

INLAND REVENUE BOARD OF REVIEW DECISIONS

Case No. D73/04

Salaries tax – whether or not the sums in question constituted income arising in or derived from Hong Kong from employment of profit – the true nature of the sums in question was to be examined – the label attached to the payment was not conclusive – sections 8(1), 8(2)(c)(i) and 9(1)(a) of the Inland Revenue Ordinance ('IRO').

Panel: Ronny Wong Fook Hum SC (chairman), Arthur Chan Ka Pui and Michael Seto Chak Wah.

Date of hearing: 11 January 2003.

Date of decision: 21 January 2005.

The appellant had been employed by Bank B – Hong Kong Branch ('the Employer') since 20 November 1987. Due to the economic turmoil of the Asian market, the Head Office of the Employer decided to close its overseas office including its branch in Hong Kong.

In order to ensure a smooth ending of its business, the Employer issued a letter dated 2 November 1998 ('the 1st Letter') to its employees, including the appellant, proposing the payments of (i) 'severance pay' which was 'equivalent to the appellant's monthly salary x length of service x 2/3 which amount will be set off by employer's portion of the appellant's provident fund entitlement'; (ii) 'payment in lieu of notice corresponding to the appellant's rank' and 'a further sum' which was 'equivalent to 50% of total salary (including basic salary and position allowance but excluding bonus or overtime allowance)' in return for the employees' agreement *inter alia* to have their employments terminated at any time the Employer deemed appropriate and necessary.

In recognition of the employees' loyalty and support and as a means to further smoothening its operations during the final months of closure, the Employer issued a further letter dated 10 March 1999 ('the 2nd Letter') offering the 'Special Retention Bonus' which included 'a sum equivalent to the appellant's monthly salary x length of service x 1/3 and a further sum equivalent to the employer's portion of the appellant's provident fund', on top of the payments outlined in the 1st Letter, to its staff, including the appellant, who agreed *inter alia* to continue to work for the Employer through the very last day until the Employer took the initiative to terminate their services.

By a return dated 28 June 1999, the Employer reported to the Revenue the payments it made in favour of the appellant for the period between 1 April 1999 and 30 June 1999, including the two sums in question: (i) HK\$263,197.09 which was termed 'severance pay according to years of service', equivalent to one month's salary for each year of service ('Sum A') and (ii) HK\$90,351.75 which was termed 'additional severance pay' (after adjustment for attendance)

INLAND REVENUE BOARD OF REVIEW DECISIONS

(‘Sum B’). The IRD determined that both Sum A and Sum B were not severance payments and should not be exempt from salaries tax. On the other hand, the appellant contended *inter alia* that the payments under the 2nd Letter were severance payments to compensate her for loss of her job; and that it was unfair for the IRD to accept vis-a-vis some of her former colleagues that 2/3 of Sum A was not assessable (because it was regarded as severance pay) but maintained against her that the entire sum was assessable.

The present appeal was one of the four cases that came before this Board involving former employees of Bank B – Hong Kong Branch. The first two cases were B/R 94/02 (reported in D107/02, IRBRD, vol 18, 32) and B/R 125/02 (reported in D126/02, IRBRD, vol 18, 188), with the taxpayers succeeded in both cases. In each of those cases, the Revenue had invited this Board to state a case for consideration of the Court of First Instance. No decision has yet been delivered by the Court of First Instance (the challenge of the decision in B/R 94/02 is not scheduled to be heard until June 2005), despite the Board’s deferred delivery of the decision in this case for two years in the hope of avoiding any conflicting findings in the light of authoritative rulings by the Court of First Instance.

The question before the Board was whether Sum A and Sum B constituted income arising in or derived from Hong Kong from the appellant’s employment with Bank B – Hong Kong Branch within the meaning of section 8 of the IRO. To answer the question, the Board had to examine the true nature of Sum A and Sum B: Were they paid in consideration of services, past, present or future or were they paid for a consideration wholly unrelated to the appellant’s service/employment or were they paid for mixed considerations.

