a specialist in retailing but did not want to be a retailer forever. He had been head-hunted as a retailer but he did not want to continue as a retailer for the rest of his working life. The business activities of Y Co was new to and interested him.

5.4.7 When asked if the $420,000 was an integral part of the package he said that he would not have accepted the offer without it. On a net cash basis the offer from Y Co benefitted him. However, the amount itself was not adequate compensation for what he gave up.

5.4.8 When pressed he acknowledged that the $420,000 'tipped the balance'.

5.4.9 The $420,000 imposed no obligation on him to serve Y Co for a minimum period. However, a short period of employment would not look good on his

curriculum vitae. He had resigned when he had been asked to go to Y Co's London office.

5.4.10 He had not forfeited all of his pension rights from X Co. On the retirement date specified in X Co's scheme he would receive a pension based on his salary at the time of his resignation multiplied by his four years of service with X Co.

5.4.11 Confirmed that as personnel controller the personnel manager was under his direction, including the person who had signed the letter dated 8 August 1991, refer paragraph 2.12 above.

5.5 Under a brief re-examination the Taxpayer stated that:

5.5.1 The $420,000 was not refundable and there had been no obligation for him to serve Y Co for a minimum period.

5.5.2 New United Kingdom pension legislation would have been beneficial to him.

5.6 In answers to questions from the Board he stated that:

5.6.1 There was only one payment of $420,000.

5.6.2 That the letter of 10 January 1990, refer paragraph 2.7 above, referred to the $420,000 as a 'guaranteed bonus' but stated that he now realised that at the time he had not appreciated the 'terminology'.

5.6.3 The $420,000 did not include any amount for reimbursement of expenses involved in his relocation to Hong Kong.

5.7 Neither the Taxpayer's tax representative nor the representative of the Revenue accepted the Board's invitation to clarify or expand any matters raised by the Board's questions.

5.8 Submission:

5.8.1 The Taxpayer's evidence was that the $420,000 paid to him in January 1990 was compensation for loss of the benefits to which he was entitled by virtue of his employment by X Co. By their very nature some of these benefits could not be precisely valued although they were of considerable value to him. For some Y Co provided absolutely no substitute.

5.8.2 The use of the expression 'special bonus', although in reality this was 'compensation', in his contract had clouded the issue. The representative

hoped to be able to demonstrate to the Board that its inclusion in the contract does not mean it is assessable to salaries tax.

5.8.3 The IRD had read too much into the recent case Shilton v Wilmshurst [1991] STC 88 as, apparently, they considered that any payments made to an employee must be chargeable to tax.

5.8.4 The $420,000 was a recompense for benefits lost. It was of a capital nature and was non-refundable. The case law supports the view that this sum was not 'income from employment' within the meaning of section 9(1).

5.9 Authorities:

The Board was referred to several authorities. The headnote of each report was read as were the noted passages. The Board does not consider it necessary to rehearse the passages quoted although a brief summary of the facts of each case is recorded.

5.9.1 Beak v Robson 25 TC 33

This case was concerned with the liability to tax of a sum paid on the signing of an agreement, in fulfillment of one of its terms, for a convenant from the recipient not to set up in competition under certain circumstances, a payment which was held to be made for giving up a right wholly unconnected with the recipient's office and operative only after he ceased to hold that office and, accordingly, was not taxable under the law as it then was.

The Board was referred to a passage from the judgment of Viscount Simonds, Lord Chancellor, commencing at the foot of page 41 and continuing on page 42.

5.9.2 Hochstrasser v Mayes 38 TC 673

This case involved the taxation of a payment made by an employer to an employee under a scheme which indemnified an employee who agreed to be transferred to one of the employer's other industrial plants if he sold his home at a loss. The General Commissioners held that the payment was not assessable and, ultimately, were upheld by the House of Lords.

The Board was referred to paragraph 3(g) of the stated case, at page 675, several passages from the judgment of Upjohn, J at first instance, namely at pages 683 to 686, a passage for the judgment of Viscount Simonds from page 705 to page 707 and the penultimate paragraph of the judgment of Lord Cohen, at page 710.

