Case No. D63/93

Costs – appeal without merit – award of costs of $1,000 – section 68(9) of the Inland Revenue Ordinance.

Panel: T J Gregory (chairman), John Lo Siew Kiong and Benny Wong Man Ying.

Date of hearing: 9 December 1993.
Date of decision: 11 March 1994.

The taxpayer appealed against a determination of the Deputy Commissioner and claimed that a payment of $4,363 which he had received from his employer was compensation for early termination of employment as opposed to salary. The taxpayer submitted that an instruction given by his employer that he need not report to work constituted a constructive breach of his employment contract and accordingly the salary paid to him was paid by way of damages for breach of contract. The Board found that the submission by the taxpayer was 'absurd'.

Held:

In dismissing the appeal the Board considered that the exercise of the provision of section 68(9) of the Inland Revenue Ordinance was merited. The Board ordered that the taxpayer pay the sum of $1,000 by way of costs.

Appeal dismissed.

Cases referred to:

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

Tsui Siu Fong for the Commissioner of Inland Revenue.
Ho Man Kit of Messrs Horace Ho & Co for the taxpayer.

Decision:

1. THE SUBJECT MATTER OF THE APPEAL

The Taxpayer appealed against the determination of the Deputy Commissioner dated 31 July 1993 ('the determination') in which the Deputy Commissioner rejected the Taxpayer's objection to the salaries tax assessment raised on him for the year of assessment 1989/90 on the grounds that the assessment included as taxable income $4,363 which he asserted was compensation for early termination of his employment as opposed to salary.

2. THE FACTS

The following facts were not in dispute:

2.1 On 12 May 1986 the Taxpayer took up employment with a Hong Kong company ('Company X').

2.2 The terms and conditions of his employment were set out in a letter dated 23 April 1986 and the only provision relevant to this appeal is a sub-paragraph which dealt with termination. The sub-paragraph reads:

> 'by either party after three months' service by giving notice of not less than one month, or payment in lieu.'

2.3 By letter in writing dated 13 October 1989 the Taxpayer resigned his employment with Company X effective 13 November 1989.

2.4 On 1 November 1989 the Taxpayer was verbally informed that he need not attend Company X's office with effect from 2 November 1989. He complied with this instruction.

2.5 On 1 November 1989 Company X's personnel department issued a notification to its payroll department itemising the amount to be paid to the Taxpayer, namely:

2.5.1 Salary to 12 November 1989;

2.5.2 11.5 days annual leave to be paid in lieu; and

2.5.3 Leaving Service Benefits according to 'Retirement Scheme'.

2.6 On 13 November 1989 the Taxpayer took up employment with another employer.

2.7 On 24 November 1989 Company X paid $23,033 into the Taxpayer's bank account.

2.8 On 22 December 1989 Company X issued a reference for the Taxpayer.

2.9 On 27 February 1990 Company X lodged the notification required by section 52(5) of the Inland Revenue Ordinance Chapter 112 ('the Ordinance'). This notification included 'salary/wages' of $86,260 and 'leave pay' of $6,220.50.

2.10 In his salaries tax return for the year of assessment 1989/90 the Taxpayer stated that his 'salary/wages' from Company X during that year of assessment amounted to $81,897, namely $4,363 less than that returned by Company X. He disclosed the amount he had received in respect of 'leave pay' and his emoluments from the employer referred to in sub-paragraph 2.6 above.

2.11 On 31 March 1992 the assessor raised a salaries tax assessment on the Taxpayer in which the deduction made by the Taxpayer in his return, refer sub-paragraph 2.10 above was disregarded.

2.12 The Taxpayer duly objected to this assessment stating, inter alia, that the $4,363 represented compensation for early termination of employment. In subsequent correspondence he put it this way:

> 'The amount of $4,363 was in fact consideration of variation of the termination date from 12 November 1989 to 1 November 1989 and was exempt from salaries tax charge because the amount flow from breach of contract and not from the employment itself.'

3. THE CASE FOR THE TAXPAYER

The Taxpayer was represented at the hearing. His representative took the Board through a written submission which may be summarised as follows:

3.1 The Taxpayer agreed with the facts stated in the determination save for what was set out in sub-paragraph 1(7)(which is a quotation from a letter dated 29 July 1992 addressed from Company X to the assessor).

3.2 The only relevant fact was that the Taxpayer did not physically attend Company X's office for the eleven days from 2 to 12 November 1989.

3.3 The issue was whether the sum of $4,363 was salary and taxable or compensation for early termination of employment and not taxable.