Held:

1. The Board had reservations on the general exclusion of compensation for loss of employment and severance pay from the tax net as suggested by D24/97 and D80/00. In relation to severance pay, the statutory entitlement of a monthly rated employee to such payment was to be found in section 31G(1)(a) of the Employment Ordinance which provides that the amount of severance payment which he is entitled shall be calculated by allowing ‘two-thirds of his last full month’s wages, or two-thirds of \$22,500, whichever is less’ for every year (and pro rata as respects an incomplete year) of employment. However, the ‘Severance pay’ provided by the 1st Letter did not follow the statutory formula. Had there been no set off of such payment against the Employer’s portion of the appellant’s provident fund entitlement, any payment made pursuant to the formula in the 1st Letter would not have been within the Revenue’s concession. The taxability or otherwise of such payment would have to be examined and would not be dictated solely by the label ‘Severance pay’ which the parties adopted in the 1st Letter.

INLAND REVENUE BOARD OF REVIEW DECISIONS

2. The factual evidence adduced in this case was different from the factual evidence adduced in B/R 94/02 and B/R 125/02. Therefore, B/R 94/02 and B/R 125/02 were not strictly binding on this Board.
3. As regards Sum A, the Board found that it was the ‘Special Retention Bonus’ (which consisted of two parts) provided for in the 2nd Letter. The second part had the effect of neutralizing the set off which 1st Letter extended in favour of the Employer. Payment of severance payment was provided in the 1st Letter. It was calculated by reference to an employee’s length of service. The Board found that the appellant had no contractual right for such payment. The Board was of the view that three factors prompted the Employer in offering such payment: recognition of past services, alleviation of potential hardship and inducement for continued services. The same factors prompted the Employer to revise its package by the terms of the 2nd Letter. The acceptance of the Non-disclosure Clause was also part of the consideration for the ‘incentive payments’. For these reasons, the Board apportioned Sum A and allowed the appeal to the extent of 4/10 of Sum A.
4. In relation to Sum B, the Board followed the decision in B/R 125/02 in the characterization of this sum as a ‘retention bonus to induce the staff to remain in the employ for as long as was necessary for [Bank B – Hong Kong Branch’s] purposes. In B/R 125/02, that part of the payment had been subject to salaries tax, on which there was no appeal (See §19(c) of D126/02). The phrase ‘Additional severance pay’ in the Employer’s return was misleading. The 1st Letter only described this sum as ‘A further sum’. Had it been the Employer’s intention to provide for ‘Additional severance pay’, it would have been simple for them to say so. The Board did not believe there was any error or mistake. No attempt was made by the Employer to rectify such alleged error by the 2nd Letter. For these reasons, the Board dismissed the appeal as to Sum B.
5. As a result of the 2nd Letter, the Employer had to call on its resources to meet the payments due under that letter which was issued at the time when the economic situation was gloomy. The ‘incentive payments’ were therefore inducements to the relevant employees to continue rendering services in favour of the Employer. The Board rejected the appellant’s submission that the Sums in question were compensation for violation of her contractual or other rights to continued employment.
6. As far as the unfairness point was concerned, the Board agreed with the decision in B/R 125/02.

Appeal allowed in part.

INLAND REVENUE BOARD OF REVIEW DECISIONS

Cases referred to:

B/R 94/02 (Decision reported in D107/02, IRBRD, vol 18, 32)
B/R 125/02 (Decision reported in D126/02, IRBRD, vol 18, 188)
D24/97, IRBRD, vol 12, 195
D80/00, IRBRD, vol 15, 715
D12/92, IRBRD, vol 7, 122

