

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D45/89

Salaries tax – termination of employment – emoluments received after termination and in next year of assessment relate back to previous year.

Panel: William Turnbull (chairman), Vincent Liang Wan Sang and Norman Ngai Wai Yiu.

Date of hearing: 13 July 1989.

Date of decision: 30 August 1989.

The employment of the taxpayer terminated in November 1986. Under the terms of his employment, the employer paid his tax to the Hong Kong Government. In June 1987, the employer paid a sum of \$51,358 to the Hong Kong Government being tax payable by the taxpayer in respect of emoluments which he had received for the services which he had rendered prior to 30 November 1986. The taxpayer argued that his employment had not terminated and accordingly the money paid in June 1987 was not taxable in the year of assessment 1986/87 but in the year of assessment 1987/88.

Held:

As the taxpayer's employment had terminated on 30 November 1986, the money paid on his behalf in the following year related back to the year in which the employment terminated that is the year of assessment 1986/87 and not the year of assessment in which the money was paid.

Appeal dismissed.

Luk Nai Man for the Commissioner of Inland Revenue.

Alexander Michael De Gier for the taxpayer.

Decision:

This is an appeal by a taxpayer against the inclusion in his taxable income for the year of assessment 1986/87 of certain money paid on his behalf by his employer which money was not paid until a subsequent year of assessment.

The facts are as follows:

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1. The Taxpayer was employed by a bank in Hong Kong for many years. In February 1984 in the course of his employment he became the group staff controller of the employer for which he was paid a salary and received other benefits. One of the benefits was that his employer accepted responsibility for the payment of his liability to pay tax in Hong Kong.
2. On 30 November 1986 the Taxpayer retired from his employment with the employer and left Hong Kong to take up residence in England. By notice dated 8 January 1987 the employer gave notice to the Commissioner on form IR 56F that the Taxpayer was expected to cease employment on 30 November 1986 by reason of retirement.
3. By notice dated 5 January 1987 on form IR 56E the employer gave notice to the Commissioner of the commencement of the employment of the Taxpayer as a director of its company with the date of commencement of employment being stated as 1 January 1987.
4. In June 1987 the employer paid a sum of \$51,358 on behalf of the Taxpayer to the Hong Kong Government being tax payable by the Taxpayer in respect of the emoluments which he had received for the services which he had rendered as group staff controller performed up to and prior to 30 November 1986.
5. The assessor assessed the Taxpayer to tax on this sum in respect of the year of assessment 1986/87 on the ground that the employment of the Taxpayer had terminated on 30 November 1986 and that the amount of tax paid by the employer in respect of the Taxpayer's emoluments earned up to and prior to 30 November 1986 was taxable income for that year by reason of section 11D(b)(ii) of the Inland Revenue Ordinance.
6. The Taxpayer objected to this assessment. The Deputy Commissioner by his determination dated 19 January 1989 upheld the assessment of the assessor and the Taxpayer lodged his notice of appeal against the Deputy Commissioner's determination on 3 March 1989.
7. At the hearing of the appeal the representative for the Taxpayer applied for an extension of time for giving notice of appeal to the Board of Review under section 66(1)(a) and (b) on the ground that the Taxpayer was prevented from giving notice of appeal within the statutory period because he was absent from Hong Kong. The Commissioner's representative did not object to this application and accordingly the Board granted the extension of time for the filing of notice of appeal.

At the hearing the representative for the Taxpayer submitted that the employment of the Taxpayer had been continuous and that there was no termination of employment every time an employee received a new position with the same employer. He

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submitted that there was no material distinction in the present case between 'office' and 'employment'. He argued that throughout the year of assessment 1986/87 the Taxpayer was at all relevant times in the employment of the employer and that all that happened was that the employment changed in form without the employer being changed. In these circumstances he submitted that it was not correct to say that the employment of the Taxpayer had ceased with effect from 30 November 1986 because the Taxpayer's employment in fact continued until 13 December 1988 when he finally ceased to derive income from that employment with that employer.

The representative for the Commissioner submitted that the employment of the Taxpayer had terminated on 30 November 1986 and that the office of director which commenced on 1 January 1987 was an entirely new office which was distinct and distinguishable from the previous employment.

Both the representative for the Commissioner and the representative for the Taxpayer argued at length before us on the meaning and interpretation of the Inland Revenue Ordinance and referred us to various cases both in Hong Kong and elsewhere.

With due respect to the submissions made before us this case appears to be quite simple and depends entirely upon its facts. We find no difficulty in interpreting or applying the Inland Revenue Ordinance to this particular case.

The representative for the Taxpayer did not call any evidence.

On the facts before us it is quite clear to us that the employment of the Taxpayer ceased with effect from 30 November 1986 and that new employment commenced on 1 January 1987 when the Taxpayer became a director.

In the course of their submissions the representatives for the Taxpayer and the Commissioner confirmed to the Board that the Taxpayer was entitled to long service retirement benefits as part of his original employment. When the Taxpayer retired as group staff controller on 30 November 1986 he received the long service retirement benefits to which he was entitled.

On the facts before us we find that the employment of the Taxpayer ceased on 30 November 1986 and accordingly the payment which was made by his employer on his behalf after such employment had ceased but which was made in respect of that employment is taxable in the year of assessment in which the Taxpayer's employment ceased, that is, the year of assessment 1986/87. We find as a fact that the employment of the Taxpayer which commenced on 1 January 1987 was a new employment or new office which did not relate back to the previous employment and was not a continuation thereof. There was both a clear break of one month between the termination of the old employment and the commencement of the new employment or office and furthermore the new office was of an entirely different nature to the previous employment. The fact that there was only one employer does not mean that there was only one source of income. If we accept this argument then it would

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mean that no employer could ever re-employ an employee on totally new terms and conditions. It is not uncommon for an employer and an employee to agree that the employee's previous employment is totally terminated and for the employee to be re-employed with a new employment on new terms and conditions. Each case depends upon its own facts. There may be many reasons for terminating one employment and starting a new one. For example the parties may wish to have a break of continuous service for the calculation of long service benefits. We note that in this case the retirement benefits of the Taxpayer under his original employment came to an end and were paid to him with effect from 30 November 1986. This is one further factor to demonstrate that his employment terminated and he was then re-employed.

As the facts of this case are so clearly determined by us the application of the law is simple. The Inland Revenue Ordinance provides that any payments made after employment has ceased relate back to the year in which the employment terminated. In this case it means that the tax paid in June 1987 relate back to the employment which terminated on 30 November 1986 and are assessable in the year of assessment 1986/87 and not in the year of assessment 1987/88 as claimed by the Taxpayer.

Accordingly we dismiss this appeal and confirm the determination of the Commissioner.