5.9.3 Jarrold v Boustead 41 TC 701

This case was concerned with the taxation of a fee paid to an amateur sportsman for turning professional. The Special Commissioners held that this was not remuneration in advance but an inducement for the taxpayer to put himself in the position in which he could be employed as a professional by relinquishing his amateur status and, accordingly, was not assessable to income tax.

The Board was referred to the judgment of Lord Denning, MR at pages 728 and 729.

5.9.4 Pritchard v Arundale 47 TC 680

In this case the taxpayer received shares in a company as a condition of his accepting an offer to become employee. The Special Commissioners upheld the taxpayer's appeal against the assessment to tax under Schedule E of the value of the shares transferred to him holding that the transfer of the shares was not something in the nature of a reward for his future services for the company. On appeal to the High Court Megarry, J held that there was ample evidence, including evidence extrinsic to the terms of the agreement, on which the Commissioners could reach their conclusion.

The Board was referred to a passage from the judgment of Megarry, J commencing at page 685 and concluding at page 687 and two more passages one commencing towards the foot of page 689 and the final paragraph which is at page 690.

5.9.5 Riley v Coglan 44 TC 481

This case was also concerned with an amateur sportsman turning professional. However, the payments were found to be on account of future services. Assessments under Schedule E were raised but the General Commissioners upheld the taxpayer's appeal. On appeal to the High Court Ungoed-Thomas, J reversed the decision of the General Commissioners.

The Board was referred to the final paragraph of the judgment at page 490.

5.9.6 Vaughan Neil v CIR 54 TC 223

The taxpayer, a barrister, accepted employment with a company and was paid a sum as an inducement to give up his practice at the Bar. He was assessed to surtax on this payment and his appeal to the Special Commissioners was unsuccessful. He appealed to the High Court and on the appeal the Revenue conceded that the payment was not chargeable to tax otherwise than under section 34 of the Income and Corporation Taxes Act 1970. Oliver, J allowed the appeal stating that the critical question is 'what is the reality' and finding

that the 'reality' was that the payment was an inducement to the taxpayer to accept the professional and social consequences of taking the employment and that the payment was not made 'in respect of' the undertaking by the taxpayer.

The Board was referred to the text of section 34, which is at pages 231 and 232, and the final paragraph of the judgement, page 237.

5.9.7 Shilton v Wilmshurst [1991] STC 88

This case involved the assessment to tax of a sum of money paid to a professional footballer by his then club for agreeing to be transferred to another club. He was unsuccessful in his appeals against the assessment.

The Board was referred to the speech of Lord Templeman commencing at the foot of page 67 and continuing on to page 68; the final paragraph on page 68 continuing on to page 69; and a paragraph on page 71 addressing the law applied at first instance and by the Court of Appeal.

5.9.8 Mairs v Haughey [1992] TC 373

This was a test case relating to the taxation of a sum paid to one of the workers at the Harland and Wolff shipyard in Belfast by the Department of Economic Development ('DED') as compensation for loss of rights under a redundancy scheme which, to assist in the privatisation of the shipyard, needed to be terminated. The Special Commissioner had held that the payment was not taxable under Schedule E as an emolument of the taxpayer's employment or as a benefit in kind. The Revenue's appeal to the Court of Appeal (Northern Ireland) was unsuccessful and leave to appeal to the House of Law was refused.

The Board was referred to a part of the Special Commissioner's decision at page 376, part of a paragraph at letter F on page 377, the first paragraph on page 378 and a passage commencing at letter F on page 379 and concluding at letter F on page 380. The Board was also referred to passages in the judgment of Hutton, LCJ, particularly his summary of the Crown's main arguments on page 394 and the first paragraph on page 395 and most of pages 396 and 397, the first half of page 398 and, finally, the first two paragraphs on page 399.

5.10 The representatives submitted that a fair summary of the position as demonstrated by the first eight cases is that an employee is chargeable to tax in respect of emoluments for:

5.10.1 having been an employee;

5.10.2 being or continuing to be an employee;

5.10.3 becoming an employee;

5.10.4 undertaking to do anything within the three preceding sub-paragraphs.

The overriding condition in both the United Kingdom and Hong Kong is that the emolument is 'from' the employment. If it is not 'from' the employment it is not subject to salaries tax.