Chan Siu Ying for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. By a 'Service Agreement' dated 20 November 1987, the Appellant was employed by Bank A. Clause 10 of the Service Agreement provided that the engagement may be terminated by either side giving one month notice on the other.
2. By a Supplemental Agreement dated 1 November 1989 between Bank A, Bank B – Hong Kong Branch and the Appellant, Bank B – Hong Kong Branch assumed the obligations of Bank A under the Service Agreement of 20 November 1987.
3. Staff members of Bank B – Hong Kong Branch were eligible to join its Provident Fund Plan. Each participating staff had to contribute 5% of his basic salary to the plan whilst the contribution of Bank B – Hong Kong Branch was 10%. The entitlement of a staff member upon his resignation was dependant upon the number of completed years of service that he had with Bank B – Hong Kong Branch.
4. Due to the economic turmoil of the Asian market, the Head Office of Bank B – Hong Kong Branch decided to close its overseas office including its branch in Hong Kong. In order to ensure 'a smooth ending of [its] business', by letter dated 2 November 1998 ['the 1st Letter'] Bank B – Hong Kong Branch offered to the Appellant 'the following alternative of employment arrangement with effect from 1/11/98 until closure of our business which is expected to be not later than June 1999'. The arrangement proposed included the following:
 - (a) The management of Bank B – Hong Kong Branch reserved the right to terminate the Appellant's employment 'at any time deemed appropriate and necessary'.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (b) In the event of the Appellant's employment being terminated by Bank B – Hong Kong Branch or in the event of the Appellant remaining in service until the closure of Bank B – Hong Kong Branch, the Appellant would be paid the following:
 - (i) Severance pay equivalent to the Appellant's monthly salary x length of service x ? which amount 'will be set off by employer's portion of your Provident Fund entitlement'.
 - (ii) Payment in lieu of notice corresponding to the Appellant's rank.
 - (iii) 'A further sum equivalent to 50% of total salary (including basic salary and position allowance but excluding bonus or overtime allowance) to be paid to the Appellant during the period concerned'.
- (c) In the event of the Appellant resigning before the cessation of Bank B – Hong Kong Branch's business, the Appellant would be paid the sum referred to in § 4(b)(i) and half of the sum referred to in § 4(b)(iii) above.

5. By further letter dated 10 March 1999 ['the 2nd Letter'], the General Manager of Bank B – Hong Kong Branch informed its staff including the Appellant that 'In recognition of your loyalty and support to [Bank B – Hong Kong Branch], and also as a means to further smoothing our operations for the months to come', Bank B – Hong Kong Branch would on top of the sums outlined in the 1st Letter pay the Appellant 'Special Retention Bonus' in accordance with the following provisions:

- (a) The Special Retention Bonus included two heads of payments:
 - (i) A sum equivalent to the Appellant's monthly salary x length of service x ?
and
 - (ii) A further sum equivalent to the employer's portion of the Appellant's Provident Fund.
- (b) 'Employees must continue to work for [Bank B – Hong Kong Branch] through the very last day until [Bank B – Hong Kong Branch] takes the initiative to terminate their services.'
- (c) 'Employees must continue to perform their duties to our satisfaction up to end of their services. **Their performance will be evaluated by respective superiors...**'.

INLAND REVENUE BOARD OF REVIEW DECISIONS

- (d) ‘Employees must continue to attend their duties punctually’. Payment under this head will be reduced by the sick leave taken and any late attendance on the part of the Appellant.
- (e) ‘This special retention bonus was approved separately by the Head Office taking into account of the unique situation of HK Branch. To ensure its smoothness, **no information contained in this letter shall be divulged** to unrelated parties including but not limited to ex- [Bank B – Hong Kong Branch] staff and other overseas branches/subsidiaries of [Bank B – Hong Kong Branch]. Any breaches of that will not only lead to non-payment of the above, but may also affect other benefits they are entitled’ [‘the Non-disclosure Clause’].

6. By letter dated 21 June 1999, Bank B – Hong Kong Branch informed its staff members including the Appellant of the closure of its Hong Kong Branch on 1 July 1999 and assured its staff members that ‘each of you will be compensated according to our staff regulation, the Employment Ordinance of Hong Kong and the conditions set forth [in the 1st and 2nd Letters]’.

7. By letter dated 25 June 1999, Bank B – Hong Kong Branch offered to the Appellant ‘Temporary Employment’ for the month of July 1999. No issue turns on the terms of this letter.

8. By a return dated 28 June 1999, Bank B – Hong Kong Branch reported to the Revenue the payments it made in favour of the Appellant for the period between 1 April 1999 and 30 June 1999:

- (a) The following payments are not controversial:

Salary/wages	\$54,990
Leave pay	\$15,911
Position allowance	\$13,200
Housing subsidy	\$16,475
Bonus	\$22,730

- (b) What is controversial is the ‘Severance Pay’ calculated as follows:

- (i) Severance pay according to years of service
Equivalent to one month’s salary for each year of service
 $\$22,730 \times 11.611 \text{ (Years)} \times 1 = \$263,917.09$ [‘Sum A’]
- (ii) Additional severance pay
 $\$181,840 \times 50\%$ \$90,920
Adjustment for attendance \$ 568.25

INLAND REVENUE BOARD OF REVIEW DECISIONS

\$90,351.75 ['Sum B']

(iii) Payment in lieu of notice
\$22,730 x 2 \$45,460

- (c) Bank B – Hong Kong Branch explained that Sum A 'is a severance pay based on years of service of employee concerned'. In relation to Sum B, Bank B – Hong Kong Branch stated that 'To ensure a smooth ending of its business, an additional severance pay is offered to employee who is willing to stay with the company until his/her service becomes redundant'.