3.4 The instruction given to the Taxpayer 'prevented' him from working. This instruction constituted a breach of contract on the part of Company X and, accordingly, the payment of $4,363 should be regarded as compensation for loss of office.

3.5 On that basis the determination was wrong.

4. THE CASE FOR THE REVENUE

The representative for the Revenue took the Board through a written submission which may be summarised as follows:

4.1 The Board was taken through the sequence of relevant events and the documents which were cross-referenced for ease of perusal.

4.2 The Board was only concerned with whether or not the $4,363 was salary or compensation. There was no dispute with respect to the taxation of the amount paid with respect to untaken leave or the fact that the retirement benefit was from an approved scheme.

4.3 The Board was then taken through the relevant provisions of the Ordinance, namely section 8(1) and section 9(1)(a).

4.4 To assist in its interpretation of those sections, the Board was referred to D13/89, IRBRD, vol 4, 242 and D19/92, IRBRD, vol 7, 156.

4.5 It was submitted that these decisions would enable the Board to conclude that:

4.5.1 An employee could receive remuneration even though he did not render any service to earn that remuneration; and

4.5.2 Remuneration was taxable if the source of that receipt was employment.

4.6 The Board was then addressed with respect to the Taxpayer's grounds of appeal. The Board was requested to accept that:

4.6.1 The amount paid to the Taxpayer for November 1989 was salary, as specified by the Ordinance; and

4.6.2 Was not compensation for a wrongful termination of employment.

4.7 The Board was requested to dismiss the appeal.

5. REPLY FOR THE TAXPAYER

There was no reply for the Taxpayer.

6. REASONS FOR THE DECISION

6.1 Section 68(4) of the Ordinance provides that the onus of proving the assessment appealed is excessive or incorrect is on the taxpayer.

6.2 The Board notes that the terms regulating the Taxpayer's employment required notice of, in the words of the letter dated 23 April 1986:

'… not less than one month, or payment in lieu.'

refer sub-paragraph 2.2 above.

6.3 The Board notes that there was no suggestion that Company X was not entitled to act as it did. That is understandable as, if that had been the suggestion, an appeal against a salaries tax assessment would not be the correct venue for the determination of that dispute.

6.4 Pursuant to section 68(4) it was for the Taxpayer to satisfy the Board that the instruction from his employer not to attend the office whilst his contractual period of notice had some time to run constituted a constructive dismissal.

6.5 No legal authority was cited to suggest that an employer was obliged to permit its employee to serve out a period of notice was cited to the Board.

6.6 Whilst the Board is aware of precedent which requires an employer to permit an employee whose remuneration could be adversely affected if he were not to be permitted to serve out the period of his notice, including, as an example, an employee whose emoluments include a commission on work performed or introduced and who could be adversely impacted by an instruction which denied him that opportunity during his period of notice, the Board is not aware of any precedent which denies an employer the right to require an employee who has given notice to afford the employee the right of continued access to his place of work. The submission on behalf of the Taxpayer did not suggest that any such precedent existed.

6.7 In light of section 68(4), it is not for the Revenue to cite authority or for the Board to search for precedent to support an appeal and, particularly, if the taxpayer is represented. Nevertheless, the Board will not reject an appeal on purely procedural points. However, in the present instance the Board has no hesitation in stating that this particular appeal was entirely misconceived.

6.8 Whilst the terms regulating the Taxpayer's employment recognised the ability of each the employer and employee to terminate the employment on a prescribed period of notice or payment in lieu the law has always recognised that an employer or employee has the right to terminate without notice provided the party to whom notice is given is properly compensated. The law recognises that an employer may pay an employee that to which he would have been entitled during the contractual period of notice and require the employee to leave forthwith. Similarly, the employee may leave instantly subject to him recompensing the employer accordingly.

6.9 All that occurred in this particular case was that the employer opted not to require the Taxpayer to attend at his desk to discharge such tasks as could have

been assigned to him between the date that decision was communicated to him and the date on which his notice expired. The suggestion that the Board should find that that decision amounts to a constructive breach by Company X of its agreement with the Taxpayer is absurd.

6.10 Section 68(9) of the Ordinance reads:

> 'Where … the Board does not reduce or annul such assessment, the Board may order the taxpayer to pay as costs of the Board a sum not exceeding $5,000, …'

6.11 The Board considers that this appeal merits the exercise by it of the provisions of sub-section (9) of section 68.

7. DECISION

7.1 For the reasons given, this appeal fails and is dismissed.

7.2 As, in its opinion, the Board is of the view that this appeal was without any merit howsoever, the Board orders the Taxpayer to pay the sum of $1,000 as costs of the Board which sum shall be added to the tax charged and recovered therewith.