

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D51/94

Salaries tax – termination of employment – date when emoluments accrue.

Panel: Howard F G Hobson (chairman), Benjamin Kwok Chi Bun and Andrew Wang Wei Hung.

Date of hearing: 25 October 1994.

Date of decision: 23 November 1994

The taxpayer was wrongfully dismissed by his employer and referred the matter to the Labour Tribunal. The Labour Tribunal found in favour of the taxpayer and ordered that certain sums of money be paid to the taxpayer. The employer did not pay the money to the taxpayer during the year of assessment in question but in a subsequent year. The taxpayer argued that the money paid to him did not accrue to him until it was paid by the employer. He appealed to the Board of Review.

Held:

The money accrued due in the year of assessment when it became payable.

Appeal dismissed.

Case referred to:

Cape Brandy Syndicate v CIR 12 TC 358

Chiu Kwok Kit for the Commissioner of Inland Revenue.

Taxpayer represented by his mother.

Decision:

This concerns an appeal against a salaries tax assessment for the year of assessment 1992/93 on two grounds, namely it improperly included some income paid well after the employment had ceased and incorrectly included a sum attributable to the value of residential quarters.

At the hearing the Taxpayer was represented by his mother.

1. The Facts

INLAND REVENUE BOARD OF REVIEW DECISIONS

The following matters are not disputed.

- 1.1 The Taxpayer was employed by Company A until 19 October 1992 when his employment was wrongfully abruptly terminated.
- 1.2 During his employment Company A refunded the rent the Taxpayer paid for his residence. The total of the refunds for the period from 1 April 1992 to 19 October 1992 was \$66,129.
- 1.3 The Taxpayer brought a claim against Company A before the Labour Tribunal which on 3 May 1993 gave judgment in favour of the Taxpayer in the total amount of \$134,274.73 made up as to:

	\$		
3 months pay in lieu of notice	96,600.00		
1½ days arrears of wages	1,558.06)	
Compensation holiday pay for 14 days	15,026.67)	\$38,784.73
Pro rata bonus	22,200.00)	
	\$135,384.73		

- 1.4 By a notice (entitled notification by an employer of an employee who is about to cease to be employed) dated 1 June 1993, Company A advised the Revenue of the Taxpayer's cessation as of 19 October 1992 and of the following amounts paid to the Taxpayer:

	\$
Salary	146,806
Leave pay	10,948
Labour Tribunal Award	<u>134,274*</u>
Total	<u>292,028</u>

[* - There is a discrepancy of \$1,110.73, which is not material to this Decision.]

- 1.5 Despite the award of 3 May 1993 and the said notice, the Taxpayer did not receive payment through the Tribunal until 7 June 1993.
- 1.6 The Taxpayer had objected to his 1991/92 final & 1992/93 provisional assessment under Charge No. XX because he was quite unsure then that he would recover what he claimed Company A owed him, and on 8 April 1993 the

INLAND REVENUE BOARD OF REVIEW DECISIONS

assessor concerned agreed to hold over the portion referable to the 1992/93 provisional assessment, leaving a balance referable to the 1991/92 final assessment of \$3,772 payable by 2 instalments. On 7 May 1993 at the request of the Taxpayer the assessor concerned by letter agreed to the \$3,772 being paid by four instalments. The letter is headed 'Request for Instalments Salaries Tax 91/92/93 Charge No. XX', there is no specific reference to the provisional assessment.

1.7 On 30 November 1993 the assessor raised the following 1992/93 assessment:

	\$	
Principal income	292,028	(see 1.4 above)
Quarters	<u>29,202</u>	10% of principal income
Total assessable income	\$321,230	
<u>Less: Allowances</u>	<u>124,000</u>	
Net chargeable income	<u>\$197,230</u>	
Tax payable thereon	<u>\$39,907</u>	

1.8 On 30 December 1993 the Taxpayer filed an objection and supplied a copy of the Tribunal's award which contained the breakdown at 1.3. In the light of this latter information the assessor wrote proposing to revise the assessment for the year of assessment 1992/93 by deducting the wages in lieu of notice viz:

	\$
Income per employer's notice	292,028
<u>Less: 3 months wages</u>	<u>96,600*</u>
	195,428
<u>Add: Quarters value</u>	<u>19,542</u>
Assessable income	214,970
<u>Less: Allowances</u>	<u>124,000</u>
Net chargeable income	<u>\$90,970</u>
Tax thereon	<u>\$13,342</u>

INLAND REVENUE BOARD OF REVIEW DECISIONS

[* - The \$96,600 was deducted as being in the nature of damages.]