9. According to the benefit statement supplied by the Trustee of the Provident Fund, the Appellant was paid \$106,596.32 and \$213,193.01 representing the Appellant's contribution and her vested benefit in Bank B – Hong Kong Branch's contribution.

- (a) It is not in dispute that the amounts so paid should be excluded from the Appellant's assessable income under section 8(2)(cc) of the Inland Revenue Ordinance ['IRO'].
- (b) Had the 1st Letter stood alone, the Appellant's entitlement under the provisions summarized under § 4(b)(i) above would have been:

$\$22,730 \times 11.611 \text{ (Years)} \times ? = \$173,158.71.$

As Bank B – Hong Kong Branch's contribution under the Provident Fund (\$213,193.01) exceeded this sum of \$173,158.71, it would not have been necessary for Bank B – Hong Kong Branch to make any payment pursuant to those provisions and the Appellant would not have derived any additional benefit from such provisions.

10. The issue before us relates to the taxability or otherwise of Sum A and Sum B.

The history of this appeal

11. The present appeal is one of four cases that came before this Board involving former employees of Bank B – Hong Kong Branch. The first of those cases was B/R 94/02 when the Board delivered a decision on 9 January 2003 which was two days before the hearing of this appeal. The second of those cases was B/R 125/02 when the Board delivered its decision on 11 March 2003. The taxpayers succeeded in both cases. In each of those cases the Revenue had invited this Board to state a case for consideration of the Court of First Instance. By agreement between the parties, delivery of the decision in this case was deferred in the hope of avoiding any conflicting findings in the light of authoritative rulings by the Court of First Instance.

INLAND REVENUE BOARD OF REVIEW DECISIONS

12. No decision has yet been delivered by the Court of First Instance. As the Chairman presiding in this appeal will shortly be retiring from this Board, this Board is duty bound to state its collective views for the benefit of the parties.

The hearing of this appeal

13. The Appellant was accompanied by her husband at the hearing of her appeal. We summarize hereunder the salient points of the Appellant's sworn testimony:

- (a) The staff of Bank B – Hong Kong Branch were unhappy with the terms of the 1st Letter. They negotiated with Bank B – Hong Kong Branch for further improvement of the redundancy terms.
- (b) She accepted the terms of the 1st and 2nd Letters. She agreed that the two letters clearly stated the circumstances surrounding the payments of Sums A and B.
- (c) She maintained that the payments under the 2nd Letter were severance payments to compensate her for loss of her job.
- (d) She agreed that the amount of special retention bonus was a consideration that she took into account in deciding whether she would remain with Bank B – Hong Kong Branch till the cessation of its business. By virtue of the attractiveness of that offer, she gave up her 'resignation right' and did not look for a new job in view of the then gloomy conditions in the job market.
- (e) She emphasized that right till 21 June 1999, there was no certainty as to the date of Bank B – Hong Kong Branch closure of the Hong Kong Branch. The letter from Bank B – Hong Kong Branch dated 21 June 1999 mentioned 1 July 1999 for the first time.
- (f) The Non-Disclosure Clause was different from the confidentiality clause in her contract of employment as the subject matter was not confined to her personal terms of employment.

14. At the hearing of the appeal we enquired with the Appellant whether she would, in line with other employees of Bank B – Hong Kong Branch who appealed before this Board, take any point arising from the Revenue's settlement with some of her colleagues on the basis that an amount equivalent to ? of one month's pay per year of service would be regarded as severance pay and not as income from employment. We invited the Appellant to include in her written submission on

INLAND REVENUE BOARD OF REVIEW DECISIONS

the applicability of the decision in Case No 94/02 such submission as she may wish to make on the Revenue's refusal to extend such terms of settlement in her favour.