5.11 The representative concluded by submitting that the $420,000 paid by Y Co to the Taxpayer when he joined that company was to compensate him for material benefits he lost when he left the employment of X Co. The facts show that the payment was not 'from' his employment whereby, based on the authorities, it was not chargeable to salaries tax. The amount was negotiated as a bargain between Y Co and the Taxpayer to represent the loss to be suffered on the change of employment. The payment was not refundable and was totally distinct from the salary, bonus and other benefits appertaining to his employment with Y Co.

5.12 The Board was asked to order the Commissioner to adjust the assessment by deleting this amount.

6. THE CASE FOR THE REVENUE

The submission by the representative of the Revenue may be summarised as follows:

6.1 The issue was whether the $420,000 is chargeable to tax.

6.2 The history could be obtained from the documents including the contract, the letter dated 28 July 1989, refer paragraph 2.4 above, and particularly the paragraph numbered 4 in that letter, refer paragraph 2.5 above, which created the liability, the actual payment of the sum, refer the letter dated 10 January 1990 and paragraph 2.7 above, the inclusion of the sum in the assessment of 21 November 1990, refer paragraph 2.10 above, the Taxpayer's objection of 3 December 1990, refer paragraph 2.11 above and the determination of the Deputy Commissioner dated 13 March 1992, refer paragraph 2.16 above.

6.3 The Board was then referred to sections 8(1), 9(1) and 68(4) of the Ordinance.

6.4 Whether a sum is income from employment is a question of fact to be determined by reference to all of the evidence and the expression 'income from employment' is not restricted to 'a reward for service'. It was the case for the Revenue that where a sum is received by an employee under a contract of employment it is income from that employment.

6.5 Authorities:

The Board was referred to several authorities. The headnote of each report was read as were the noted passages. In common with the authorities referred to by the Taxpayer's representative, the Board does not consider it necessary to rehearse the passages quoted although a brief summary of the facts of each case is recorded.

6.5.1 Laidler v Perry 42 TC 351

This case involved the assessment to tax of the value of gift voucher given by an employer to all employees without regard to their rate of remuneration, personal circumstances of personality or the way they had carried out their duties. On appeal against additional assessments to Income Tax under Schedule E for the years of assessment 1955/56 to 1960/61 inclusive the taxpayer contended that the vouchers did not represent rewards for services but were personal gifts and, accordingly, not assessable as emoluments of his employment. The Special Commissioners found that the vouchers were made available in return for services and confirmed the assessments.

In due course the matter reached the House of Lords whose decision was that the Commissioners 'were well entitled to come to their decision'.

The Board was referred to one paragraph in the speech of Lord Reid being the final paragraph on page 363 continuing onto page 364.

6.5.2 Glantre Engineering Limited v Goodhand 56 TC 165

The taxpayer appointed a financial director and paid him £10,000 which was claimed was to compensate him for leaving his previous employment. As the taxpayer failed to deduct tax under PAYE from this payment the inspector made a determination under regulation 29 of the Income Tax (Employments) Regulations 1973. The taxpayer's appeal to the Special Commissioners was unsuccessful and that decision was appealed. Warner, J dismissed the appeal holding that the Special Commissioners were justified in concluding that the payment of £10,000 was not severable from the other benefits to which the financial director was entitled under his contract of employment, that it was an inducement to him to enter the employment of the taxpayer and that it was therefore an emolument taxable under Schedule E.

The Board was referred to passages from the judgment at pages 178, 179 and 180, and the final two paragraphs which are at pages 181 and 182.

6.5.3 Hamblett v Godfrey 59 TC 694

This case involved a payment given for the loss of a right to continue as a member of a trade union. The taxpayer was assessed to tax under Schedule E for the year of assessment 1983/84 in an amount which included the payment of

£1,000. The inspector contended that the payment was chargeable as an emolument under section 181 of the Income and Corporation Taxes Act 1970 or alternatively that, as the taxpayer was a high paid employee, the payment was a benefit chargeable within section 61 of the Finance Act 1976. On appeal against the assessment the Special Commissioners held that the payment was not an emolument from the taxpayer's employment as it was not paid in return for her services but that it was a benefit chargeable under section 61 of the Finance Act 1976. The High Court held that the payment was an emolument and taxable and the claim under section 61 of the Finance Act 1976 did not arise. The Court of Appeal dismissed the taxpayer's further appeal holding that emoluments from employment are not restricted to payments made in return for the performance of services. The approach which the courts should take in determining whether a payment is an emolument is to consider the status of the payment and the context in which it was made. The £1,000 was paid because of the employment and because of the changes in the conditions of employment and for not other reason. Accordingly, the £1,000 was a taxable emolument.