The assessor asked the Taxpayer to let her know if he agreed.

- 1.9 On February 1994 the Taxpayer wrote to the Commissioner at length explaining that he continued to be unemployed due to the difficulty of getting a job once it became known that he had taken his previous employer to Court. He said he had asked Company A to amend its records (which showed him to have been dismissed) but he was told it could not do so. He said he, his wife and two children were depending on his mother's very small pension and the generosity of relatives and friends. The Taxpayer went on to ask for the award monies to be considered as income for the year of assessment 1993/94 in view of his straitened circumstances and the fact that he only received it in that year of assessment, some 8 months after his dismissal. He also asked for the quarter's value to be waived, it having been omitted from an earlier calculation made in April 1993.
- 1.10 On 8 July 1994 the Commissioner dealt with the objection to the 30 November 1993 assessment and reduced it in line with the figures at 1.8 above.

2. Grounds of Appeal

- 2.1 Can the amount recovered under the award be treated as accruing in the year of assessment 1993/94?

The material parts of the relevant sections of the Inland Revenue Ordinance (the IRO) read as follows:

Section 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.'

Section 11D:

For the purpose of section 11B:

- (a) ...;
- (b) *income accrues to a person when he becomes entitled to claim payment thereof ...*
- (i) ...
- (ii) *..., 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*

INLAND REVENUE BOARD OF REVIEW DECISIONS

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.'

Unfortunately as the representative for the Commissioner pointed out, the Labour Tribunal's award was itself confirmation that the Taxpayer had a right to claim for income emoluments and bonus due to him for services he rendered prior to his dismissal, that is in the year 1 April 1992 to 31 March 1993. That right existed before the Labour Tribunal's action was begun. We consider there is no gainsaying the representative's logic on this point. We therefore find as a fact that the arrears of wages, compensation, holidays and pro rata bonus (whether the total be \$38,784.73 as shown on the award or \$37,674.73 as extrapolated from Company A's notice) all accrued to the Taxpayer in the year of assessment 1992/93 even though not received by him until June 1993.

2.2 Can the rent refunded by Company A to the Taxpayer be excluded from his 1992/93 assessment?

The IRO contains no provision enabling the Commissioner (or his deputies) or this Board to grant concessions. All are bound by the strict letter of the IRO: Moreover it is a harsh matter of law that there is 'no equity about a tax' (per Rowlatt, J in Cape Brandy Syndicate v CIR 12 TC 358).

Section 9(1A)(2) deems the rental value of any place of residence to be 10 per cent of the Taxpayer's income as established under section 9(1) viz \$292,028 less \$96,600 = \$195,428 resulting in \$19,542 for the quarters. We therefore find that this ground of appeal is untenable.

We have considerable sympathy for the Taxpayer's difficult plight and acknowledge that it may possibly have been brought about because he chose to exercise his right to go to law to recover what was legitimately due to him. The Taxpayer obviously has strong suspicions to that effect, and if it is true it is disgraceful, but we apprehend that it is unlikely that he could prove that he has been discriminated against on that account.

The Taxpayer's mother said the Taxpayer was misled by the 7 May 1993 letter (see 1.6 above) into supposing that the 1992/93 assessment was final. However when it is read in the context of the 8 April holdover letter we do not think the Taxpayer should have been misled.

The Taxpayer's mother suggested that certain assessors had committed themselves to agreeing to make concessions. We believe that she has misconstrued their attempts to be as helpful as possible in the light of her son's difficulties, but even if – contrary to our belief – concessions had been promised those promises could not be binding in law.

We therefore have no choice but to dismiss this appeal.