15. In her written submission to this Board dated 28 January 2003, the Appellant drew our attention to a letter dated 6 December 2001 from Bank C to the Inland Revenue Department. Bank C took over the operation of Bank B – Hong Kong Branch. It explained in that letter of 6 December 2001 that:

‘After the (First Letter), we had a second thought to the above payment. Considering that many of our ex-employees might have much difficulties to find another comparable positions in view of the very gloomy economic situation in Hong Kong (which, unfortunately turned out to be true) ...we issued (the Second Letter) to the employees announcing the following severance pay compensating their loss of employment would be added...’

The Appellant further submitted that it is unfair for the Inland Revenue Department to accept vis-a-vis some of her former colleagues that ? of Sum A is not assessable but maintain against her that the entire sum is assessable.

The applicable statutory provisions in the Inland Revenue Ordinance (Chapter 112) [‘IRO’]

16. Section 8(1) of the IRO provides that:

‘Salaries tax shall, subject to the provisions of this 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 –

– any office or employment of profit....’

17. Section 8(2)(c)(i) of the IRO provides that in computing the income of any person for the purpose of subsection 8(1), subject to subsection 8(4), there shall be excluded any sum received by way of commutation of pension under a recognized occupational retirement scheme upon termination of service.

18. Section 9(1)(a) of the IRO provides that ‘Income from any office or employment includes any wages, salary, ...gratuity, perquisite, or allowance’.

The applicable legal principles

INLAND REVENUE BOARD OF REVIEW DECISIONS

19. The issue is whether the sums in question constitute income arising in or derived from Hong Kong from the Appellant's employment with Bank B – Hong Kong Branch within the meaning of section 8 of the IRO.

20. In D24/97, IRBRD, vol 12, 195 the Board reviewed the relevant English and local authorities and came to the view that two different approaches have been adopted in determining whether a payment falls within the tax net or not:

- (a) The wider approach: According to this approach, it is not necessary to demonstrate that the income was received by the employee in the nature of a reward for services past, present or future.

'We do not need to know if the payment might have been for compensation for loss of the employment or a reward for services rendered in the past or as an inducement to continue with the services during the employment. Indeed it could be a combination of one or more of those reasons. All we need to know is that the payment was sourced from the employment'

- (b) The narrower approach: *'...We have to examine the reason for the payment and be satisfied that the payment was to the employee for services and not as compensation for loss of employment.'*

21. In D80/00, IRBRD, vol 15, 715 the Board formulated the following propositions on the basis of the previous decisions of this Board:

- (a) a payment would be taxable if it is in the nature of a gift on account of past services. The word 'gratuity' connotes a gift or present usually given on account of past services.
- (b) a payment made on account of compensation for loss of employment or a payment in lieu of or on account of severance pay is not taxable.
- (c) it is not the label, but the real nature of the payment, that is important.
- (d) the way in which the sum in question was arrived at is a material factor in determining the real nature of the payment.

22. We have reservations on the general exclusion of compensation for loss of employment and severance pay from the tax net as suggested by D24/97 and D80/00. The taxability or otherwise of payments made to employees on cessation of the employer's business

INLAND REVENUE BOARD OF REVIEW DECISIONS

was considered by this Board in D12/92, IRBRD, vol 7, 122. The Board expressed the following sentiments:

‘The Board has total sympathy for the Taxpayer. Retirement benefits are a major subject of debate and discussion by our government, our legislators and pressure groups. There is a major debate taking place about whether or not the so-called ‘sandwiched’ middle class should be subject to salaries tax and whether the tax threshold should be substantially increased. Arguments are put forward that employers should be responsible and take care of their employees in their old age. It is pointed out that if statutory arrangements are not made the burden will eventually fall on the government and public revenue. It seems inconceivable in the light of all of this that our taxation law should require that when an employer goes out of business leaving behind an employee with some forty years of loyal service, and a comparatively modest ex-gratia payment of \$500,000 is made, that payment [is] to be subject to tax only because the employer did not establish an approved provident fund or retirement scheme. Unfortunately for the Taxpayer that is the state of our law and neither the Commissioner nor this Board has any discretion in the matter. We are not allowed to investigate to see whether or not the payment is in fact reasonable and whether or not it would have been capable of approval if the employer had sought to establish an approved retirement scheme’.