The Board was referred to a passage in the judgment at first instance appearing at the foot of page 708 and continuing on to page 709.

6.5.4 Shilton v Wilmshurst [1991] STC 88

The Board was referred to a passage in the speech of Lord Templeman at page 91 with respect to the interpretation of section 181.

6.5.5 D13/89, IRBRD, vol 4, 242

The taxpayer was a Hong Kong Government employee who was provided with quarters. He was required to move from the quarters provided to him and was paid a removal allowance to cover the removal expenses and other outgoings incurred by him. The taxpayer agreed that the removal expenses were not capable of being deducted as an expense from his income for salaries tax purposes. Instead he argued that the removal allowance was not connected with the services which he performed as part of his employment and, accordingly, did not arise from his employment. The Board held that the removal allowance was taxable income arising from the office or employment of the taxpayer with the Hong Kong Government.

The Board was referred to paragraphs 10 and 12 of the decision.

6.5.6 Glynn v CIR 3 HKTC 245

The last two pages of the report of the decision of the Judicial Committee were handed to the Board and its attention drawn to the penultimate paragraph which states that expressions employed in British legislation and authorities on the

meaning of such expressions are of assistance in construing identical expressions in Hong Kong legislation concerned with the same subject matter, subject to the right of the Hong Kong legislation to provide to the contrary.

6.6 The representative then provided a summary of the legal points:

6.6.1 Income from employment is not restricted to payments made for the performance of services, refer Hamblett v Godfrey and D13/89.

6.6.2 If a sum is given to an employee in the expectation that he will provide good services in the future it is taxable even though it cannot be said to be a reward for something that has not yet been done and may never be done, refer Laidler v Perry.

6.6.3 It is an income from employment if a sum paid is to induce someone to become or remain an employee and not for something else, refer Glantre Engineering Limited v Goodhand and Shilton v Wilmshurst.

6.6.4 Income from employment should follow the construction in section 9(1)(a), which is in wide and sweeping terms. Income from employment should not be restricted to mean income in the nature of a reward for services past, present or future or in reference to the services of the employee. The English cases must be read with caution when applied to Hong Kong legislation. If section 8(1) stands alone there would be a strong case for looking closely at the English authorities, refer D13/89.

6.6.5 Income derived from an employer can only escape taxation if it falls within the exemption provisions under section 8 or the exceptions to the definition of income in section 9, refer D13/89.

6.7 The representative commented on the authorities referred to by the Taxpayer's representative and drew the Board's attention to matters considered relevant to its consideration of those cases.

6.8 The Taxpayer's evidence. The representative drew the attention of the Board to three points:

6.8.1 He had asked for the amount he received.

6.8.2 He said that he would not have accepted the offer if this sum had not been agreed but then had said that he would have had to reconsider.

6.8.3 He agreed that he had not forfeited his entire pension; the amount was affected by his resignation.

6.9 The source of the $420,000 is a question of fact, not of law. The Taxpayer was given this by Y Co as a special bonus shortly after he took his employment with Y Co. The amount was specified in his contract although it was paid to him a year earlier than stated. Although it was claimed that this sum represented a capital payment no evidence was adduced to show that it was. At most, the evidence shows that the $420,000 was paid to induce the Taxpayer to resign from X Co and take employment with Y Co. In view of Shilton v Wilmshurst an inducement to enter into an employment contract, in other words to become an employee, is income from employment.

6.10 The source of the $420,000 was the employment of the Taxpayer by Y Co. It was not a payment made to him unrelated to his employment. It was not a gift. It was not a payment made some time before he was employed and unrelated to employment. It was a front end payment and was an integral part of his remuneration package from Y Co.

6.11 The Taxpayer claims to have lost certain benefits as a result of giving up his employment with X Co. Such is a natural consequence of a change of employment. Y Co and X Co are in completely different businesses and are not in any form of competition. Y Co agreed to make this payment to secure his services. Y Co did not seek to ensure that X Co did not get his services.

