

Case No. D42/06

Salaries tax – burden of making out a case – section 11B, 11C and 11D of the Inland Revenue Ordinance ('IRO').

Panel: Patrick Fung Pak Tung SC (chairman), Kwong Chi Keung and Erik Shum.

Date of hearing: 13 February 2006.

Date of decision: 15 September 2006.

The taxpayer was an employee in the Organization A for the period between 22 April 1977 and 16 March 2004. The taxpayer disputed that a sum of money was paid to the taxpayer on 29 June 2004 as being emoluments paid to the taxpayer for the year ended 31 March 2005 and it should therefore fall into the assessment year of 2004/05.

Held:

1. The burden of making out a case is on the appellant rather than the Commissioner. Thus, it is not correct to say that the Commissioner has not proved her case beyond reasonable doubt or that she should have called this or that witness. Primarily, it is for an appellant to adduce whatever evidence he thinks appropriate in order to support his appeal. It is then up to the Commissioner to see whether she needs to call any evidence to rebut whatever evidence has been adduced by the appellant.
2. In the ascertainment of assessable income, section 11B of the IRO provides that 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.
3. It is quite clear that by the operation of the statutory provisions of section 11C and 11D of the IRO, the said sum of money was deemed to have been received by the taxpayer on 16 March 2004 (the last day of his employment), that is to say, within the year of assessment 2003/04 rather than 2004/05 despite the fact that he actually received it after the expiration of the year of assessment 2003/04 (D28/95, IRBRD, vol 10, 169 and D75/04, IRBRD, vol 19, 586 followed).

Appeal dismissed.

Cases referred to:

D28/95, IRBRD, vol 10, 169

D75/04, IRBRD, vol 19, 586

Taxpayer in person.

Lau Wai Sum and Tsui Nin Mei for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against the determination dated 31 October 2005 by the Respondent ('the Commissioner') whereby she by one of her deputies overruled an objection lodged by the Taxpayer against an assessment for additional salaries tax for the year of assessment 2003/04 raised on him.

The facts

2. The facts in this case are not in dispute.

3. The Taxpayer was an employee in the Organization A for the period between 22 April 1977 and 16 March 2004.

4. On 15 June 2005, the assessor raised on the Taxpayer the following 2003/04 additional salaries tax assessment:

Income (\$1,198,276 + \$22,885)		\$1,221,161
<u>Less</u> : Home loan interest	\$19,540	
Contributions to retirement schemes	<u>12,000</u>	<u>31,540</u>
		1,189,621
<u>Less</u> : Allowances		<u>268,000</u>
		921,621
<u>Less</u> : Already assessed		<u>898,736</u>
Additional assessable income		<u>\$22,885</u>
Tax payable on total assessable income		\$159,774
<u>Less</u> : Already assessed		<u>155,541</u>
Additional tax payable		<u>\$4,233</u>

The case of the Taxpayer

5. The Taxpayer did not dispute any of the figures set out in paragraph 4 above. The only point raised by him was that the assessment should be for the year of assessment 2004/05 as opposed to 2003/04. He did so first in his correspondence with the Inland Revenue Department ('the IRD').

6. The case of the Taxpayer is encapsulated in his letter to the IRD dated 20 July 2005. It reads as follows :

' I write to object the tax for \$4,233 to be calculated for the year of assessment 2003/04.

As I had stated it very clear that my employment with [Organization A] was expired on 16 March 2004. (please see attached)

All the salary and wages were paid to me within that period. i.e. **before** 30.3.2004. And I had already settled all the tax payment.

As for the sum of \$22,885, it was paid to me on **29 JUN 2004**, (please see attached copy bank statement) i.e. it fall into the assessment year of 2004/2005.

This amount was only claimed by me after 30.3.2004. As I obtained the mortgage statement from the bank after I had paid the mortgage from the Housing Loan and subject to I had settled the payment with the bank, **then I am eligible to claim back** the Housing Loan from the Government, **i.e. after 30.3.2004**.

In any event, I am **not eligible** to claim the Housing Loan of \$22,885 **prior to 30.3.2004**.

As stipulated in the newspaper cutting from [Newspaper B]. (please see attached) I am only eligible to claim back the money after 30.3.2004, therefore the sum **should not be calculated for the assessment year 03/04**.

I will include the sum (\$22,885) in the tax return for the year 2004/2005.'

7. By letter dated 11 August 2005, the assessor explained to the Taxpayer about the reasons for not accepting his claim.

8. In response, the Taxpayer by a letter dated 24 August 2005 put forth the following contentions :

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‘I had no challenge about \$22,885 is assessable to tax ... The point is ... that the sum of \$22,885 is for the assessment for the year 04 to 05. Reason being I had **NO POWER, NO AUTHORITY, NO RIGHT IN LAW** whatsoever to claim the said amount \$22,885 prior to 16.3.2004.

An official letter was issued to me by Treasury Dept (i.e. a Dept of HKSAR) stipulated that I could only claim the said amount i.e. \$22,885 on condition that I had settled the mortgage, then the said sum would be reimbursed to me.