23. In relation to severance pay, the statutory entitlement of a monthly rated employee to such payment is to be found in section 31G(1)(a) of the Employment Ordinance (Chapter 57) which provides that the amount of severance payment which he is entitled shall be calculated by allowing ‘two-thirds of his last full month’s wages, or two-thirds of \$22,500, whichever is less’ for every year (and pro rata as respects an incomplete year) of employment. By way of concession, the Revenue has consistently refrained from taxing severance payments made pursuant to the Employment Ordinance. It is probable that as a result of this concession, the Appellant was informed by Bank B – Hong Kong Branch’s ‘Personnel staff that the severance payment is tax free and does not need (sic) to report as assessable income under Employee’s tax return’ (See § 5 of the Appellant’s ‘Statement of the Grounds of Appeal’). Such intimation is not an accurate representation of the legal position as the exemption is by way of concession and extends only to payments within the statutory formula. The ‘Severance pay’ provided by the 1st Letter did not follow the statutory formula. Instead of adopting the lesser of ? of the last month’s wages or ? of \$22,500, the 1st Letter provided that ‘Severance Pay’ was to be calculated by reference to the Appellant’s monthly salary which stood at \$22,730. Had there been no set off of such payment against Bank B – Hong Kong Branch’s portion of the Appellant’s Provident Fund entitlement, any payment made pursuant to the formula in the 1st Letter would not have been within the Revenue’s concession. The taxability or otherwise of such payment would have to be examined and would not be dictated solely by the label ‘Severance pay’ which the parties adopted in the 1st Letter.

INLAND REVENUE BOARD OF REVIEW DECISIONS

The decisions of this Board in B/R 94/02 and B/R 125/02

24. The factual evidence adduced in this case is different from the factual evidence adduced in B/R 94/02 and B/R 125/02. In B/R 125/02, the taxpayer called Mr D, the taxpayer in B/R 94/02. Mr D drafted the 1st and 2nd Letters and he gave evidence on the thinkings of Bank B – Hong Kong Branch behind those letters. No such evidence was tendered before us. B/R 94/02 and B/R 125/02 are therefore not strictly binding on this Board.

25. The issue before us relates to the true nature of Sum A and Sum B: Were they paid in consideration of services, past, present or future or were they paid for a consideration wholly unrelated to the Appellant's service/employment or were they paid for mixed considerations?

26. In answering that issue, the starting point must be the 1st and 2nd Letters. The Appellant accepted the terms of both letters. It might be convenient in the current dispute with the Revenue for the Appellant and Bank B – Hong Kong Branch to attempt to put a gloss on both letters. The Board should not however lose sight of the fact that their relationship at the material times was governed by the terms of both letters.

27. We do not say that the background of the 1st and 2nd Letters is irrelevant in ascertainment of the true bargain. We do however attach little weight to the previous negotiations of the parties and their declarations of subjective intent in deciding the real nature of the payments.

Our decision

28. Sum B

- (a) According to Bank B – Hong Kong Branch's return dated 28 June 1999, Sum B was 'Additional severance pay' made up of two parts:
 - (i) The first part was \$90,920 being 50% of the total salary computed in accordance with the terms of the 1st Letter. The 1st Letter did not describe this sum as 'Additional severance pay'.
 - (ii) The second part was \$568.25 said to be 'Adjustment for attendance'. Adjustments were provided for by the terms of the 2nd Letter but not the 1st Letter. Those provisions were arbitrarily applied to reduce the sum of \$90,920 due under the 1st Letter.
- (b) In B/R 125/02, the analogous sum was regarded as a 'retention bonus to induce the staff to remain in the employ for as long as was necessary for [Bank B – Hong Kong Branch's] purposes. That part of the payment had been subject to

INLAND REVENUE BOARD OF REVIEW DECISIONS

salaries tax, on which there is no appeal' [See § 19(3) of the decision in B/R 125/02].

- (c) The Appellant did not challenge the explanation given by Bank B – Hong Kong Branch for this sum in its return dated 28 June 1999 [See § 8(c) above]. We see no reason why we should differ from the characterization of this sum as adopted in B/R 125/02. The phrase 'Additional severance pay' in Bank B – Hong Kong Branch's return is misleading. The 1st Letter referred to 'A further sum'. Had it been Bank B – Hong Kong Branch intention to provide for 'Additional severance pay', it would have been simple for them to say so. We do not believe there was any error or mistake. No attempt was made by Bank B – Hong Kong Branch to rectify such alleged error by the 2nd Letter.