6.12 There is nothing in sections 8 and 9 of the Ordinance which limits taxable payments to remuneration for services rendered or to be rendered. Section 8 relates to income from a source, namely the employment and the $420,000 was part and parcel of the employment of the Taxpayer by Y Co. It arose directly from that employment and, accordingly, is taxable.

6.13 The Board was advised that the reasons which had been advanced by the Board in reaching its decision in D19/92, refer section 4 above, had been covered in the representative's submission.

6.14 The Taxpayer had failed to discharge the onus of proving that the lump sum was not income from employment.

7. REPLY ON BEHALF OF THE TAXPAYER

7.1 The inclusion of the second part of paragraph 4 in the Taxpayer's contract, refer paragraphs 2.4 and 2.5 above, was not conclusive. The argument is whether the payment was 'from' the contract. The Taxpayer's submission was that it was not.

7.2 The representative then addressed the authorities referred to by the Revenue:

7.2.1 Laidler v Perry: The vouchers represented a regular annual payment and was part of the taxpayer's contract.

7.2.2 Glantre Engineering Limited v Goodhand: This case involved a question of fact and the Special Commissioners were found to have come to a conclusion which they were entitled to reach.

7.2.3 Hamblett v Godfrey: All employees had been treated in the same manner.

7.2.4 Shilton v Wilmshurst: The Forest payment was part of the whole transfer arrangement and, further, Shilton had lost nothing. He was playing and being paid for playing.

7.2.5 D13/89: This decision was reached before the Glynn case and was concerned with an allowance a word which is not so restrictive as the description the Taxpayer submitted should be applied to the payment of $420,000. Further, the recipient of a removal allowance is not obliged to spend any of it on removal expenses and is entitled to retain for his own benefit the entire amount or so much as he does not spend on removal costs.

7.2.6 D19/92: Having expressed some inability to rationalise certain of the Board's statements in this decision, the representative emphasised that the sum involved was in reimbursement of that appellant's relocation expenses.

7.3 Clearly, from the evidence it was apparent that not enough attention had been given to the terminology adopted for the second part of paragraph 4 of the Taxpayer's contract. The $420,000 was a gesture to recompense him for what he was to lose by changing employment. This payment was not 'from' the employment.

7.4 The Board could rely on the British cases which the Taxpayer considered supported his appeal.

7.5 In answer to questions from the Board the representative:

7.5.1 Reaffirmed that it was the Taxpayer's case that the payment of the $420,000 did not come or arise 'from' his employment by Y Co. For the payment to be taxable it must be connected.

7.5.2 Stated that the expression 'Golden Hello' as used in the tax representative's letter of 19 November 1991 to the Revenue, refer paragraph 2.14 above, was, in hindsight, not a very apt expression.

8. REASONS FOR THE DECISION

8.1 Onus of proof

On several occasions during the course of his submission the Taxpayer's representative stated that it was not for a taxpayer to prove that a receipt was not taxable; that was for the assessor and that the Commissioner or Deputy Commissioner should make his determination with that in mind. However, the Board is not concerned with that submission as section 68(4) of the Ordinance expressly provides that 'the onus of proving the assessment appealed against is excessive or incorrect shall be on the appellant'.

8.2 The Questions

The Board records that it was not in dispute that, first, Y Co made an offer of employment which would oblige it to pay the Taxpayer $420,000 if, having accepted the offer, the Taxpayer took up the position and, secondly, that the Taxpayer accepted the offer, took up the position and was paid $420,000. Accordingly, the duty of the Board is to find out the answer to two questions:

8.2.1 What was the nature of the payment?

8.2.2 Is a payment of the nature found by the Board taxable under section 8(1) of the Ordinance?

8.3 The evidence as to the nature of the payment

8.3.1 The representative, when addressing section III(2) of the determination, said that the Taxpayer had offered to obtain evidence as to the intent of Y Co's chairman/chief executive from him but that this offer had not been taken up, refer paragraph 5.2.4 above. The Board does not consider that it is the duty of an assessor to decide for a taxpayer what evidence the taxpayer should or should not provide when being asked to clarify the source of a receipt or in support of his objection to an assessment. That decision is for the Taxpayer and the Taxpayer must accept the expense of obtaining evidence from overseas, as in this case, or, if he elects not to incur that expense, risk the consequences. The Board notes that the Taxpayer had filed an objection to the assessment and had appointed his representative's firm as his tax representative before the Deputy Commissioner issued his determination.

