Case No. D65/94

Salaries tax – whether payment made to a United Kingdom Pension Fund is subject to Hong Kong salaries tax and whether the same can be deducted as an expense.

Panel: Denis Chang Khen Lee QC (chairman), Herbert Hak Kong Tsoi and Yeung Kwok Chor.

Date of hearing: 6 October 1994.
Date of final submissions from appellant: 22 October 1994.
Date of decision: 16 January 1995.

The taxpayer was employed in Hong Kong. During his period of employment both the taxpayer and his employer were required to make contributions to a United Kingdom Pension Fund. The contributions of the taxpayer were deducted directly from his salary and paid over to the Pension Fund. The taxpayer was assessed to Hong Kong salaries tax on the contributions made to the United Kingdom Pension Fund. The taxpayer appealed to the Board of Review on three grounds namely that the income had not accrued, that the contributions had not been received by him and should not be deemed to have been received by him, and thirdly that the contributions were a deductible expense.

Held:

The taxpayer had become entitled to the salary out of which the contributions were deducted and accordingly the income had accrued to him. The income had been received by the taxpayer within the meaning of the Inland Revenue Ordinance because it had been made available to the employee and had been dealt with on his behalf. Finally the contributions were not expenses wholly exclusively and necessarily incurred in the production of the assessable income.

Appeal dismissed.

Case referred to:

D4/85, IRBRD, vol 2, 155

Tam Tai Pang for the Commissioner of Inland Revenue.
Taxpayer in absentia.

Decision:

1. The sole issue in this appeal is whether contributions amounting to $196,400 made by the Taxpayer to a pension fund during the years of assessment 1988/89 to 1991/92 inclusive should be excluded from his assessable income under salaries tax.

2. This appeal comes before the Board in the absence of the Taxpayer. The Taxpayer was not in Hong Kong at the date of the hearing but wrote to the Board to say that he elected to have this appeal heard in his absence under section 68(2D) of the Inland Revenue Ordinance (the IRO).

3. We proceeded to hear the appeal accordingly but adjourned the hearing after the Revenue had made its submissions to enable a copy thereof to be forwarded to the Taxpayer for such comments he might wish to make in response. The Taxpayer sent in his written comments and we have reached our decision after considering all submissions made, including the Taxpayer's written submissions forwarded to the Board prior to the hearing.

4. It is not in dispute that the Taxpayer was employed by Company A ('the employer') in Hong Kong as a manager on 9 October 1988 and that the employment ceased on 6 October 1991.

5. The Taxpayer was a member of a pension fund (the Pension Fund) which was set up in the United Kingdom (UK) and approved by the United Kingdom tax authorities. Both the Taxpayer and the employer were required to make contributions to the Pension Fund. The Taxpayer's contributions were deducted directly from his salary income derived from the employer and paid over to the Pension Fund. The salary income to which the Taxpayer was entitled under this contract of service with the employer is shown in the employer's returns.

6. In his grounds of appeal the Taxpayer states, inter alia, that in the UK employees' contributions to approved pension schemes (including the Pension Fund) are not subject to tax but that at such times as the pension fund becomes due, tax is levied on the proceeds. He argues that he should not be taxed twice over, first in Hong Kong and then in the UK at the point when the Pension Fund becomes due in the UK. He contends that both the employer's and employee's contributions should be treated similarly as delayed or deferred income.

7. 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.' Section 11D(b) further provides that 'income accrues to a person when he entitled to claim payment thereof.'

8. Thus the first question is whether the income in question (out of which the contributions were deducted) had accrued. In our view there can be no doubt that the income had accrued since the Taxpayer clearly had become entitled to the salary out of which the contributions were deducted and paid into the Pension Fund.

9. The next question is whether the contributions thus deducted represented income which had been received or should be deemed to have been received by the

Taxpayer. Section 11D(a) provides that where income has accrued to a person but has not yet been received it is not included in assessable income for the year in question until it is received provided, however, that 'income which has either been made available to the person to whom it has accrued or has been dealt with on his behalf or according to his directions shall be deemed to have been received by such person.'

10. Quite clearly it is not the law that income is received by an employee only if it is paid in the form of cash directly into the employee's pocket. In the present case the income which had accrued were made available at source for the purposes of contributions to the Pension Fund and/or were dealt with on the employee's behalf since these were employee's contributions to the Pension Fund deducted from the employee's salary. It matters not, in our judgment, that the Taxpayer as a member of the Pension Fund or as part of his contractual arrangements was required to make the contributions to be deducted at source out of his salary.

11. In our judgment therefore the said contributions deducted from his salary and paid into the Pension Fund as employee's contributions were to be regarded as having been received by the Taxpayer for present purposes. This may be contrasted with employer's contributions; such contributions are made in discharge of the employer's obligation (however arising) and are therefore made on behalf of the employer.

12. The final question is whether the contributions are deductible from the assessable income as outgoings and expenses wholly, exclusively and necessarily incurred in the production of the assessable income under section 12(1)(a) of the IRO. In our judgment they are not. They are contributions made out of the salary earned in return for pension benefits, not expenditure incurred in the production of the salary earned.

13. In D4/85, IRBRD, vol 2, 155, the taxpayer, a resident of the UK, made mandatory contributions to a National Insurance Scheme operated by the UK government during his employment in Hong Kong. The Board held that the contributions do not fall within the category of an allowance expense under section 12(1)(a). The Board in the course of the decision said: *'The Board takes note of the Taxpayer's submissions that such payments are tax deductible in the UK. Tax law in Hong Kong is very different from the UK and it is worth nothing that payments by an employee to a provident fund which has been approved under the IRO in Hong Kong are not tax deductible so far as the employee is concerned. Employee's contributions to a provident fund in Hong Kong may well be a contractual requirement of employment but are nevertheless certainly not deductible from taxable emoluments.'*

14. For the reasons given above we dismiss the appeal and confirm the assessments.