29. **Sum A**

- (a) This is the Special Retention Bonus provided for in the 2nd Letter. It consisted of two parts:
 - (i) The first part: A sum equivalent to the Appellant's monthly salary x length of service x ? and
 - (ii) The second part: A further sum equivalent to Bank B – Hong Kong Branch's portion of the Appellant's Provident Fund.
- (b) The second part had the effect of neutralizing the set off which the 1st Letter extended in favour of Bank B – Hong Kong Branch. As a result of the 2nd Letter, Bank B – Hong Kong Branch had to call on its resources to meet the payments due under that letter.
- (c) We are of the view that several factors prompted the payments promised under the 2nd Letter:
 - (i) The letter was issued at the time when the economic situation was gloomy. Comparable positions were few. Bank B – Hong Kong Branch was minded to alleviate the difficulties confronting its employees.
 - (ii) The 'incentive payments' were expressed to be 'In recognition of your loyalty and support to [Bank B – Hong Kong Branch]'. We reject the Appellant's submission that Bank B – Hong Kong Branch was merely trying to be courteous in dealing with its employees. The payments were prompted in part by Bank B – Hong Kong Branch's desire to

INLAND REVENUE BOARD OF REVIEW DECISIONS

acknowledge the past services rendered by the relevant employees in favour of Bank B – Hong Kong Branch.

- (iii) The ‘incentive payments’ were also ‘a means to further smoothening our operations for the months to come’. Bank B – Hong Kong Branch was closing down its operation. Its employees were informed of such closure. Bank B – Hong Kong Branch was concerned to retain suitable number of staff till its final closure. The ‘incentive payments’ were therefore inducements to the relevant employees to continue rendering services in favour of Bank B – Hong Kong Branch. The Appellant said the payments were inducements to persuade her to give up the right to resign and to seek alternative employment. We are of the view that such argument is no more than the other side of the same coin and does not detract from the substance of the consideration which is inducement for continued services.
- (iv) The Appellant argued that she took up employment with Bank B – Hong Kong Branch on it’s assurance that Bank B – Hong Kong Branch will take care of her long term career and will not dismiss her easily. She adverted to the ‘Cradle to Grave’ philosophy generally held by employees of Japanese companies and asserted that Sum A and Sum B were compensation for loss of a career at Bank B – Hong Kong Branch. We do not accept her submission that she has a ‘right’ to continued employment by Bank B – Hong Kong Branch. The Service Agreement provided that her engagement may be terminated by either side giving one month notice to the other. She was paid salary in lieu of notice. We reject the suggestion that the Sums in question were compensation for violation of her contractual or other rights.
- (v) The 1st Letter provided for payment of severance payment. It was calculated by reference to an employee’s length of service. The Appellant had no contractual right for such payment. We are of the view that three factors prompted Bank B – Hong Kong Branch in offering such payment: recognition of past services, alleviation of potential hardship and inducement for continued services. By virtue of the set off provision the 1st Letter did not involve further outlay by Bank B – Hong Kong Branch. The self same factors prompted Bank B – Hong Kong Branch to revise its package by the terms of the 2nd Letter.
- (vi) The acceptance of the Non-disclosure Clause was also part of the consideration for the ‘incentive payments’. As opposed to the three

INLAND REVENUE BOARD OF REVIEW DECISIONS

factors which we outlined above, we are of the view that this clause was not the major cause that prompted the payments.

- (d) We would apportion Sum A as follows:
- (i) 3/10 thereof as payment in recognition for past services.
 - (ii) 3/10 thereof as inducement for future services.
 - (iii) 3/10 thereof as payment for the alleviation of the difficulties arising from the then economic climate experienced by the Appellant.
 - (iv) 1/10 thereof her other consideration including the Non-disclosure Clause.

30. For these reasons, we allow the appeal to the extent of 4/10 of Sum A. We dismiss the remaining part of the appeal.

31. As far as the unfairness point is concerned, we agree with the decision in B/R 125/02.

32. We regret that we have come to a conclusion different from our colleagues. We echo the sentiments expressed in § 26 of the decision of this Board in B/R 125/02. As the challenge of the decision in B/R 94/02 is not scheduled to be heard until June 2005, we hope that steps can be taken by all parties to ensure that all cases are heard by the Court of First Instance at the same time so as to avoid unnecessary wastage of costs and judicial time.