8.3.2 The case for the Taxpayer at the appeal did not introduce any evidence relevant to the resolution of the issue from any third party which was not before the assessor. Accordingly, the Board is left with the evidence contained in the correspondence and the oral evidence of the Taxpayer.

8.3.3 The evidence in the correspondence.

8.3.3.1 The Board questions whether the person on whose behalf the letter which contained Y Co's accepted offer of employment was signed could have given

any evidence different to the content of the letters before the Board? What do his letters say?

8.3.3.1.1 His letter of 28 July 1989, refer paragraphs 2.4 and 2.5 above, unambiguously describes the payment of $420,000 as 'a special bonus'.

8.3.3.1.2 His letter of 10 January 1990, written in his then capacity as chief executive of Y Co, refer paragraph 2.7 above, again describes this sum as a bonus but uses the word 'guaranteed' as opposed to 'special'.

8.3.3.1.3 His letter of 29 January 1992, written in his capacity as chairman of Y Co, in a paragraph immediately preceding the paragraph quoted in paragraph 2.13 above, states:

> 'The amount was originally erroneously included within his employment letter dated 28 July 1989 under the heading of 'Incentive Scheme'. This was not in fact the case as the amount had been agreed previously as being an incentive payment for [the Taxpayer] to join [Y Co] in Hong Kong. It was not related to the Incentive Scheme which is dependent upon company profits, departmental profits and individual performance as stated in the offer letter to [the Taxpayer].'

Having referred to a payment to the Taxpayer under Y Co's Incentive Scheme for 1990, this letter continues:

> 'His employment with [Y Co] began very late in 1989 and he was therefore not due a payment from the Incentive Scheme in January 1990 which would have related to the calendar year 1989.'

8.3.3.2 The other correspondence from Y Co.

8.3.3.2.1 Within a matter of weeks of the chairman/chief executive's letter dated 10 January 1990, at the time Y Co's return of remuneration and pension with respect to the Taxpayer was filed, a covering letter dated 27 April 1990 signed by Y Co's personnel manager describes this $420,000 as compensation 'for forfeited pension and employment rights which were lost as a result of his breaking his contract with his former employer' and states that Y Co does not regard this sum as remuneration and has not included it on the 'attached employer's return'.

8.3.3.2.2 This theme is repeated in the letter dated 8 August 1991.

8.3.3.3 When considering the contrasting positions provided by this correspondence the Board records that the letters of Y Co's chairman/chief executive, the first two of which were addressed to the Taxpayer before the assessment was raised and the third of which, in which the expression 'incentive payment' is used,

was written to the assessor after the assessment was raised are consistent each with the other. If there was a misunderstanding in the mind of the Taxpayer as to 'terminology', as suggested by him in his evidence, refer paragraph 5.6.2 above, and his representative, refer paragraph 5.8.2 above, there was no misunderstanding in the mind of the person who approved not only the undertaking of the obligation to effect the payment but also the effecting of the payment when it was paid. The Board also records that the letter referred to in paragraph 8.3.3.2.1 above was signed by an individual under the supervision of the Taxpayer, refer paragraph 5.4.11 above.

8.3.3.4 In reaching a decision as to which of the explanations has the greater credibility, the Board has no alternative other than to accept that of Y Co's then chairman/chief executive as stated in his letter dated 29 January 1992.

8.3.4 The oral evidence

8.3.4.1 The Taxpayer's evidence fell into two main parts. First, he explained how he negotiated the right to receive the $420,000. Secondly, he explained what it was meant to represent, namely compensation for the benefits received by him as an employee of X Co which would be lost by his resignation.

8.3.4.2 Several relevant facts are to be found from his evidence:

8.3.4.2.1 He did not want to continue as a retailer throughout his career and that the prospects of employment overseas by a company in a field entirely new to him was attractive, refer paragraph 5.4.6 above. The Board accepts this evidence.

