Case No. D80/03

Salaries tax – termination of employment – whether payment in lieu of notice.

Panel: Kenneth Kwok Hing Wai SC (chairman), John Peter Victor Challen and Archie William Parnell, Jr.

Date of hearing: 1 November 2003.
Date of decision: 28 November 2003.

The appellant's employment was terminated by her employer on two months' notice given to her in accordance with the employment agreement. On the other hand, she was not required to go to work from the date she received the notice.

The issue is whether the salaries she received during these two months were payment in lieu of notice and thus being not taxable.

Held:

The Board found that the appellant's employment was terminated by two months' notice given to her. Hence, they were not payment in lieu of notice but taxable.

Appeal dismissed.

Fung Ka Leung for the Commissioner of Inland Revenue.
Taxpayer in person.

Decision:

1. This is an appeal against the determination of the Commissioner of Inland Revenue dated 25 July 2003 whereby the salaries tax assessment for the year of assessment 2001/02 under charge number 9-1833867-02-9, dated 5 February 2003, showing net chargeable income of $208,914 with tax payable thereon of $25,015 was reduced to net chargeable income of $208,856 with tax payable thereon of $22,005 (as reduced by the Tax Exemption (2001 Tax Year) Order).

The Appellant's contention

2. The Appellant contended that her employment by her former employer ceased on 31 January 2002; that she was entitled to payment in lieu of notice; and that such payment in lieu of notice was not taxable.

Factual background

3. By clause 1.1 of her employment agreement dated 13 August 2001, the Appellant's employment commenced on 13 August 2001. Clause 3.1 provided for a probationary period of six months. However, by letter dated 9 November 2001, her former employer advised her that she had satisfactorily completed her probation period which ended on 8 November 2001 and that her employment had been confirmed since 9 November 2001. Clause 12.1 of her employment agreement provided that:

> 'The employment continues after the end of the Employee's probationary period. The period of notice to be given in writing by the Company or by the Employee to terminate your employment is two months or to pay salary in lieu of notice.'

4. By letter dated 31 January 2002, the Appellant's former employer gave her notice that her employment agreement would be terminated and that the period from 31 January 2002 to 30 March 2002 would constitute the two-month notice period. The letter went on to state that she need not report to work during that period but her former employer reserved the right to require her to return to the company to handle job-related matters.

5. The Appellant told us that 31 January 2002 was her last day of work and that, apart from chasing her former employer for payment, she had no further contact with her former employer.

Whether entitled to payment in lieu of notice

6. We do not agree with the Appellant's contention that she was entitled to payment in lieu of notice. In our decision, she had no such entitlement, whether in law or in fact.

7. Section 6(1) of the Employment Ordinance (Chapter 57) provides that, subject to some exceptions which are irrelevant for present purposes, either party to a contract of employment may at any time terminate the contract by giving to the other party notice, orally or in writing, of his intention to do so. Section 7(1) provides that, subject to some exceptions which are irrelevant for present purposes, either party to a contract of employment may at any time terminate the contract without notice by agreeing to pay to the other party a sum equal to the amount of wages which would have accrued to the employee during the period of notice required by section 6. The combined effect of these two sections is that:

(a) either party may terminate the contract of employment;

(b) either party may choose to terminate under section 6 by giving notice, not being confined to termination under section 7; and

(c) the consent of the other party is not required.

8. As a matter of contract, either party to the employment agreement could lawfully terminate the employment under clause 12.1 of the employment agreement by:

(a) giving two months' notice of termination; **or**

(b) paying two months' salary in lieu of notice.

The choice between (a) and (b) was that of the party seeking to invoke clause 12.1, not that of the other party, and the consent of the other party was not required. The employee could choose between (a) serving a two-month resignation notice and (b) paying two months' salary instead of giving notice, the choice being that of the employee and the consent of the employer was not required. Likewise, the employer could choose between (a) serving a two-month termination notice and (b) paying two months' salary instead of giving notice, the choice being that of the employer and the consent of the employee was not required.

The last date of employment

9. We turn now to the factual question of the last date of her employment. It is clear from the letter dated 31 January 2002 that the former employer chose to terminate the Appellant's employment by giving notice. The Appellant told us that she did not disagree when she was given this letter, but added that there was an understanding with her former employer for her former employer to tell the Revenue that her employment was terminated as at end of January 2002. What

they agreed to tell the Revenue does not alter the fact that 30 March 2002 was in fact the last day of her employment.

Source of income

10. Her employment was the source of the payments received by her after 31 January 2002 and such income is caught by the charge under section 8(1)(a) of the Inland Revenue Ordinance (Chapter 112) ('IRO') which 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'*.

Conclusion

11. For the reasons given above, the Appellant's contention fails.

Other matters

12. The fact that some payments were not received by the Appellant until after 31 March 2002 does not help the Appellant because of sections 11B and 11D(b)(ii) of the IRO.

13. In her notice of appeal, she raised a point about deduction of her contribution to a recognised retirement scheme. She abandoned the point at the hearing of the appeal. No deduction was made in the original assessment by the assessor but this omission had since been corrected by the assessor and the Acting Deputy Commissioner in their final computations – see paragraph 1(10) of the determination.

Disposition

14. The Appellant has not discharged the onus under section 68(4) of the IRO of proving that the assessment appealed against is excessive or incorrect. We dismiss the appeal and confirm the assessment as reduced by the Acting Deputy Commissioner.