

Case No. D65/05

Salaries tax – salaries received under secondment but handed over to the seconding company.

Panel: Patrick Fung Pak Tung SC (chairman), Emily Lam Yuet Ming and Man Mo Leung.

Date of hearing: 18 October 2005.

Date of decision: 22 December 2005.

The taxpayer was appointed by Company C as Managing Director and later executive director. He received salaries as a result.

The taxpayer claimed that he was sent by a Company G, for a take over, to vet and supervise the business of Company C. He had to and did handover all his salaries to Company G but was given only a small allowance. In the circumstances, he should not bear the liability for salaries tax.

Held:

Though the Board accepts the evidence of the taxpayer, he, as a matter of law, cannot be exempted from salaries tax.

Appeal dismissed.

Taxpayer in person.

Lau Wai Sum and Tsui Siu Fong for the Commissioner of Inland Revenue.

Decision:

1. This is an appeal by the Appellant ('the Taxpayer') against a determination ('the Determination') by the Respondent ('the Commissioner') dated 25 November 2003 whereby she by one of her deputies substantially overruled an objection lodged by the Taxpayer against the assessments and demand for salaries tax for the years of assessment 1998/99 and 1999/2000 against him.

2. By the Determination, the Commissioner:

- (i) revised the assessment and demand for the year of assessment 1998/99 against the Taxpayer by amending the net assessable income from \$819,419 to \$681,419 and the tax payable thereon from \$128,801 to \$105,341;
- (ii) maintained the original assessment and demand for the year of assessment 1999/2000 against the Taxpayer based on an assessable income of \$284,000 with tax payable thereon in the sum of \$37,780.

Late appeal

3. The Taxpayer lodged the present appeal on 26 July 2005. This is more than 1½ years after the Determination was sent by the Inland Revenue Department ('the IRD') to him. Under section 66(1) of the Inland Revenue Ordinance Chapter 112 ('IRO'), he was supposed to lodge the appeal within one month. The Board dealt with this matter as a preliminary point. The Taxpayer gave sworn evidence and explained that, because he and his family emigrated to Country A, he never received a copy of the Determination until about 18 July 2005. The Board accepted his explanation and came to the conclusion that he was prevented by a reasonable cause within the meaning of section 66(1A) of the IRO from giving notice of appeal within one month of the Determination being sent to him originally. He was allowed to proceed with the substantive appeal.

The facts

4. On 8 July 1998, the Taxpayer was appointed an executive director of a company by the name of 'Company B' which later changed its name to 'Company C' ('the Company').

5. The Company was incorporated in Country D. At all material times, its headquarters were in Hong Kong and its registered place of business was at Address E. It was a company listed on the Stock Exchange of Hong Kong.

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6. On 8 September 1998, the Taxpayer was appointed the Managing Director of the Company. On 14 September 1999, he resigned as Managing Director and remained an executive director until 29 March 2000.

7. According to the Employer's Returns filed by the Company, the remuneration received by the Taxpayer was as follows:

- (i) For the year of assessment 1998/99, the Taxpayer received salary in the sum of \$877,419 and bonus in the sum of \$50,000, making a total of \$927,419.
- (ii) For the year of assessment 1999/2000, the Taxpayer received salary in the sum of \$500,000.

8. In making the assessments and demand for salaries tax against the Taxpayer, the IRD had already given him the benefit of the personal allowances under the IRO.

The case of the Taxpayer

9. There is no dispute that, at all material times during the two years of assessment in question, the Taxpayer was living in City F. There was disagreement between the Taxpayer and the IRD as to whether he was in Hong Kong for a total of 60 days or more in each year of assessment. If he was in Hong Kong for less than 60 days during a year of assessment, he would have been entitled to exemption from tax under section 8 (1A)(b) and (c) and section 8(1B) of the IRO.

10. The records obtained by the IRD from the Immigration Department show that in fact the Taxpayer was in Hong Kong for more than 60 days in total in each of the two years of assessment in question.

11. In any event, neither in his notice of appeal nor in his submission at the hearing of the appeal did the Taxpayer argue the point.

12. In fact, the only point taken by the Taxpayer on appeal is that he was originally a member of the staff of a company by the name of Company G, a company incorporated in Mainland China. There was a plan for Company G to take over the Company. The Taxpayer was sent by Company G to vet and supervise the business carried on by the Company. All the remuneration received by the Taxpayer was to be handed over to Company G and he was only given a small allowance for living expenses. The Taxpayer gave evidence to the effect that that was in fact what happened. He submitted that in the circumstances since he did not pocket the remuneration but Company G, he should not have to bear the liability for salaries tax.

The law

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13. Section 8(1) of the IRO provides as follows:

‘(1) Salaries tax shall, subject to the provisions of the 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 –

(a) an office or employment of profit; and

(b) any pension.’

Our finding

14. We are of the view that the remuneration paid by the Company to the Taxpayer during the two years of assessment in question is clearly taxable under section 8(1) of the IRO.

15. The Company is a company listed on the Stock Exchange of Hong Kong. After paying the remuneration to the Taxpayer, the Company must have claimed the same as an item of expenditure in doing its tax returns. This is clear from the Employer’s Returns copies of which have been put in evidence before the Board.

16. Further, by a letter dated 22 October 2001 from the Company to the IRD, it was said: ‘The Company paid the salary directly to [the Taxpayer]. He has the right to dispose his income in his way. So, we are unable to comment the correctness of the statement quoted by yourself.’

17. We tend to think that the Taxpayer is an honest witness and that he was telling the truth about handing all his remuneration to Company G and was given only a small allowance. Nevertheless, as a matter of law, he cannot be exempted from liability for salaries tax.

18. The Taxpayer says Company G has closed down or been wound up and that there is no way in which he can resort to Company G for the tax payable. That is unfortunate. What he should have done in the first place was to ask Company G to keep a portion of his remuneration in reserve to cover the liability for salaries tax.

Conclusion

19. In all the circumstances, despite the fact that we believe the evidence of the Taxpayer and that we have some sympathy for him, we have no alternative but to dismiss his appeal. We confirm the assessment by the Commissioner as set out in the Determination.

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