8.3.4.2.2 On a reading of paragraph 4 of his employment letter he would not receive ay payment under Y Co's Incentive Scheme for 1989, refer paragraph 5.2.4 above. This is confirmed by the letter dated 29 January 1992. The Board accepts this evidence and has little doubt that whilst the Taxpayer was discussing the prospect of employment with Y Co he would have enquired about and been given details of the Incentive Scheme and some approximation, based on previous years, of the amount he could have expected to receive for 1989 had he been eligible.

8.3.4.2.3 He was entitled to participate in X Co's 'annual bonus scheme' which is described in paragraph 8 of the Schedule of Benefits issued by X Co, a copy of which was before the Board. The Board accepts this evidence but expresses the view that, inevitably, his resignation before the amount of X Co's 1989 bonus was declared would determine his eligibility to participate.

8.3.4.2.4 He was approached in connection with the position he eventually accepted with Y Co on terms which benefitted him on a net cash basis, refer paragraph 5.4.7 above. The Board accepts this evidence and the corollary that this put him in a stronger position to negotiate terms than would have been the case had he

approached Y Co for employment. The Board has little doubt that the Taxpayer, a married man with young children, would have been concerned about the loss of his employee's benefits from X Co, including discounts on clothing for his wife and growing children and his annual bonus for 1989, and notwithstanding that he would be better off cash wise, the prospect of no totally corresponding employee benefits from Y Co with his first payment from Y Co's Incentive Scheme not becoming due until January 1991. A person in the position of the Taxpayer would not only need to be induced to sacrifice those very material benefits but also would be in a position to drive a hard bargain. In this case the bargain was Y Co's commitment to pay the $420,000.

8.3.4.2.5 The Board accepts that Y Co's agreement to pay the $420,000 'tipped the balance', refer paragraph 5.4.8 above.

8.3.4.3 The Board does not consider it necessary to go further into the Taxpayer's evidence as to the reason for the payment by Y Co of this $420,000 save to say that the Board does not accept that what the Taxpayer now says he had in mind during the negotiations affects the nature of the payment. It is clear from the correspondence that the Taxpayer needed to be induced to leave X Co to join Y Co and Y Co agreed to pay the $420,000 for that purpose.

8.3.5 Although in his submission the Taxpayer's representative sought to disassociate himself from the expression 'golden hello' used in his firm's correspondence with the Revenue, refer paragraph 2.14 above, it is clear that this is precisely what it was.

8.5 What payments are taxable?

8.5.1 Section 8(1) of the Ordinance imposes salaries tax on 'income arising in or derived from Hong Kong' from 'any office or employment of profit'. Section 9(1) which the Board accepts is not exhaustive, provides that 'income from any office or employment includes', and under sub-section (a), 'perquisite'.

8.5.2 D19/92, IRBRD, vol 7, 156

8.5.2.1 As already noted in this decision, the Board had occasion to consider a similar issue in D19/92, at the date of writing of this decision unreported. The distinction between the lump sum paid to the taxpayer in D19/92 and this present appeal is that the obligation to pay that lump sum was not included in the taxpayer's contract. In D19/92 the Board found as a fact that the contractual terms of the taxpayer's employment included an obligation upon his Hong Kong employer to pay that lump sum to him upon his taking up his employment and that, for the reasons stated, the payment could be an 'allowance' or a 'perquisite' as those words are used in section 9(1)(a) and, accordingly, was taxable under section 8(1). Many of the cases to which the Board's attention were drawn were referred to in that appeal.

8.5.2.2 A feature common to both cases is that the Taxpayer stated in evidence that 'without such a payment I would not have accepted their offer' and the Taxpayer stated that without Y Co's agreement to effect the payment of the $420,000 he would not have accepted Y Co's offer, refer paragraph 5.4.5 above.

9. FINDINGS

9.1 The nature of the payment

The Board finds as a fact that the $420,000 was an inducement paid as a contractual obligation by Y Co to the Taxpayer in consideration of his taking up the position offered to him. Accordingly, it was a 'perquisite', as that word is used in section 9(1)(a) of the Ordinance.

9.2 Is the payment taxable

The Board also finds as a fact that the perquisite was received by the Taxpayer in Hong Kong from his Hong Kong employer and that the source of that payment was the employment of the Taxpayer by Y Co in Hong Kong whereby it is income arising in or derived from Hong Kong from employment and is charageable to salaries tax.

10. DECISION

For the reasons given above, this appeal is dismissed.