The \$22,885 is for the Housing allowance for the mortgage of March 2004, i.e. before my last working day (i.e. 16 March 2004). I could only claim for the payment from HK Govt after I received the bank statement. Definitely it was after 1.4.2004, therefore it should be assessed for income after 1.4.2004 which I had already filled in the tax return for 2004/05.

...’

9. At the hearing of the appeal, the Taxpayer further made or emphasized the points set out in the following paragraphs.

10. First, he relied heavily on the document intituled ‘IR56C RETURN OF PAYROLL EMOLUMENTS FOR YEAR ENDED 31/03/2005’ issued by the Treasury to say that that document issued by another Government Department referred to the sum of \$22,885 as being emoluments paid to him for the year ended 31 March 2005 rather than 31 March 2004. He further said that the Commissioner should have called as a witness the Director of Accounting Services or some other official from the Treasury to say that the said sum of \$22,885 was already reserved for him or that he had the right to demand payment of the same before the expiration of the year ending 31 March 2004, but the Commissioner failed to do so.

11. Secondly, he relied on an article in Newspaper C which referred to the case of another government employee whose salary for March 2005 was not regarded as having been received by him within the year of assessment 2004/05 because the salary for that month was paid to him only in April 2005. He said he requested the IRD to supply him with details of that case but the IRD had refused to do so.

12. Thirdly, he said that the IRD had failed to prove ‘beyond reasonable doubt’ that he was liable to pay the tax in question for the year of assessment 2003/04.

Our Finding

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13. We wish to point out at once that on an appeal of this kind, as a matter of law, the burden of making out a case is on the appellant rather than the Commissioner. Section 68(4) of the Inland Revenue Ordinance Chapter 112 ('IRO') reads as follows :

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

14. Thus, it is not correct to say that the Commissioner has not proved her case beyond reasonable doubt or that she should have called this or that witness. Primarily, it is for an appellant to adduce whatever evidence he thinks appropriate in order to support his appeal. It is then up to the Commissioner to see whether she needs to call any evidence to rebut whatever evidence has been adduced by the appellant.

15. In the present case, so far as the suggestion that the Director of Accounting Services or some other official from the Treasury should have been called is concerned, it is completely irrelevant. We accept the contention by the Taxpayer that the said sum of \$22,885 was not reserved for the Taxpayer and that he had no right to demand payment of that sum prior to 1 April 2004.

16. So far as the case referred to in the newspaper cutting is concerned, the IRD was justified in not releasing details of the case to the Taxpayer because of the duty of confidentiality. In any event, by the letter from the IRD to the Taxpayer dated 11 August 2005, it had already been explained to him that the two situations were different because the case referred to in the newspaper cutting did not concern the payment of income after cessation of an employment with the employer as in the case of the Taxpayer. If the Taxpayer was not satisfied with such an answer by the IRD, it was up to him to make investigations and to adduce evidence to support his own case. After all, the Taxpayer should be well experienced in making investigations and adducing evidence as he himself kept on emphasizing that he had 27 years' experience in such matters and court procedure because of his work in the Organization A.

17. At the end of the day, it is for us to decide the matter on the true interpretation of the applicable law which we set out below.

18. Section 2(1) of the IRO defines the term 'year of assessment' to mean 'the period of 12 months commencing on 1 April in any year'.

19. The relevant part of section 8(1) of the IRO reads as follows :

'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 –

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(a) *any office or employment of profit; and*

(b) *...'*

20. The relevant part of section 9(1) of the IRO provides as follows :

'Income from any office or employment includes –

(a) *any wages, salary, leave pay, fee, commission, bonus, gratuity, perquisite, or allowance, whether derived from the employer or others, ...'*

21. In the ascertainment of assessable income, section 11B of the IRO provides that 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.

22. Section 11C of the IRO provides as follows :

'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; or*

(b) *to become entitled to a pension.'*

23. The relevant parts of section 11D of the IRO provide as follows :

'For the purpose of section 11B –

(a) *income which has accrued to a period during the basis period for a year of assessment but which has not been received by him in such basis period shall not be included in his assessable income for that year of assessment until such time as he shall have received such income, when notwithstanding anything contained in this Ordinance, an additional assessment shall be raised in respect of such income:*

...

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

Provided that –

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

24. It can be seen that sections 11C and 11D of the IRO are all 'deeming' provisions. They can work against or in favour of a taxpayer depending on the personal circumstances of the individual taxpayer.

25. It is quite clear that by the operation of the statutory provisions set out above, the said sum of \$22,885 is deemed to have been received by the Taxpayer on 16 March 2004 (the last day of his employment), that is to say, within the year of assessment 2003/04 rather than 2004/05 despite the fact that he actually received it **after** the expiration of the year of assessment 2003/04.

26. The same result occurred in similar cases previously decided by the Board, namely, **D28/95, IRBRD, vol 10, 169** and **D75/04, IRBRD, vol 19, 586**.

Conclusion

27. In all the circumstances, we dismiss the appeal of the Taxpayer and confirm the assessment referred to in the determination by the Commissioner showing additional assessable income of \$22,885 with additional tax payable in the sum of \$4,223.